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IN THE COURT OF APPEALS OF INDIANA

Paul M. Robey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 20, 2021

Court of Appeals Case No. 20A-CR-2187

Appeal from the Morgan Superior Court

The Honorable Brian H. Williams, Judge

Trial Court Cause No. 55D02-1901-F4-78

Crone, Judge.

Case Summary

[1] A jury convicted Paul M. Robey of class 4 felony child molesting. On appeal, Robey argues that the trial court committed reversible error in allowing the State to play a video of the victim's forensic interview for the jury. We affirm.

Facts and Procedural History

[2] B.B. was born in August 2008. In November 2018, she lived in Indianapolis with her mother, Miranda Bowles, Bowles's boyfriend, and her siblings. B.B. frequently spent weekends with her paternal grandparents, Robey and his wife Patricia, at their home in Martinsville. On the evening of Friday, November 30, Robey and Patricia brought B.B. to their home for the weekend. They watched TV in the living room, and then Patricia went to bed. Robey asked B.B. if she wanted to sit on his lap in his recliner, which she often did. B.B. climbed onto Robey's lap, put her head on his shoulder, and started to fall asleep. She then "felt his hand starting to go down [her] pants." Tr. Vol. 2 at 59. Robey's hand touched B.B.'s "private part" and "was like rubbing, kind of, going up and down." *Id*. at 60, 61. His hand felt "[s]harp[,]" and "it hurt." *Id*. at 61. B.B. "acted like [she] was asleep" and "rolled over" so Robey "didn't do anything worse." *Id* at 60. She then "went to the couch" and fell asleep. *Id*. at 62. Robey went to bed.

[3] On Saturday, December 1, B.B. went shopping with Patricia. B.B. was too "nervous" to tell Patricia about what Robey did to her because she felt like Patricia "wouldn't believe [her], and she would have got mad at [her]." *Id*. at 67. Patricia then took B.B. to B.B.'s father's house, where she spent the night. B.B. "wanted to tell [her] dad" about what Robey did to her, but she "felt like he wasn't going to believe [her], because [Robey's] his dad." *Id*. at 65, 66.

[4] On Sunday, December 2, Robey and Patricia picked up B.B. and took her back to Indianapolis. "After they dropped [B.B.] off, [she] went straight to [her] mom's room to tell her what happened." *Id*. at 67. According to Bowles, B.B. was "quiet" and "kind of nervous" and "cried a couple of times." *Id*. at 118. Bowles told B.B. that Bowles would have to call the police, and that the police "would either go to her [grandparents'] house or have her grandfather go in and question him, and he could go to jail." *Id*. Bowles called 911, and an Indianapolis Metropolitan Police Department (IMPD) officer responded and took a report. A Department of Child Services caseworker arranged for B.B. to undergo a forensic interview at Susie's Place, a facility in Avon, which occurred on December 7. The interview was recorded on video.

[5] IMPD notified the Martinsville Police Department (MPD) about B.B.'s allegations, and MPD Detective Jerry Bertelsen reviewed the IMPD police report and the video of B.B.'s forensic interview. On December 13, the detective contacted Robey and asked him to come to his office for an interview, which he did later that day. This interview was also recorded on video. Detective Bertelsen told Robey that he was not under arrest and was free to leave at any time. The detective questioned Robey about B.B.'s allegations. Robey initially denied touching B.B. inappropriately, then admitted that he "could have" or "probably" touched her inappropriately. State's Ex. 1. Upon further questioning, Robey claimed that he and B.B. fell asleep in the recliner; that he woke up and rubbed B.B.'s genital area both outside and inside her underwear, thinking that B.B. was Patricia because he was "half asleep" and

Patricia "sometimes" sits on his lap; and that when he realized that he was touching his granddaughter, he pulled his hand away and thought, "Oh sh*t." *Id*. And afterward, he felt "like sh*t." *Id*.

[6] In January 2019, the State charged Robey with one count of level 4 felony child molesting and one count of level 6 felony sexual battery, which was later dismissed. The charging information alleged that Robey committed level 4 felony child molesting by performing fondling or touching with B.B., a child under age fourteen, with the intent to arouse or satisfy B.B.'s or Robey's sexual desires. Appellant's App. Vol. 2 at 2; Ind. Code § 35-42-4-3(b). A three-day jury trial was held in September 2020. B.B. testified about the molestation, and the trial court allowed the State to publish part of her forensic interview video to the jury, over Robey's objection, as a recorded recollection pursuant to Indiana Evidence Rule 803(5). Detective Bertelsen testified regarding his interview with Robey, and the video of that interview was admitted as an exhibit and played for the jury over Robey's objection.

[7] The defense called Patricia as a witness, and she testified that she never falls asleep or sits on Robey's lap. Tr. Vol. 2 at 219. Robey also testified. Regarding his interview with Detective Bertelsen, Robey stated, "Some of that stuff I can't believe that I really said. By that time, it was so confusing being bombarded with everything." *Id*. at 249. He also denied inappropriately touching B.B.

[8] The jury found Robey guilty of level 4 felony child molesting. The trial court sentenced him to six years executed, with two years on home detention. This appeal ensued.

Discussion and Decision

[9] Robey contends that the trial court committed reversible error in allowing the State to publish B.B.'s forensic interview video to the jury. In general, a trial court has broad discretion in making evidentiary rulings. *Scott v. State*, 139 N.E.3d 1148, 1153 (Ind. Ct. App. 2020), *trans. denied*. We typically review such rulings for an abuse of discretion. *Baumholser v. State*, 62 N.E.3d 411, 414 (Ind. Ct. App. 2016), *trans. denied* (2017). "An abuse of discretion occurred if the trial court misinterpreted the law or if its decision was clearly against the logic and effect of the facts and circumstances before it." *Id*. Erroneous evidentiary rulings are considered harmless unless they affect the substantial rights of a party. *Whiteside v. State*, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006). "When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction, or where the offending evidence is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and we deem the error harmless." *Smith v. State*, 839 N.E.2d 780, 784 (Ind. Ct. App. 2005).

[10] At trial, B.B. testified about the molestation as described in paragraphs 2 through 4 above. When asked by the prosecutor, B.B. stated that she could not remember the time of day or the day of the week on which the molestation

occurred or what kind of clothes she was wearing. She also stated that she did not recall hearing or smelling anything during the molestation or where Robey's other hand was and what he was doing with it. The prosecutor then questioned B.B. about her forensic interview:

> Q. All right. Did you tell the lady at Susie's Place what happened with your grandpa?
>
> A. Yes.
>
> Q. Do you think that you had a better memory of it then than you do now?
>
> A. Yes.
>
> Q. Do you think you remembered more details then than you do now?
>
> A. Yes.
>
> Q. Did you tell her the truth about what happened?
>
> A. Yes.

Tr. Vol. 2 at 69. The prosecutor also asked B.B., "[I]s there anything else that you remember about what happened with your grandfather on the chair that you haven't told us?" *Id*. at 70. B.B. replied, "No." *Id*. at 71.

[11] The prosecutor then asked "to make a Motion outside the presence of the jury." *Id*. The trial court replied, "Rather than have everyone file out, let's go into the jury room very briefly. We'll go off the record." *Id*. When the parties returned

to the courtroom, the court recessed the jury and asked the prosecutor to summarize her request for the record. The prosecutor said, "Judge, at this time, the State believes that the witness has laid the foundation for a past recorded recollection for the witness, the Susie's Place interview that she gave in 2018[,]" pursuant to Indiana Evidence Rule 803(5). *Id*. at 72. Evidence Rule 803 provides that certain evidence is not excluded by the rule against hearsay,[1] regardless of whether the declarant is available as a witness, including a recorded recollection, which is "[a] record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge." Ind. Evidence Rule 803(5). "If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party." *Id*.

[12] The prosecutor argued, "There's significant detail upon the review of the Susie's Place interview that [B.B.] was not able to recall." Tr. Vol. 2 at 73. In response, defense counsel observed that B.B. "did give some testimony" about the molestation and that she

> did not say she doesn't remember anything, at least, she doesn't remember anything else. So I think that the video would simply be filling in the blanks, or possibly bolstering.… She has testified [to] some details. She has testified simply I don't remember all of

[1] Hearsay is a statement that is not made by the declarant while testifying at trial and is offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible unless the evidence rules or other law provides otherwise. Ind. Evidence Rule 802.

> the details, and so therefore, I don't think that's quite enough to get us over that hump.

Id. The trial court ruled that it would allow a forty-six-minute portion of the video to be published to the jury, but not admitted as an exhibit. Defense counsel asked, "So we're keeping [B.B.] out [of the courtroom] for this, is that right?" *Id*. at 87. The court replied, "I think so." *Id*. Defense counsel did not object to B.B.'s absence,[2] and the video was played for the jury.

[13] Only the court reporter's transcription of the video appears in the record before us. B.B.'s account of the molestation during the interview is largely consistent with her trial testimony, with some minor additional details. *See, e.g.*, *id*. at 91 ("[Robey] was spreading my bad part out with his fingers."), 92 ("[I]t started hurting, like it started getting red."), 94 ("I was wearing tights .. no, I was wearing pajamas, with a tank top, I think."). The interviewer asked B.B. the following questions:

> Q. When you .. when you asked [Robey] what he was doing, and he was acting like he was asleep, where were his hands at then?
>
> A. He like, they were like .. like on his spot.[3]

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[2] Consequently, Robey has waived his argument that B.B.'s absence denied him an opportunity to effectively confront and cross-examine her about the video. *See Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019) ("A party's failure to object to, and thus preserve, an alleged trial error results in waiver of that claim on appeal.").

[3] The term "spot" was not defined in the portion of the video played for the jury.

Q. They were on his spot?

A. Yeah.

Q. Okay. Tell me about everything .. tell me everything about his hand being on his spot.

A. Like he was like doing this, like he was rubbing on it.

Q. Was that on his clothes, or under his clothes, or something else?

A. Both.

Q. Both? Okay, tell me about it being both.

A. Like he was like .. when it was on top, he was just doing like this, like squeezing it. And then when he went under it, he was like squeezing it too.

Q. Okay. B., could you see his spot with your eyes?

A. No.

Q. No? Okay. When you .. tell me about knowing that he was touching his spot.

A. Like I could feel it, like, because he was doing .. because my back was like right next to his spot, and like it was like his hand was hitting my back.

….

Q. …. I want to go back to when you were feeling the touches on you, okay? Tell me about what you could hear then.

A. Like I heard like water noises. Like liquid noises.[4]

Q. What .. do you know what made him stop touching his spot?

A. I started moving.

Id. at 92-94. At the conclusion of the video, B.B. reentered the courtroom and was cross-examined by defense counsel.

[14] In his appellate brief, Robey raises several challenges to the trial court's evidentiary ruling, most of which are waived because he made no such objections on the record at trial.[5] *See Gill v. State*, 730 N.E.2d 709, 711 (Ind. 2000) ("It is well-settled law in Indiana that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal."); *Griffin v. State*, 16 N.E.3d 997, 1006 (Ind. Ct. App. 2014) (noting that waiver rule in part protects integrity of trial court, as it cannot be found to have erred as to an "argument that it never had an opportunity to consider") (quoting *Showalter v. Town of Thorntown*, 902 N.E.2d 338, 342 (Ind. Ct. App. 2009), *trans. denied*).[6]

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[4] During the interview with Robey, Detective Bertelsen confronted him with B.B.'s allegation regarding the "water noises" and asked him if he masturbated while B.B. was on his lap. Robey denied masturbating and initially was incredulous at the mention of "water noises," but ultimately acknowledged that they "could have" been caused by him rubbing B.B.'s genital area. State's Ex. 1. Robey makes no claim of error regarding the admission of the portions of his interview involving statements that B.B. made during her forensic interview but not during her trial testimony.

[5] If Robey in fact made these objections during the sidebar conference in the jury room, he should have either repeated them on the record or, as the State suggests, taken steps to supplement the record pursuant to Indiana Appellate Rule 31. Also, Robey could have asked the trial court to give a limiting instruction to the jury regarding the proper purpose for which the video could be considered.

[6] Robey asserts that to the extent he has waived any arguments, the publication of the video constituted fundamental error. The fundamental error doctrine "applies 'only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and

The only challenge that Robey preserved is that the State failed to establish that the video was "on a matter [B.B.] once knew about but now [could not] recall well enough to testify fully and accurately[.]" Ind. Evidence Rule 803(5). To be sure, B.B. was able to testify fully and accurately about the essential elements of the crime with which Robey was charged, and the video simply added some minor details to her account. Thus, the video was merely cumulative of B.B.'s testimony, and any error in its publication was harmless. *Smith*, 839 N.E.2d at 784. Accordingly, we affirm Robey's conviction.

[15] Affirmed.

Riley, J., and Mathias, J., concur.

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which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.'" *Hollingsworth v. State*, 987 N.E.2d 1096, 1098 (Ind. Ct. App. 2013) (quoting *Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008)), *trans. denied*. Because Robey "merely cites the fundamental error rule and makes a conclusory statement that" a fair trial was impossible, this argument is also waived. *Id*. at 1099.