

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Marielena Duerring
Duerring Law Offices
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Joshua Lee Cassel,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 20, 2023

Court of Appeals Case No.
22A-CR-2041

Appeal from the St. Joseph
Superior Court

The Honorable John M.
Marnocha, Judge

Trial Court Cause No.
71D02-2108-F1-15

Memorandum Decision by Judge Robb
Judges Crone and Kenworthy concur.

Robb, Judge.

Case Summary and Issue

- [1] Joshua Cassel was convicted of child molesting, a Level 1 felony. Cassel appeals, raising one issue for our review which we restate as whether the trial court abused its discretion by admitting certain evidence. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

- [2] Around 5:00 a.m. on April 20, 2021, Kathy Carlin dropped off her seven-year-old granddaughter, L.N., at Sarah Baker's home. Baker is Carlin's daughter and L.N.'s aunt. Baker is married to Cassel.
- [3] That afternoon, Carlin picked up L.N. from Baker's home around 3:00 p.m. On the ride home L.N. was quiet, which Carlin described as "not normal" because L.N. had been off her ADHD medication for two days. Transcript of Evidence, Volume II at 51. Carlin asked L.N. how her day was and L.N. told her that Cassel had touched her inappropriately. Carlin then took L.N. to the hospital. At the hospital, L.N. was examined by forensic nurse Tammy McKee. When McKee asked L.N. what happened, L.N. responded, "I'll draw you a picture." *Id.* at 108. L.N. proceeded to draw a picture of a "tall stick figure with a protruding . . . body part standing over a smaller figure that appeared to be [in] a bed." *Id.* L.N. then told McKee that "the tall figure was [Cassel] and the little figure was her[.]" *Id.*

- [4] During McKee's physical exam of L.N., McKee discovered a possible new bruise on the back of L.N.'s thigh and an abrasion around her anus. McKee collected L.N.'s underwear and performed genital and anal swabs on L.N. Cassel's DNA was found on the external genital swab and on L.N.'s underwear. *See id.* at 185-86. The next day, L.N. completed a forensic interview with Deborah Verduin of the CASIE Center wherein L.N. again used a drawing to convey what Cassel did to her.
- [5] On August 5, 2021, the State charged Cassel with child molesting as a Level 1 felony and child molesting as a Level 3 felony. The case proceeded to a jury trial during which L.N. testified that she remembered telling Carlin that Cassel "did inappropriate things" to her. *Id.* at 80. When L.N. was asked what she meant by "inappropriate things," she was unable to give a verbal answer. However, over Cassel's objection, L.N. was allowed to draw "whatever it was that you mean[t] when you said that he touched you inappropriately." *Id.* at 82. L.N. drew a stick figure picture of Cassel behind her. Cassel was drawn with a smiling face while L.N. was shown having a sad face. When asked where Cassel touched her, L.N. wrote out "stike his dik" and "in mi but[.]" Exhibit Volume, Volume IV at 3-5. L.N. then confirmed that she meant Cassel attempted to stick "one of his private parts . . . [in] one of [her] private parts[.]" Tr., Vol. II at 86.
- [6] The jury found Cassel guilty as charged. The trial court entered judgment of conviction only for the Level 1 felony and sentenced Cassel to serve forty years

executed in the Indiana Department of Correction. Cassel now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Standard of Review

[7] Cassel contends the trial court abused its discretion when it admitted L.N.'s non-verbal testimony. The trial court has broad discretion in ruling on the admissibility of evidence. *Small v. State*, 632 N.E.2d 779, 782 (Ind. Ct. App. 1994), *trans. denied*. We will disturb its ruling only upon a showing of abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Baxter v. State*, 734 N.E.2d 642, 645 (Ind. Ct. App. 2000). But even if a trial court abuses its discretion by admitting challenged evidence, we will not reverse the judgment if the admission of evidence constituted harmless error. *Sugg v. State*, 991 N.E.2d 601, 607 (Ind. Ct. App. 2013), *trans. denied*.

[8] Error in the admission of evidence is harmless if it does not affect the substantial rights of the defendant. *See McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied*. In determining whether an evidentiary ruling has affected a defendant's substantial rights, we assess the probable impact of the evidence on the factfinder. *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007).

II. Admission of Evidence

[9] The Confrontation Clause of the Sixth Amendment to the United States Constitution provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” Cassel argues the trial court abused its discretion by permitting L.N. to “testify non-verbally through both drawing and written words” because it denied Cassel “the fundamental right to be able to effectively cross-examine his accuser[.]” Appellant’s Brief at 8. We disagree.

[10] Here, L.N. testified at trial and during her testimony she wrote out some of her answers and used a drawing to convey what Cassel did to her. These writings and the drawing were then admitted into evidence. “Demonstrative evidence is evidence offered for purposes of illustration and clarification.” *Wise v. State*, 719 N.E.2d 1192, 1196 (Ind. 1999). Demonstrative evidence may be admissible if it sufficiently explains or illustrates relevant testimony to be a potential help to the trier of fact. *Id.*; see also *Newton v. State*, 456 N.E.2d 736, 741 (Ind. Ct. App. 1983) (holding, in part, sufficient foundation was laid for the victim’s use at trial of an anatomically correct doll while testifying). L.N. also non-verbally clarified what her writings and drawing meant in the following interaction with the State:

Q. Okay. So just so I’m hearing you right, you’re saying [Cassel] tried to stick his dick in your butt?

A. (Nods head up and down.)

Q. And when you say his dick . . . [i]s that one of his private parts?

A. (Nods head up and down.)

Q. Okay. And when you say your butt, do you mean one of your private parts?

A. (Nods head up and down.)

Tr., Vol. II at 86.¹

[11] Cassel contends “[i]t is virtually impossible to effectively cross examine a drawing or words written on a piece of paper.” Appellant’s Br. at 13. However, L.N. was available for cross examination. In fact, Cassel did cross-examine L.N. and chose not to ask any questions regarding either her writings or drawing.² Therefore, we conclude Cassel’s Sixth Amendment right to cross-

¹ “Leading questions should not be used on direct examination except as necessary to develop the witness’s testimony.” Ind. Evidence Rule 611(c). Certain witnesses, including children and young, inexperienced, and frightened witnesses, may be asked leading questions on direct examination to develop their testimony. *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000); *Kien v. State*, 782 N.E.2d 398, 408 (Ind. Ct. App. 2003), *trans. denied*. A leading question is one that suggests the desired answer to the witness. *Williams*, 733 N.E.2d at 922. The use of leading questions is limited in order to prevent the substitution of the attorney’s language for the thoughts of the witness as to material facts in dispute. *Id.* “The trial court is afforded wide discretion in allowing leading questions and the trial court’s decision will be reversed only for an abuse of discretion.” *Bussey v. State*, 536 N.E.2d 1027, 1029 (Ind. 1989).

² We also note that during the cross-examination Cassel’s attorney stated the following to L.N.:

Okay. And you still have your crayons and stuff up there? If you want to use that plus talk out loud, that’s okay. If you want to use your crayons, I’m good with that.

Tr., Vol. II at 97. L.N. then answered one of Cassel’s attorney’s questions by writing and, as on direct examination, clarified by nodding her head up and down. *See id.* at 98.

examine L.N. was not violated by her writing out answers to questions or using a drawing.

[12] Even if the trial court's admission of L.N.'s writings and drawing at trial constituted error it was harmless. In determining whether a party's substantial rights have been affected by erroneous admission of evidence, we consider the evidence's probable impact on the factfinder. *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012). Improper admission of evidence is harmless error "if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction." *Id.*

[13] Here, L.N. also used drawings to convey the sexual encounter with Cassel to both McKee and Verduin. McKee conducted a physical exam on L.N., discovering a new bruise on the back of her thigh and an abrasion around her anus. Further, Cassel's DNA was found on L.N.'s underwear and on an external genital swab.

[14] Therefore, any error in this case was harmless.

Conclusion

[15] We conclude the trial court did not abuse its discretion by admitting L.N.'s non-verbal testimony. Accordingly, we affirm.

[16] Affirmed.

Crone, J., and Kenworthy, J., concur.