MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Megan Shipley
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Alexandria Sons
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Erik Hernandez Berrera,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 12, 2023

Court of Appeals Case No. 23A-CR-54

Appeal from the Marion Superior Court

The Honorable Jennifer P. Harrison, Judge

Trial Court Cause No. 49D20-2008-F1-26047

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Erik Hernandez Berrera appeals his conviction for Level 1 felony child molesting following a jury trial. Berrera presents one issue for our review, namely, whether the trial court abused its discretion when it admitted into evidence a forensic interview with the alleged child victim. We affirm.

Facts and Procedural History

[2] In August 2020, Berrera was dating R.B., who has two children, including then-five-year-old J.B. On August 2, R.B. left the children with Berrera while she ran errands. After R.B. got home, J.B. told her that Berrera had touched her "private area" with his finger. Tr. Vol. 2, p. 124. R.B. confronted Berrera, who denied R.B.'s allegation. R.B. then called 9-1-1. Berrera indicated that he wanted to leave R.B.'s apartment, but she tried to convince him to stay and talk to the police. But before officers arrived, Berrera "jumped off the balcony" of R.B.'s apartment, got into his car, and drove away. *Id.* at 127.

[3] That same day, R.B. took J.B. to Riley Hospital, where a nurse examined J.B.'s genitalia. The nurse observed a "generalized redness" to the area "surround[ing] the hymen" that may or may not have been caused by sexual assault. Tr. Vol. 3, p. 67. J.B. subsequently gave a videorecorded forensic interview to a police detective.

[4] The State charged Berrera with two counts of Level 1 child molesting. During his jury trial, then-seven-year-old J.B. testified that Berrera touched inside the part of her body where "you pee out of" with the part of his body "that he pees out of[.]" Tr. Vol. 2, p. 152. J.B. also testified that Berrera put his finger inside

her "butt[.]" *Id.* at 155. J.B. testified that Berrera stopped because R.B. came home. R.B. testified that, as soon as she got home on August 2nd, J.B. told her that "something [had] happen[ed]" with Barrera. *Id.* at 123. R.B. asked J.B. to show her what had happened, and J.B. "began to touch her private area." *Id.* at 124. R.B. testified that she confronted Barrera before calling 9-1-1.

[5] Later during the trial, the State asked a police detective questions about the forensic interview of J.B. In particular, on direct examination of Indianapolis Metropolitan Police Department ("IMPD") Detective Daniel Henson, the State questioned him as follows:

> Q: Detective, earlier you talked about J.[B.] having a forensic interview. Can you tell us what a forensic interview is?
>
> A: Absolutely. So a forensic interview is -- there are -- there are certain guidelines that are put into place by organizations. The one that we use is called Child First, about how children should be interviewed, children victims should be interviewed.
>
> So there's a lot that goes into it, but very roughly, the idea is that we minimize any outside influence.
>
> So we do that by interviewing the child in [a] one-on-one setting and trying to reduce the appearance of authority. So we -- we do it in a very, I guess, kind of relaxed environment.
>
> It's recorded. It's audio recorded and video recorded. And -- and the primary feature of it is that it's non-leading. It's child-led.
>
> So in other words, we would ask open-ended questions. You -- you wouldn't ask a question like, "Did Mr. Fernandez touch your vagina?" You would -- you would ask questions more

generally about body safety. You know, do -- do you know about the parts of your body it's not okay to touch? And allow the child to offer up the information about what's happened to them.

We would never introduce a sex act ourselves or introduce a perpetrator. So we do -- we do everything we can to minimize suggestiveness and keep things open ended and child-led.

Q: Okay. And what's the purpose of keeping things open and non-suggestive?

A: Well, because we want to know the truth. It's – it's to keep the interview as neutral as possible so that we're not giving the child cues about how we want them to answer.

We won't say to them like, "Good job. It's great. You're being so brave." We don't want -- we don't want them to be giving us answers just that we want to hear or suggesting ideas to them and introducing false information.

So we're very careful about how we interview so that the information we're getting is information that's offered by the child and it's not been tainted by us or by an outside influence.

Q: In this particular case, who conducted the forensic interview with J.[B.]?

A: That would've been Detective Nicole Flynn.

Q: Right. And where does she work? How do you know her?

A: She was actually my DTO. She was my training officer when I was a detective. So she was also a child abuse detective. She's – she's now elsewhere on the department. But she is a certified Child -- Child First forensic interviewer.

* * *

> Q: Right. And I know you said earlier that you did not do J.[B.]'s[interview], but you were able to watch it from an observation room. Is that right?
>
> A: That's correct.
>
> Q: So you were watching it the whole time?
>
> A: Correct.
>
> * * *
>
> Q: Right. When you watched this interview from the observation room and when you subsequently reviewed it, *did the interview that Detective Flynn did follow protocol that you know since being a trained forensic interviewer*?
>
> A: *It did. It followed the Child First protocol. Yes*.

Tr. Vol. 3, pp. 18-22 (emphases added).

[6] Defense counsel then cross-examined Detective Henson as follows:

> Q: Now -- And you said that a forensic interview was done of the accuser in this case, correct?
>
> A: Yes, that's correct.
>
> Q: And [in] a forensic interview there is a questioning style that you describe as nonleading, right?
>
> A: That is the goal. Yes.
>
> Q: Often times those questions, however, are sort of a multiple-choice question, right?

A: They can be. Yes.

Q: I -- my shirt is white, black or something else.

A: Yes, and then always end it with the something else if we provided a multiple-choice option.

Q: And so the child is actually given choices?

A: That can happen in the interview. It's possible. Yes.

Q: And often times you also describe the children will give an answer and then wait.

A: Oh, you mean in terms of tentative disclosure?

Q: Right. To gauge the reaction.

A: Yes, sir. That's true.

Q: And one of those reactions that a child is gauging is how the interviewer reacts to that answer.

A: I think that can be true. Yes.

Q: And so sometimes a child could be giving answers that they perceive the interviewer to want to hear.

A: Is that possible? Yes, it's possible.

Id. at 34-35.

[7] The following colloquy occurred on redirect examination of Detective Henson:

Q: Alright. And referring back to the forensic interview, you said nonleading questions are asked, right?

A: Correct.

Q: And Mr. Fleming talked about how sometimes you're giving a choice like is my shirt white, black, or something else?

A: Yes.

Q: What is the purpose of the something else?

A: So, that's to leave it open ended, and I would also say we don't–we would never start with multiple choice. That would be—they have a thing they call hour glassing where you start very wide. We would never start with, hey, did Mr. Hernandez touch your vagina, or your breast, or anus or something else? It would start as I described very general, and then as a child begins to disclose and we need to get in the specifics, if we then have to offer multiple choice questions to get that, we would and we would make sure that it is multiple choice and not just did he touch your vagina. It would be this range of things and something else to leave it as open ended as possible. The entire goal is to reduce the suggestibility.

[Q]: I've even asked you questions today that have been one, two, or something else, right?

[A]: Correct.

[Q]: It also helps to explain what the question is when you can give examples of what you're looking for, doesn't it?

[A]: Absolutely.

> [Q]: Talking about children and disclosing and the reaction of who they're talking to, are you guys trained to have any sort of visual reaction?
>
> A: We intentionally – that's specifically part of the Child First program is that because that is a danger of the child giving us what we want to hear, *we do not react to them*. We don't tell them that's good or bad; we don't show any sympathy for them in the disclosures. We make zero judgment that we as much as humanly possibly can to portray no sort of indication that the answer was good or acceptable, or bad or that we feel sorry for them or anything like that. *That's all left as neutral as possible by the interviewer if they're following Child First protocol for that reason*.
>
> Q: And would that include facial expressions or body language, those things as well?
>
> A: Absolutely.
>
> Q: And so those are things the interviewer is cognizant of when they're conducting a forensic?
>
> A: They should be. Yes.

Id. at 40-41 (emphases added).

[8] On recross examination of Detective Henson, defense counsel asked questions specific to the forensic examination of J.B.:

> Q: Now, in this case you didn't perform the forensic interview?
>
> A: That's correct.
>
> Q: However, the other detective that did, she's a human, right?

A: She is human. Yes.

Q: Just like you?

A: I think so (inaudible).

Q: And -- and you said that you do your best to not react emotionally, but we are humans.

A: That's true.

Q: And you've dealt with a lot of children over the course of your career, right?

A: Unfortunately, yes.

Q: And you've noticed that kids are often pretty good at picking up the environment they're in.

A: They can be. Sure.

Q: And as humans we can't completely hide our reactions and our feelings about what's going on around us.

A: I would like to think that I'm good at doing that. I don't know that I would ever say that someone could completely do that. I do think we do our best to . . . not portray any response is the best I think I could answer that.

Q: But the best you can do is your best.

A: Certainly. Yeah, absolutely.

Id. at 42. On further redirect examination, this colloquy ensued:

> Q: When you watched this interview, did you see any reaction from Detective Flynn as she was conducting the interview?
>
> A: No, and she's done hundreds of these and they've—they look exactly the same as everyone I've seen her do.
> Q: And again, you were watching it in real time as it was happening from the observation room?
>
> A: Correct.

Id. at 43.

[9] At that point, the following colloquy occurred during a sidebar conference:

> [State]: Judge, I believe at this point the door has been opened for the admission of the forensic interview given all the questions dancing around it at this point. I think it makes sense for the trier of fact to be able to see it and judge for themselves since we're going into whether it was leading, multiple choice, all of things [sic].
>
> [Defense counsel]: And I don't believe the door has been opened. We're asking about the types of questions that were asked not. . . .
>
> THE COURT: You really had [opened the door] on whether or not the questions were leading. You really had [opened the door] on whether or not she was making responses, visible or emotional responses to the testimony. I think that you have really put it into question, and so now that it's been into question, I agree with the State that you've put -- you've made it such a big deal that it has become -- that it's now the jury who gets to look at it and decide whether or not they believe the questions are leading, or whether they believe that a response is being had by the interviewer. I mean you -- I mean it's been almost the entirety

> of -- a lot of your cross examination is whether any of that occurred, and I can't disagree with them.

Id. at 44.

[10] Accordingly, the trial court played for the jury a video recording of J.B.'s forensic interview. In that interview, J.B. stated that Berrera had touched her "butt" with his finger. State's Ex. 9. And J.B. stated that Berrera had touched the part of her body she uses to "pee." *Id.* J.B. did not know the name of Berrera's body part that he used to touch that part of her body, but she circled the groin area of a male drawing to indicate which part he had used. J.B. stated twice that these things had happened "a lot of times," but she did not describe additional molestations. *Id.* J.B. stated that when the molestations occurred, Berrera took her "panties" off. *Id.* J.B.'s live testimony was consistent with her forensic interview statements.[1] During trial, J.B. still did not know the word "penis," so she just pointed to the circle she had made on the diagram of a boy during the interview.

[11] The jury found Berrera guilty of one count of Level 1 child molesting but acquitted him on the second count. The trial court entered judgment accordingly and sentenced Berrera to thirty years with ten years suspended. This appeal ensued.

---

[1] Berrera asserts that J.B.'s statements in the interview were "more detailed" than her trial testimony. Appellant's Br. at 28. But our review of the evidence reveals no meaningful differences.

Discussion and Decision

[12] Berrera contends that the trial court abused its discretion when it admitted into evidence the videorecorded forensic interview of J.B., which everyone agrees was inadmissible hearsay. Generally, a trial court has broad discretion in ruling on the admissibility of evidence. *Dycus v. State*, 108 N.E.3d 301, 303 (Ind. 2018). We will ordinarily disturb a trial court's admissibility rulings only where it has abused its discretion. *Id.* A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court misapplies the law. *Id.*

[13] Here, again, the trial court found that Berrera had opened the door to permit the admission of the video-recorded forensic examination of J.B. As our Supreme Court has explained,

> [h]earsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *See* Evid. R. 801(c); *Coleman v. State*, 946 N.E.2d 1160, 1168 (Ind. 2011). Subject to certain limited and specific exceptions, hearsay is generally not admissible at trial. *See* Evid. R. 802. However, what might otherwise be inadmissible hearsay evidence "may become admissible where the defendant 'opens the door' to questioning on that evidence." *Kubsch*[*v. State*], 784 N.E.2d [905,] 919 n.6[(Ind. 2003)].

Turner v. State, 953 N.E.2d 1039, 1055 (Ind. 2011).

> "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof,

> even though the rebuttal evidence otherwise would have been inadmissible." *Wilder v. State*, 91 N.E.3d 1016, 1023 (Ind. Ct. App. 2018) (quoting *Sampson v. State*, 38 N.E.3d 985, 992 n.4 (Ind. 2015)). Evidence which opens the door must leave the trier of fact with a false or misleading impression of the facts related. *Id.* When that happens, the State may introduce otherwise inadmissible evidence if it is a fair response to evidence elicited by the defendant. *Id.*

Garcia-Berrios v. State, 147 N.E.3d 339, 343 (Ind. Ct. App. 2020).

[14] Here, the trial court found that Berrera had, during his cross-examination of Detective Henson, left the jury with the false or misleading impression that Detective Flynn may have asked leading questions of J.B. during the forensic interview and that she may have made "visible or emotional responses" to J.B.'s answers. Tr. Vol. 3, p. 44. However, Berrera maintains that, because his cross-examination of Detective Henson was only in response to the State's questions on direct examination of Detective Henson regarding Detective Flynn's interview of J.B., he did not open the door to the admission of the videorecording. We agree with Berrera on this point.

[15] During the prosecutor's questioning on direct examination, Detective Henson explained the "Child First" protocol used in forensic interviews, which requires that the interviewer ask only "non-leading" questions of the child and "keep the interview as neutral as possible so that we're not giving the child cues about how we want them to answer." *Id.* at 18-19. The prosecutor then asked Detective Henson whether Detective Flynn had used the Child First protocol in her interview with J.B.:

> Q: Right. When you watched this interview from the observation room and when you subsequently reviewed it, did the interview that Detective Flynn did follow protocol that you know since being a trained forensic interviewer?
>
> A: It did. It followed the Child First protocol. Yes.

Id. at 21-22. Thus, the State initially created the impression that Detective Flynn asked only non-leading questions of J.B., gave J.B. no "cues" about how she wanted J.B. to answer, and otherwise followed the Child First protocol. *Id.* at 19. In his cross-examination of Detective Henson, Berrera then followed up with questions designed to illustrate that an interviewer's perfect compliance with the protocol is unrealistic.

[16] Because the State first introduced the issue of Detective Flynn's forensic interview of J.B.,[2] it was the State that opened the door, which permitted Berrera to question Detective Henson further regarding how Detective Flynn conducted the interview. Thus, the trial court erred when it found that Berrera had opened the door. And the court abused its discretion when it admitted into evidence the video-recorded forensic interview.

---

[2] In its brief on appeal, the State asserts that its "questions concerning the forensic interview were general and it was Berrera who asked specific questions about the facts of this case" and that its "questions that were specific to this case began only after Berrera began attacking the neutrality of the interviewer." Appellee's Br. at 10-11. Those assertions are not well taken. As the transcript makes clear, it was the prosecutor, on direct examination of Detective Henson, who first asked questions about Detective Flynn's interview of J.B., including whether Detective Flynn had followed the Child First protocol. Berrera was permitted to challenge the State's evidence on those points.

[17] Nonetheless, we agree with the State that the error in the admission of the video-recording was harmless. As our Supreme Court explained in *Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021):

> An error is harmless when it results in no prejudice to the "substantial rights" of a party. *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018). The harmless-error analysis is a practical one, embodying "the principle that courts should exercise judgment in preference to the automatic reversal for error and ignore errors that do not affect the essential fairness of the trial." *Id.* (quoting *United States v. Harbin*, 250 F.3d 532, 546 (7th Cir. 2001)). Factors considered in a harmless error analysis "include the presence or absence of other, corroborating evidence on material points; whether the impermissibly admitted evidence was cumulative; the overall strength of the prosecution's case; the importance of the impermissible evidence in the prosecution's case; and the extent of cross-examination or questioning on the impermissibly admitted evidence." *Zanders v. State*, 118 N.E.3d 736, 745-46 (Ind. 2019).

[18] The video-recording of Detective Flynn's forensic interview with J.B. was cumulative of J.B.'s trial testimony, and R.B. provided corroborating testimony to J.B.'s testimony as well. The State also provided corroborating testimony from police officers and played a recording of the 9-1-1 call for the jury. Berrera thoroughly cross-examined Detective Henson about the methods Detective Flynn used during the forensic interview, and he challenged the integrity of J.B.'s answers. We hold, based on the totality of the record, that, had the trial court properly excluded the forensic interview, the outcome of Berrera's trial would not have been different. Thus, the trial court's error in admitting the

video-recording was harmless. *See, e.g.*, *Taylor v. State*, 841 N.E.2d 631, 637 (Ind. Ct. App. 2006), *trans. denied*.

[19] For all these reasons, we affirm Berrera's conviction for Level 1 child molesting.

[20] Affirmed.

Vaidik, J., and Pyle, J., concur.