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IN THE COURT OF APPEALS OF INDIANA

Jeffrey Archer,
Appellant-Defendant,

v.

State of Indiana
Appellee-Plaintiff.

April 12, 2021

Court of Appeals Case No. 20A-CR-1677

Appeal from the Marion Superior Court

The Honorable Shatrese Flowers, Judge

Trial Court Cause No. 49G02-1109-FA-68637

Darden, Senior Judge.

Statement of the Case

[1] Jeffrey Archer brings this interlocutory appeal from the trial court's order granting the State's motion to quash his notice of deposition. We reverse and remand.

Issue

[2] The sole question presented in this appeal is:

> Did the State meet its burden under the *Dillard*[1] test to prevent Archer from taking the deposition of L.B.?

Facts and Procedural History

[3] A jury found Archer guilty of Class A felony child molesting and two counts of Class C felony child molesting of L.B., a child born on June 2, 2003, and on direct appeal this Court affirmed his convictions. *See Archer v. State*, 996 N.E.2d 341 (Ind. Ct. App. 2013), *trans. denied.* In that appeal, among several arguments, Archer[2] challenged his trial counsel's performance on four separate grounds, none of which involved his performance during discovery. *Id.* at 352-54.

[4] Following direct appeal, Archer filed a petition for post-conviction relief, which was denied by the post-conviction court. Next, Archer appealed the denial of his petition for post-conviction relief, challenging appellate counsel's

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[1] *Dillard v. State*, 257 Ind. 282, 274 N.E.2d 387 (1971).

[2] Archer is the paternal step-grandfather of the victim, L.B. *Id.* at 345.

performance. *See Archer v. State*, No. 18A-PC-2681 (Ind. Ct. App. July 25, 2019). Initially we affirmed the post-conviction court's denial of relief. *Id.* However, following Archer's petition for rehearing, we granted relief, reversed the judgment of the post-conviction court; and, remanded the case to the trial court for further proceedings. *See Archer v. State*, 133 N.E.3d 176, 178 (Ind. Ct. App. 2019).

[5] On rehearing, we more closely examined Archer's argument concerning appellate counsel's failure to argue on direct appeal that an obviously biased juror had been challenged, but nonetheless, had served on Archer's jury. *Id.* During the post-conviction hearing, appellate counsel testified that "it was not his policy to review voir dire because what transpires then is not evidence." *Id.* at 177. At Archer's original trial, a juror had expressed bias and defense trial counsel passively challenged her for cause. *Id.* The trial court conceded that the juror was "pretty bad," but did not excuse her. *Id.* at 178. At that point, trial counsel resumed voir dire, thanking the juror for her candor, and then moved on. *Id.* Apparently, without further challenge by trial counsel, the juror was seated and served during Archer's trial, which ended in his conviction.

[6] During the post-conviction hearing, trial counsel was asked about that juror's ability to be a fair and impartial juror to serve in Archer's case, and he testified that he tells clients in child molesting cases, "most people believe that the accused is guilty based on the accusation, so the case starts in a hole and we need to try to dig out of it." *Id.* (quotations omitted). After additional discussion of trial counsel's comment in light of the presumption of innocence

and the right to a fair trial, this Court observed that there were two consequences of appellate counsel's decision, or failure thereof, to raise ineffective assistance of trial counsel on Archer's direct appeal.

> First, it means that we cannot consider that issue here. Second, it means that appellate counsel had an obligation to review the entire record of the trial proceedings, including the voir dire transcript. Had appellate counsel done so, counsel would have seen this significant, obvious, and strong issue to be raised on appeal. And we believe that had appellate counsel raised the issue, we would have ruled in Archer's favor, reversing and remanding for a new trial.

Id.

[7] After remand, a trial date was set by the trial court and Archer, with new defense trial counsel commenced preparing to defend against the child molesting charges anew. During correspondence between the parties concerning discovery, trial counsel made known her need to depose L.B. The State objected, replying that L.B. already had been deposed for purposes of Archer's first trial and had testified, and there was no need for a second deposition.

[8] Trial counsel responded that the "trial was 7 years ago, lots of things happen in between, and the child has now grown, and I'm entitled as counsel for Archer, to learn what she will testify to and what she remembers." Appellant's App. Vol. 2, pp. 29-30. Trial counsel went on to state that "I am not required to use a prior ineffective counsel's work on the case. That would be a serious breach

of a defendant's right to counsel under the Sixth Amendment and the commensurate Indiana provisions." *Id.* at 30. The State maintained that it would move to quash any subpoena for a second deposition of L.B. We note, however, that the State did not seek a protective order under Indiana Trial Rule 26(C) (protective orders issued in discovery).

[9] On February 19, 2020, defense counsel noticed the State to take the deposition of L.B. Two days later, the State moved to quash the deposition, and Archer moved to strike or deny the State's motion. The trial court held a hearing on the motions on March 6, 2020. Trial counsel also filed a post-hearing brief, wherein, she argued that she needed L.B.'s deposition because the initial interview had not been conducted using proper protocols. She also argued that this Court had implicitly found prior trial counsel was ineffective, and that as new defense counsel she should not be required to rely on that attorney's work product or to be held or limited to or by his prior trial strategy.

[10] In response, the State argued that "one of the first things the victim brought up was how awful an experience the past deposition was." Tr. Vol. 2, p. 13. The State further responded that trial counsel's desire to explore events that occurred after Archer's first trial was irrelevant to the case, and that questions about the interviewer's methodology were deposition topics better suited for the interviewer or interviewers.

[11] The State, in its correspondence resisting the deposition, had noted, "If you have legal authority showing that I'm wrong please share, [sic] it is not often

that we have a case with these circumstances." Appellant's App. Vol. 2, p. 31. At the hearing, the State compared Archer's position to that of a defendant who replaces trial counsel during a trial, such that repetition of all prior discovery was not required after said replacement. The State further observed that it had an obligation to relay to trial counsel any statements by L.B. that might contradict her prior testimony.

[12] Trial counsel disagreed, arguing that as new counsel herein, she is not of the same status or in the same position as a trial counsel being replaced, taking over, or substituted in the midst of an ongoing trial or during the pendency of a case previously set for trial. Rather, she is serving in the capacity of new trial counsel for Archer who has been granted a new trial by the Indiana Court of Appeals. Trial counsel reiterated that the purpose of the deposition was: (1) to determine what L.B. remembers now as opposed to what she remembered before; (2) to discover areas of additional investigation concerning Archer and custody matters; and (3) to ask things not previously asked of L.B., such as L.B.'s sleeping arrangements with her non-custodial grandparents at the time alleged. Archer's post-hearing brief also raised the need for more information about L.B.'s relationships with her custodial grandparents and others who visited both homes, visitation with Archer, and background about her belief structures regarding the concepts of "good touch/bad touch." *Id.* at 45.

[13] The court granted the State's motion to quash the notice of deposition on June 30, 2020, also denying trial counsel's motion to strike. On July 30, 2020, trial counsel moved to certify the trial court's order for interlocutory appeal, and the

motion was granted the next day. We granted Archer leave to proceed with his appeal.

Discussion and Decision

[14] The cornerstone of our criminal justice system is based upon the premise that an accused is entitled to a fair trial and to receive effective assistance of counsel.[3] The issue of effective assistance of both trial and appellate counsel has been litigated before this Court, resulting in remand and the granting of a new trial. Archer continues to face very serious charges with new counsel who is entitled to develop her own theories and strategies about defending her client. *See Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (counsel enjoys considerable discretion in developing legal strategies for client).

[15] The issue here involves the trial court's discovery ruling and our obligation to balance the equities and harms to a defendant and the State regarding that discovery. More particularly, we are asked to review whether the trial court correctly balanced the harm of using a prior deposition developed on the strategy of prior counsel, who tacitly has been found to be ineffective in

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[3] *See Ben-Yisrayl v. State*, 738 N.E.2d 253, 260 (Ind. 2000) (The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel at trial); *Williams v. State*, 690 N.E.2d 162, 166-67 (Ind. 1997) (constitutional guarantee of right to a speedy and public trial to ensure a fair trial).

representing Archer, against the "awful [] experience" a nearly eighteen-year-old victim remembered. *See* Tr. Vol. 2, p. 13.

[16] Our standard of review in discovery matters is limited to determining whether the trial court abused its discretion. *Hale v. State*, 54 N.E.3d 355, 357 (Ind. 2016). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court. *Id.* "'We do not reweigh the evidence; rather, we determine whether the evidence before the trial court can serve as a rational basis for its decision.'" *Id.* (quoting *DePuy Orthopaedics, Inc. v. Brown*, 29 N.E.3d 729, 732 (Ind. 2015)). "'Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal,' and 'discovery, like all matters of procedure, has ultimate and necessary boundaries.'" *Hinkle v. State*, 97 N.E.3d 654, 664 (Ind. Ct. App. 2018) (quoting *Mut. Sec. Life Ins. Co. v. Fid. & Deposit Co.*, 659 N.E.2d 1096, 1103) (Ind. Ct. App. 1995)).

[17] However, in this situation, the trial court's order was non-specific, leaving us with no details about the ground or grounds on which it relied.[4] Therefore, the posture of our review seemingly is akin to de novo. Nonetheless, "[i]t is a

[4] The trial court's order states, "The Court having heard evidence and arguments of counsel and having reviewed said Memorandum, now GRANTS State's Motion to Quash Deposition Subpoena of L.B. and DENIES Defendant's Motion to Strike and Deny State's Motion to Quash." Appealed Order p. 2.

cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment." *Marion-Adams Sch. Corp. v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006). Therefore, we choose to review the trial court's judgment for an abuse of discretion in this case. *See Hale*, 54 N.E.3d at 357.

[18] We start by acknowledging that "there is no general constitutional right to discovery in a criminal case." *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). "The Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). However, in the State of Indiana, pre-trial practice in both criminal and civil matters routinely involves taking depositions of witnesses. Indiana Code section 35-37-4-3 (1981) sets forth that, "The state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure." Indiana Criminal Rule 21 provides that, "The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings." Indiana Trial Rule 30(A) provides that, "After commencement of the action any party may take the testimony of any person, including a party, by deposition upon oral examination."

[19] As for the 'ultimate and necessary boundaries' mentioned above, *see Hinkle*, 97 N.E.3d at 664, some of those limits are set by rule. Trial Rule 26(b)(1) sets out that the "parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action[]."

(emphasis added). Here, the State has not claimed privilege. The Rule further focuses on whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." T.R. 26(b)(1). The Rule's limitations on discovery include the following:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).

Id.

[20] Additionally, our Supreme Court established what has come to be known as the *Dillard* test shortly after the Indiana Trial Rules took effect. *See Hale*, 54 N.E.3d at 358 (Ind. 2016) (referring to the three-part test as the "Dillard test"). The *Dillard* test is a three-part standard used by courts to determine whether a criminal defendant's discovery request should be granted. *Beville v. State*, 71 N.E.3d 13, 18 (Ind. 2017). The court's analysis must include these considerations: (1) is there a sufficient designation of the items sought to be discovered (particularity), and (2) are the items sought to be discovered material

to the defense (relevance); if so, then the request must be granted unless (3) the State makes a sufficient showing of its "paramount interest" in non-disclosure. *Id.* (citing *Dillard*, 257 Ind. 282, 291-92, 274 N.E.2d 387, 392 (1971)).

[21] Walking through the *Dillard* test analysis, we first look to see if Archer's request has the requisite particularity. New trial counsel for Archer informed the trial court that she needed to depose L.B. She informed the trial court that the purpose of the deposition was not to harass or traumatize L.B., but to discover what her testimony would be now that she is nearly eighteen years old. Specifically, she argued she needed to (1) determine what L.B. remembers now as opposed to what she remembered before; (2) discover areas of additional investigation concerning Archer and custody matters; and (3) ask things not previously asked of L.B., such as L.B.'s sleeping arrangements with her non-custodial grandparents. Archer's post-hearing brief also raised the need for more information about L.B.'s relationships with her custodial grandparents and others who visited both homes, visitation with Archer, and background about her belief structures regarding the concepts of "good touch/bad touch." Appellant's App. Vol. 2, p. 45. These requests appear to be stated with sufficient particularity to satisfy the first requirement.

[22] Next, we turn to relevance. The State argued that "some things [counsel] has indicated to me is [counsel] wanted to ask the victim about the past seven years, which would be irrelevant. And then [counsel] also hinted [] that she believes the trial counsel was ineffective, but I don't see where the Court of Appeals ever stated that." Tr. Vol. 2, p. 7.

[23] L.B. is now nearly eighteen years old. Under these circumstances, it would be unfair to prohibit Archer's new trial counsel from discovering what L.B. remembers and the language she uses today to describe the events of more than seven years ago. Further, her belief structures regarding the concepts of "good touch/bad touch," may or may not be different from the pertinent time period. Information about her relationships with family members and possible preferences between sets of grandparents, might lead to admissible evidence and/or help to formulate defense strategies. We conclude that Archer's stated reasons for L.B.'s deposition meet the *Dillard* test's requirement of relevance.

[24] We also observe notions of fundamental fairness. It would be unfair to the defendant to limit him to a defense strategy, poorly or well-formed, that was adopted to address a victim aged eight or nine, when that victim will be testifying in his new trial from the life experience of a nearly grown adult.

[25] In *Boushehry v. Ishak*, 560 N.E.2d 116, 116 (Ind. Ct. App. 1990), we discussed the fairness of remanding the matter for further proceedings as opposed to remanding the matter for a new trial. We concluded that it would be unfair to the plaintiff to allow the trial court to simply issue new findings of fact and conclusions of law on the record it had before it when there had been error at the previous trial. *Id.* We modified our original opinion to remand the matter for a new trial. *Id.* Similarly, requiring Archer to be limited to the record

established for convictions that were reversed, in this instance, defeats the purpose of ordering a new trial.[5]

[26] Therefore, under *Dillard*, Archer's discovery request should have been granted unless the State showed a "paramount interest" in non-disclosure.

[27] The State argued at the hearing that: (1) a prior deposition was available for Archer's use; (2) prior trial testimony also was available; and (3) the victim recalled how awful the prior deposition experience was. On appeal, the State additionally raises the argument from *Maryland v. Craig*, 497 U.S. 836, 855 (1990), about "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."

[28] *Craig* addressed a challenge to a trial court's use of a statutorily created procedure for presentation of testimony of an alleged child abuse victim vis-à-

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[5] In our opinion granting Archer relief on rehearing, we stated that "had appellate counsel raised the issue, we would have ruled in Archer's favor, reversing and remanding for a new trial." *Archer*, 133 N.E.3d at 178. We recognize that a trial counsel's actions are evaluated by identified error or errors. *See Brockway v. State*, 502 N.E.2d 105, 107 (Ind. 1987). We presume that counsel rendered effective assistance. *Id.* Therefore, reversal on one or more grounds of ineffective assistance of counsel does not necessarily lead to a sweeping, wholesale conclusion that counsel was ineffective in all things; rather, counsel is ineffective only as to those grounds that are identified, argued, and evaluated, leading to a new trial. His prior trial counsel's conduct was never deemed ineffective solely because appellate counsel was ineffective for failing to raise it. Archer's case was remanded for a new trial because of his appellate counsel's error. When the case is remanded for a new trial, the slate is wiped clean.

vis the Sixth Amendment's Confrontation Clause. In that case, the United States Supreme Court held that,

> if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. The Court further directed the courts that,

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.

Id. at 855-56 (citations and parentheticals omitted).

[29] Again, the alleged child abuse victim here is nearly an adult. The State argued that the victim commented about how "awful an experience the past deposition was." Tr. Vol. 2, p. 13. *This record* shows that L.B. was apprehensive about another deposition more than it shows that a child would be further traumatized by encountering the defendant or reliving the experience. *This record* does not support or show that the level of her trauma about reliving the experience now, as an adult, would outweigh trial counsel's need to take her deposition to properly defend her client.

[30] On balance, given the sentencing exposure of the defendant–between 20 and 50 years–versus the uncomfortable feeling of having to be deposed (similarly experienced by most deponents) and testifying, this record weighs in favor of granting trial counsel's request to depose L.B. As the alleged victim, L.B.'s testimony will be the centerpiece of the State's case-in-chief. Under the circumstances of this case, the defendant should be allowed to discover what her present testimony will be and prepare his defense accordingly. The trial court retains the authority to ensure that the deposition addresses relevant issues and is not unduly burdensome to the deponent. We find that the State did not meet its showing of a paramount interest in non-disclosure under the *Dillard* test. Therefore, we find that the trial court abused its discretion by quashing the subpoena for L.B.'s deposition.

Conclusion

[31] The trial court's judgment is reversed and remanded for further proceedings, accordingly.

[32] Reversed and remanded.

Najam, J., and Bailey, J., concur.