

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John August Barnes, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 17, 2023

Court of Appeals Case No.
22A-CR-1547

Appeal from the St. Joseph
Superior Court

The Honorable Elizabeth C.
Hurley, Judge

Trial Court Cause No.
71D08-2101-F1-2

Memorandum Decision by Judge Riley.
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, John August Barnes III (Barnes), appeals his conviction for child molesting, a Level 1 felony, Ind. Code § 35-42-4-3(a)(1).
- [2] We affirm.

ISSUE

- [3] Barnes presents a single issue on appeal, which we restate as: Whether the trial court abused its discretion by admitting certain evidence.

FACTS AND PROCEDURAL HISTORY

- [4] W.S. (Father) and J.S. (Mother) are the biological parents of J.M., who was born on April 16, 2012. When their marriage ended sometime in 2016, Mother was granted physical custody of J.M., and Father had scheduled visits with J.M. These visits occurred on weekends at his mother's (Grandmother) home in South Bend, Indiana. Mother later married Barnes, and in 2020, J.M. resided with Mother and Barnes during the week.
- [5] On June 22, 2020, J.M. was eight years old. Father had visitation with J.M. and took her swimming at Grandmother's pool, where Father's girlfriend (Father's Girlfriend) and Grandmother's friend were also present. At some point, J.M. disclosed to Grandmother "about something an adult in her life was doing to her[.]" (Transcript Vol. II, p. 130). The disclosure was that Barnes had inappropriately touched her. When Father asked J.M. for further

explanation, she “started telling [him] everything[,]” which was that Barnes “had touched her with his penis and milk came out” of his penis. (Tr. Vol. II, p. 88). It appears that J.M. initially reported Barnes’ molestation to Mother before disclosing the claim to Grandmother, Father, and others present when she made that revelation. Unfortunately, Mother failed to believe J.M. and even called her “a liar.” (Exhibit 1A at 35:03). In response to J.M.’s claims, Father’s Girlfriend contacted her brother-in-law, a police officer, and asked him what “the next steps should be.” (Tr. Vol. II, p. 132). The brother-in-law arrived, and a formal report was eventually made to the police. Grandmother’s friend explained to J.M. the importance of telling the truth when questioned by the police. J.M. did not return to Mother’s home and continued to stay in Grandmother’s home.

- [6] On June 24, 2020, two days after J.M.’s disclosure of Barnes’ actions to Grandmother and other family members, the Department of Child Services (DCS) instructed Grandmother to bring J.M. to CASIE Center,¹ a child advocacy center in St. Joseph County. A trained forensic interviewer, Sally Wisthuff (Wisthuff), conducted J.M.’s interview. Wisthuff presented J.M. with anatomical diagrams of a boy and a girl. On the girl diagram, J.M. circled the vagina and the buttocks, and on the boy diagram, she circled the penis. J.M. referred to the regions she marked on both anatomies as “no-no.” (Exh. 1A at 24:00). She then asserted that Barnes had touched her “no-no” with his

¹ CASIE stands for Child Abuse Services Investigation and Education.

“finger” and “licked” her “no-no” with his tongue. (Exh. 1A at 13:36, 15:29). She added that when Barnes’ penis touched her vagina, it made “icky. . . milk.” (Exh. 1A at 15:29, 25:06). She stated that Barnes’ penis was black in color, and when Barnes’ penis touched her “butt,” it “hurt.” (Exh. 1A at 26:39). According to J.M., Barnes’ touching occurred when she was seven and eight years old, for over five months, and was conducted when Mother ran errands outside the home. J.M. explained that she had not reported Barnes because he had requested her “not to tell anyone” about the touching because he “could get into trouble.” (Exh.1A at 13:36, 20:26). Before the interview ended, J.M. claimed that Barnes had shown her a picture on his cellphone of a child who had pulled their pants down and an adult touching the child’s “no-no.” (Exh. 1A at 42:47).

- [7] In November 2020, DCS engaged Dr. Jeff Burnett (Dr. Burnett), a forensic psychologist, to evaluate J.M.’s participation in a pending child in need of services (CHINS) case. Upon assessing J.M.’s cognitive abilities, Dr. Burnett determined that J.M.’s responses resulted in an IQ composite score of 63, which is exceptionally low compared to other children her age and that she fell within the range of a mild intellectual disability. Also, Dr. Burnett administered the receptive and expressive vocabulary subtests in which J.M. scored below average and suggested that her receptive vocabulary was comparable to that of an average four-year-old child. As for her expressive vocabulary test, J.M. scored 64, indicating that her language skills as a speaker were abysmal and below those of an average four-year-old child. The

information gathered from these assessments suggested that J.M. may require special assistance to improve her cognitive and language abilities.

[8] On August 24, 2021, the State filed an Information, charging Barnes with Level 1 felony child molesting. On March 9, 2022, the State filed a motion seeking the admissibility of J.M.'s forensic interview under Indiana's Protected Persons Statute (PPS). Ahead of the PPS hearing scheduled on March 17, 2022, the trial court directed Dr. Burnett to evaluate J.M. and prepare a report. The report was comprehensive in that it incorporated J.M.'s evaluation conducted pursuant to the CHINS case and the evaluation of J.M. in relation to her participation in Barnes' trial. Dr. Burnett concluded that J.M. would likely "experience significant distress if asked to testify about her sexual abuse in the presence of [] Barnes[.]" (Exh. Vol. IV, Conf. Vol. II, p. 9).

[9] During the PPS hearing, Dr. Burnett stated that when he evaluated J.M. and "brought up the subject of the abuse," J.M. at first stated that she could recall the abuse. (Tr. Vol. II, p. 12). However, when he asked J.M. for permission to ask further questions, J.M. stated "no" and explained that he "could not ask her questions about that." (Tr. Vol. II, p. 12). Dr. Burnett observed that J.M. became "distressed just at entertaining the subject" and that she "wanted to end the interview and go back to see [] Mother in the waiting room." (Tr. Vol. II, p. 12). When he asked J.M. if she was willing to testify at Barnes' trial, she stated "no" and that she was "scared." (Tr. Vol. II, pp. 12, 13).

[10] Wisthuff offered testimony that CASIE Center adheres to the Child First interview protocol for child interviews, which emphasizes the use of a “non-leading and non-suggestive questioning” technique. (Tr. Vol. II, p. 70). Wisthuff confirmed that this protocol was utilized throughout J.M.’s interview and that J.M. made “spontaneous disclosures” during the interview. (Tr. Vol. II, p. 78). Also testifying at the PPS hearing was J.M.’s therapist, Kristen Sikorski-Conklin (Sikorski-Conklin). During testimony, Sikorski-Conklin stated that she has been providing therapy to J.M. twice a week since 2018. According to her testimony, J.M. has consistently been truthful during therapy sessions, a crucial factor in achieving progress. Sikorski-Conklin also noted that J.M. has not yet processed the molestation and that she becomes emotional and seeks to terminate the session when the topic is raised. Based on her professional opinion, Sikorski-Conklin warned that J.M. would suffer severe emotional distress if required to testify in front of Barnes. Prior to testifying, J.M. affirmed her recognition of the importance of honesty and truthfulness. She responded in the affirmative when asked about her visit to CASIE Center and her conversation with a female interviewer. She subsequently recalled what she told the woman, namely, that Barnes had touched her “in a weird way.” (Tr. Vol. II, p. 62). The trial court subsequently entered an order, finding J.M.’s statements admissible pursuant to the PPS.

[11] On April 12-14, 2022, the trial court conducted a jury trial, during which J.M.’s video-recorded forensic interview was entered into evidence. At the close of the evidence, the jury found Barnes guilty as charged. On June 2, 2022, the trial

court sentenced Barnes to forty-five years in the Department of Correction (DOC), but suspended ten years to probation, and required him to register as a sex offender.

[12] Barnes now appeals. Additional information will be provided as necessary.

DISCUSSION AND DECISION

[13] The decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We review evidentiary rulings for an abuse of discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances. *Johnson v. State*, 157 N.E.3d 1199, 1203 (Ind. 2020).

[14] The PPS is codified at Indiana Code section 35-37-4-6, and it "allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are deemed 'protected persons.'" *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009). The PPS defines a protected person, in relevant part, as "a child who is less than fourteen (14) years of age." I.C. § 35-37-4-6(c)(1). Since J.M. is a child younger than fourteen, she meets the definition of a protected person under the PPS. The statute provides further in relevant part:

(d) A statement or videotape that:

(1) is made by a person who at the time of trial is a protected person;

(2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and

(3) is not otherwise admissible in evidence;

is admissible in evidence in a criminal action for [certain enumerated offenses, including child molesting] if the requirements of subsection (e) are met.

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person in person or by using closed circuit television testimony as described in section 8(f) and 8(g) of this chapter;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

(ii) The protected person cannot participate in the trial for medical reasons.

(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:

(1) at the hearing described in subsection (e)(1); or

(2) when the statement or videotape was made.

I.C. § 35-37-4-6.

[15] Barnes' only contention is that J.M.'s forensic interview did not have sufficient indicia of reliability to be admissible under the PPS. Considerations in making the reliability determination under the PPS include: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) use of age-appropriate terminology, and (6) spontaneity and

repetition. *Trujillo v. State*, 806 N.E.2d 317, 325 (Ind. Ct. App. 2004).

Furthermore, we have held that trial courts should take into account factors arising from the child's apparent ability to respond to interviewer questions:

"The court should consider such factors as the child's ability to observe, remember, recollect, and describe experience[s] and the child's ability to understand the nature and consequences of an oath as well as the time and circumstances of the making of the tape." *Poffenberger v. State*, 580 N.E.2d 995, 998 (Ind. Ct. App. 1991) (citing *DeMotte v. State*, 555 N.E.2d 1336, 1340 (Ind. Ct. App. 1990), *trans. denied*).

[16] Barnes begins by arguing that the molestation, as alleged by the State, occurred between April 2020 and June 2020, and "[f]rom J.M.'s statement, it is impossible to determine the accuracy as to when the alleged molestation happened." (Appellant's Br. p. 16). The State contends that Barnes' argument is without merit because J.M. was able to provide details regarding when the molestation occurred. A review of the record reveals that during her interview at the CASIE Center in June 2020, J.M. demonstrated awareness of important dates, including her date of birth (April 16th) and her age (eight years old). When asked about the timeline of the molestation, J.M. disclosed that it had been ongoing for five months. Given the range of dates contained in the charging Information, the evidence in the record supports a determination that Barnes had molested J.M. during the period in question. *Alvarado v. State*, 89 N.E.3d 442, 445 (Ind. Ct. App. 2017) (holding that we consider the evidence most favorable to the trial court's ruling on the admissibility of evidence, we do

reweigh the evidence, and we may affirm the decision of the trial court on any legal theory, even if it is not enunciated by the trial court) *trans. denied*.

[17] Barnes next focuses on J.M.'s low intellectual functioning to cast doubt on the reliability of her statements. Specifically, Barnes contends that during cross-examination at the PPS hearing, J.M. could not differentiate between days of the week and inaccurately identified the first person to whom she reported the molestation instead of Grandmother. However, despite J.M. being an eight-year-old with low intellectual functioning at the time of the forensic interview, we still find her statements reliable. As noted, before the PPS hearing, Dr. Burnett evaluated J.M. and indicated that her IQ was low and that her low scores on the receptive and expressive vocabulary subtests put her in the range of an average four-year-old child. Although J.M.'s cognitive test results were poor, which ultimately reduced her age, this court has previously affirmed the dependability of a forensic interview conducted on a four-year-old. *See In re A.M.*, 121 N.E.3d 556, 561 (Ind. Ct. App. 2019) (holding that the statements made by a four-year-old child during a forensic interview regarding her father's molestation were admissible, as the child underwent the forensic interview on the same day that the allegations were reported to DCS, the interview was conducted in a neutral setting, nonleading questions were used, and the child provided specific information concerning the body part that her father had allegedly touched). *trans. denied*. In this case, J.M. was interviewed two days after she disclosed the molestation claim to Grandmother and other people that were present. Further, after Wisthuff detailed the protocol that CASIE Center

follows for forensic interviews and assured that the interview was conducted per those standards, J.M. was able to provide specific information regarding the body parts that Barnes had inappropriately touched either with his tongue, hand, finger, or penis. She even went so far as describing the color of Barnes' penis as black, a fact which Mother confirmed at trial, that is, Barnes had a "darkening around the tip of his genitals." (Tr. Vol. II, p. 159). Based on the evidence, we conclude that J.M.'s statements were reliable, even considering her low level of intellectual functioning. *Id.*

[18] Lastly, Barnes argues that J.M.'s statements were not spontaneous but resulted from coaching and fabrication from Grandmother and Father. According to Barnes, J.M. repeatedly expressed a desire to live with Father and reported to "Wisthuff, [] that her daddy told her that the police were going to arrest her mom and take her to jail and that she was going to be able to live with her dad." (Appellant's Br. p. 18). The State contends that the evidence fails to demonstrate any indication of coaching of J.M. Furthermore, the State argues that Barnes undermines his own argument by contradicting himself when he asserts that J.M.'s low IQ renders her statement unreliable, yet at the same time he claims that J.M. is sophisticated enough to fabricate a child-molesting allegation solely to remain at Father's house. Upon review of the forensic interview, it is apparent that J.M. made unsolicited accusations of molestation to either Grandmother or Father. The record further establishes that when J.M. initially reported Barnes' behavior to Mother, her claims were met with disbelief, and she was accused of lying. Consequently, J.M. felt compelled to

disclose her traumatic experience to Grandmother and Father. This court has previously held that a child's statement can be considered spontaneous when the child simply comes out and tells someone about the abuse, as was the case here. *See e.g., Taylor v. State*, 841 N.E.2d 631, 635 (Ind. Ct. App. 2006) (concluding that child victim's statement to mother was spontaneous when, upon being questioned about her behavior, child "just came out and told" mother of molestation), *trans. denied*.

- [19] Based on the foregoing, we agree with the trial court's conclusion that J.M.'s statements offered at the forensic interview contained sufficient indicia of reliability to be admissible under the PPS.

CONCLUSION

- [20] Based on the foregoing, we conclude that the trial court did not abuse its discretion in concluding that J.M.'s hearsay statements at the forensic interview were sufficiently reliable and therefore admissible under the PPS.
- [21] Affirmed.
- [22] Altice, C. J. and Pyle, J. concur