MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Sean C. Mullins
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Donovan L. Wilson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

August 11, 2021

Court of Appeals Case No. 21A-CR-131

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No. 45G01-2002-F1-12

Robb, Judge.

Case Summary and Issue

[1] Following a three-day jury trial, Donovan Wilson was convicted of child molesting, a Level 1 felony. Wilson now appeals, raising one issue for our review: whether the trial court abused its discretion by admitting into evidence the victim's recorded forensic interview because it lacked sufficient indications of reliability. Concluding that the victim's interview contained sufficient indications of reliability, we affirm.

Facts and Procedural History

[2] In February 2020, twenty-eight-year-old Wilson and his then wife, Ashlay, lived in Gary, Indiana, with their five children. Wilson was the biological father of four of the children and stepfather to then eight-year-old A.N.[1] Ashlay is A.N.'s biological mother.

[3] On the evening of February 9, 2020, Wilson was at home in the basement that he had turned into his "man cave[.]" Record of Jury Trial Proceedings ("Jury Tr."), Volume 4 at 10. The basement had an open-concept design and contained Wilson's couch, a television, video games, and DVDs. Most of the basement was visible from the top of the basement stairs.

[1] During the proceedings, A.N. was also referred to and identified as "A.T." In this opinion, we refer to the victim as "A.N."

[4] As the children prepared for bed, Wilson's two sons and A.N. went downstairs to say goodnight. Shortly thereafter, the boys returned upstairs; A.N. did not. Ashlay waited five minutes before going downstairs to check on A.N. When she reached the third or fourth stairstep, Ashlay saw Wilson sitting on the edge of the couch with A.N. bent over between his legs. Ashlay saw that A.N.'s pajama pants were at her ankles and Wilson had his hand on her back, moving her back and forth. Wilson was not wearing a shirt.

[5] Ashlay shouted Wilson's name and immediately ran down the stairs. Wilson answered in an aggressive manner, "What." *Id.* at 15. He then jumped up, pulled up his pants, charged at Ashlay, then proceeded up the stairs. A.N. was shaking and looked "really scared[.]" *Id.* at 14.

[6] Ashlay had A.N. pull up her pants, and the two went upstairs. Ashlay then told A.N. to go to her room and that she would "handle things from there." *Id.* Ashlay told A.N. not to open the door unless she heard a female voice.

[7] Ashlay left the house and ran down the street to a family member's home for help. Ashlay then returned to her house to collect the children. By the time she arrived, several members of her family who lived nearby, and who had learned of the incident, were gathered—including her aunt, uncle, and mother. Ashlay's aunt went into the house and brought the children outside.

[8] A family member called the police, and, shortly thereafter, the police and an ambulance arrived. A.N. refused to speak with the police. Ashlay, upset and

crying, told the police that Wilson had penetrated A.N. and molested her. Wilson was arrested.

[9] A.N. was first taken to a Gary hospital for a sexual examination; however, the hospital could not perform the examination because A.N. was too young. A.N. was then transferred to a hospital in Mishawaka and examined by a sexual assault nurse examiner ("SANE nurse") who administered a pediatric sexual assault kit at around 6:00 a.m. on February 10. During the examination, A.N. used the term "middle part" to describe female genitalia and "peanuts" to describe male genitalia. *Id.* at 59, 60. A.N. told the SANE nurse that Wilson had put his "peanuts" in her "middle part" and "bottom" and that it hurt. *Id.* The nurse observed redness in A.N.'s inner vaginal area. The nurse performed swabs of A.N.'s internal and external genitalia to collect DNA for the sexual assault kit. Once the kit was completed, it was sealed and handed over to the police.

[10] The swabs were subsequently analyzed by a forensic DNA analyst and compared with buccal and penile swabs obtained from Wilson. The analyst testified at trial that results from the following swabs demonstrated very strong support for the probability—that is, that it was at least one trillion times more likely—that the DNA found originated from Wilson: internal vaginal swabs, internal anal swabs, and swabs from both the front and rear of A.N.'s underwear.

[11] On February 11, 2020, the State charged Wilson with child molesting as a Level 1 felony. On February 18, 2020, Detective Sergeant Jeremy Kalvaitis with the Lake County Sheriff's Department Special Victims Unit conducted a forensic interview with A.N. During the interview, Kalvaitis asked A.N. if something happened to her recently, and A.N. answered that after she had gone downstairs, Wilson turned her around and pulled down her pants and underwear. Confidential Exhibit, Volume 3 at 3, State's Exhibit 12A at 8:04, 9:54, 10:12. Kalvaitis asked A.N. what happened next, and she replied, "I forgot." *Id.* at 8:47. A.N. did remember that her mother came downstairs, shouted Wilson's name, and began to cry. *Id.* at 9:00. A.N. told Kalvaitis that Wilson was "on the couch," and she then described the layout of the basement and its contents. *Id.* at 10:08. A.N. told Kalvaitis that Wilson put his "peanuts in [her] butt" and "around" her "middle part." *Id.* at 11:33, 13:12. She said that she could "feel it" and that she told Wilson to stop, but Wilson told her to "be quiet." *Id.* at 12:07, 12:19, 12:27. When Kalvaitis asked if Wilson's pants were pulled down, A.N. answered that his pants were pulled down to his knees. *Id.* at 12:42.

[12] Kalvaitis gave A.N. a drawing that contained an outline of a girl, and A.N. placed a circle around what she referred to as her "middle part" and an "X" over what she referred to as her "butt." *Id.* at 13:46, 14:24, 14:46. Kalvaitis then drew a stick-figure image meant to depict Wilson and asked A.N. to circle where on the figure Wilson's "peanuts" were located. *Id.* at 15:24, 15:44. A.N. placed a circle between the stick-figure's legs. *Id.* at 15:52. Near the end of the

interview, A.N. told Kalvaitis that when Wilson's "peanuts" were in her "butt" and "around" her "middle part," Wilson was sitting on the couch; she was standing in front of Wilson; she had her back toward Wilson; and she was watching the television. *Id.* at 22:40.

[13] On October 29, 2020, the State filed a motion under the protected person statute for admission of A.N.'s recorded forensic interview. *See* Ind. Code § 35-37-4-6 (2016). On November 6, 2020, the trial court held a protected person hearing, during which the State presented the testimony of a Department of Child Services therapist, Ashlay, A.N., and Kalvaitis. Wilson's counsel questioned each witness at the hearing, including A.N. A.N. testified that she did not remember ever being in the basement with Wilson or experiencing any inappropriate touching from him. Both parties presented arguments, which included Wilson's argument that the statements A.N. made during the interview were not sufficiently reliable. Following the hearing, the trial court granted the State's motion to admit the recorded interview, finding that A.N. was unavailable as a witness and the State "met its burden of proof that the time, content, and circumstances of the prior recorded statement provide[d] sufficient indications of reliability to be admissible at trial." [Public Access Version of] Appendix of the Appellant, Volume Two at 60-61.

[14] A three-day jury trial was held beginning on November 9, 2020. When the State offered A.N.'s recorded interview into evidence as State's Exhibit 12A, Wilson did not object. The trial court gave a limiting instruction regarding the

exhibit before it was played to the jury.[2] Wilson introduced into evidence a transcript of A.N.'s testimony from the protected person hearing.

[15] At the conclusion of the trial, the jury found Wilson guilty as charged. On December 23, 2020, the trial court sentenced Wilson to a thirty-year executed term in the Indiana Department of Correction. Wilson now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Admission of Evidence

[16] Wilson contends that the trial court abused its discretion when it admitted into evidence A.N.'s recorded forensic interview. According to Wilson, A.N.'s statements during the interview lacked sufficient indications of reliability because the interview took place nine days after the incident occurred, which decreased the spontaneity of A.N.'s statement and increased the likelihood that her statement was the product of suggestion or coaching. Wilson maintains that A.N.'s statements were "devoid of details exclusive to her experience, [and appeared] to instead mirror details available from her mother's statement to police." Brief of Appellant at 8. Wilson also argues that "concerns" regarding

---

[2] The trial court instructed the jury to determine the weight and credit to be given to State's Exhibit 12A (A.N.'s recorded interview) and that it should consider the mental and physical age of the person making the statement, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors. *See* Jury Tr., Vol. 4 at 109.

the reliability of A.N.'s statement "are only compounded by the fact that . . . A.N. received her physical examination prior to making the statement[.]" *Id.* at 10. Wilson asks this court to vacate his conviction and remand the matter for a new trial.

A. Standard of Review

[17] A trial court has broad discretion in ruling on the admissibility of evidence. *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011). We review its rulings for abuse of discretion, which occurs only if the decision was clearly against the logic and effect of the facts and circumstances or misinterprets the law. *Williams v. State*, 43 N.E.3d 578, 581 (Ind. 2015).

B. Waiver

[18] Before we consider the merits of Wilson's claim, we first consider the State's argument that Wilson failed to preserve any error in the admission of the recorded interview because he failed to make a contemporaneous objection when the recording was admitted into evidence at trial. Indeed, Wilson did not object when the interview was admitted into evidence. However, in his reply brief, Wilson argues that this admission-of-evidence issue is not waived because the protected person statute specifically requires that the admissibility of a prerecorded statement be addressed during a hearing held outside the presence of the jury. *See* Ind. Code § 35-37-4-6(e)(1)(A). According to Wilson, because such a hearing was held pretrial, "during which Wilson specifically argued against the introduction of the interview, explicitly citing concerns of 'whether

[A.N.'s] statement is sufficiently reliable[,]'" the issue was preserved for appeal. Reply Brief of Appellant at 5; Jury Tr., Vol. 3 at 56-57. We disagree.

[19] "As a general rule, failure to object at trial results in waiver of an issue for purposes of appeal." *Washington v. State*, 840 N.E.2d 873, 886 (Ind. Ct. App. 2006) (citation omitted), *trans. denied*. Wilson did not object at trial to the admission of the interview. Thus, the issue is waived. *See Shoda v. State*, 132 N.E.3d 454, 460-61 (Ind. Ct. App. 2019) (stating pretrial motions do not preserve error and defendant must make a contemporaneous objection when evidence is introduced at trial). The only exception would be for fundamental error, and Wilson does not argue or mention fundamental error in his briefs. However, despite this waiver, we will address Wilson's claim regarding the admissibility of A.N.'s interview.

C. Sufficient Indications of Reliability

[20] Wilson claims that the trial court erred in admitting A.N.'s interview because it lacked sufficient indications of reliability. The protected person statute allows for the admission of otherwise inadmissible evidence relating to specified crimes whose victims are deemed "protected persons." Ind. Code § 35-37-4-6; *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009). Here, the statute applies because A.N. was the victim of a sex crime and was under fourteen years of age. Ind. Code § 35-37-4-6(a)(1), –(c)(1). The purpose of the protected person statute is to "spare children the trauma of testifying in open court against an alleged sexual predator." *Tyler*, 903 N.E.2d at 466. However, as our Supreme Court

explained, because the statute "impinges upon the ordinary evidentiary regime[,]" the "trial court's responsibilities thereunder carry with them . . . 'a special level of judicial responsibility.'" *Carpenter v. State*, 786 N.E.2d 696, 703 (Ind. 2003) (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

[21] The protected person statute provides a list of certain conditions that must be met before otherwise inadmissible evidence will be allowed. The conditions relevant to the case before us are:

> (1) the court must find, in a hearing attended by the protected person and outside the presence of the jury, that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability;
>
> (2) the protected person must either testify at the trial or be found unavailable as a witness; and
>
> (3) if the protected person is found to be unavailable as a witness, the protected person must be available for cross-examination at the hearing or when the statement or videotape is made.

See Ind. Code § 35-37-4-6(a)–(f). In addition, the statute provides for jury instructions and permits a defendant to introduce a transcript or videotape of the hearing into evidence at trial. Ind. Code § 35-37-4-6(h)–(i). Regarding the reliability of the statement or videotape, considerations in making such a determination include "the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age appropriate terminology,

and spontaneity and repetition." *M.T. v. State*, 787 N.E.2d 509, 512 (Ind. Ct. App. 2003) (quoting *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997) (citing *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990))).

[22] Wilson asserts that A.N.'s interview should have been excluded from evidence because the interview took place more than a week after the incident occurred, and there was an increased likelihood that A.N.'s statements were coached and the result of suggestion; A.N.'s statements during the interview were short, lacked spontaneity, and lacked details and a narrative of the incident; and the interview took place after A.N. received her physical examination. In *Pierce*, our Supreme Court noted its concern with the delay of several hours between the alleged molestation and the child's videotaped interview, as the "passage of time tends to diminish spontaneity and increase the likelihood of suggestion." *Pierce*, 677 N.E.2d at 45. Also, doubt may be cast on the reliability of the statement or videotape if it is preceded by lengthy or stressful interviews or examinations. *Id.* at 44.

[23] In the instant case, there was a gap of nine days between the discovery of the inappropriate touching and the forensic interview, and the interview took place after A.N's physical examination. However, we are mindful that these are not the only factors to consider in determining the reliability of the interview and that they are not necessarily dispositive. *See, e.g.*, *Mishler v. State*, 894 N.E.2d 1095, 1100 (Ind. Ct. App. 2008) (noting that "even though some time passed between the touchings and the statements, this is just one factor to be considered and is not necessarily dispositive"). "There are undoubtedly many

other factors [a court may consider] in individual cases." *Pierce*, 677 N.E.2d at 44.

[24] The record demonstrates that within hours after the allegations came to light, A.N. told a SANE nurse that Wilson had put his "peanuts" in her "middle part" and "bottom" and that it hurt. Jury Tr., Vol. 4 at 60. Nine days later, Kalvaitis conducted the forensic interview in civilian clothing and outside the presence of family members. He had received special training in conducting forensic interviews; the interview lasted approximately twenty-eight minutes; and Kalvaitis asked no leading questions.

[25] At the beginning of the interview, Kalvaitis provided A.N. with certain "rules," and explained to her that she was only supposed to talk about things that actually happened—nothing "made up" and nothing pretend; she should say she did not know if there was a question asked that she did not know the answer to or a word used that she did not understand; and she should correct Kalvaitis if he said something during the interview that A.N. knew was incorrect. Conf. Ex., Vol. 3 at 3, St.'s Ex. 12A at 1:15, 1:38. A.N. indicated that she understood the "rules." *Id.* at 2:54. Kalvaitis then ascertained that she understood the difference between the truth and a lie, and A.N. promised Kalvaitis that she would tell the truth during the interview. *Id.* at 3:00, 3:35. During the interview, A.N. used age-appropriate terminology such as "peanuts" and "middle part." *Id.* at 11:33, 13:12.

[26] A.N.'s answers to Kalvaitis' questions were not long, and she did not provide many details or a narrative of the incident. For example, she answered, "no" when Kalvaitis asked if she remembered what Wilson's "peanuts" looked like. *Id.* at 16:22. When Kalvaitis initially asked A.N. what happened after Wilson pulled down her pants, A.N. stated that she forgot what happened. When asked how Wilson's "peanuts" felt, A.N. first replied, "I don't know" and later, "soft." *Id.* at 21:31, 22:32. However, A.N. told Kalvaitis, unequivocally, that after she had gone downstairs, Wilson turned her around and pulled down her pants and underwear. A.N. said that Wilson put his "peanuts in [her] butt" and "around" her "middle part." *Id.* at 22:40.

[27] Although nine days passed between the day of the inappropriate touching and the forensic interview, and the interview took place after A.N.'s physical examination, A.N.'s statements remained consistent. And, nothing in the record suggests that A.N.'s statements during her interview were the product of coaching or that she had any motive to fabricate the allegations against Wilson. Ashlay testified at the protected person hearing that she did not discuss the incident with A.N. Wilson had an opportunity at the hearing to question Ashlay regarding the possibility that she coached A.N. He was also able to question A.N. and challenge her statements. Furthermore, the transcript of A.N.'s testimony from the hearing was introduced into evidence at trial, and the jury had the opportunity to weigh A.N.'s testimony that she did not remember what happened on the night of the incident.

[28] Under these facts and circumstances, we conclude that A.N.'s recorded forensic interview contained sufficient indications of reliability. The trial court did not abuse its discretion in admitting the recorded interview into evidence.

[29] Assuming *arguendo* the trial had abused its discretion in admitting A.N.'s interview, which it did not, this would still have amounted to harmless error. The admission of a recorded statement may be harmless error if it is no more than cumulative of the statements of a witness and the recording is not the only direct evidence of the events. *Fox v. State*, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999) (citing *Pierce*, 677 N.E.2d at 45), *trans. denied*. Ashlay, an eyewitness to the molestation, testified about the same allegations that A.N. made in her interview. The SANE nurse testified that, during the physical examination, A.N. told her what Wilson had done. Thus, the evidence contained in the interview was cumulative of other evidence properly admitted, and any error in its admission would be harmless. *See Willis v. State*, 776 N.E.2d 965, 967 (Ind. Ct. App. 2002).

Conclusion

[30] The trial court did not abuse its discretion in admitting into evidence A.N.'s recorded forensic interview. Therefore, the judgment of the trial court is affirmed.

[31] Affirmed.

Bailey, J., and May., concur.