MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Keith Allen Morrett,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

July 23, 2024

Court of Appeals Case No.
23A-CR-1566

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No.
35C01-2106-F1-184

Memorandum Decision by Judge Pyle
Judges Bailey and Crone concur.

Pyle, Judge.

Statement of the Case

[1] Keith Allen Morrett ("Morrett") appeals, following a jury trial, his conviction for Level 1 felony child molesting.[1] Morrett argues that the trial court abused its discretion by: (1) admitting the child victim's statements into evidence; and (2) denying his oral motion to continue his jury trial and trying him in absentia. Concluding that the trial court did not abuse its discretion, we affirm Morrett's conviction.

[2] We affirm.

Issues

1. Whether the trial court abused its discretion by admitting the child victim's statement into evidence.

2. Whether the trial court abused its discretion by denying Morrett's oral motion to continue the jury trial and trying him in absentia.

Facts

[3] In March 2021, forty-five-year-old Morrett was the paternal grandfather to four-year-old B.M. ("B.M.") and her three-year-old sister ("B.M.'s sister"). B.M.

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[1] IND. CODE § 35-42-4-3.

referred to Morrett as "Papaw Keith[,]" "Small Papaw[,]" or "Little Papaw." (Tr. Vol. 2 at 199).

[4] On March 17, 2021, Morrett's son ("B.M.'s father") took B.M. and B.M.'s sister to Morrett's house. While B.M.'s father was outside working on his truck, B.M. went to the bathroom. B.M.'s sister was in the bathroom with B.M. As B.M. was sitting on the toilet, Morrett went into the bathroom and then touched B.M.'s vaginal area with his fingers. B.M. and B.M.'s sister told Morrett to stop.

[5] Two days later, B.M. went to her maternal grandmother's ("maternal grandmother") house. While they were at a restaurant, B.M. told maternal grandmother that her "doodle hurt[.]" (Tr. Vol. 2 at 192). B.M. referred to her vagina or "female sex organ" as her "doodle." (Tr. Vol. 2 at 203; Tr. Vol. 3 at 22). Maternal grandmother initially told B.M. that maybe she had not wiped well enough. The following day, B.M. again told maternal grandmother that her doodle hurt. When maternal grandmother asked why it hurt, B.M. hung her head and said that "maybe that Papaw Keith [had] put a scratch on [it] when he [had] put his fingers in it." (Tr. Vol. 2 at 195). B.M. then told maternal grandmother she had been in Morrett's bathroom at his house when he came into the bathroom and "put his fingers inside of her doodle." (Tr. Vol. 2 at 195). Maternal grandmother called B.M.'s mother and told her what B.M. had reported. B.M.'s mother then called B.M.'s father and told him that Morrett had touched B.M. B.M.'s mother and father went to maternal grandmother's house, and the police eventually came to the scene.

[6] B.M.'s mother then took B.M. to a center to have a forensic examination. During the examination, B.M. told the sexual assault nurse examiner that she had been on the toilet when Morrett had come into the bathroom and had "touched [her] doodle" on the "inside" with his fingers and that it "hurt." (Tr. Vol. 2 at 248). B.M. also stated that B.M.'s sister had told Morrett to stop touching B.M. Additionally, B.M. told the sexual assault nurse examiner that Morrett's touching made her feel "sad" and that "Little Papaw" w[ould] be mad now." (Tr. Vol. 2 at 248).

[7] A few days later, on March 24, 2021, Department of Child Services ("DCS") family case manager Brittney Strahm ("FCM Strahm") conducted a forensic interview with B.M. During that interview, B.M. told FCM Strahm that "[S]mall [P]apaw [had] touched her doodle" when she was in the bathroom. (Tr. Vol. 3 at 22). B.M. stated that Morrett had touched her on "the inside." (Tr. Vol. 3 at 23). B.M. told FCM Strahm that it had "hurt" when Morrett had touched her with his hand and that he had "pushed it too far." (Tr. Vol. 3 at 23).

[8] Indiana State Police ("ISP") Detective Matthew Teusch ("Detective Teusch") interviewed Morrett on March 31 and April 20. During Morrett's first interview, he initially denied that he had touched B.M. or gone into the bathroom when B.M. and her sister were in there. During Morrett's second interview, he alleged that B.M. had made the allegation against him because maternal grandmother had made her do so.

[9] Morrett agreed to take a polygraph examination, and an ISP polygraph examiner conducted the polygraph exam on Morrett on May 10, 2021. Morrett's exam revealed that he was being deceptive. Detective Teusch interviewed Morrett a third time after he had completed his polygraph exam. During that interview, Morrett admitted that he had gone into the bathroom when B.M. was on the toilet and had told B.M. that "grandpa's never seen a little pussy before." (State's Ex. 8; Tr. Vol. 3 at 104).[2] B.M. then told him "ew, grandpa." (State's Ex. 8; Tr. Vol. 3 at 104). Morrett told the detective that he "was going to help her pull her britches up" and then he "st[u]ck [his] finger in [B.M.]" (State's Ex. 8; Tr. Vol. 3 at 104-05). Morrett explained that he had to spread B.M.'s legs open because "she had [had] 'em tight." (State's Ex. 8; Tr. Vol. 3 at 109). Morrett stated that B.M.'s sister told him to stop touching B.M., and he sent B.M.'s sister out of the bathroom.

[10] The State charged Morrett with Level 1 felony child molesting. Thereafter, Morrett posted and was released on bond. The trial court held a status conference on April 11, 2022, and Morrett and his attorney attended this hearing. At that time, the trial court informed Morrett that his jury trial was scheduled for three days starting on September 27, 2022. The trial court also scheduled a final pretrial conference for August 15, 2022.

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[2] The recorded police interview that was introduced as State's Exhibit 8 was also partially transcribed within the trial transcript.

[11] On May 4, 2022, the State filed a motion to introduce child hearsay evidence. In its motion, the State asserted that, pursuant to INDIANA CODE § 35-37-4-6 ("the protected person statute"), it intended to introduce statements about the alleged child molestation that B.M. had reported to maternal grandmother and to the forensic interviewer, FCM Strahm. The trial court set the matter for a hearing on August 24, 2022.

[12] In July 2022, a psychologist, Siquilla Liebetrau ("Dr. Liebetrau"), conducted a child hearsay evaluation with then five-year-old B.M. to offer an opinion on whether B.M. would be able to testify at the jury trial. In Dr. Liebetrau's child hearsay evaluation report, she concluded as follows: "Based on [a] review of records, interviews with [B.M.'s] parents and [the] child, and test results, it is this examiner's opinion that [B.M.] should not testify based on established trauma and substantial likelihood that she will suffer serious emotional trauma as the result of testifying in the presence of [Morrett]." (Ex. Vol. 4 at 12).

[13] When the trial court held the August 15, 2022 final pretrial conference, Morrett failed to appear. The trial court issued a warrant for Morrett's arrest. The trial court also reset the final pretrial conference on the same day as the child hearsay hearing. Morrett was taken into custody on August 20, 2022.

[14] The trial court held the child hearsay hearing on August 24, 2022, and Morrett, who was still in custody at that time, appeared at that hearing. B.M. was present in the courthouse at that time. During the child hearsay hearing, Dr. Liebetrau testified, and the State introduced her child hearsay evaluation report

as an exhibit. Dr. Liebetrau testified that her recommendation was that B.M. should not be asked to testify at trial because testifying in Morrett's presence would cause her psychological harm. Following the State's presentation of witnesses, the State stated that "as noted in chambers, one of the requirements under the [protected person] statute is that the protected person be available for cross examination at this hearing. Uh, she is. She's upstairs in our conference room." (Tr. Vol. 2 at 78). Morrett's counsel replied, "Your Honor, no, we do not require that [B.M.] appear today." (Tr. Vol. 2 at 78). At the end of the hearing, the trial court noted that Morrett's jury trial remained scheduled for September 27, 2022. The trial court then released Morrett back on bond under his previous conditions.

[15] Following the child hearsay hearing, Morrett filed an objection to the State's child hearsay motion. Morrett disagreed with Dr. Liebetrau's opinion that B.M. was unavailable to testify due to emotional distress if she were to testify in Morrett's presence. Additionally, Morrett argued that the issue regarding B.M.'s ability to testify in the presence of Morrett was "moot" because Morrett would "agree[], and w[ould] stipulate, to remain[ing] outside the courtroom during [B.M.'s] testimony[.]" (App. Vol. 2 at 60). Finally, Morrett argued that allowing the admission of testimony of others regarding B.M.'s statements would be prejudicial to Morrett.

[16] Thereafter, on September 6, 2022, the trial court entered an order granting the State's motion to introduce B.M.'s statements to maternal grandmother and FCM Strahm as child hearsay evidence at trial. In its order, the trial court

made conclusions on each required element of the protected person statute. The trial court found, in part, that B.M. was a protected person and was unavailable for trial due to emotional distress. Additionally, the trial court specifically noted that B.M. had been present at the hearing and had been made available for cross-examination but that Morrett had declined to cross-examine her.

[17] The trial court commenced Morrett's two-day jury trial on September 27, 2022. Morrett failed to appear for both days of the trial, and the trial court issued a warrant for his arrest. On the first day of trial, Morrett's counsel told the trial court that he was renewing Morrett's objection to the admission of the child hearsay statements based on his prior argument, and he contested whether there was a sufficient basis to find that B.M. was unavailable to testify at the trial due to emotional distress. The trial court overruled Morrett's renewed objection but noted his continuing objection.

[18] Morrett's counsel also asked the trial court to continue the trial since Morrett had failed to appear. Morrett's counsel acknowledged that Morrett had been advised and knew of the trial date, and counsel stated that he was unaware of why Morrett was not present for the trial. The State informed the trial court that it had met with Morrett's son, B.M.'s father, on September 16, and that B.M.'s father had told the State that Morrett had been selling his personal belongings and had listed his house for sale. The trial court denied Morrett's request to continue the trial, noting that Morrett "ha[d] been advised multiple times of his trial dates" and had "elected not to appear[.]" (Tr. Vol. 2 at 186).

[19] Maternal grandmother and FCM Strahm testified regarding B.M.'s statements about how Morrett had touched B.M.'s vaginal area with his fingers. The sexual assault nurse examiner also testified about the statements that B.M. had made during the forensic examination. Morrett objected based on hearsay, and the State argued that B.M.'s statements were admissible under Evidence Rule 803(4) as statements made for medical diagnosis or treatment. The trial court overruled Morrett's objection. Additionally, the State introduced the video recording from Morrett's police interview, during which he admitted that he had touched B.M.'s vaginal area with his fingers. The jury found Morrett guilty as charged.

[20] Nine months after the trial, in May 2023, Morrett was taken into custody. Thereafter, the trial court then held Morrett's sentencing hearing. During the sentencing hearing, Morrett's counsel pointed out that Morrett had "take[n] responsibility" for his offense when he had "admitted to what he had done" to the police. (Tr. Vol. 3 at 160). Counsel then acknowledged that Morrett had "sacrificed some of that goodwill . . . when he didn't appear for the trial." (Tr. Vol. 3 at 160). Counsel also noted that Morrett's failure to appear for trial "was just surely a matter of nerves" and that he had "stayed gone until he [had] got[ten] arrested and charged in Tennessee[.]" (Tr. Vol. 3 at 161). The trial court imposed a forty (40) year sentence, with thirty-five (35) years executed at the Indiana Department of Correction and five (5) years suspended to probation.

[21] Morrett now appeals.

Decision

[22] Morrett argues that the trial court abused its discretion by: (1) admitting B.M.'s statements into evidence; and (2) denying his oral motion to continue his jury trial and trying him in absentia. We will review each argument in turn.

1. Admission of Evidence

[23] We first review Morrett's argument that the trial court abused its discretion by admitting maternal grandmother's and FCM Strahm's testimony regarding B.M.'s statements. Specifically, Morrett contends that the trial court abused its discretion because the trial court failed to comply with the procedural requirements of the protected person statute that B.M. be present at the hearing and made available for cross-examination.

[24] The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. *Wilson v. State*, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012), *reh'g denied*.

[25] We need not, however, review Morrett's argument because he has waived it by raising a different ground on appeal than he did at trial to challenge the admission of the evidence. Here, the State sought to admit, pursuant to the protected person statute, B.M.'s statements, which she had made to maternal

grandmother and FCM Strahm, that Morrett had touched the inside of her vagina with his fingers. The trial court held a child hearsay hearing, and Morrett argued that maternal grandmother's and FCM Strahm's testimony about B.M.'s statements should not be allowed into evidence because B.M. should not be considered unavailable to testify due to emotional distress and because the testimony would be prejudicial. Morrett did not object to the testimony based on a failure to follow a statutory procedural requirement that B.M. be present and available for cross-examination. Instead, at trial, Morrett made a standing objection to the admission of maternal grandmother's and FCM Strahm's testimony regarding B.M.'s statements based on his prior objections raised at the time of the child hearsay hearing.

[26] It is well established that a party may not object on one ground at trial and raise a different ground on appeal. *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002). Because Morrett's trial objection did not specifically reference any statutory procedural challenge under the protected person statute regarding B.M.'s availability for cross-examination, we conclude that he has waived this issue on appeal. *See Brittain v. State*, 68 N.E.3d 611, 619 (Ind. Ct. App. 2017) (finding waiver when defendant's appellate argument regarding evidence admissibility was different than trial objection and noting that "a party may not present an

argument or issue to an appellate court unless the party raised the same argument or issue before the trial court"), *trans. denied*.[3]

[27] Moreover, Morrett's challenge to the admission of maternal grandmother's and FCM Strahm's testimony regarding B.M.'s statements is without merit because Morrett invited any alleged error of which he now complains. "[T]o establish invited error, there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, well-informed trial strategy." *See Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019) (internal quotation marks omitted). *See also Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (explaining that the invited error doctrine "forbids a party from taking advantage of an error that []he commits, invites, or which is the natural consequence of h[is] own neglect or misconduct"). Here, Morrett invited any alleged error of which he now complains when B.M. had been present at the courthouse and available for cross-examination, and Morrett explicitly declined to cross-examine her.

[28] Additionally, Morrett's challenge to the admission of maternal grandmother's and FCM Strahm's testimony regarding B.M.'s statements is without merit because the admission of the testimony was harmless error. Our Indiana

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[3] Additionally, Morrett does not acknowledge that his trial objection differs from the basis he argues on appeal. Nor does Morrett argue that the admission of maternal grandmother's and FCM Strahm's testimony constituted fundamental error. Thus, we will not engage in such a review. *See Bradfield v. State*, 192 N.E.3d 933, 935 (Ind. Ct. App. 2022) (explaining that a defendant waived his admission of evidence appellate argument by arguing a different ground on appeal and also waived any fundamental error claim by not raising it on appeal).

Supreme Court has explained that when conducting a harmless error review under Appellate Rule 66(A), our Court is to "consider the likely impact of the improperly admitted or excluded evidence on a reasonable, average jury in light of all the evidence in the case." *Hayko v. State*, 211 N.E.3d 483, 492 (Ind. 2023), *reh'g denied*, *cert. denied*. "Ultimately, the error's probable impact is sufficiently minor when—considering the entire record—our confidence in the outcome is not undermined." *Id.* *See also Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017) (explaining that "[t]he improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before the trier of fact"), *trans. denied*. Here, the admission of the maternal grandmother's and FCM Strahm's testimony was harmless error where it was merely cumulative of the sexual assault nurse's testimony regarding B.M.'s statements of how Morrett had touched the inside of B.M.'s vaginal area with his finger and Morrett's own admission, which he made during the police interview, that he had told B.M. that "grandpa's never seen a little pussy before" and that he had "st[u]ck [his] finger in [B.M.]" (State's Ex. 8; Tr. Vol. 3 at 104-05). The probable impact of any possible error in admitting the challenged testimony, in light of all the evidence in this case, is sufficiently minor so as not to undermine our confidence in the outcome of this case. Accordingly, we conclude that the trial court did not abuse its discretion by admitting B.M.'s statements into evidence.

2. Trial In Absentia

[29] Next, we review Morrett's argument that the trial court erred by denying his oral motion to continue his jury trial and trying him in absentia. Specifically, Morrett challenges the trial court's decision to try him in absentia, asserting that there was no showing that Morrett had knowingly or voluntarily waived his right to be present. We disagree.

[30] Generally, a criminal defendant has a right to be present at all stages of the trial. *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007). However, a defendant may waive this right and be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right. *Id.* "The trial court may presume a defendant voluntarily, knowingly, and intelligently waived his right to be present and try the defendant in absentia upon a showing that the defendant knew the scheduled trial date but failed to appear." *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied.* "The best evidence of this knowledge is the defendant's presence in court on the day the matter is set for trial." *Id.* "When a defendant fails to appear for trial and fails to notify the trial court or provide it with an explanation of its absence, the trial court may conclude that the defendant's absence is knowing and voluntary and proceed with trial when there is evidence that the defendant knew of his scheduled trial date." *Holtz v. State*, 858 N.E.2d 1059, 1062 (Ind. Ct. App. 2006), *trans. denied*. "On appeal, we consider the entire record to determine whether the defendant made a voluntary, knowing, intelligent waiver." *Id.* at 1061.

[31] Here, the facts, as set forth above, reveal that Morrett failed to appear for his jury trial despite the fact that the trial court had informed Morrett of the

scheduled trial date on at least two occasions. Prior to trial, Morrett did not notify the trial court or his attorney that he would be absent for the trial, and Morrett provided no explanation for his absence. Morrett's counsel acknowledged that Morrett knew of the trial date but could not provide any reason for Morrett's absence. The State noted that Morrett's son had indicated that, about two weeks before trial, Morrett had been selling his personal possessions and had put his house up for sale. Based on the record before us, we conclude that the trial court did not err by trying Morrett in absentia. *See id.* (affirming the trial court's decision to try the defendant in absentia where the trial court had twice notified the defendant of the trial date, and the defendant did not notify the trial court that he would be absent or provide any explanation for his absence).[4]

[32] Affirmed.

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[4] Morrett also asserts that the trial court erred by failing to provide him with a specific "opportunity to present evidence to explain his [trial] absence and rebut any presumption that the absence was voluntary." (Morrett's Br. 14-15). Morrett seems to suggest that, when he appeared for the sentencing hearing, the trial court was required to sua sponte ask him for the reason for his absence at trial. However, as this Court explained in *Holtz*, we have already rejected such an argument. *Holtz*, 858 N.E.2d at 1062 (citing *Walton v. State,* 454 N.E.2d 443 (Ind. Ct. App. 1983)). While a defendant tried in absentia must be given "the opportunity to present evidence that his absence was not voluntary, this does not require a sua sponte inquiry." *Id.* at 1062-63 "Rather, 'the defendant *cannot be prevented* from giving an explanation.'" *Id.* at 1063 (quoting *Hudson v. State*, 462 N.E.2d 1077, 1081 (Ind. Ct. App. 1984)) (emphasis added by *Holtz*). Here, the trial court did not prevent Morrett from explaining his trial absence. Indeed, during the sentencing hearing, Morrett's counsel acknowledged that Morrett's failure to appear was voluntary by explaining that Morrett had been nervous and had fled Indiana until he was later arrested in Tennessee. Therefore, we find Morrett's argument without merit. *See Holtz*, 858 N.E.2d at 1062-63.

Bailey, J., and Crone, J., concur.

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