

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Troy Horton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 4, 2023

Court of Appeals Case No.
22A-CR-2181

Appeal from the Marion Superior
Court

The Honorable Angela Dow
Davis, Judge

Trial Court Cause No.
49D27-2011-F1-33709

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

- [1] Troy Horton appeals his conviction for level 1 felony child molesting. He asserts that the trial court committed fundamental error in admitting certain evidence at trial. Concluding that Horton has not met his burden to establish fundamental error, we affirm.

Facts and Procedural History

- [2] In April 2020, five-year-old A.D. was placed in Horton's home as a foster child under the care of Horton and his wife. During the short time A.D. lived in Horton's home, Horton touched her bottom with his penis on at least three occasions, and he penetrated her anally with his penis on one occasion. Horton told A.D. not to tell anyone because "he didn't want to get in trouble." Tr. Vol. 3 at 110. Nevertheless, A.D. told her foster mother, Horton's wife. However, Horton's wife did not take any action after hearing the disclosure.
- [3] In July 2020, the Indiana Department of Child Services received a report from A.D.'s foster mother that A.D. was displaying inappropriate "sexually reactive behavior" in the home, and the young child was referred to Charlotte Cox, a trauma and attachment therapist at the Children's Bureau. *Id.* at 141. During her second therapeutic session with Cox in August 2020, A.D. revealed to Cox that Horton had "kissed her private parts and that his private parts touched her private parts." *Id.* at 136. Cox contacted the Indianapolis Metropolitan Police Department, and A.D. was removed from Horton's home.

[4] The State subsequently charged Horton with two counts of level 1 felony child molesting. Count 1 alleged molestation by sexual intercourse, and Count 2 alleged molestation by performing or submitting to other sexual conduct. A jury trial was held in July 2022. A.D. testified and identified Horton as the “grownup” “boy” who touched her bottom with his “penis.” *Id.* at 106, 107, 108, 114. Cox also testified for the State. After questioning Cox generally about child sexual abuse and trauma behavior, the deputy prosecutor asked her, “And based on your expertise, knowledge, and you know, working with A.D. in this case, what is your opinion.” *Id.* at 143. Cox responded, “My opinion is that A.D. has witnessed or experienced sexual abuse.” *Id.* Horton did not object to this testimony. At the conclusion of the State’s evidence, the trial court granted the State’s motion to dismiss Count 1. The defense presented its evidence, after which the jury found Horton guilty of the remaining charge. The trial court sentenced Horton to thirty years in the Department of Correction. This appeal ensued.

Discussion and Decision

[5] Horton challenges the trial court’s admission of evidence. We note that as a general matter, a trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its rulings only where it is shown that the court abused that discretion. *Hoglund v. State*, 962 N.E.2d 1230, 1237 (Ind. 2012). 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. *Id.*

[6] Specifically, Horton claims, and the State concedes, that Cox’s testimony was impermissible vouching testimony in violation of Indiana Evidence Rule 704(b), which provides that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” When a witness’s testimony even indirectly suggests that a child witness was telling the truth, the testimony violates the prohibition against vouching set forth in Evidence Rule 704(b). *Hoglund*, 962 N.E.2d at 1236. Such vouching testimony is considered an invasion of the province of the jurors in determining what weight they should place upon a witness’s testimony. *Carter v. State*, 31 N.E.3d 17, 29 (Ind. Ct. App. 2015), *trans. denied*.

[7] However, as already noted, Horton failed to make a contemporaneous objection, which would generally result in waiver of any error on appeal. *Sparks v. State*, 100 N.E.3d 715, 720 (Ind. Ct. App. 2018). Thus, he argues that the fundamental error exception to the waiver rule applies. An error is fundamental, and thus reviewable on appeal, if it “made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm.” *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (citations omitted). These errors create an exception to the general rule that a party’s failure to object at trial results in a waiver of the issue on appeal. *Id.* This exception, however, is “extremely narrow.” *Id.* When raising an issue as fundamental error, the defendant bears the burden of proving that such a violation occurred, which

rendered the trial unfair. *Pinkins v. State*, 799 N.E.2d 1079, 1089-90 (Ind. Ct. App. 2003), *trans. denied* (2004).

[8] Here, Horton has not met his burden to establish fundamental error. Significantly, the challenged portion of Cox's testimony was extremely brief and isolated. Indeed, her singular vouching statement came after A.D. had already testified about the molestation. The extremely young child was able to describe and then identify Horton, accurately identify body parts, and communicate in some detail the circumstances under which the molestation occurred. This testimony was consistent with A.D.'s revelation to Cox, during their second therapeutic session, that Horton had molested her. Moreover, A.D.'s foster mother (Horton's wife) testified that she observed abnormal sexual behavior from A.D. while A.D. was in Horton's home, and the record revealed that A.D. had never displayed such behavior in prior foster placements. Additionally, A.D.'s birth mother testified that A.D. did not know anything about sex before being placed in Horton's care, but after her placement, A.D. started talking about sex and became uncharacteristically angry and started throwing tantrums. Given A.D.'s testimony, which was corroborated by other evidence, we cannot say that the brief and singular vouching statement by Cox rose to a level where it affected the fairness and integrity of the judicial proceedings or denied Horton due process. *See Kelley v. State*, 566 N.E.2d 591, 593 (Ind. Ct. App. 1991) (providing that a therapist's brief statement that the therapist believed the child victim was telling the truth did not amount to fundamental error because it did not affect the fairness and

integrity of the judicial proceedings or deny the defendant due process). Simply put, Horton has failed to demonstrate that fundamental error occurred.

Therefore, we affirm his conviction.

[9] Affirmed.

Robb, J., and Kenworthy, J., concur.