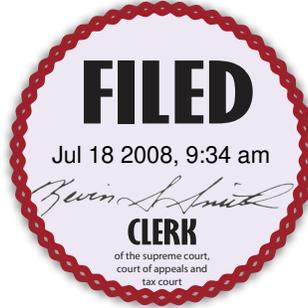


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DEREK COLEMAN,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-0712-CR-671

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Judge
Cause No. 49G05-0608-FA-146110

July 18, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Derek Coleman (“Coleman”) was convicted in Marion Superior Court of Class C felony child molesting and sentenced to a term of four years suspended to probation. On appeal, Coleman raises the following issues:

1. Whether the trial court properly admitted hearsay testimony pursuant to the protected person statute;
2. Whether the evidence was sufficient to convict Coleman of Class C felony child molestation; and
3. Whether Coleman received ineffective assistance of counsel.

We affirm.

Facts and Procedural History

On August 5, 2006, Coleman and his wife were present in the home of a minor child, J.B. At the time of the incident, J.B. was four years old and his date of birth was June 24, 2002. Coleman’s wife stayed at the home so J.B.’s mother could do her hair. Coleman took J.B. to a nearby Wal-Mart. They were gone for about one to one and one-half hours.

During the trip, Coleman and J.B. stopped by Coleman’s house so J.B. could use the bathroom. While at Coleman’s house, Coleman allegedly put his penis on J.B.’s bottom while J.B. was in the bathroom. Coleman and J.B. returned to J.B.’s house.

They both entered the house together. Coleman left after about an hour. After Coleman left, J.B.’s mother noticed that J.B. was not as playful as he usually was and was being quiet and keeping to himself. Later that evening, J.B.’s mother asked J.B. if anything was wrong. At first, J.B. said no but later recounted to her that Coleman had put his penis on J.B.’s bottom while at Coleman’s house.

J.B.'s mother contacted J.B.'s father and related the story to him. She asked that he speak with J.B. because J.B. would open up more with his father. On August 6, 2006, J.B. told his father that Coleman had tried to put his penis in J.B.'s bottom but failed.

The next day J.B.'s father took J.B. to the hospital to get examined. The hospital contacted CPS for an interview. Linette Garcia ("Garcia") is a forensic child interviewer at the Children's Advocacy Center. She interviews children when there is an allegation of sexual or physical abuse. Garcia interviewed J.B. on August 7, 2006. The interview was videotaped. In the interview, J.B. stated that Coleman had stuck his penis in J.B.'s bottom while in the bathroom at Coleman's house. This occurred after J.B. used the toilet.

On August 9, 2006, the State charged Coleman with Class A felony child molesting, Class C felony child molesting, and Class D felony intimidation. The State later amended the information to include another Class A felony child molesting.

After the State filed a notice of intent to introduce statements pursuant to Indiana Code section 35-37-4-6 (2004) ("the protected person statute"), the trial court held a hearing. At the hearing, J.B., his mother and father, and Garcia testified. The trial court determined that J.B.'s statements made to his mother, father, and Garcia would be admissible at trial. After a bench trial, the trial court found Coleman guilty of Class C felony child molesting and sentenced him to a term of four years, all suspended to probation. Coleman appeals.

I. Hearsay Statements

Coleman argues that the trial court abused its discretion in admitting the hearsay statements made by J.B. to his mother, father, and Garcia. Coleman asserts that the statements were not sufficiently reliable to be admissible under the protected person statute. The admission and exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of testimony for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the “decision is clearly against the logic and effect of the facts and circumstances. Id. “At the same time, the protected person statute impinges upon the ordinary evidentiary regime such that we believe a trial court’s responsibilities thereunder carry with them what we recently called in another context ‘a special level of judicial responsibility.’” Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003).

Generally, a contemporaneous objection is required to preserve an issue for appeal. Rembusch v. State, 836 N.E.2d 979, 982 (Ind. Ct. App. 2005) trans. denied. The purpose of this rule is to promote a fair trial by precluding a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him. Id. at 983. Coleman waived the issue when he failed to contemporaneously object to admitting the hearsay statements made by J.B. to his mother, father, and Garcia. We therefore deem the issue waived for lack of a timely objection.

Waiver notwithstanding, the statements made by J.B. to his mother, father, and Garcia contained sufficient indicia of reliability and were properly admitted by the trial

court. As a general rule, hearsay statements are inadmissible. Ind. Evid. R. 802. However, an exception was created that allowed statements of “protected persons” who have been victims of certain enumerated crimes. Indiana Code section 35-37-4-6 states, in relevant part, as follows:

(a) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2):

(1) Sex crimes (IC 35-42-4).

(b) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(3):

(2) A sex crime (IC 35-42-4).

(c) As used in this section, “protected person” means:

(1) a child who is less than fourteen (14) years of age[.]

(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 an offense listed in subsection (a) or (b) 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;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[.]

Before a protected person's statement may be admitted at trial, the trial court must determine, at a hearing held outside the presence of the jury and attended by the protected person, that the statements of the protected person were sufficiently reliable. In this case, the trier of fact was the judge. The trial court determined that the "child's statements, in total, confirm he understands the difference between the truth and a lie and further understands the nature and importance of an oath." Appellant's App. p. 65.

As noted in Pierce v. State, 677 N.E.2d 39 (Ind. 1997), there are many considerations to take into account when determining the reliability under Indiana Code section 35-37-4-6, which are not limited to, but include: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, the nature of the questioning, (3) whether there was a motive to fabricate, (4) use of age appropriate terminology, and (4) spontaneity and repetition. *Id.* at 44; See also Idaho v. Wright, 497 U.S. 805, 821-22 (1990) (listing factors bearing on whether hearsay statements exhibit particularized guarantees of trustworthiness for Sixth Amendment purposes).

While J.B. did not immediately tell his mother of the actions of Coleman, after his mother noted his change in behavior and inquired about that change, J.B. related what happened. This occurred on the same day as the molestation, although not immediately following. J.B.'s mother then related this to J.B.'s father, who spoke with J.B. the next day and received substantially the same account. The day after J.B. spoke with his father, he gave the same account to Garcia. While the account may not have been truly spontaneous, J.B. told his mother an account that remained substantially similar to that related during the protected person hearing.

Moreover, J.B. used age-appropriate terminology.¹ Also, it does not appear that J.B. had a motive to fabricate such a story. Under these facts and circumstances, the events that J.B. related to his mother, his father, and Garcia bore sufficient indicia of reliability.

Prior to trial, the trial court held a hearing concerning J.B.'s statements, at which J.B., his mother, his father, and Garcia testified. Coleman cross-examined J.B. at this hearing. At the hearing, during the competency determination, J.B. initially stated that he did not understand the difference between the truth and a lie. Tr. p. 151. However, upon further questioning, the trial court determined that J.B. did, in fact, understand the difference between a truth and a lie.

Both during the protected person hearing and the actual trial, J.B. continually responded to questions in an age-appropriate manner. His recount of the molestation was substantially the same from the time of the first conversation with his mother to his testimony at trial.

¹ J.B. referred to his penis as "wee-wee" throughout the interviews and proceedings.

As this was a bench trial and not a jury trial, “[t]he assumption is that the trial court, as factfinder correctly applies and follows the law.” Bordenkecher v. State, 562 N.E.2d 49, 51 (Ind. Ct. App. 1990), trans. denied. Coleman’s argument is essentially that we reweigh the evidence, but we will defer to the trial court’s judgment. The trial court did not abuse its discretion when it found that J.B.’s out-of-court statements contained sufficient indicia of reliability and were admissible.

II. Sufficiency of Evidence

Coleman argues that J.B. was incompetent to testify and his statements were unreliable therefore the charges could not have been proven beyond a reasonable doubt. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. A victim’s testimony, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000)

While Coleman does not explicitly state as much, he appears to claim that J.B.’s testimony is incredible dubious. Appellate courts may apply the “incredible dubiousity” rule to judge the credibility of a witness. This rule is expressed as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly

uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo v. State, 859 N.E.2d 1201,1208 (Ind. 2007) (quoting Love v. State, 761 N.E.2d 806, 810 (Ind. 2002)).

Coleman points out perceived equivocations in J.B.'s testimony. However, upon review of the transcript of J.B.'s testimony, we find that the testimony of the five-year-old witness was not so incredibly dubious or inherently improbable that no reasonable person could believe it. Although, J.B.'s testimony may have some confusing responses and inconsistencies, the overall testimony established the necessary elements of child molesting. See Hill v. State, 646 N.E.2d 374, 378 (Ind. Ct. App. 1995); Lowe v. State, 534 N.E.2d 1099, 1100 (Ind. 1989). We conclude that the evidence was sufficient to convict Coleman beyond a reasonable doubt.

III. Ineffective Assistance of Counsel

Coleman argues that if we determine that he waived the issue of hearsay statements made by J.B. to J.B.'s mother, J.B.'s father, and Garcia then his trial counsel provided ineffective assistance.² In a review of ineffective assistance of counsel claim, we utilize the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007). First, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that errors committed by counsel were so serious that the defendant was effectively

² Normally, a post-conviction hearing is the preferred forum to adjudicate a claim of ineffective assistance of counsel. McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). Presenting such a claim often requires the development of new facts not present in the trial record. McIntire, 717 N.E.2d at 101. While a defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, if he does so the issue will be foreclosed from collateral review. Id. at 102; Woods, 701 N.E.2d at 1220.

denied the right to counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. at 152. “Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.” Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), trans. denied. Second, the defendant must show that the deficient performance prejudiced his defense. Overstreet, 877 N.E.2d at 152. The defendant must show that the errors were so serious that the defendant was deprived of a fair trial. Id. “To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. “Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” Id.

Although the trial court determined that J.B. was competent and admitted his statements to his mother, his father, and Garcia, trial counsel should have objected during the bench trial in order to avoid waiving issues related to the trial court’s determinations. However, that error was not prejudicial to Coleman. Coleman has not established that, but for the inaction of his trial counsel, the result would have been different. It is not enough to argue that if J.B.’s testimony and all related testimony would have been excluded if trial counsel had appropriately and contemporaneously objected; Coleman must show that the trial court would have actually excluded the testimony. In this case, the trial court conducted the earlier protected person hearing and determined that J.B. was competent and that his statements bore sufficient indicia of reliability. It is highly

unlikely that those determinations would have been reversed upon an objection at the subsequent bench trial.

Conclusion

The trial court properly admitted the hearsay testimony pursuant to the protected person statute. The evidence was sufficient to support Coleman's conviction of Class C felony child molesting beyond a reasonable doubt. Additionally, Coleman failed to establish ineffective assistance of counsel.

We affirm.

MAY, J., and VAIDIK, J., concur.