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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

KIMBERLY A. JACKSON
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RONALD COX,)
)
Appellant- Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee- Plaintiff,)

No. 49A05-1009-CR-536

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-0906-FB-55485

May 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Ronald Cox appeals, following a bench trial, his convictions of two counts of child molesting as Class C felonies and one count of child solicitation as a Class D felony. Cox raises two issues on appeal, which we restate as: 1) whether the trial court abused its discretion by admitting a victim's videotaped statement under the recorded recollection exception to the hearsay rule; and 2) whether sufficient evidence supports Cox's conviction of child solicitation and one of the two counts of child molesting. Concluding the trial court did not abuse its discretion in admitting the evidence, and as a result sufficient evidence supports Cox's convictions, we affirm.

Facts and Procedural History

In 2005, two of Cox's cousins, then-six-year-old L.D.C. and then-eight-year-old D.C., reported to child protective services that Cox had touched them inappropriately. D.C. later testified that beginning when she was six years old, Cox touched her breasts and vagina with his hand and made her touch his penis with her hand. D.C. also testified regarding an incident when Cox was in the back seat of a car next to L.D.C., and D.C., in the front seat, saw Cox "act[] like he dropped a battery in between [L.D.C.'s] legs." Transcript at 55.

On February 6, 2009, L.D.C. was interviewed by a Department of Child Services ("DCS") investigator. In the videotaped interview, L.D.C. reported that Cox had "[a] long time ago" touched her vaginal area and buttocks with his hand. Id. at 147-48. L.D.C. also reported that Cox had, on the same occasion, asked her to touch his "private part." Id. at 152. These statements were similar to what L.D.C. reported to child protective services in 2005.

The State charged Cox with five felony counts for offenses against D.C., L.D.C., and another child alleged to have occurred between 2003 and 2005. Cox waived his right to a jury trial and a bench trial was held. During a recess in trial, the deputy prosecutor showed L.D.C. the videotape of the February 6, 2009 interview in an attempt to refresh her recollection. However, L.D.C. still lacked independent memory of the specific incidents recounted in the interview.¹ L.D.C. was then called as a witness for the State, identified Cox as the defendant, and testified that she remembered incidents when Cox “would usually just take me into his room.” Id. at 102. L.D.C. also testified that she remembered giving the videotaped interview with DCS and telling the truth at that time. The State offered and the trial court admitted the videotape into evidence, over Cox’s objections, as a recorded recollection. After the videotape was played in open court, L.D.C. was cross-examined by Cox’s counsel.

¹ L.D.C. testified as follows on direct examination:

Q. As you sit here today, do you remember anything happening with Ronald Cox?

A. Nothing else that was – that wasn’t on the movie.

...

Q. Okay. So now that you’re sitting here, you watched the movie, do you actually remember anything happening with Ronald, or do you just remember what you saw in the movie?

A. Yeah, just what I saw in the movie.

Q. Okay. So if I asked you from your own memory what do you remember with Ronald, what would you tell me?

A. He would usually just take me into his room.

...

Q. Okay. Do you remember what would happen in Ronald’s room when you’d go in there with him?

A. Not exactly. Like, just things that I don’t really –

...

Q. What – what sort of things do you remember?

A. Nothing really.

Q. Nothing really? Okay. When you watched the video that I showed you, was that you in the video?

A. Yes.

Q. And did you talk to that other lady who was in the video?

A. Yes.

Q. And everything that you said to the lady back then when you said it, would it have been the truth?

A. Yes.

The trial court found Cox guilty of the following: Class C felony child molesting for fondling or touching D.C., Class C felony child molesting for fondling or touching L.D.C., and Class D felony child solicitation for soliciting L.D.C. to engage in fondling or touching. Following a sentencing hearing, the trial court sentenced Cox to four years in prison. Cox now appeals.

Discussion and Decision

I. Admission of Evidence

Cox argues the trial court abused its discretion in admitting the videotaped interview of L.D.C. because the State failed to establish the foundational requirements of Indiana Evidence Rule 803(5) and claims admission of the evidence violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.²

A. Standard of Review

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. Griffith v. State, 788 N.E.2d 835, 839 (Ind. 2003). A trial court abuses its discretion if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. Figures v. State, 920 N.E.2d 267, 271 (Ind. Ct. App. 2010). When a determination of admissibility requires resolution of a question of fact, "the question shall be resolved by the preponderance of the evidence." Ind. Evidence Rule 104(a). In reviewing a trial court's decision to admit evidence, we do not reweigh

² The State argues Cox waived these arguments by failing to make them to the trial court as part of his objection to the admissibility of the interview. While an issue generally may not be raised for the first time on appeal, we have observed that an argument against the admissibility of evidence is naturally more detailed on appeal than when made during trial. Chest v. State, 922 N.E.2d 621, 624 (Ind. Ct. App. 2009). Cox's objections during trial were specific enough to alert the State and the trial court to the gist of his arguments, and therefore they are not waived. See Tr. at 110 (deputy prosecutor responding to Cox's objection by citing Evidence Rule 803(5)); id. at 112 (trial court stating in response to Cox's additional objection, "I think I understand your objection. Is there case law that addresses the Crawford situation?").

the evidence, we consider conflicting evidence in a light most favorable to the trial court's ruling, and, viewing the circumstances in their totality, determine whether substantial evidence of probative value supports the trial court's ruling. Griffith, 788 N.E.2d at 839-40.

B. Recorded Recollection

Hearsay evidence is generally inadmissible. Ind. Evidence Rule 802. However:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. . . .

Evid. R. 803(5). The videotaped interview of L.D.C. clearly qualifies as a "record," and it concerns the alleged molestation by Cox as to which L.D.C. at trial had insufficient recollection to testify fully, even after the deputy prosecutor attempted to refresh her recollection by showing her the videotape. Cox contends, however, that the interview was not shown to be made or adopted when the matter was fresh in L.D.C.'s memory and was not shown to reflect her knowledge correctly.

Cox does not dispute the obvious, that L.D.C. spoke with the investigator and thus made or adopted the interview on February 6, 2009. Yet Cox points out that as the charged offenses took place, at the latest, in 2005, the interview occurred four or more years after the events L.D.C. described. Thus, Cox contends the interview was not made "when the matter was fresh in the witness's memory" as required by Rule 803(5).

However, the videotape shows that at the time of the interview, L.D.C. did remember details of the molestation, such as how often it took place (once), where it took place (Cox's home), what time of day (the daytime), what time of year (it was warm outside, probably over summer break), and how Cox found an opportunity to molest L.D.C. (by Cox telling her to go to his room because her aunt was also at Cox's home). Tr. at 147-49. L.D.C. was also able to recall that Cox touched her on the outside, not the inside, of her vaginal area and buttocks and that she was able to refuse his demand to touch him because she got up and left Cox's room. Id. at 150-53. Moreover, Rule 803(5) does not by its terms require that a record be made or adopted at or near the time of the event recalled. Cf. Evid. R. 803(6) (imposing such a requirement for the admissibility of business records). It was for the trial court to weigh the lapse of time against the indications that L.D.C. at the time of the interview remembered details of the events involving Cox and therefore the matter was fresh in her memory. We cannot reweigh the testimonial evidence, assess witnesses' credibility, or indiscriminately accept appellate argument to conclude the matter was not fresh in L.D.C.'s memory at the time of the interview.

As for the requirement that the videotaped interview reflect L.D.C.'s knowledge correctly, we have previously stated this requirement demands "some acknowledgment that the statement was accurate when it was made." Ballard v. State, 877 N.E.2d 860, 862 (Ind. Ct. App. 2007) (quotation omitted). While the recorded recollection exception applies when the witness has insufficient memory of the event recorded, the witness must be able to "vouch for the accuracy of the prior statement." Kubsch v. State, 866 N.E.2d 726, 734 (Ind. 2007) (quotation omitted), cert. denied, 553 U.S. 1067 (2008).

In Horton v. State, 936 N.E.2d 1277 (Ind. Ct. App. 2010), trans. pending, we addressed under facts similar to the present case a defendant's argument that a child witness's videotaped interview with DCS was not shown to reflect the child's knowledge correctly. At the time of trial, the child, even after viewing the interview in an attempt to refresh her recollection, was unable to remember specific details of the molestations. Id. at 1281. We affirmed admission of the interview as a recorded recollection in part because the interview was consistent with the child's live testimony and her statements to others. In addition, the child testified she recalled making the interview and telling the truth at that time. Id. at 1283.

Similarly here, L.D.C. testified that she remembered giving the videotaped interview and that what she said in the interview would have been the truth. L.D.C.'s statements in the interview were consistent with her report to child protective services in 2005 that she had been molested by Cox. The interview was also consistent with L.D.C.'s live testimony that she recalled times when Cox "would usually just take me into his room." Tr. at 102. While L.D.C. gave some equivocal responses when questioned by Cox's counsel regarding her memory of the interview,³ we cannot conclude, without reweighing the evidence, that the State failed to present a sufficient foundation for admission of the recorded recollection under Evidence Rule 803(5).

C. Confrontation

Further, Cox's Sixth Amendment right to confront witnesses was not violated by admission of the interview because L.D.C. testified at trial and responded willingly to

³ The gist of L.D.C.'s responses was that she remembered giving the interview but did not necessarily remember all of what she said in the interview. See tr. at 107 ("I remember that [those things] happened, and I remember what I said. I just don't know exactly what I said – remember exactly what I said.").

questions. In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits admission in a criminal trial of testimonial statements by a person who is absent from trial, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the person. Fowler v. State, 829 N.E.2d 459, 464 (Ind. 2005), cert. denied, 547 U.S. 1193 (2006).⁴ In Fowler, the Indiana Supreme Court observed that Crawford left in place prior holdings “that as long as the declarant testifies the Confrontation Clause has been satisfied even if the declarant is unable to recall the events in question.” Id. at 466 (citing United States v. Owens, 484 U.S. 554 (1988)). Thus in Proctor v. State, 874 N.E.2d 1000 (Ind. Ct. App. 2007), we upheld admission of a witness’s taped statement when that witness was present at trial, testified, and responded willingly to questions, because despite the witness’s lack of memory of the events, she was available for cross-examination for purposes of the defendant’s confrontation right. Id. at 1002-03. Similarly here, L.D.C. was present at trial and responded willingly to questions on direct and cross-examination, and therefore Cox’s confrontation right was not violated notwithstanding L.D.C.’s lack of memory of the molestations.⁵

⁴ Fowler was partially abrogated, on other grounds, by Giles v. California, 554 U.S. 353 (2008). See Roberts v. State, 894 N.E.2d 1018, 1024-25 (Ind. Ct. App. 2008), trans. denied.

⁵ We understand and acknowledge Cox’s point that L.D.C.’s lack of memory “meant that any questioning would be fruitless” as L.D.C. “was not able to defend or explain statements which she did not remember.” Brief of the Appellant at 19. However, our supreme court has explained, quoting the United States Supreme Court, that the Confrontation Clause guarantees “only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to what ever extent, the defense might wish.” Fowler, 829 N.E.2d at 469 (quoting Owens, 484 U.S. at 559) (emphasis in original).

II. Sufficiency of the Evidence

Cox argues the State presented insufficient evidence to support his convictions for fondling or touching L.D.C. and soliciting L.D.C. to engage in fondling or touching.⁶ In reviewing claims of insufficient evidence, we neither reweigh the evidence nor judge witnesses' credibility. Staten v. State, 844 N.E.2d 186, 187 (Ind. Ct. App. 2006), trans. denied. On appeal following a bench trial, we consider only the evidence favorable to the judgment together with the reasonable inferences to be drawn therefrom. Id. We affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

To support the conviction for fondling or touching L.D.C., the State was required to prove beyond a reasonable doubt that, among other things, Cox performed or submitted to “any fondling or touching” with the intent to arouse or satisfy the sexual desires of L.D.C. or Cox. Ind. Code § 35-42-4-3(b); Appellant’s Appendix at 22.⁷ In the videotaped interview, L.D.C. reported that Cox touched her on the outside of her buttocks and vaginal area while the two were alone in Cox’s room. L.D.C. did not give an audible response when asked whether the touching was over or underneath her clothing. Nonetheless, the nature and circumstances of Cox’s touching were such as to support a reasonable inference of his intent to arouse.⁸ See Bowles v. State, 737 N.E.2d 1150,

⁶ Cox does not challenge the sufficiency of his conviction for molesting D.C., and we limit our review accordingly.

⁷ The information refers to the victim as “L.C.,” the initials of another child involved in the investigation leading to this case, but Cox and the State agree the charges actually referred to L.D.C.

⁸ Cox asserts that “[t]he trial court specifically found that it was convicting Cox . . . based on” the incident when D.C. observed Cox drop a battery between L.D.C.’s legs, and therefore our review of the sufficiency issue is

1152 (Ind. 2000) (stating the requisite intent “may be inferred from the actor’s conduct and the natural and usual sequence to which such conduct usually points”); Cruz Angeles v. State, 751 N.E.2d 790, 798 (Ind. Ct. App. 2001) (holding evidence sufficient when defendant touched victims’ breasts over their clothing), trans. denied.

To support the conviction for soliciting L.D.C. to engage in fondling or touching, the State was required to prove beyond a reasonable doubt that, among other things, Cox knowingly or intentionally solicited L.D.C. to engage in fondling or touching intended to arouse or satisfy the sexual desires of L.D.C. or Cox. See Ind. Code § 35-42-4-6(b). To “solicit” is defined as to “command, authorize, urge, incite, request, or advise” a person to perform an act. Ind. Code § 35-42-4-6(a). Cox’s sole argument regarding this conviction is that it rested on the evidence of the videotaped interview of L.D.C, which he contends was inadmissible. In light of our conclusion that the videotaped interview was properly admitted, we note the interview provided evidence that Cox asked L.D.C. to touch his “private part” and made this demand as part of the same incident when he touched L.D.C. in a sexual manner while they were alone in his room. The evidence was therefore sufficient to support Cox’s conviction for child solicitation.

Conclusion

The trial court did not abuse its discretion in admitting L.D.C.’s videotaped interview as a recorded recollection. Further, sufficient evidence supports Cox’s

limited to that incident. Br. of Appellant at 23. However, the trial court did not state that the battery incident was the only evidence supporting the charge of molesting L.D.C.; rather it stated, in denying Cox’s motion for judgment on the evidence, that the battery incident provided additional evidence aside from L.D.C.’s videotaped interview. Tr. at 218. We also point out that the charging information used general language tracking the child molesting statute and did not specify the battery incident as the basis for the charge.

convictions for child molesting and child solicitation, which are accordingly affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.