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FILED
May 20 2009, 9:34 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. EASTWOOD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A01-0810-CR-502
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Christopher Burnham, Judge
Cause No. 55D02-0704-FC-78

May 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Michael A. Eastwood appeals the trial court's denial of his motion to correct error and to consider newly discovered evidence. We affirm.

Issue

Did the trial court abuse its discretion by denying Eastwood's motion to consider newly discovered evidence?

Facts and Procedural History

In the fall of 2005, L.E. alleged that Eastwood, her stepfather, had fondled her genital area and masturbated in her presence during a Labor Day weekend several years earlier when she had been residing with her mother and Eastwood in Martinsville. L.E.'s mother, Katina Eastwood, testified at trial that the only Labor Day weekend L.E. had lived with her and Eastwood in Martinsville was in the year 2000.

At the bench trial on April 29, 2008, there was conflicting testimony about L.E.'s whereabouts on Labor Day weekend of 2000. Katina testified that she "generally" spent Labor Day weekends in Tipton, Indiana, attending an "Indian Pow-wow[.]" Tr. at 13. L.E.'s sister testified that L.E. usually accompanied their mother on this annual trip. On the day of trial, Katina brought with her a letter she had written to the school requesting permission for L.E. to be excused as she was going to be "out of town" on the Friday preceding and the days immediately following Labor Day weekend in 2000. *See* Defendant's Exhibit A. Katina testified that she could not remember why she had made this request. The trial court found Eastwood guilty as charged.

Shortly after the trial, Eastwood's counsel contacted L.E.'s elementary school, which provided him with copies of her attendance records from September 2000. According to these records, L.E. was in fact absent on the four days immediately following Labor Day weekend. Also, Eastwood's counsel obtained an affidavit from Eastwood's brother, David Eastwood, in which he states that he was at Eastwood's home over Labor Day weekend 2000 and that L.E. was not there because she had gone on "an Indian trip" with her mother. Appellant's App. at 34.

On May 28, 2008, Eastwood filed a motion to correct error and to consider newly discovered evidence, which included L.E.'s certified attendance record and David Eastwood's affidavit. In light of this evidence, Eastwood asked the trial court to set aside his conviction and/or order a new trial. On August 1, 2008, the trial court held a hearing on the motion and denied it. This appeal ensued.

Discussion and Decision

Eastwood claims that the trial court abused its discretion by denying his motion to correct error and to consider new evidence. Our standard of review is well settled. The decision to grant or deny a motion predicated on newly discovered evidence rests within the sound discretion of the trial court. *Chupp v. State*, 509 N.E.2d 835, 837 (Ind. Ct. App. 1987). We will not overturn the trial court's order unless there was an abuse of that discretion. *Id*.

Motions for a new trial based upon newly discovered evidence are viewed with disfavor. *Denney v. State*, 695 N.E.2d 90, 93 (Ind. 1998).

> New evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and

> relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result.

Carter v. State, 738 N.E.2d 665, 671 (Ind. 2000). The defendant bears the burden of showing that the newly discovered evidence meets all nine prerequisites for a new trial. *Denney*, 695 N.E.2d at 302.

At the hearing on Eastwood's motion, the trial court considered the new evidence in light of the nine factors listed above. The trial court stated in pertinent part:

> The problem with this purported new evidence is that it fails several of the nine criteria, and all nine have to be established, not just one. The question of whether it's material and relevant, certainly, it tends to be somewhat relevant and material. It appears to be merely impeaching in that it questions … brings into question the allegations of the whereabouts of the child at the time of the incident charged. But that's not enough, being merely impeaching. It's not proof because it simply shows according to school records the child was not in attendance at school. It doesn't say where she was on the date alleged, and that's what is important here. I'm not sure that due diligence was used to discover it in time for the trial. I'm not sure that it would produce a different result at trial. This is one of the many pieces of evidence the Court had to weigh and consider regarding what happened, who was where, who had access to whom, during the trial, and I did weigh and consider those things and made my findings accordingly. So the Court finds that the Defendant has failed to establish clearly the burden required by *Taylor v. State*, [840 N.E.2d 324, 329-30 (Ind. 2006),] all nine criteria for a new trial on the basis of new evidence, and the motion is therefore denied.

Tr. at 204.

We agree with the trial court's analysis. While the issue of L.E.'s whereabouts over Labor Day weekend is relevant and material, her mother's letter to the school and the attendance records prove only that L.E. was not in school on the days following that weekend. Thus, they merely impeach L.E.'s testimony and fail to show that she was

somewhere other than her stepfather's house in Martinsville during that weekend. For these reasons, it is not probable that this evidence would lead to a different result. As for David Eastwood's affidavit stating that he was at the house in question over Labor Day weekend 2000 and remembers L.E. leaving "on an Indian trip" with her mother, it is merely impeaching of L.E.'s testimony as well. Such an affidavit—produced by the defendant's brother nearly eight years after the weekend in question—is not likely to carry much weight or credibility and therefore merely adds to the conflicting evidence of L.E.'s whereabouts. Thus, it also is unlikely to produce a different outcome. Moreover, Eastwood's claim of due diligence is questionable at best, considering that he apparently waited until *after* the trial to interview his brother, who was supposedly at the house during the time of the alleged incident and therefore would have knowledge as to L.E.'s presence or absence that weekend.

In sum, Eastwood failed to carry his burden of showing that the newly discovered evidence meets all nine prerequisites for a new trial. The trial court acted within its discretion by denying Eastwood's motion to correct error and to consider newly discovered evidence.

Affirmed.

BRADFORD, J., and BROWN, J., concur.