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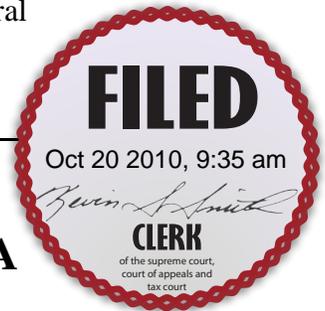
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**IN THE
COURT OF APPEALS OF INDIANA**

MARLET TURPIN,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 49A02-1003-CR-285

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0810-FA-217698
Cause No. 49G04-0901-FC-20703

October 20, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Marlet Turpin appeals following his convictions for Child Molesting¹ as a class A and a class C felony. Turpin contends that his class C felony child molesting conviction should be overturned because the trial court erroneously concluded that the six-year-old victim was competent to testify and erroneously admitted hearsay testimony into evidence.² Finding no reversible error, we affirm.

FACTS

During the summer of 2008, Turpin sexually molested two minor girls. While M.L., a twelve-year-old girl, was lying on the couch, Turpin put his fingers into her vagina and moved them in a circular motion outside the inner lips of her labia. Turpin also touched four-year-old T.P.'s breasts and put his "private," meaning his penis, on her "two bad spots," meaning her vagina and bottom. Tr. p. 139-42.

On October 1, 2008, the State charged Turpin with one count of class A felony child molesting of M.L. and two counts of class C felony child molesting of M.L. and another girl, A.G., in cause number 49G04-0819-FA-217698 (7698). On February 2, 2009, Turpin was charged with three counts of class C felony child molesting of T.P. in cause number 49G01-0901-FC-20703 (0703). The State moved to join 7698 and 0703, and the trial court granted the motion.

At Turpin's February 16, 2010, bench trial, then-six-year-old T.P. testified after the trial court found her to be competent, with no objection from Turpin. The trial court also permitted T.P.'s mother to testify, over Turpin's hearsay objection, that at one point

¹ Ind. Code § 35-42-4-3.

² Turpin does not challenge the class A felony conviction on appeal.

during playtime, T.P. had laid down on the bed, spread her legs in the air, and asked her mother's boyfriend to tickle her "down there." Id. at 176-78. At the close of the trial, the trial court found Turpin guilty of class A child molesting of M.L. in 7698 and of one count of class C child molesting of T.P. in 0703, and found him not guilty of the remaining charges. That same day, the trial court sentenced Turpin to concurrent terms of forty-five years for the class A felony and eight years for the class C felony. Turpin now appeals.

DISCUSSION AND DECISION

I. Witness Competency

Turpin first argues that the trial court erred by finding T.P. to be a competent witness. The determination of a witness's competency to testify lies within the trial court's sound discretion, and as a general rule, we review such a ruling for an abuse of discretion. Aldridge v. State, 779 N.E.2d 607, 609 (Ind. Ct. App. 2002).

Here, however, Turpin did not raise an objection regarding T.P.'s competency at trial. To prevail on appeal, therefore, he must establish that the trial court committed fundamental error by finding her to be competent and permitting her to testify. Fundamental error "is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible." Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). In other words, we will reverse on this basis only when there has been a blatant violation of basic principles that denies a defendant fundamental due process. Id.

A child's competency to testify is determined by the trial court based on its observation of the child's demeanor and responses to questions posed by counsel and the court. Agilera v. State, 862 N.E.2d 298, 303 (Ind. Ct. App. 2007). A child is competent to testify if she (1) understands the difference between telling a lie and telling the truth, (2) knows she is under a compulsion to tell the truth, and (3) knows what a true statement actually is. Kien v. State, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007).

Here, the trial court began by asking T.P. if she would promise to tell only the truth, and she replied, "Yeah." Tr. p. 127. The trial court then had the following discussions with T.P. about her understanding of truth:

Court: Do you know what color this robe is?

A: Black.

Court: Okay. If I told you that it was red, is that real?

A: No.

Court: What is it then?

A: Black.

Court: It's black, okay. Does that mean that it's true that it's black? Is it real?

A: Yeah.

Tr. p. 151.

Court: If there's a box of cookies on the table—we'll put it on the table. If mom says that's a box of cookies and you can't have any, would you understand what that means?

A: Yeah.

Court: What would that mean?

A: No.

Court: No cookies, okay. If you got a cookie, and you said somebody else took it, but not you, was that real or not real?

A: Not real.

Id. at 152.

Court: . . . What would happen if you took a cookie and you said somebody else did it?

A: That would be not real.

Court: Okay. And would you get in trouble or not?

A: I would get in trouble.

Id. at 152-53.

Court: . . . Do you know what a lie is?

A: Huh-uh.

Court: No?

A: Yeah.

Court: Yes, you do know? Okay. Can you tell me about it?

A: A lie is about if you took a cookie.

Court: And you said you didn't?

A: Yeah.

Id. at 154-55.

The record reveals, therefore, that upon questioning by the trial court, T.P. showed that she knew the difference between the truth and a lie, demonstrating this knowledge by differentiating between truthful and non-truthful statements. She promised to tell the truth. The trial court had the opportunity to observe the manner in which T.P. answered

the questions, her demeanor, her responses, her facial expressions, and concluded that T.P. was competent to testify.

Turpin directs our attention to other points in T.P.'s testimony in which she provided answers that were unresponsive, nonsensical, or inconsistent. It is well established, however, that "[t]o be qualified to testify, a child need not be a model witness, have an infallible memory, or refrain from making inconsistent statements." Kien, 866 N.E.2d at 385; see also Harrington v. State, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001) (holding that the fact that a child victim's testimony at trial could be interpreted as ambiguous or inconsistent went to his credibility, not his competency). The trial court acknowledged the challenges presented by a witness of such tender age:

You're going to have to rely on recall from a person whose sense of time is not yet well developed, whose understanding of the English language is not well developed, and relies in great part on the behaviors of the people around her, as well as the language use of the people around her.

Tr. p. 200. It is evident, therefore, that the trial court considered the issue carefully and with an awareness of the challenges presented by T.P.'s testimony. Having had the chance to question T.P. and observe her demeanor and behavior, however, the trial court found her competent to testify. We cannot say that it was fundamental error for the trial court to do so.

Furthermore, although Turpin complains that the State asked leading questions of T.P., we note that leading questions may be used on direct examination to develop the testimony of certain kind of witnesses, including child witnesses. Williams v. State, 733 N.E.2d 919, 922 (Ind. 2000). Therefore, we find no error on this basis.

We also note that although T.P.’s testimony certainly included inconsistencies, she did not waver on her assertion that Turpin had “touched me on the two bad spots.” Tr. p. 139. She unambiguously indicated that her “two bad spots” were her vagina and her buttocks and that Turpin had touched those parts with his penis. Id. T.P. also consistently explained that the molestation had occurred when the weather was warm, which is consistent with the timeframe contained in the charging information. With this record, and given the trial court’s careful consideration of the issue and Turpin’s failure to object, we decline to reverse on this basis.

II. Admission of Evidence

Turpin next contends that the trial court erroneously permitted T.P.’s mother to testify, contending that a portion of her testimony was inadmissible hearsay. The admission of evidence falls within the trial court’s sound discretion and we will reverse only if we find an abuse of that discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002).

The disputed testimony occurred in the following context:

Q: . . . While you were playing with [T.P.], did she say or do something that called your attention to her?

A: She laid back on the bed—

Defense counsel: I would object to hearsay as to what she said.

Prosecutor: Present sense impression.

Prosecutor: I’m—a statement of [T.P.’s] then existing state of mind, emotion, sensation or physical condition. As an offer of proof, what I anticipate . . . that this

witness will say is that [T.P.] asked [her mother's boyfriend] to tickle her the way [Turpin] tickles her. So it was a then existing bodily condition.

Court: Okay. If it was a question, it's not hearsay, so I'll allow it.

Prosecutor: Okay.

Q: What did [T.P.] say?

A: She laid back on the [bed] and spread[] her legs up in the air and told [the boyfriend] to tickle her down there. I asked her where she got that from and she told me that [Turpin] had done that to her.

Tr. p. 176-78 (emphasis added).

Turning to the first sentence of the disputed testimony, we note that hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and it is not admissible unless it falls under an exception to the general rule. Ind. Evidence Rule 801(c). T.P.'s mother's statement that T.P. "laid back on the [bed] and spread[] her legs up in the air and told [the boyfriend] to tickle her down there" is not hearsay. Tr. p. 178. Instead, T.P.'s communication to her mother's boyfriend was a question or request that was made to obtain a response from the boyfriend. See Treadway v. State, 924 N.E.2d 621, 635-36 (Ind. 2010) (holding that portions of defendant's statement to police that included questions was not hearsay because the questions were made to elicit a response from the defendant; therefore, they were not offered for their truthfulness). Therefore, the trial court did not abuse its discretion by permitting the testimony.

As for the second disputed sentence, we note that Turpin did not object to the statement that “she told me that [Turpin] had done that to her,” tr. p. 178;³ consequently, he has waived the right to raise the issue on appeal. To the extent that he maintains it was fundamental error to permit this testimony, we again note the heavy burden he bears in attempting to meet this standard. See Jewell, 887 N.E.2d at 942. Merely establishing that it was error to admit the second disputed sentence into evidence is insufficient; instead, Turpin must prove that any error was fundamental.

Assuming solely for argument’s sake that it was, in fact, erroneous to admit the second sentence into evidence, we note again that T.P. testified consistently that Turpin had molested her by touching his penis to her vagina and buttocks and that he had done so when the weather was warm. Her mother testified that four-year-old T.P. spread her legs in the air and requested that a man tickle her vagina. A reasonable factfinder could conclude that such a request is abnormal from a four-year-old and constituted evidence of molestation, even without the subsequent statement that Turpin had tickled her there in the past. Under these circumstances, we simply cannot find that the harm or potential for harm from the admission of the second disputed sentence cannot be denied or that the violation was so prejudicial to Turpin’s rights as to make a fair trial impossible. In other words, if there was error, it was not fundamental, and we decline to reverse on this basis.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.

³ Defense counsel only objected to the testimony regarding T.P.’s request that her mother’s boyfriend tickle her; the discussion did not concern T.P.’s statement that Turpin had done the same thing to her in the past.