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.

FILED
Oct 27 2009, 9:57 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEYS FOR APPELLANT:

MICHAEL C. KEATING
YVETTE M. LAPLANTE
Keating & LaPlante, LLP
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

TIFFANY N. ROMINE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRYAN D. COWAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 63A05-0905-CR-286
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
Cause No. 63C01-0804-FA-228

October 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bryan D. Cowan appeals his conviction, after a jury trial, of child molesting, as a class A felony, and incest, as a class B felony.

We affirm.

ISSUE

Whether playing the victim's recorded statement to the jury twice constituted fundamental error.

FACTS

On April 11, 2008, the State charged Cowan with two counts: child molesting, a class A felony, and incest, a class B felony. The two counts alleged that the offenses had been committed against his minor daughter C.C.[1] several years earlier. A jury trial was held on March 18-19, 2009.

The first witness was C.C., then age sixteen. She testified that her parents divorced when she was in kindergarten. According to C.C., when she was "about eleven" years old and in "fourth or fifth grade," Cowan would pick her up for visitation on Friday evening and she would stay with him until Sunday. (Tr. 52, 53). He was then residing in a three bedroom trailer with another man and his teenage son; each of the three had his own room. Cowan's room was "tiny," with a television and only "a single bed" -- which they both shared. (Tr. 56). On one night, after several visits, Cowan put his hand inside her pants and "touched [her] in the vagina"; and this happened "about six (6) or more" times after that. (Tr. 60). C.C. testified that on one occasion, when "he was actually

[1] C.C. was born August 20, 1992.

physically touching [her],” he told her that “this is a no-no,” and that she should not “let any other guy or any other person do this to you.” (Tr. 61). C.C. testified that several times, Cowan “wanted [her] to physically wrap [her] hands around his penis and move it up and down like,” and “told [her] what to do.” (Tr. 62, 63). On another occasion, C.C. testified, Cowan “got on top of [her] and wanted [her] to suck his penis”; that when she was “shaking [her] head,” he said, “just try it,” and “physically forced it in [her] mouth.” (Tr. 64). “[T]he very last time” he was “touching [her],” C.C. testified, Cowan said “that he [was] very sorry; that he kn[ew] he ha[d] done wrong; that the only reason he [had done] this in the first place was because he didn’t have a girlfriend at the time.” (Tr. 65). Thereafter, the molestation stopped.

C.C. testified that when these incidents happened, she felt “very, very confused,” “really confused.” (Tr. 63, 65). C.C. further testified that it was not until several years later, in November of 2007, that she told her girlfriend, and then she told Christy Boeglin, her high school counselor.

The second trial witness was Detective Tobias Odom, of the Indiana State Police, who testified that on December 5, 2007, he interviewed C.C. Odom testified that C.C. told him about Cowan “touching her vagina,” and “having her put his [sic] hand on his penis,” and “straddling her and having her try to perform oral sex on him.” (Tr. 95). Such constituted the entirety of his testimony regarding what C.C. alleged Cowan did to her. Odom also testified that Cowan admitted to him that C.C. slept in the same bed with him during the relevant time period.

The third witness was Boeglin, the high school counselor. When asked whether C.C. had come to her office to report that her "dad had molested her," she answered, "Yes." (Tr. 111). Boeglin's testimony included no details about C.C.'s allegations of molestation.

The State then "recall[ed]" Detective Tobias. (Tr. 119). Tobias identified State's Exhibit 1 as the recording of his interview with C.C. on December 5, 2007, and offered it for admission. Cowan's counsel stated "No objection," and the trial court admitted it "without objection." (Tr. 121). The recording was then played for the jury.[2]

During his closing argument Cowan's counsel directed the jury's attention to evidence that C.C. had repeatedly "felt left out and neglected" by Cowan. (Tr. 150). He noted C.C.'s "giddy," "giggly" and "smiling" demeanor on the stand. (Tr. 151). Counsel argued that C.C. testified to certain details that "[s]he never said . . . during the course of her statement." (Tr. 153). Counsel asked the jury to "be the judges" and "take that back to the jury room and . . . listen to it, if the judge permits you." *Id.*[3] Counsel opined that in C.C.'s testimony, "the lily ha[d] been gilded" with "more embellishments." *Id.*

Thereafter, in its closing, the State responded to various arguments by Cowan's counsel. It asserted that C.C. had "been entirely consistent," and was "telling the same thing [at trial] that she said in December of 2007," and played C.C.'s recorded statement again to the jurors, for them to decide. (Tr. 159).

---

[2] Neither the recording, nor a transcript thereof, is included in Cowan's Appendix.

[3] We assume that counsel was referring to C.C.'s recorded statement. The transcript provides no indication of whether the jury was given the recording for its review during deliberations.

The jury returned verdicts finding Cowan guilty on both counts.

DECISION

Cowan argues that "fundamental error occurred" when following C.C.'s testimony at trial, there was "testimony regarding the victim's statement of events by the investigating detective and the school guidance counselor," and the playing of her recorded statement two times. Cowan's Br. at 5. This "drumbeat repetition" of her allegations, he claims, left him "unable to receive a fair trial." *Id.* We cannot agree.

Cowan acknowledges that he lodged no objection to the admission of the recording. "Failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." *Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000). The fundamental error exception

> is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential 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).

Cowan first asserts the lack of any "valid reason . . . for admitting the recorded statement." Cowan's Br. at 6. It was his failure to object, however, that left the State without the burden of demonstrating a valid reason for admitting the statement. Further, he reminds us that upon being recalled to the stand, Detective Odom's testimony responded to Boeglin's description of C.C.'s demeanor when reporting the alleged molestation, and he characterizes the recording as lacking probative evidence as to "the

victim's demeanor." *Id.* at 72. His appellate record, however, does not include the recording. An appellant bears the burden of presenting the appellate court with a record complete enough to sustain his argument. *Purdy v. State*, 708 N.E.2d 20, 23 (Ind. 1999). Therefore, we find his first argument unpersuasive.

Cowan next argues that playing C.C.'s "recorded statement twice in combination with the testimony of" C.C., Detective Odom, and Boeglin "created a drumbeat repetition of the same set of facts," and warrants our holding that such cumulative evidence should be excluded because its probative value was substantially outweighed by the risk that its admission would cause undue or unfair prejudice, or confusion of witness credibility. Cowan's Br. at 8, citing *Stone v. State*, 536 N.E.2d 534, 537 (Ind. Ct. App. 1989), *trans. denied*. In *Stone*, the jury heard the child victim B.L.'s version of what happened the night of the alleged molestation <u>seven</u> times: the mother's testimony of what the sister told her B.L. said happened; the mother's testimony of what B.L. told her; B.L.'s own testimony; and the testimony of the sister, an officer, and two doctors, each of whom "repeated B.L.'s out of court statements to them as to what happened in its entirety." *Id.* at 536. Here, as indicated above, Detective Odom's testimony, admitted without objection, regarding C.C.'s specific allegations of molestation was extremely minimal, and Boeglin's testimony entailed no specific details pertaining to the molestation. Hence, we do not find their testimony to constitute a drumbeat of alleged facts. Further, unlike in the case before us, Stone's counsel had made repeated, timely objections of "hearsay, contrary to *Patterson* [*v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975)], cumulative and repetitious." 536 N.E.2d at 536. Based on the foregoing, we find *Stone* inapposite.

Finally, Cowan cites the recent opinion in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009). In *Tyler*, our Supreme Court exercised its supervisory powers to declare that when statements of a protected person pursuant to the Protected Person Statute ("PPS," *see* Ind. Code § 35-37-4-6) "are consistent and . . . otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statements though the PPS, but not both except as authorized under the Rules of Evidence." *Id.* at 467. Here, C.C. is not a protected person pursuant to the PPS -- "a child who is less than fourteen (14) years of age; or a mentally disabled individual . . . ." I.C. § 35-37-4-6(a). Further, the holding in *Tyler* is expressly "not applicable to proceedings conducted prior to" its publication on March 31, 2009. *Tyler*, 903 N.E.2d at 467. Cowan was tried on March 18-19, 2009. In addition, although Tyler had argued that the admission of <u>both</u> the child victim's testimony and their videotaped interviews was "fundamental error," our Supreme Court ultimately held that the trial court did not "commit[] reversible error by admitting [the children's] taped statements" after their testimony at trial. *Id.* at 465, 467.

Finally, we note again that in his closing argument, Cowan's counsel invited the jury to listen to the recorded statement and compare it with C.C.'s trial testimony. Thus, to the extent that there was any error in the playing of the recording for a second time, arguably, it is invited error. "[E]rror invited by the complaining party is not reversible error" or "fundamental error." *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995).

Affirmed.

ROBB, J., and MATHIAS, J., concur.