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IN THE COURT OF APPEALS OF INDIANA

JOHN V. GUTHRIE, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-1003-CR-166
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0807-FA-28

November 29, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

John V. Guthrie, Jr., ("Guthrie") was convicted in Lake Superior Court of Class A felony child molesting and Class C felony child molesting. Guthrie appeals and argues that the trial court abused its discretion in admitting into evidence a videotaped statement made by the victim. We affirm.

Facts and Procedural History

Guthrie and his ex-wife Christine had three children: S.G., who was born in 2002, A.G., who was born in 2003, and H.G., who was born in 2004. Guthrie and Christine divorced in 2008, and Christine was awarded primary custody of the children. Guthrie had visitation every other weekend and one night during the week.

On July 4, 2008, the children spent the night at Guthrie's house as part of his parenting time. The following day, Christine gave S.G. a bath, and S.G. then went outside to play. Shortly thereafter, S.G. told her mother, "Daddy had sex with me." Tr. p. 97. At first, Christine did not believe S.G. and admonished her not to say such things about her father. This caused S.G. to cry, and she insisted that she was not lying. Christine called Guthrie that night, but he was drunk and "blew it off." Tr. p. 101. Christine spoke with S.G. to determine why she would say her father had sex with her. S.G. told her mother that Guthrie "got on top of her," and that he "bounced" on her, indicating to her genital area. Tr. p. 100. She also said that Guthrie put his "pee-pee" in her mouth, made her suck on it, and "peed" on her. Tr. pp. 100-01. She described Guthrie's penis as looking like a "hot dog" that had hair "at the top." Tr. p. 102.

The next morning, Christine asked S.G. about the incident again. When S.G. described the incident "everything was still the same," so Christine took S.G. to the

police department. Tr. p. 102. There, S.G. was interviewed by Hammond Police Officer Travis Wheatley ("Officer Wheatley"). S.G. told Officer Wheatley that Guthrie "had sex" with her. Tr. p. 149. She explained that Guthrie made her lie down and "bounced on top" of her. Tr. p. 150. She again stated that Guthrie "peed" on her and stated that "[h]e put his pee-pee in my pee-pee and made me suck on his pee-pee." Id. S.G. was taken to the hospital and examined, but there were no signs of physical trauma.

On July 9, 2008, S.G. was interviewed by Lake County Police Sergeant John Gruszka ("Sgt. Gruszka"). At first, the child was uncooperative, but she later agreed to talk to Sgt. Gruszka. During this interview, S.G. again stated that Guthrie "did sex" with her, and that Guthrie pushed his "pee pee" on her "pee pee" and that this hurt. Tr. pp. 315-16. S.G. again described Guthrie's penis, and stated that his "pee" was white. Id. at 319.

The underwear and dress S.G. had worn during her visit with Guthrie were later tested at the Indiana State Police lab. No seminal material was found, but amylase was found on one pair of underwear. "Amylase is a digestive enzyme" that "converts starches into sugars" and is found in "saliva and other bodily fluids but [in] especially high concentrations through the digestive tract." Tr. pp. 228-29. A DNA analysis from the underpants showed a mixture of S.G.'s profile with another individual. Although the DNA from the other individual could not be matched with Guthrie, neither could he be excluded as a possible contributor.

Hammond Police Detective Christopher Matanovich ("Detective Matanovich") interviewed Guthrie on July 14, 2008. When asked about "what he knew" about the

alleged sexual molestation, Guthrie did not directly deny the allegations but did claim that he had caught his son A.G. and S.G. "touching each other." Tr. p. 198. He denied sleeping with the children and denied that Christine had ever called him about S.G.'s allegations.

The State charged Guthrie with Class A and Class C felony child molestation on July 31, 2008. On January 14, 2010, the State filed a motion to admit S.G.'s videotaped statement under the protected persons statute. The trial court held a hearing on the motion on January 15, 2010, and found S.G. unavailable to testify and further found that the videotaped statement was sufficiently reliable to admit. A jury trial was held an January 19-21, 2010. At the conclusion of the trial, the jury found Guthrie guilty as charged. At a sentencing hearing held on February 26, 2010, the trial court sentenced Guthrie to thirty-five years on the Class A felony conviction and a concurrent term of five years on the Class C felony conviction. Guthrie filed his notice of appeal on March 29, 2010.

Discussion and Decision

On appeal, Guthrie claims that the trial court abused its discretion in admitting into evidence the videotaped statements S.G. made during the interview with Sgt. Gruszka. The decision to admit evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Taylor v. State, 841 N.E.2d 631, 634 (Ind. Ct. App. 2006) (citing Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003)). A trial court abuses its discretion where its decision is clearly against the logic and effect of the facts and circumstances before it or it misinterprets the law. Id. Because "the protected person

statute impinges upon the ordinary evidentiary regime" a trial court's responsibilities thereunder carry with them what our supreme court in Carpenter referred to in another context as "'a special level of judicial responsibility.'" 786 N.E.2d at 703 (quoting Cox v. State, 706 N.E.2d 547, 551 (Ind.1997)); accord Taylor, 841 N.E.2d at 634.

Indiana Code section 35-37-4-6 (2004), also known as the "protected person statute" or the "child hearsay statute," provides a list of certain conditions under which evidence that would otherwise be inadmissible will be allowed in cases involving certain crimes against "protected persons." J.A. v. State, 904 N.E.2d 250, 255 (Ind. Ct. App. 2009), trans. denied. Among the crimes to which the protected person statute applies are sex crimes under Indiana Code chapter 35-42-4, which includes child molesting under Indiana Code section 35-42-4-3 (2004). J.A., 904 N.E.2d at 255 n.4 (citing I.C. § 35-37-4-6(a)(1)). A "protected person" is defined to include "a child who is less than fourteen (14) years of age." Id. (citing I.C. § 35-37-4-6(c)(1)).

The protected person statute provides that 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 a listed group of offenses that includes child molesting, that was allegedly committed against the person; and (3) is not otherwise admissible into evidence, is admissible into evidence in a criminal action for a listed group of offenses that includes child molesting, if the requirements of subsection (e) are met. Id. (citing I.C. § 35-37-4-6(d)).

Subsection (e) of the protected person statute, which is at issue here, provides:

> 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; or
> (B) is found by the court to be unavailable as a witness for one (1) of the following reasons:
> (i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate. . . .

I.C. § 35-37-4-6(e).[1] Factors to be considered by the trial court in determining the reliability of the statement include: the time and circumstances of the statement, whether there was a significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age-appropriate terminology, spontaneity, and repetition. Taylor, 841 N.E.2d at 635.

Here, Guthrie claims that the trial court abused its discretion in concluding that S.G.'s videotaped statements were sufficiently reliable to be admissible under the protected person statute. First, Guthrie complains that there was no evidence regarding when the molestation took place, noting that the charging information alleged that

[1] Subsection (f) of the protected person statute provides that "[i]f a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination: (1) at the hearing described in subsection (e)(1); or (2) when the statement or videotape was made." Guthrie makes no argument that S.G. was not available for cross-examination.

Guthrie committed the acts of molestation "between January 1, 2008 and July 5, 2008." Guthrie therefore argues that S.G.'s statements could have occurred months after her molestation.

The State claims that it could reasonably be inferred from the time and circumstances of S.G.'s initial accusation that the molestation had occurred during the visitation that had occurred the prior day. The State notes that S.G. had just returned from staying the night with Guthrie, and the children, including S.G. slept in Guthrie's bed. The State also notes that the day she returned to her mother's care, S.G. spontaneously told her mother, "Daddy had sex with me." Tr. p. 97.

However, in Carpenter, supra, our supreme court concluded that State had "effectively conceded" that there was a period exceeding six weeks during which the alleged molestation could have taken place by alleging in the charging information that the offense occurred "on or before April 1, 2000 and May 19, 2000." 786 N.E.2d at 703. Thus, it could be said that the State, by alleging in the charging information that the acts of molestation occurred over a six month period, effectively conceded that the precise time of the molestation was unknown.

Guthrie also claims that S.G.'s statements were unreliable because the interview with Sgt. Gruszka took place four days after the statement to S.G.'s mother. This, Guthrie claims, "created the potential for an adult to plant a story or cleanse one." Carpenter, 786 N.E.2d at 703. We note, however, that S.G.'s statement to her mother was spontaneous and unprompted. And S.G. repeated her claims even after she was chastised by her mother for making such a claim against her father.

More importantly, even if we were to agree with Guthrie that any delay in S.G.'s statements weighs against their admissibility, the time between the molestation and the statement is just one factor to be considered and is not dispositive. See Taylor, 841 N.E.2d at 636; Trujillo v. State, 806 N.E.2d 317, 328 (Ind. Ct. App. 2004). And here, the other facts and circumstances surrounding S.G.'s statements support the trial court's finding of reliability.

The trial court specifically noted that, with regard to the nature of the questioning, the interviewer did not ask any suggestive or leading questions and did not coach S.G. in any way; instead, "[e]verything was put upon the child . . . for the sole purpose of trying to bring out words from the child herself." Tr. p. 51. And S.G. consistently used age-appropriate terminology. Although Guthrie argues that a six year old would not use the term "having sex," when asked to explain what she meant by this, S.G. used terminology very appropriate for her young age. As noted, S.G.'s statements were spontaneous, and she repeated them in a very consistent manner. Therefore, even if the time of S.G.'s statements weighed against their reliability, we cannot say, considering the other relevant factors, that the trial court abused its discretion in concluding that S.G.'s statements were reliable.

We further note that Guthrie claims only that S.G.'s videotaped statement was improperly admitted. As noted by the State, S.G.'s statements regarding Guthrie's molestation were admitted through the testimony of several other witnesses, including S.G's mother Christine, Officer Wheatley, Sgt. Gruszka, and Dr. Choi, who was S.G.'s psychologist. "[T]he admission of a videotape may be harmless error if it is no more than

cumulative of the statements of a witness and the tape is not the only direct evidence of the events." Taylor, 841 N.E.2d at 637. Given the other evidence and testimony regarding S.G.'s statements that Guthrie molested her, concerning which no objection was raised at trial and which are not challenged on appeal, we conclude that any error in the admission of the videotape would be harmless. See id. (concluding that any error in admission of child molestation victim's videotaped statement would have been harmless given the testimony of three other witnesses, including the victim's mother, the person who conducted the interview, and the victim herself).

Affirmed.

BAKER, C.J., and NAJAM, J., concur.