

Case Summary

Jeremy James Lahr appeals his convictions for three counts of Class A felony child molesting, two counts of Class C felony child molesting, one count of Class D felony fondling in the presence of a minor, and one count of Class D felony dissemination of matter harmful to minors. Lahr contends that the trial court erred in admitting the forensic interviewer's testimony into evidence because it improperly bolstered the victim's credibility and violated the Indiana Supreme Court's opinion in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009), which elaborated on the permissible use of statements under the Protected Person Statute. Concluding that the forensic interviewer did not cross the line into impermissible Indiana Evidence Rule 704(b) vouching and that there is not a violation of *Tyler*, we affirm the trial court.

Facts and Procedural History

K.M. was born in April 1998. Lahr began dating K.M.'s mother, C.C., when K.M. was six years old. When K.M. was seven years old, she and her mother moved in with Lahr and his two sons. Between April 2004 and December 2008, Lahr molested K.M. On one occasion, Lahr pulled down his and K.M.'s pants. He then attempted to stick his "private" in K.M.'s "butt." Tr. p. 120-21. Lahr also touched the "inside" of K.M.'s "private." *Id.* at 122. Lahr then ejaculated and cleaned himself off with a towel. Lahr did this to K.M. "every time" he woke her up for school. *Id.* at 123. On other occasions, Lahr kissed K.M. on the mouth and licked her breasts. Sometimes when K.M. and Lahr were in the computer room, Lahr showed K.M. pornography on the computer and stuck his fingers inside K.M.'s vagina. Lahr also made K.M. put her mouth on his

penis and masturbate him with her hand until he ejaculated. *Id.* at 129-30. Lahr told K.M. not to tell anyone.

On December 12, 2008, Fort Wayne Community Schools nurse Suzette Moore talked to K.M. about good and bad touches. K.M. cried and said that her mother's boyfriend had been touching her vaginal area. Nurse Moore immediately called the Department of Child Services.

DCS case manager Daniel Whiteley went to K.M.'s home that very day. Lahr answered the door, and Whiteley indicated why he was there. Lahr said he wanted to be present during Whiteley's interview with K.M. and her mother C.C., but Lahr eventually agreed to leave the house. After Whiteley spoke with K.M. and C.C., C.C. said that she and K.M. would immediately leave the house and go stay with a relative.

Forensic interviewer Julie DeJesus interviewed K.M. at the Child Advocacy Center one week later on December 19, 2008. K.M. was ten years old at the time. K.M. told DeJesus that Lahr had molested her on numerous occasions.

The State eventually charged Lahr with three counts of Class A felony child molesting (deviate sexual conduct), Ind. Code § 35-42-4-3(a), two counts of Class C felony child molesting (fondling or touching), *id.* § 35-42-4-3(b), one count of Class D felony fondling in the presence of a minor, *id.* § 35-42-4-5(c), and one count of Class D felony dissemination of matter harmful to minors, *id.* § 35-49-3-3(a)(2).

A jury trial was held in April 2010. At trial, twelve-year-old K.M. testified about the molestations. On cross examination, defense counsel asked K.M. details about her interview with DeJesus. DeJesus then testified that during her interview with K.M., K.M.

made a disclosure of sexual assault by Lahr. Tr. p. 181. DeJesus said that K.M. “recounted multiple incidences” of “[m]ultiple different types of abuse.” *Id.* DeJesus, however, did not elaborate on the details of K.M.’s disclosures. When the State asked DeJesus if she was taught to look for signs of coaching during her training, defense counsel immediately objected on grounds that such testimony would improperly bolster K.M.’s credibility. The trial court overruled defense counsel’s objection but instructed the State to “be careful.” *Id.* at 184. The following colloquy then occurred between the State and DeJesus:

Q What kind of things are you taught to look for to be aware of in your interviews[?]

A We’re taught to look for signs of coaching and by signs of coaching would be if the child has been coached the child can recall or recount more than one incident of abuse. They can’t provide details. They’re very inconsistent throughout the interview. If they do say that they’ve been abused more than one time, the details in those incidences are very similar if not exactly the same.

Q So, in other words, if they say . . . to make sure I understand, . . . if they said it happened, you know ten times then everything remained the same thing every time.

A Uh-hum. (indicating affirmative response.)

Q Okay. During your interview with [K.M.] did you observe any of those incidents that you’ve talked about?

[At this point defense counsel objected again to preserve the record. Defense counsel argued improper bolstering and a violation of the Indiana Supreme Court’s opinion in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009). The trial court overruled the objection.]

Q During your interview with [K.M.], did you see any signs of inaccuracy or coaching that you were taught to look for to be aware of[?]

A No, I did not.

Q And you indicated this was the only time you met with her, is that correct?

A That's correct.

Id. at 184-86.

The jury found Lahr guilty as charged, and the trial court sentenced him to an aggregate term of sixty years. Lahr now appeals.

Discussion and Decision

Lahr raises one issue on appeal. He contends that the trial court erred in admitting DeJesus's testimony that she did not see any signs of coaching or inaccuracy during her interview with K.M. because such testimony improperly bolstered K.M.'s credibility pursuant to Indiana Evidence Rule 704(b) and violated the Indiana Supreme Court's opinion in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009).

A trial court has broad discretion in ruling on the admission or exclusion of evidence. *Kimbrough v. State*, 911 N.E.2d 621, 631 (Ind. Ct. App. 2009). The trial court's ruling on the admissibility of evidence will be disturbed on review only upon a showing of an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's ruling is clearly against the logic, facts, and circumstances presented. *Id.* Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. Ind. Evidence Rule 103.

Evidence Rule 704(b) provides that “[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” However, our Supreme

Court has recognized “that there is a special problem in assessing the credibility of children who are called upon as witnesses to describe sexual conduct.” *Lawrence v. State*, 464 N.E.2d 923, 925 (Ind. 1984), *abrogated on other grounds by Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992); *Krumm v. State*, 793 N.E.2d 1170, 1178-79 (Ind. Ct. App. 2003). This is because such children “often employ unusual words to describe sex organs, and the manner in which they function, and have lively imaginations which can color their testimony. Some are easily influenced by suggestions of parents and other adults.” *Lawrence*, 464 N.E.2d at 925.

In *Lawrence*, the Indiana Supreme Court considered the testimony of a clinical social worker who testified that an alleged molesting victim had “a strong ability to know what happens to her” and had “a great anxiety on (her) part to be very sure she was telling the truth very precisely.” *Id.* The defendant argued that the trial court abused its discretion by admitting the testimony over his objection. *Id.* at 924-25. Our Supreme Court held as follows:

Whenever an alleged child victim takes the witness stand in such cases, the child’s capacity to accurately describe a meeting with an adult which may involve touching, sexual stimulation, displays of affection and the like, is automatically in issue, whether or not there is an effort by the opponent of such witness to impeach on the basis of a lack of such capacity. The presence of that issue justifies the court in permitting some accrediting of the child witness in the form of opinions from parents, teachers, and others having adequate experience with the child, that the child is not prone to exaggerate or fantasize about sexual matters. Such opinions will facilitate an original credibility assessment of the child by the trier of fact, so long as they do not take the direct form of “I believe the child’s story”, or “In my opinion the child is telling the truth.” As we read the challenged testimony of the social worker in this case it did not take this direct form, and was thus properly permitted by the trial court to be heard by the jury.

Id. at 925.

The Indiana Supreme Court later analyzed the case of a psychologist testifying at trial about the alleged molestation of a child with autism. *Carter v. State*, 754 N.E.2d 877, 882 (Ind. 2001). The psychologist testified that children with autism generally have trouble deliberately deceiving others. *Id.* She substantiated this conclusion by describing a study in which children with autism could follow an instruction to lock a box to prevent a “thief” from taking the candy inside but could not lie on command and tell the “thief” that there was no candy in the box. *Id.* Our Supreme Court stated that “[a]lthough [the psychologist] did not at any point directly state an opinion that [the victim] was telling the truth, the jury could easily have drawn a logical inference: autistic children do not deliberately lie, [the victim] is autistic, therefore [the victim] is not lying.” *Id.* The Court concluded:

[B]ased on the entire context of the expert’s testimony that she came close to, but did not cross the line into impermissible Rule 704(b) vouching. Although her statements that autistic children find it difficult to deliberately deceive others may have been persuasive, the jury still had to draw its own inference as to whether [the victim’s] story was an accurate account.

Id. at 882-83.

In 2003, this Court applied *Lawrence* and *Carter* in the case of *Krumm*. In *Krumm*, the psychologist testified that the alleged molesting victim was “firmly based in reality,” she found no indication that the victim had difficulty distinguishing fantasy from reality, the victim had a “very balanced ability” to store and retrieve memories, and the victim’s account was consistent with the other evidence in the case. 793 N.E.2d at 1178. In addition, the forensic interviewer testified that details were important “because there are times when nothing has happened” and the victim was able to provide details. *Id.*

We concluded that the psychologist's and forensic interviewer's testimony did not cross the line into impermissible vouching. *Id.* at 1179. We reasoned that although their testimony may have been persuasive, “neither directly commented on the credibility of [the victim's] testimony.” *Id.*

The same can be said here. DeJesus testified concerning what signs to look for in determining whether a child has been coached. DeJesus then testified that she did not “see any signs of inaccuracy or coaching” during her interview with K.M. DeJesus did not directly comment upon K.M.'s credibility. Rather, the information from DeJesus “facilitate[d] an original credibility assessment of the child by the trier of fact” and did not “take the direct form of ‘I believe the child's story’, or ‘In my opinion the child is telling the truth.’” *Lawrence*, 464 N.E.2d at 925. The jury still had to draw its own inference as to whether K.M. was telling the truth. *Carter*, 754 N.E.2d at 883. Because DeJesus did not cross the line into impermissible Evidence Rule 704(b) vouching, the trial court did not abuse its discretion in admitting DeJesus's testimony. *See also Curtis v. State*, 905 N.E.2d 410, 416 (Ind. Ct. App. 2009) (holding that a doctor's one-word response of “No” to a single question from the State—that is, whether the alleged molesting victims gave false positives—did not constitute improper vouching when placed in the context of a record that exceeded one thousand pages), *trans. denied*.

Lahr also argues that DeJesus's testimony violates the Indiana Supreme Court's recent opinion in *Tyler*, which elaborated on the permissible use of statements under the Protected Person Statute (“PPS”). 903 N.E.2d at 467. In *Tyler*, all five child molesting victims testified at trial. *Id.* at 465. In addition, videotaped interviews of three of the

victims were admitted into evidence at trial. *Id.* Our Supreme Court used its supervisory powers to hold that “if the statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both except as authorized under the Rules of Evidence.” *Id.* at 467. The Court stated that “[i]f the person is able to testify live without serious emotional distress such that the protected person cannot reasonably communicate, that is clearly preferable.” *Id.*

Here, K.M. testified at trial. Lahr concedes that the State did not present a prerecorded statement of DeJesus’s interview with K.M. at trial. Nevertheless, Lahr argues that because DeJesus testified that “K.M. was not coached and that her testimony did not contain inaccuracies,” the State was able to get in through the “side door” what *Tyler* prohibits coming in through the front door. Appellant’s Br. p. 18. But *Tyler* prohibits statements from a protected person when that protected person also testifies at trial. DeJesus’s testimony that she did not see any signs of inaccuracy or coaching during her interview with K.M. is not a statement from a protected person. Rather, it is DeJesus’s conclusion based on her training, experience, and observation of K.M. during the interview.

We acknowledge that DeJesus also testified at trial that K.M. told her during the interview that K.M. “recounted multiple incidences” of “[m]ultiple different types of abuse” from Lahr. Importantly, however, DeJesus did not delve into the details of K.M.’s statements. Rather, DeJesus testified generally about the process of interviewing child molesting victims and specifically about how her interview with K.M. flowed.

DeJesus did not disclose any details of K.M.'s statements whatsoever other than the fact that K.M. implicated Lahr in the multiple molestations. We find that this type of general, background information from a forensic interviewer about his or her interview with a protected person is not what *Tyler* was designed to prohibit. There is no violation of *Tyler*.

Moreover, we note that defense counsel is the one who first introduced the subject of what K.M. said during the interview with DeJesus. That is, during cross examination, defense counsel asked K.M., the first witness at trial, what she told (and did not tell) DeJesus during the interview. *See* Tr. p. 144-46. We therefore affirm the trial court.

Affirmed.

BAKER, J., and BARNES, J., concur.