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IN THE COURT OF APPEALS OF INDIANA

WILLIAM WEINBERG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0909-CR-848
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0811-FC-116

May 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

William Weinberg appeals his convictions for three counts of class C felony child molesting.[1]

We affirm.

ISSUES

1. Whether the trial court abused its discretion in excluding evidence.

2. Whether there is sufficient evidence to support the convictions.

FACTS

A.F., who was born in August of 1996, lived with her mother ("Mother") in Wisconsin. Mother and Weinberg began dating in February of 2002. Shortly thereafter, Weinberg moved in with Mother and A.F. In July of 2002, Weinberg, Mother, and A.F. moved to Fishers, Indiana, after Mother and Weinberg purchased a business. In July of 2003, they moved to Noblesville. Mother and Weinberg married in November of 2003.

In February of 2005, Mother received a telephone call from the Hamilton County Department of Child Services ("DCS"). DCS informed Mother that A.F. "was overheard in the bathroom at school saying that [Weinberg] told her he wanted to have sex with her." (Tr. 268). At DCS's request, Mother took A.F. to Chaucie's Place for an investigative interview.[2]

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[1] Ind. Code § 35-42-4-3.

[2] According to Chaucie's Place's mission statement, it "provides a neutral, child-friendly, home-like environment where a single, comprehensive investigative interview can take place in cases of alleged child sexual or physical abuse and neglect." http://chauciesplace.org/ (last visited Mar. 12, 2010).

A.F. informed the investigator that Weinberg would "grab [her] butt" as she walked down the basement stairs. (Tr. 309). She further told the investigator that Weinberg touched her in the kitchen and living room while they practiced martial arts; was never undressed when he touched her; and touched her over her clothes. She also informed the investigator that the touching only lasted approximately five seconds. The State did not file charges against Weinberg.

Following the initial investigation, Mother and Weinberg briefly separated. Several days later, Weinberg returned to the family residence. Mother, Weinberg, and A.F. remained in the residence until Mother and A.F. moved back to Wisconsin in August of 2005 because "[t]hings weren't going very well with the marriage . . . ." (Tr. 229).

During the following two years, Weinberg visited Mother and A.F. on holidays and every other weekend; "he would come on the weekends that [Mother] didn't work." (Tr. 241). During this time, Mother and Weinberg attempted to sell their business and house in Indiana because she and Weinberg had reconciled. Mother and A.F. moved back to Indianapolis for approximately one month in 2007. They, however, returned to Wisconsin in September of 2007 due to Weinberg's "drinking" and financial difficulties related to the business. (Tr. 247).

In March of 2008, A.F. asked Mother "why [Weinberg] wasn't put in jail for what he did." (Tr. 249). Mother told her that "at the time that the first investigation happened, they didn't believe her." (Tr. 249). Mother did not pursue the issue further at that time

because she was in the process of filing for bankruptcy and "needed [Weinberg] to cooperate with getting all the paperwork for the bankruptcy." (Tr. 250).

In June of 2008, when A.F. was almost twelve-years old, Mother took her to Indiana for a visit. During the visit, she left A.F. alone with Weinberg. At no time did A.F. express any fear of Weinberg. In September of 2008, Mother took A.F. to a counselor at a sexual assault crisis center. A.F. also spoke with Appleton Police Department Officer Polly Olson. Officer Olson contacted Noblesville Police Department Detective Marc Cruea regarding A.F.'s allegations.

Detective Cruea recorded interviews with Weinberg on October 23, October 24, October 27, and November 12, 2008. The interviews on October 23 and 24 each lasted approximately three hours. Weinberg admitted that he and A.F. would play a game called, "what's in it for me," or "have I got a deal with you." (Tr. 365). During the game, A.F. would offer to do something for Weinberg in exchange for a toy or trip to the mall. Weinberg described one incident when A.F. "offered to give him a massage anywhere he wanted, not just on his back," in exchange for a trip to the mall. (Tr. 369). Weinberg admitted that A.F. "might rub his back or do something for him and he would buy her [a] doll." (Tr. 370). Weinberg, however, denied that the touching ever was sexual in nature.

On November 10, 2008, the State charged Weinberg with three counts of class C felony child molesting. The State alleged that on or between November 30, 2003, and

December 31, 2004, Weinberg submitted to the fondling of his penis by A.F. on two occasions; and that he fondled A.F.'s vagina on one occasion.

The trial court commenced a three-day jury trial on May 18, 2009. A.F. testified that in 2003 and 2004, Weinberg would buy her toys if she touched his "privates." (Tr. 300). According to A.F., she would agree to touch Weinberg for a certain length of time, usually no more than fifteen minutes. Weinberg then "would go upstairs and [A.F.] would follow him and then he would be on the bed and then [A.F.] would come in and start . . . rubbing his privates," (tr. 301), by holding her hand around "it" and "[r]ub[bing] up and down." (Tr. 302). She continued to do so until "[t]his white stuff that looked like glue came out of it," (tr. 302), or "time was up[.]" (Tr. 304). She stated that she "would watch the clock to see how long [she] had and then when time was up, [she] would stop." (Tr. 304). She testified that Weinberg wore "[a] shirt and that's it" during these episodes. (Tr. 301).

A.F. further testified that sometimes Weinberg would touch her. She testified that she would lie on the bed in the master bedroom, wearing only a shirt, and "then he would come in and start and then [she] would watch the clock again and then when time was up, [she] would say stop." (Tr. 306). Afterwards, she would "get the new toy." (Tr. 307). According to A.F., she did not reveal these incidents during the 2005 interview because she "didn't really know it was wrong." (Tr. 310).

During the State's case-in-chief, the trial court admitted into evidence the recordings made during Weinberg's interviews with police on February 8, 2005, and

October 27, 2008. The State did not seek to admit into evidence the recordings made during Detective Cruea's interviews with Weinberg on October 23, and 24, 2008.[3] Rather, Detective Cruea testified regarding statements made by Weinberg during those two interviews.

Prior to cross-examination of Detective Cruea, Weinberg's counsel sought admission of the recordings made on October 23, and 24, 2008, pursuant to Evidence Rule 106. The trial court denied Weinberg's request; Weinberg's counsel therefore made an offer of proof.

The jury found Weinberg guilty as charged. Following a sentencing hearing on June 15, 2009, the trial court sentenced Weinberg to three consecutive sentences of four years each for a total sentence of twelve years[4], with one year suspended on each count.

DECISION

1. Exclusion of Evidence

Weinberg asserts that the trial court abused its discretion in excluding the recordings made during his two interviews with Detective Cruea on October 23, and 24, 2008. Specifically, he argues that he was entitled to introduce the entire recordings pursuant to the doctrine of completeness because "the excluded interviews provided more

[3] Both of these interviews each lasted approximately three hours.

[4] We remind Weinberg's counsel that Appellate Rule 9(J) requires documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) be filed in accordance with Trial Rule 5(G). Presentence investigation reports are excluded from public access and are confidential. *See* Ind. Administrative Rule 9(G)(1)(viii). Presentence investigation reports therefore shall be "tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential." Ind. Trial Rule 5(G)(1).

details about the relationship between [Weinberg] and A.F. as well as more explanation about the allegations." Weinberg's Br. at 5.

> We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (internal citations omitted), *reh'g denied*.

Regarding the admission of recorded statements, Indiana Evidence Rule 106 provides:

> When a . . . recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other . . . recorded statement which in fairness ought to be considered contemporaneously with it.

"The doctrine's 'purpose is to provide context for otherwise isolated comments when fairness requires it.'" *Sanders v. State*, 840 N.E.2d 319, 323 (Ind. 2006) (quoting *Evans v. State*, 643 N.E.2d 877, 882 (Ind. 1994), *reh'g denied*).

> The doctrine is designed to avoid misleading impressions caused by taking a statement out of its proper context or otherwise conveying a distorted picture by the introduction of only selective parts of the document. A court need not admit the remainder of the statement, or portions thereof, that are neither explanatory of nor relevant to the portions already introduced.

Barnett v. State, 916 N.E.2d 280, 286 (Ind. Ct. App. 2009) (internal citations omitted), *trans. denied*.

Here, Detective Cruea testified regarding the statements made by Weinberg on October 23, and October 24, 2008. The State, however, did not offer the recordings of these statements into evidence. Thus, Evidence Rule 106 does not apply to the admission of these recordings. *See id.* (finding Evidence Rule 106 inapplicable where neither the videotape nor transcript of a conversation is offered into evidence); *Lewis v. State*, 754 N.E.2d 603, 606 (Ind. Ct. App. 2001), *trans. denied*.

The common-law doctrine of completeness, however, "applies not only to writings but oral conversations too." *Farmer v. State*, 908 N.E.2d 1192, 1200 (Ind. Ct. App. 2009). "'Therefore, it will always be proper to cross-examine and to impeach an officer testifying about a conversation with a defendant.'" *Id.* (quoting *Lewis*, 754 N.E.2d at 607).

Given the facts of this case, any error in excluding the recorded statements clearly was harmless. Weinberg extensively cross-examined Detective Cruea regarding the statements made by Weinberg. Furthermore, the jury heard extensive testimony from Weinberg regarding the circumstances surrounding his statements and the events described therein. Thus, the excluded recordings would have been merely cumulative of other evidence presented to the jury. We therefore cannot say that the exclusion of the evidence affected Weinberg's substantial rights. Accordingly, any error in the exclusion of the recorded statements was harmless. *See Allen v. State*, 787 N.E.2d 473, 479 (Ind.

Ct. App. 2003) ("Where the wrongfully excluded [evidence] is merely cumulative of other evidence presented, its exclusion is harmless error."), *trans. denied*.

2. Sufficiency of the Evidence

Weinberg asserts there is insufficient evidence to support his convictions. We disagree.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted). A conviction of child molesting may rest solely upon the uncorroborated testimony of the alleged victim. *Baber v. State*, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007), *trans. denied*.

Weinberg argues that the evidence does not support his conviction because "[t]estimony from A.F. was incredibly dubious . . . ." Weinberg's Br. at 13. "Under the incredible dubiosity rule, a court will impinge on the jury's responsibility to judge the credibility of the witness only when it is confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Altes v.*

State, 822 N.E.2d 1116, 1122 (Ind. Ct. App. 2005), *trans. denied*. We will reverse a conviction where a "'sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence . . . .'" *Id.* (quoting *White v. State*, 706 N.E.2d 1078, 1079 (Ind. 1999)). The application of the rule is rare, however, "and is limited to cases where the sole witness' testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Id.*

Weinberg maintains that A.F.'s testimony was incredibly dubious because it conflicted with her pre-trial statements to investigators. The incredible dubiosity rule, however, does not apply to conflicts that exist between trial testimony and statements made before trial. *Buckner v. State*, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006). Rather, it only applies to conflicts in trial testimony. *Id.* We therefore find this argument unavailing.

Moreover, we cannot say that A.F.'s testimony was equivocal and therefore dubious. She did not deny that the touching described in February of 2005 occurred. Rather, she testified that Weinberg touched her both in the manner she described in February of 2005 and the manner she described during trial.

Any discrepancy between A.F.'s statements in 2005 and her testimony in 2009 is reasonable given the difference in her age and the passage of time. *See Fajardo v. State*, 859 N.E.2d 1201, 1209 (Ind. 2007). We decline to invoke the incredible dubiosity rule where Weinberg's counsel cross-examined A.F., and the jury was able to independently evaluate her testimony and judge her credibility.

Weinberg further asserts that A.F.'s testimony is "unbelievable and incredibly dubious," (Weinberg's Br. at 14), because A.F. and Mother continued to live with him after 2005; "A.F.'s behavior toward [him] was no different after the 2005 allegations than it was before"; and A.F.'s behavior was not of "someone who was scared of [him]." Weinberg's Br. at 15. The record shows that A.F. testified that no offenses occurred after February of 2005; she also testified that she was never afraid of Weinberg.

There is nothing so inherently improbable, equivocal, or dubious about A.F.'s testimony that no reasonable person could believe her as, at the time of the offenses, she was a young child; in the care of her stepfather; admittedly did not understand at the time that Weinberg's actions were wrong; and "was just looking ahead to getting the new toy" promised to her by Weinberg. (Tr. 311). Furthermore, it would not appear unreasonable that after Weinberg was put on notice of the sexual abuse allegation that he would not attempt to commit the offense again.

Weinberg is asking this Court to reweigh the evidence and judge A.F.'s credibility, which we will not do. We find the evidence presented at trial is sufficient to support his conviction.

Affirmed.

BAKER, C.J., and CRONE, J., concur.