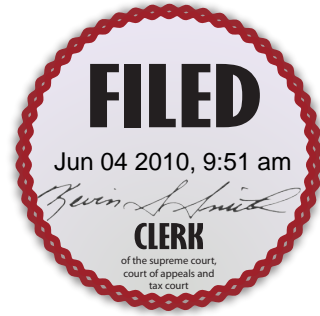


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUAN ONTIVEROS,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0910-CR-608
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0902-FA-024531

JUNE 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Juan Ontiveros appeals his two convictions for child molesting, both as class C felonies.¹ We affirm.

ISSUES

Ontiveros raises two issues, which we restate as:

- I. Whether the trial court prevented Ontiveros from making an offer of proof;
and
- II. Whether the trial court abused its discretion by refusing to admit a videotaped interview into evidence.

FACTS

During the investigation of this case, Detective Anna Humkey of the Indianapolis Metropolitan Police Department called Ontiveros on February 10, 2009, at approximately 10:00 am. Detective Humkey asked Ontiveros if he could come in for an interview. Ontiveros told Detective Humkey that he was preparing to leave for Mexico. Over the course of the phone call, Ontiveros changed his time of departure from sometime that week to the next day, then to that night, then to noon that day. Ontiveros told Detective Humkey that his father, who lived in Mexico, was ill. Detective Humkey convinced Ontiveros to speak with her in person and drove to his residence to pick him up.

When she arrived at Ontiveros' residence, Ontiveros appeared to be in a rush. As they were leaving for the police station, Ontiveros' relatives drove up to take Ontiveros to

¹ Ind. Code § 35-42-4-3.

the bus station so that he could leave for Mexico. Ontiveros put a large duffel bag in his relatives' car before going with Detective Humkey. Detective Humkey asked Ontiveros how long he would be in Mexico, and Ontiveros replied that he did not know. Ontiveros said that he was taking with him everything that he owned because he did not know when he would be back.

Ontiveros and Detective Humkey went to the police station for the interview. At the end of the interview, Detective Humkey arrested Ontiveros. Detective Humkey had videotaped the interview, and a transcript of the interview was prepared.

At trial, the State called Detective Humkey to the stand. She testified about her telephone call with Ontiveros and meeting him at his residence. Detective Humkey also testified, over Ontiveros' objection, about some of what they discussed during the interview at the police station and stated that she arrested him after the interview. The State did not seek to introduce into evidence the videotape of the interview or the transcript of the interview.

During cross-examination, Ontiveros asked Detective Humkey if he had denied the allegations of molestation during the interview. Detective Humkey did not answer the question because the trial court sustained the State's objection that Detective Humkey's answer would be hearsay. Consequently, Ontiveros asked the trial court to admit the videotaped interview into evidence. The State objected on grounds of hearsay and foundation, and the trial court sustained the objection.

After the State rested, the trial court and the parties discussed the videotaped interview outside the jury's presence. Ontiveros expressed an intention to recall

Detective Humkey to the stand for the purpose of admitting the video and playing it for the jury. Ontiveros argued that the entire video was relevant to Ontiveros' state of mind and the circumstances surrounding his trip to Mexico. The trial court concluded that Ontiveros could play for the jury "those portions of the tape that complete any of the questioning asked of this detective" but refused to allow Ontiveros to play the entire tape. Tr. p. 176.

Shortly thereafter, Ontiveros again asked the trial court for leave to play the entire tape to the jury. The trial court reaffirmed its ruling that Ontiveros could play portions of the video that completed the questioning of Detective Humkey regarding Ontiveros' interview but could not play the entire tape. At that point, Ontiveros asked to make an offer of proof and to submit the videotaped interview as part of the offer. The trial court declined to view the entire videotape, which was an hour and forty-five (45) minutes long, and asked to review a transcript of the interview instead. Ontiveros, by counsel, stated:

MS. RUEMMELE: We believe the video actually is the best evidence. And we would—we'll have the—we'll be glad to admit both, and the Court can review, for purposes of our motion and our request to the Court—well, just—

MS. BLAIR: The transcript.

Tr. p. 179. Shortly thereafter, Ontiveros told the trial court, "we would be willing to just use the transcript with respect to the statements regarding Mexico and as to whether the defendant made any admissions during the interview." Tr. p. 180.

Later in the discussion, the trial court again stated, "I will allow you to ask—or to do the transcript or the video with respect to that portion of the statement that talks about

Mexico and that whole circumstance.” Tr. p. 188. The trial court asked Ontiveros, “[a]re you going to try to introduce the—the transcript, or are you just going to ask [Detective Humkey] questions from it?” Tr. p. 191. Ontiveros responded, by counsel, “I can just ask her.” *Id.* Ontiveros then called Detective Humkey to the stand and questioned her about her interview of Ontiveros using the transcript of the interview. Ontiveros did not seek to introduce the videotape or the transcript into evidence. Next, Ontiveros testified on his own behalf. A jury found Ontiveros guilty as charged.

DISCUSSION AND DECISION

I. OFFER OF PROOF

An offer to prove is an offer from counsel regarding what a witness would say if he or she was allowed to testify. *Bradford v. State*, 675 N.E.2d 296, 301 (Ind. 1996), *reh’g denied*. Offers to prove are governed by Indiana Rule of Evidence 103, which provides, in relevant part:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

Rule 103 further provides with respect to offers of proof, “[t]he court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon.”

The purpose of an offer to prove is to preserve for appeal the trial court’s allegedly erroneous exclusion of evidence. *Duso v. State*, 866 N.E.2d 321, 324 (Ind. Ct. App.

2007). The offer to prove can also aid the trial court in ruling on the objection. *Id.* It is error for a trial court to deny a party's attempt to make an offer of proof. *Id.*

Here, Ontiveros contends that the trial court improperly limited his offer of proof by refusing to include the videotaped interview in the offer. We disagree. We note that both the videotaped interview and the transcript of the interview have been included in the exhibits on appeal. Therefore, the purpose of Ontiveros' offer to prove, which was to preserve a claim of trial court error for appellate review by tendering the substance of excluded evidence, has been fulfilled. The trial court did not limit Ontiveros' offer of proof, and we find no error.²

II. EXCLUSION OF THE VIDEOTAPED INTERVIEW FROM EVIDENCE

We review the trial court's evidentiary rulings for an abuse of discretion. *See Evans v. State*, 643 N.E.2d 877, 884 (Ind. 1994), *reh'g denied*.

Ontiveros contends that the videotaped interview should have been admitted into evidence pursuant to the doctrine of completeness. According to this doctrine, when a party introduces part of a conversation or document, the opposing party is entitled to have the entire conversation or the entire instrument placed into evidence. *McElroy v. State*, 553 N.E.2d 835, 839 (Ind. 1990). This rule prevents one party from misleading the jury by presenting statements out of context. *Evans*, 643 N.E.2d at 881. The remainder of the statement or document is subject to the general rules of admissibility, however, and any portions found immaterial, irrelevant, or prejudicial must be redacted. *Id.*

² The trial court was willing to review the transcript as part of the offer of proof. Ontiveros does not cite any authority to support his claim that the trial court was obligated to review the videotape rather than the transcript. Because both items have been provided on appeal, thereby preserving Ontiveros' claim for review, it is unclear whether the trial court was required to review either the videotape or the transcript.

In *McElroy*, an officer testified as to incriminating statements that the appellant made during interrogation. 553 N.E.2d at 839. On cross-examination, the trial court barred the appellant from asking the officer about other statements the appellant had made during interrogation. *Id.* Our Supreme Court concluded that pursuant to the rule of completeness, the appellant should have been allowed to cross-examine the officer as to the remainder of the interrogation. *See id.* at 840. Nevertheless, the error was not a basis for reversal because the appellant had the opportunity to recite his recollection of the interrogation during his own direct examination. *See id.*

In this case, the trial court followed our Supreme Court's holding in *McElroy*. The trial court allowed Ontiveros to use the interview transcript to cross-examine Detective Humkey about Ontiveros' other statements in the interview. Thus, Ontiveros was permitted to have additional portions of the interview placed into evidence in the same manner in which the State presented the interview to the jury on direct examination. Furthermore, the trial court did not bar Ontiveros from presenting relevant portions of the videotaped interview to the jury. Instead, the trial court repeatedly held that Ontiveros would be allowed to present relevant excerpts from the videotaped interview if the excerpts completed Detective Humkey's testimony on direct examination. The trial court correctly determined that irrelevant material should have been redacted from the videotape, and it was Ontiveros' responsibility to provide a redacted version. Furthermore, we note that Ontiveros, like the appellant in *McElroy*, also had the opportunity to testify and provide his account of the interview. Therefore, the trial court did not abuse its discretion by refusing to admit the videotaped interview into evidence.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

MAY, J., and BROWN, J., concur.