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IN THE
COURT OF APPEALS OF INDIANA

LARRY LEFLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-1007-CR-479
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Kelli E. Fink, Judge
Cause No. 82C01-1001-FA-20

July 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Larry Lefler appeals his convictions for two counts of class A felony child molesting and one count of class C felony child molesting.[1]

We affirm.

ISSUE

Whether the trial court abused its discretion in excluding evidence.

FACTS

Ker.L. was born on February 19, 1994. Thereafter, Lefler established paternity and sporadically exercised visitation rights.

Kel.L. was born on July 28, 1994. Kel.L.'s mother and Lefler married in October of 1998. In 2000, Lefler adopted Kel.L. Lefler and Kel.L.'s mother divorced in 2002, after which Kel.L. visited Lefler approximately three weekends per month.

Generally, Ker.L. only visited Lefler during his visits with Kel.L. Visitation usually took place at Lefler's parents' residence, where Lefler lived. During the visits, Ker.L., Kel.L., and Lefler slept in Lefler's bedroom and all three often slept in the same bed or on the floor together.

When Ker.L. was twelve years old, she and Lefler went to sleep on the floor of his bedroom. When Ker.L. woke during the night, she felt Lefler's "finger . . . in [her] vagina." (Tr. 104). Ker.L. pushed Lefler's hand away, got up, and went to the bathroom. She then went to sleep in another room. "Some time later," Ker.L. told Kel.L. about the

[1] Ind. Code § 35-42-4-3.

incident but promised Kel.L. she would not report it because Kel.L. "was scared." (Tr. 105).

When Kel.L. was in the fifth grade, Lefler gave her a blue pill, claiming it was a vitamin. After taking the pill, Kel.L. became "really tired" and fell asleep. (Tr. 158). Kel.L. later woke up to find Lefler "pulling down [her] underwear." (Tr. 158). Lefler "pulled [her] closer to him," so they were lying face-to-face on their sides. (Tr. 159). Lefler then put his "private" on her "privates," (tr. 154), and moved "forwards and backwards." (Tr. 161). This occurred "[a]t least" one other time. (Tr. 162).

On October 20, 2009, Ker.L. told her mother, Crystal Elderbrook, that Lefler had molested her. That same night, Elderbrook's boyfriend reported Ker.L.'s allegations to law enforcement. The next day, a forensic interviewer at Vanderburgh County's Holly's House[2] interviewed both Ker.L. and Kel.L.

On January 5, 2010, the State charged Lefler with Count 1, class A felony child molesting; Count 2, class A felony child molesting; and Count 3, class C felony child molesting. The trial court commenced a three-day jury trial on March 29, 2010.

Lefler and his girlfriend, Debbie Powers, testified during trial. During Powers' testimony, Lefler's counsel attempted to elicit testimony regarding purported statements made by Kel.L. during a conversation with Powers regarding Powers' molestation as a child. The State objected, asserting hearsay. The trial court sustained the objection, after which Lefler's counsel offered to rephrase his questions.

[2] Holly's House is "a child and adult advocacy center for victims of intimate crimes." *See* http://www.hollyshouse.org (last visited June 14, 2011).

Subsequently, Lefler's counsel attempted to elicit testimony from Powers regarding alleged conversations with Kel.L. regarding Power and Lefler's relationship. The trial court sustained the State's objection based on hearsay.

As to Lefler's testimony, Lefler's counsel questioned him regarding an alleged argument he had with Ker.L. and Elderbrook regarding visitation. The State objected, asserting hearsay. The trial court sustained the objection.

The State again objected based on hearsay when Lefler's counsel attempted to elicit testimony regarding an alleged argument between Lefler and Ker.L. over Lefler's refusal to purchase her a vehicle and tanning package. When the trial court sustained the State's objection, Lefler's counsel offered to rephrase the question.

The jury found Lefler guilty on all counts. Following a sentencing hearing on June 30, 2010, the trial court sentenced Lefler to concurrent sentences of thirty years on Count 1, thirty years on Count 2, and four years on Count 3.

DECISION[3]

Lefler asserts that the trial court abused its discretion in excluding testimony regarding alleged hearsay statements. Specifically, he argues that Lefler and Powers "should have been allowed to testify as to what may have been said or relayed to them by" Elderbrook, Ker.L. and Kel.L., all of whom testified at trial. Lefler's Br. at 7.

[3] We note that the Argument section of Lefler's brief fails to adhere to Rule 46(A)(8)(d) of the Indiana Rules of Appellate Procedure, which provides that "[i]f the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected . . . ."

We first note that Lefler's counsel made no offer of proof when the trial court excluded the out-of-court statements made by Elderbrook, Ker.L. and Kel.L. Indiana Evidence Rule 103(a)(2) provides that

> [e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . 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 the questions were asked.

(Emphasis added).

An offer of proof "'is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded.'" *Woods v. State*, 892 N.E.2d 637, 641-42 (Ind. 2008) (quoting *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986)). "The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling." *Woods*, 892 N.E.2d at 642. "Equally important, it preserves the issue for review by the appellate court." *Id*.

Again, Lefler made no offer of proof; furthermore, the substance of the excluded testimony, along with its relevance to Lefler's defense, was not "apparent from the context within which the questions were asked." *See* Ind. Evidence Rule 103(a)(2). Lefler therefore has waived any alleged error in the exclusion of the testimony. Waiver notwithstanding, we cannot say that the trial court abused its discretion in excluding the testimony.

In this case, the trial court sustained the State's objections based on hearsay. "'Hearsay' is a statement . . . offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c). Generally, hearsay is inadmissible. Evid. R. 802.

Citing to Evidence Rule 801(d), however, Lefler argues that the statements purportedly made by Elderbrook, Ker.L., and Kel.L. were not hearsay because "the declarants were all witnesses at the trial called by the State, and subject to recall and cross-examination." Lefler's Br. at 8. We cannot agree.

Evidence Rule 801(d)(1)(A) provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition[.]

Thus, a prior statement by a witness may be introduced "only where the statement was given under oath and is inconsistent with trial testimony . . . ." *Cox v. State*, 937 N.E.2d 874, 878 n.1 (Ind. Ct. App. 2010).

Here, Elderbrook, Ker.L., and Kel.L. did not make the purported statements, which Lefler sought to introduce, under oath. Thus, we find no abuse of discretion in excluding the statements.

Affirmed.

RILEY, J., and BARNES, J., concur.