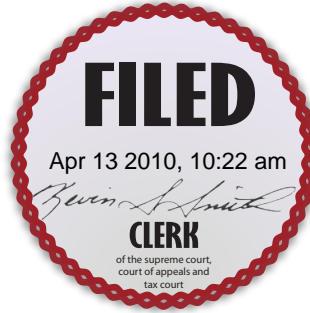


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

S. ADAM LONG
Long & Mathies Law Firm
Boonville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GLENN L. GIBSON,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 87A01-0910-CR-503

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0807-FA-63

April 13, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Glenn L. Gibson (Gibson), appeals his convictions for child molesting, as a Class A felony, Ind. Code § 35-42-4-3(a)(1); child molesting, as a Class C felony, I.C. § 35-42-4-3(b); and incest, a Class B felony, I.C. § 35-46-1-3.

We affirm.

ISSUES

Gibson presents three issues for our review, which we restate as:

- (1) Whether the trial court abused its discretion when it admitted confessions he made without being first advised of his *Miranda* rights;
- (2) Whether the trial court abused its discretion by admitting evidence of statements that Gibson made to his wife; and
- (3) Whether the trial court abused its discretion when it admitted evidence for which there was a gap in the chain of custody.

FACTS AND PROCEDURAL HISTORY

Gibson was married to Kim Gibson (Kim) and together they had three children: R.G., a fourteen-year-old girl at the time of trial; H.G., a thirteen-year-old girl at the time of trial; and D.G., a seventeen-year-old boy at the time of trial. During the summer of 2008, Kim received a phone call from Kim Gilliam (Gilliam), a family friend and R.G.'s scout leader. Gilliam asked Kim to stop by so they could speak. Gilliam informed Kim that she had learned from R.G. that Gibson had been sexually abusing H.G.

Kim took R.G. and H.G. to Gilliam's home and then went to her own home to confront Gibson. Gibson initially denied any sexual contact with either of his daughters, but when confronted with specific accusations he admitted "that there had been oral sex." (Transcript p. 73). After a very heated argument he agreed to leave the house, however, he did not leave until two days later. Both R.G. and H.G. stayed at Gilliam's home during this time.

Kim contacted a divorce attorney who insisted that she immediately report what she knew to the police, and called Detective Paul Kruse (Detective Kruse) of the Warrick County Sheriff's Department. Detective Kruse instructed Kim to have a medical examination performed on H.G. to determine if there were signs of sexual contact.

Detective Kruse interviewed both H.G. and R.G., and called Gibson who was then living in Ohio with his parents. Detective Kruse recorded two phone conversations between himself and Gibson. During a phone call, Gibson stated that there was never any abuse with his children, "[b]ut there was incest." (State's Exhibit Q, p. 4 of the transcribed phone call). He explained to Detective Kruse that R.G. would lay on top of him, and he would get an erection, but they never engaged in sexual touching. However, he had gone further with H.G. He "would ask her to touch [him] and she would[,] and it became more oral stuff between the two of [them.]" (State's Exh. Q, p. 11 of the transcribed phone call). Gibson admitted to performing oral sex on H.G. and that he had H.G. perform oral sex upon him. He further explained that there was "never any intercourse with [H.G.] until February of this year." (State's Exh. Q. p. 14 of the transcribed phone call).

And that wasn't really anything, it wasn't a . . . like you know all the way penetration kind of thing [] and I was like, "well I'm not gonna go in very far at all[,]" which I didn't . . . I mean that was, you know, the beginning of that kind of thing . . . its happened from probably about the second week of February until the end of February and that's when I tried to commit suicide[.]

(State's Exh. Q, p. 14 of the transcribed phone call).

In addition, Detective Kruse had Kim call Gibson twice and each time recorded the conversation without Gibson's knowledge. During the first phone call Gibson admitted to Kim that he had laid next to H.G. and:

it kind of happened but it wasn't . . . I mean it[']s not like, nothing like I went all the way inside her super far or nothing I mean I just barely went into her so it was . . . you know and I never, I didn't ejaculate inside her [or] any of that kind of stuff you know . . . but it was just . . . it wasn't anything real far that would have hurt her or anything like that [] actually she had started to . . . had uh . . . sucked on my penis[.]

(State's Exhibit L, p. 3 of the first transcribed phone call). Kim confronted Gibson further about how long "this stuff has been going on," and Gibson explained that he had previously "touched her and played with her but nothing significant, no penetration." (State's Exh. L, p. 3 of the first transcribed phone call). After denying any involvement with R.G., Gibson further explained that the events with H.G. "only happened 5 or 6 times probably[] penetration and oral stuff." (State's Exh. L, p. 6 of the first transcribed phone call). During the second phone call from Kim, Gibson attempted to minimize what had happened:

Well nothing, just more, just, you know, just touching each other . . . you know, it wasn't anything sexual I mean . . . I guess it is sexual but it[']s not . . . nothing sexual . . . uh, you know like me penetrating her or doing anything like that kind of stuff because I never did anything like that and that's what I was so confused about, it[']s like it was just more . . . just kind of a spontaneous thing[], it wasn't anything that was programmed or you know, you know . . . that we had talked about that we were gonna do . . .

(State's Exh. L, p. 10 of the second transcribed phone call).

On July 25, 2008, the State filed an Information charging Gibson with: Count 1, child molesting, a Class A felony, I.C. § 35-42-4-3(a)(1); Count 2, incest, a Class B felony, I.C. § 35-46-1-3; and Count 3, child molesting, a Class C felony, I.C. § 35-42-4-3(b), for his actions with H.G. On July 28 and 29, 2009, the trial court conducted a jury trial. At trial Gibson objected to the admission of the recordings of the phone calls. He based his objection to the recording of the phone call between himself and Detective Kruse on an alleged violation of his *Miranda* rights.¹ And, with respect to the phone calls between himself and Kim, Gibson based his objection upon a marital privilege, and upon an allegation that it violated his *Miranda* rights. In addition, Gibson objected to Exhibit Q, the recording and transcript of a phone conversation between him and Detective Kruse, arguing that the State had failed to demonstrate an appropriate chain of custody for that exhibit. Detective Kruse testified that he was a party to the phone call represented by Exhibit Q and that it was an accurate representation of that phone call. The trial court permitted the recordings of the phone calls and transcriptions thereof to be admitted as evidence over Gibson's objections. After brief deliberations, the jury convicted Gibson as charged.

Gibson now appeals. Additional facts will be presented as necessary.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

DISCUSSION AND DECISION

I. *Miranda*

Gibson argues that he should have been given a warning conveying his *Miranda* rights prior to the phone calls from Detective Kruse and Kim. Specifically, he contends that since he was not informed of his rights to remain silent and to consult with an attorney, the recordings of his conversations, and the transcriptions thereof, should not have been admitted as evidence during the jury trial.

The Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during ‘custodial interrogation’ without a prior warning of *Miranda* rights. *Ritchie v. State*, 875 N.E.2d 706, 716 (Ind. 2007), *reh’g denied* (quoting *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed.2d 243 (1990)). “Police officers are not required to give *Miranda* warnings unless the defendant is both in custody and subject to interrogation.” *Id.* (citing *Loving v. State*, 647 N.E.2d 1123, 1125-26 (Ind. 1995)). The test for determining whether a suspect is in custody for purposes of *Miranda* is an objective test that focuses on whether there has been a formal arrest or restraint of the suspect’s freedom of movement to the degree associated with a formal arrest. *Luna v. State*, 788 N.E.2d 832, 833 (Ind. 2003).

It is undisputed that Gibson was in Ohio, staying at his parent’s house, at the time of each phone call. No law enforcement officers were present with him before, during, or immediately after any of the phone calls. Therefore, Gibson was not in custody while participating in the phone calls. For this reason, we conclude that his claim fails.

II. Spousal Privilege

Gibson also contends that the recordings of the phone calls between him and his then wife should not have been admitted because of the spousal privilege. In support of his argument, Gibson directs our attention to the common law “testimonial” privilege which allowed either spouse to prevent the other from testifying against him or her. *See Glover v. State*, 836 N.E.2d 414, 417 (Ind. 2005). However, our supreme court has determined that a marital privilege which may be waived by either spouse is now the applicable law for Indiana. *Id.* at 420. Indiana Code section 34-46-3-1 provides that:

Except as otherwise provided by statute; the following persons shall not be required to testify regarding the following communications:

- (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.
- (2) Physicians, as to matters communicated to them by patients, in the course of their professional business, or advice given in such cases.
- (3) Clergymen, as to the following confessions, admissions, or confidential communications:
 - (A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman’s church.
 - (B) A confidential communication made to a clergyman in the clergyman’s professional character as a spiritual adviser or counselor.
- (4) Husband and wife, as to communications made to each other.

Our supreme court explained that, when compared to the other privileges in the statute, a marital privilege is qualitatively different because communications between married couples are not facilitated by the confidentiality of those communications. *Glover*, 836 N.E.2d at

421. Moreover, no professional obligation keeps marital communications confidential as with the professions also listed in the statute. *Id.* For these reasons, our supreme court determined that “[t]he marital privilege prevents a court from requiring a spouse to testify as to confidential material communications, but does not bar the spouse from testifying if the spouse chooses to do so.” *Id.* at 422.

In addition to the ability of a spouse to waive the marital privilege as determined in *Glover*, a specific statute supports the admissibility of marital communications when they regard certain offenses. Specifically, Indiana Code section 31-32-11-1 provides in pertinent part that:

The privileged communications between: (1) a husband and wife . . . is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect or relating to the subject matter of the report or failing to report as required by IC 31-33.

Here, Kim chose to aid in the investigation of her husband’s sexual abuse of their child. Gibson’s communications with Kim may have been marital communications, but Kim held the power to waive any privilege connected with those privileges. Additionally, those communications regarded the sexual abuse of a child, and therefore were admissible in any judicial proceeding. Thus, we conclude that the trial court did not abuse its discretion by admitting the recordings, and transcripts thereof, of the phone calls between Gibson and Kim.

III. *Chain of Custody*

Finally, Gibson argues that the recorded phone call between himself and Detective Kruse should not have been admitted as evidence because the State failed to demonstrate a

proper chain of custody at the trial. When admitting physical evidence in a criminal trial, “the State must provide reasonable assurances that [the] exhibit, which has passed through various hands, has remained undisturbed.” *Doty v. State*, 730 N.E.2d 175, 178 (Ind. Ct. App. 2000).

[T]he State must give reasonable assurances that the property passed through various hands in an undisturbed condition. Because the State need not establish a perfect chain of custody, slight gaps go to the weight, not the admissibility, of the evidence. There is a presumption of regularity in the handling of exhibits by public officers. Thus, merely raising the possibility of tampering is insufficient to make a successful challenge to the chain of custody.

Filice v. State, 886 N.E.2d 24, 34 (Ind. Ct. App. 2008), *trans. denied* (punctuation and citations omitted).

Gibson points out a gap in the chain of custody of Exhibits N and Q, and argues that the exhibits should have been ruled inadmissible.² However, as stated above, gaps in the chain of custody go to the weight of the evidence, not the admissibility. Furthermore, Detective Kruse participated in the phone calls which Exhibits N and Q were representations of, and he was called as a witness at Gibson’s trial. Detective Kruse testified that the recording was a fair and accurate depiction of his conversation with Gibson and Gibson presented no evidence which could support a claim that it was not. For these reasons, we

² Detective Kruse testified that he gave the original audio recording of his conversation with Gibson to Sergeant Kessler, but Sergeant Singleton delivered the recording to Officer Glogoza who enhanced the recording to make it more intelligible. Neither Sergeant Kessler nor Sergeant Singleton testified to explain how the recording got from one to the other.

concluded that the trial court did not abuse its discretion when admitting Exhibits N and Q as evidence.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it admitted as evidence the recordings, and transcripts thereof, of phone calls made between Detective Kruse and Gibson and Kim and Gibson

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.