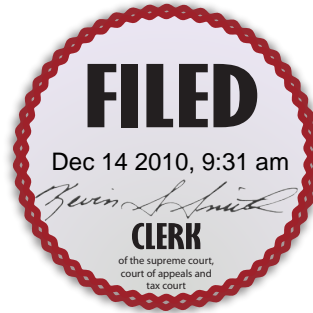


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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OSCAR IRAHETA-ROSALES, )

Appellant-Defendant, )

vs. )

No. 49A05-1005-CR-302

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Mark D. Stoner, Judge  
The Honorable Jeffrey L. Marchal, Commissioner  
Cause No. 49G06-0809-FA-206229

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**December 14, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Oscar Iraheta-Rosales appeals his convictions for two counts of child molesting as class A felonies<sup>1</sup> and one count of child molesting as a class C felony.<sup>2</sup> Rosales raises one issue which we revise and restate as whether the trial court abused its discretion in admitting H.I.’s testimony. We affirm.

The relevant facts follow. Rosales, who was born on April 1, 1969 and is a relative of H.I.’s father, lived with H.I. and his family for a few months when H.I. was ten or eleven years old. Rosales slept in the basement of H.I.’s house. Rosales sometimes took H.I. or his brothers fishing. On one such trip, at a lake in Indianapolis, Rosales told H.I. to pull down his pants and then Rosales touched H.I.’s butt with his penis.

When H.I. was in his basement, Rosales touched H.I.’s butt with his penis while H.I. was not wearing any pants. H.I. saw “[s]ome white stuff” come out of Rosales’s penis. Transcript at 80. At one point, H.I. touched Rosales, but H.I. “tried to push [Rosales] off.” Id. Another time, Rosales told H.I. to remove his pants and made H.I. touch Rosales’s penis. Rosales told H.I. that if he told anybody, Rosales would hurt his family. H.I. eventually told his mother after Rosales “had done it to another boy,” and she called the police. Id. at 85.

In September 2008, the State charged Rosales with two counts of child molesting as class A felonies and three counts of child molesting as class C felonies. On October

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<sup>1</sup> Ind. Code § 35-42-4-3 (Supp. 2007).

<sup>2</sup> Id.

14, 2008, the State filed a Notice of Intent to Introduce Statement Pursuant to I.C. 35-37-4-6 and Request for a Hearing. On November 12, 2008, the court held a child hearsay hearing.<sup>3</sup> During direct examination of H.I., the prosecutor questioned H.I. regarding lying, and H.I. testified that it was not good to tell a lie. At the end of the hearing, the court took the matter under advisement, and Rosales's attorney indicated that he could submit findings of fact within thirty days.

On April 21, 2010, the court held a bench trial,<sup>4</sup> and Rosales's attorney stated: "But I assume the Court will make a determination on whether that witness is competent to testify. It goes to the age." Id. at 69. After some discussion, Rosales's attorney indicated that there was relevant testimony at the child hearsay hearing. The court took a recess and then stated: "We are back on the record. I think we have sorted out the child hearsay issues." Id. at 70. The prosecutor made an opening statement, and Rosales waived his opening statement. H.I. then testified without objection. Rosales also testified and denied the allegations. During closing argument, Rosales's attorney referenced the testimony of H.I. and Rosales and stated that the court was "in the position where it has to obviously judge the credibility of these two witnesses." Id. at 97.

The court found H.I.'s testimony to be "exceptionally credible." Id. at 98. The court found Rosales guilty of two counts of child molesting as class A felonies and one count of child molesting as a class C felony and not guilty of the remaining counts. The

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<sup>3</sup> Judge Mark Stoner presided at this hearing.

<sup>4</sup> Master Commissioner Jeffrey Marchal presided at the trial.

court sentenced Rosales to twenty-five years for each class A felony and three years for the class C felony<sup>5</sup> and ordered the sentences to be served concurrently.

The sole issue is whether the trial court abused its discretion in admitting H.I.'s testimony. Rosales argues that the court was obligated and failed to make an inquiry into H.I.'s competency to testify and that the court was unable to use H.I.'s testimony at the child hearsay hearing as a basis at trial for a competency ruling. Rosales also argues that, even if the line of questioning from the child hearsay hearing could be considered, the court "omitted the necessary finding prior to testimony as required in *Burrell* [*v. State*, 701 N.E.2d 582, 585 (Ind. Ct. App. 1998)] and as requested by the defendant," and "no attempt was made to determine if [H.I.] understood that he was under the obligation to be truthful on the day of trial or what that obligation might entail." Appellant's Brief at 13-14. The State argues that Rosales waived this issue by failing to object. The State also argues that, waiver notwithstanding, the record demonstrates that H.I. was competent to testify.

The record reveals the following exchange at the beginning of the bench trial:

THE COURT: . . . . Anything we have to discuss?

[Rosales's Attorney:] Judge, there was a child hearsay hearing, uh, on both of his cases and I don't know if the Court made a ruling or not.

THE COURT: Who heard it?

[Rosales's Attorney]: Judge Stoner.

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<sup>5</sup> Judge Stoner accepted and approved the recommendations of Master Commissioner Marchal.

THE COURT: Is that correct, [prosecutor]?

[Prosecutor:] Your Honor, it's my understanding that a hearing was held in November of 2008. In fact, I just asked the court staff to look for the other court file to see if a ruling was in the other case. There was a case that went along with this one as well that has been resolved since. Uh, if the Court had denied the State's motion to move forward on another day with alternative testimony, it may be a moot issue. The State is presenting the testimony of two witnesses and doesn't anticipate any hearsay evidence.

THE COURT: With that I'm not going to worry about the existence of any order on the child hearsay hearing since the State is indicating they are not going to offer any such evidence.

[Rosales's Attorney:] But I assume the Court will make a determination on whether that witness is competent to testify. It goes to the age.

THE COURT: Was the child hearsay heard on this cause number or both?

[Prosecutor:] Your Honor, from what I understand, it was filed under this cause number but I couldn't find any information as to whether or not testimony was taken from witnesses that are present today.

[Rosales's Attorney:] I have the transcript. Do you have it?

[Prosecutor:] (no response)

[Rosales's Attorney:] Judge, there is testimony that pertains to this case.

THE COURT: Is it under this cause number?

[Rosales's Attorney:] Both cause numbers. Judge . . .

THE COURT: We are going to have to find the file and see what the order says. So once again we are in a holding pattern.

THE COURT TAKES A BRIEF RECESS

THE TRIAL OF SAID CAUSE RESUMES

THE COURT: We are back on the record. I think we have sorted out the child hearsay issues. Opening statement, [Prosecutor]?

Transcript at 68-70.

We cannot say that the statement of Rosales's attorney that he assumed that the court would make a determination of H.I.'s competency to testify constitutes an objection. Further, Rosales did not object after the court took a brief recess and indicated that the child hearsay issues were "sorted out." *Id.* at 70. Rosales also did not object when H.I. was called to testify. Based upon the record, we conclude that Rosales waived this issue by failing to offer a timely objection. *See Wright v. State*, 255 Ind. 292, 295, 264 N.E.2d 67, 69 (1970) (holding that "the failure of the defendant to object to the child's testimony must be treated as a waiver of any question as to the competency of such child as a witness").

Moreover, we cannot say that reversible error occurred. Generally, "[a] determination of a witness's competency lies within the sound discretion of the trial court and is reviewable only for a manifest abuse of that discretion." *Aldridge v. State*, 779 N.E.2d 607, 609 (Ind. Ct. App. 2002), *trans. denied*. Ind. Evidence Rule 601 provides: "Every person is competent to be a witness except as otherwise provided in these rules or

by act of the Indiana General Assembly.” “A child’s competency to testify at trial is established by demonstrating that he or she (1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under a compulsion to tell the truth, and (3) knows what a true statement actually is.” Richard v. State, 820 N.E.2d 749, 755 (Ind. Ct. App. 2005), trans. denied, cert. denied, 546 U.S. 1091, 126 S. Ct. 1034 (2006). “It is within the sound discretion of the trial court to determine whether a child is competent to testify based upon the judge’s observation of the child’s demeanor and responses to questions posed to her by counsel and the court, and a trial court’s determination that a child is competent will only be reversed for an abuse of discretion.” Harrington v. State, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001).

To the extent Rosales argues that the court was unable to use H.I.’s testimony at the child hearsay hearing as a basis at trial for a competency ruling, we conclude that Rosales invited any error. After a short exchange regarding the child hearsay hearing, Rosales’s attorney indicated that he had the transcript from the child hearsay hearing and stated that “there is testimony that pertains to this case.” Id. at 69-70. Rosales directed the trial court’s attention to the transcript for the child hearsay hearing and, therefore, invited any error that occurred because of the trial court’s reliance on the testimony from the child hearsay hearing.<sup>6</sup> See Kingery v. State, 659 N.E.2d 490, 494 (Ind. 1995) (“A

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<sup>6</sup> Rosales cites L.H. v. State, 878 N.E.2d 425 (Ind. Ct. App. 2007), for the proposition that the trial court was unable to use the prior testimony from the child hearsay hearing as a basis at trial for a competency ruling. In L.H., a child hearsay hearing was held and testimony and evidence were admitted. 878 N.E.2d at 427. At the end of the hearing, the prosecutor moved to incorporate all the testimony and evidence into the State’s case-in-chief, and L.H. objected to the incorporation. Id. The court granted the

party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error.”), reh’g denied.

At the child hearsay hearing, the following exchange occurred during the direct examination of H.I.:

Q. What would happen if you told your mom a lie?

A. I’ll get in trouble.

Q. What do you think she would do if you told her a lie?

A. Ground me.

Q. Do you think it’s good to tell a lie?

A. No.

Q. Do you think the Judge would be happy if you told a lie here in court today?

A. No.

Transcript at 32-33.

At trial, the court asked twelve-year-old H.I.: “Do you swear or affirm under the penalties for perjury that the testimony you are about to give will be the truth?” Id. at 71.

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prosecutor’s motion, and the prosecutor offered no additional testimony, evidence, or exhibits. Id. at 428. L.H. again stated his objection to incorporation and then rested. Id. The court made true findings as to both allegations. Id. On appeal, L.H. argued that incorporation was inappropriate at juvenile fact-finding hearings. Id. at 429. The court held that L.H. “objected to incorporation on several occasions.” Id. at 430. The court concluded that L.H. was entitled to have a fact-finding hearing at which all procedural safeguards and evidentiary rules were observed and incorporating the testimony from a preliminary hearing on an evidentiary matter did not merely minimize needless and time-consuming duplication of effort. Id. Here, unlike in L.H., the finding of guilt was not based solely upon evidence presented at the child hearsay hearing. Also, unlike in L.H., Rosales did not object to the incorporation of the testimony at the child hearsay hearing. Rather, Rosales directed the court’s attention to the testimony given at the child hearsay hearing. Thus, we do not find L.H. to require reversal.



H.I. responded affirmatively and testified regarding his age, birthday, residence, and the charges. On cross-examination, Rosales's attorney asked H.I. questions regarding the charges and did not ask H.I. any questions regarding his competency. During closing argument, Rosales's attorney referenced the testimony of H.I. and Rosales and stated that the court was "in the position where it has to obviously judge the credibility of these two witnesses." Id. at 97. After the presentation of the evidence, the court stated:

[H.I.] is rather soft-spoken young man but he didn't seem at any point to be hesitant as to his testimony. He seemed very sure of what he had to say and I think he was sufficiently detailed in what he had to say to make his testimony exceptionally credible. And I don't find any reason to doubt what he was telling me on the stand.

Id. at 98.

Based upon the record, we conclude that the trial court's admission of H.I.'s testimony did not result in reversible error. See Brewer v. State, 562 N.E.2d 22, 23-24 (Ind. 1990) (holding that the appellant failed to demonstrate the trial court abused its discretion in finding that children were competent to testify where each child demonstrated he or she knew the difference between telling the truth and telling a lie and each promised to tell the truth); Wright, 255 Ind. at 294-295, 264 N.E.2d at 69 (observing that the child witness indicated that she would answer questions truthfully and knew that it was wrong to tell a lie and holding that "[i]n the absence of any objection on the part of the appellant this was ample questioning coupled with the personal observation of the general maturity and demeanor of the witness by the trial judge for the judge to exercise his sound discretion under the statute to permit the witness to testify"); Hoover v. State,

582 N.E.2d 403, 406-407, 407 n.3 (Ind. Ct. App. 1991) (holding that the trial court did not abuse its discretion by determining the child witnesses were competent to testify and understood and appreciated the nature and obligation of an oath where they answered affirmatively when asked whether they knew the difference between telling the truth and telling a lie and testified that they would “get in trouble” for telling a lie), adopted by 589 N.E.2d 243 (Ind. 1992).

For the foregoing reasons, we affirm Rosales’s convictions for two counts of child molesting as class A felonies and one count of child molesting as a class C felony.

Affirmed.

RILEY, J., and ROBB, J., concur.