MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Juventino V. Ramirez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 6, 2021

Court of Appeals Case No.
20A-CR-1982

Appeal from the
Allen Superior Court

The Honorable
Frances C. Gull, Judge

Trial Court Cause No.
02D05-1910-F4-103

Kirsch, Judge.

[1] Juventino V. Ramirez ("Ramirez") appeals his conviction for child molesting[1] as a Level 4 felony and raises seven issues, which we restate as:

> I. Whether the trial court's rulings on Ramirez's discovery requests were an abuse of discretion;
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> II. Whether the rulings on Ramirez's discovery requests violated his constitutional rights;
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> III. Whether the trial court's denial of Ramirez's motion for continuance was an abuse of discretion;
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> IV. Whether the trial court abused its discretion in not allowing Ramirez to make an offer of proof of a recording of a forensic interview;
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> V. Whether the trial court abused its discretion in allowing a witness to give vouching testimony;
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> VI. Whether the trial court abused its discretion by admitting hearsay testimony from two of the State's witnesses; and
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> VII. Whether the trial court abused its discretion in instructing the jury.

[2] We affirm.

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[1] *See* Ind. Code § 35-42-4-3(b).

Facts and Procedural History

[3] Ramirez met Angelica Guzman ("Guzman") at church, and they married in October of 2016. *Tr. Vol.* 2 at 215-16. Soon after, Guzman's daughter A.P., who was then seven years old, moved from her father's home in Michigan to live with Ramirez and Guzman in Fort Wayne. *Id*. at 215; *Tr. Vol.* 3 at 15, 115. Ramirez would watch A.P. when Guzman was away. *Tr. Vol. 2* at 218.

[4] Between December of 2016 and December of 2018, when A.P. was between seven and nine years old, Ramirez touched A.P. with his hand on her vaginal area several times, both over her clothes and under her clothes, including under her underwear. *Tr. Vol. 3* at 26-29, 38; *Ex. Vol.* at 23. Some incidents occurred on the living room couch while Guzman slept in the master bedroom, and other incidents occurred in the master bedroom when Guzman was away from home. *Tr. Vol. 3* at 30-31, 39.

[5] In late August of 2019, A.P. returned home from a visit with her father in Michigan and told Guzman that Ramirez had been touching her. *Tr. Vol. 2* at 219-20; *Tr. Vol. 3* at 26-27. Guzman discussed A.P.'s allegations with her pastor, and the next day she discussed the allegations with the Center for Nonviolence. *Tr. Vol. 2* at 221-22, 238. During a forensic interview with Adam Blakey ("Blakey"), A.P. told Blakey that Ramirez had touched her vaginal area but said that Ramirez had touched her only over her clothes. *Tr. Vol. 3* at 27-28, 33; *Ex. Vol.* at 23. The interview lasted twenty minutes. *Tr. Vol. 2* at 45.

[6] By late September of 2019, Guzman and A.P. had moved to Georgia. *Id*. at 224, 238. Guzman and A.P. continued to talk to Ramirez over the phone, and during these conversations Ramirez admitted to Guzman that he had touched A.P. several times but claimed the touching was accidental *Id*. at 226-29. Ramirez asked A.P. to forgive him for touching her, and he asked Guzman to "drop the charges" and have A.P. lie in exchange for giving the marital home and money to Guzman. *Id*. at 229-30, 234.

[7] On October 31, 2019, the State charged Ramirez with child molesting as a Level 4 felony. *Appellant's App. Vol. 2* at 16. On November 26, 2019, the State sent a letter to defense counsel advising that all discovery was available and that he and Ramirez could view A.P.'s forensic interview at the prosecutor's office. *Id*. at 64, 79, 83. The prosecutor's office relayed the same information on November 27, December 3, and December 10, 2019. *Id*. at 64. On December 10, 2019, Ramirez's counsel responded in writing that he would not sign the receipt at the bottom of the prosecutor's letter but would proceed with discovery through "case law and the rules of trial procedure." *Id*. at 65.

[8] Throughout pre-trial proceedings, the parties litigated many discovery issues, including whether Ramirez's attorney could get his own copy of the recorded forensic interview of A.P. *Id*. at 57-59, 62-65, 68-70, 73-100, 121-25, 136-37, 139-40, 141-42; *Appellant's Conf. App. Vol. 2* at 172-78. On December 30, 2019, Ramirez filed a motion to compel discovery. *Appellant's App. Vol. 2* at 57-59. On December 31, 2019, the State filed a response stating (1) that discovery had been available since November 27, 2019; (2) that Ramirez's attorney refused to

sign the receipt; and (3) that Ramirez's attorney could have the discovery but he did not pick it up. *Id*. at 62-65. On December 31, 2019, the State notified the trial court that it had provided a summary of the witness statements to Ramirez's attorney. *Id*. at 66.

[9] On January 8, 2020, Ramirez's attorney sent a letter to the prosecuting attorney. In the letter, he objected to the conditions of discovery and requested to pick up discovery and submit his own receipt. *Id*. at 80. On January 16, 2020, the prosecuting attorney sent a letter to Ramirez's counsel that discovery was ready to be picked up, that he was welcome to view A.P.'s forensic interview at the prosecutor's office, and that he would not receive a copy of the recorded forensic interview because there had been several incidents where recorded interviews provided to defense attorneys had been posted on social media. *Id*. at 81-82.

[10] On January 16, 2020, Ramirez served the State with a subpoena duces tecum for a copy of the forensic interview. *Id*. at 70. On January 16, 2020, the State filed a motion to quash the subpoena on the basis that the motion to compel was pending and that Ramirez had not complied with Allen County Local Rule LR02-TR26-1(B)(1) which required Ramirez to apply to the trial court for a copy of the forensic interview. *Id*. at 69; Local Criminal Rules of the Allen Superior & Circuit Court, https://www.in.gov/courts/files/allen-local-rules.pdf (last visited Apr. 26, 2021).

[11] On January 20, 2020, Ramirez filed a motion for in-camera inspection of the forensic interview. *Appellant's App. Vol. 2* at 71-72. On January 21, 2020, Ramirez's attorney sent a letter to the prosecuting attorney, again stating that he would not agree to the State's conditions for conducting discovery. *Id*. at 84. On January 22, 2020, Ramirez filed a response to the State's answer to Ramirez's discovery requests and a motion to compel. In the response, Ramirez contended that the discovery disclosure agreement was inconsistent with the Indiana Rules of Trial Procedure. *Id*. at 73-100.[2]

[12] On January 23, 2020, the State filed a motion to quash Ramirez's motion to compel and requested a protective order for A.P.'s forensic interview, stating that the confidential child interview could be viewed by Ramirez and counsel "to any extent desired" but that a copy would not be provided absent Ramirez's application to the trial court under the local trial rule. *Id*. at 121-25.

[13] On January 24, 2020, the trial court held a hearing on all pending motions, including Ramirez's motions to compel discovery and request for in-camera inspection of the recorded forensic interview and the State's motion to quash Ramirez's subpoena duces tecum. *Id*. at 126; *Tr. Vol. 2* at 3-12. The State again indicated that A.P.'s forensic interview was available to be viewed by Ramirez's

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[2] In a January 16, 2020 letter, the Allen County Prosecutor wrote to Ramirez's attorney regarding his unwillingness to sign the discovery receipt provided by the Office of the Prosecutor: "You are the only attorney in Allen County who will not sign our discovery letter. Every other defense attorney has agreed to these terms and discovery is provided, pursuant to our letter. The above has been the longstanding policy of our office and is in response to several incidents of defense counsel, the defendant, or defense witnesses taking various items of discovery and posting them on social media." *Appellant's App. Vol. 2* at 81.

counsel at the prosecutor's office. *Tr. Vol. 2* at 8-9. Ramirez requested an order compelling the State to produce a copy of the interview because Ramirez's attorney claimed that going to the prosecutor's office to view the interview was inconvenient and burdensome. *Id*. at 6-8, 10-11. On February 12, 2020, the trial court issued an order denying Ramirez's motion to compel, finding that discovery had been available since November 26, 2019 and granting the State's motion to quash the subpoena duces tecum. *Appellant's App. Vol. 2* at 129-30. The trial court also issued a protective order for a copy of A.P.'s forensic interview, which the trial court noted did not prevent defense counsel from viewing the interview at the prosecutor's office. *Id*.

[14] On April 23, 2020, the State contended that Ramirez's counsel obtained all the discovery from the State that the State was willing to provide. *Id*. at 139. On May 15, 2020, the State notified Ramirez that it intended to use A.P.'s forensic interview at trial as an exhibit. *Id*.[3] Ramirez filed a motion to produce a copy of the forensic interview claiming that it was "ineffective" to require counsel to view the interview at the prosecutor's office and offered to receive the interview under a protective order. *Id*. at 141-42. At the pretrial hearing on May 19, 2020, Ramirez again argued that it was not effective to view A.P.'s forensic interview at the prosecutor's office. *Tr. Vol. 2* at 18. The State responded that the interview was available for review at the prosecutor's office and had been

[3] The State later informed the trial court and Ramirez that it would not use the forensic interview as evidence at trial. *Tr. Vol. 2* at 43.

available since November 26, 2019 and that Ramirez's attorney had an appointment to review the recording that morning. *Id.* at 19-20. Ramirez's lawyer responded that a "defense lawyer needs that recorded document at their office to view when and where and as necessary to be properly prepared." *Id*. at 20. On May 27, 2020, the trial court issued an order finding the State had provided discovery consistent with local rule LR02-TR26-1 and denying Ramirez's motion for a copy of the forensic interview. *Appellant's App. Vol. 2* at 161.

[15] Guzman and A.P. met with the deputy prosecutor for the first time on July 7, 2020, the day before the trial was to commence, and provided new information to the deputy prosecutor. *Tr. Vol. 2* at 244-45. Following that discussion, the deputy prosecutor sent an email to Ramirez's attorney to inform him of newly acquired evidence, including, according to Guzman, that: 1) A.P. claimed Ramirez had also touched her *under* her clothing; 2) Ramirez admitted that he had touched A.P.; 3) Ramirez apologized to Guzman and A.P. and asked for A.P. to forgive him; 4) Ramirez pressured Guzman to persuade A.P. to lie at trial; 5) Ramirez promised Guzman money, a car, and the marital residence if Guzman persuaded A.P. to lie at trial; 6) Ramirez said that A.P. cried one of the times that he touched her; 7) Ramirez told A.P not to not tell Guzman that he had touched A.P; and 8) Ramirez said he had told his pastor that he had touched A.P. *Id*. at 231, 234, 229-30; *Tr. Vol. 3* at 29, 35-37, 144; *Ex. Vol.* at 25-26.

[16] On the morning of the July 8, 2020 trial, Ramirez filed motions to strike the new evidence, to continue the jury trial to conduct additional discovery, and to order the State to produce a copy of the forensic interview. *Appellant's Conf. App. Vol. 2* at 172-79; *Appellant's App. Vol. 2* at 190-91. At a hearing immediately before trial, Ramirez indicated that A.P.'s allegation that Ramirez had touched her under her clothing contradicted her forensic interview and was material to his defense that any touching that may have occurred was accidental. *Tr. Vol. 2* at 33, 35-36. Ramirez also indicated that he needed to depose Guzman and A.P. and that he intended to introduce the recorded forensic interview. *Id*. at 37-39, 43. Ramirez also asked the trial court to strike all the evidence that the State had provided the previous day. *Id*. at 38-39. The State responded that it had provided the evidence as soon as possible, that it had complied with the trial court's discovery orders, and that the new evidence did not change the nature of the charge or any defense. *Id*. at 38, 43. The State agreed to provide a redacted copy of the forensic interview to the defense as soon as possible for Ramirez to use at trial. *Id.* at 45-46. The trial court denied Ramirez's motion to continue the trial and noted that it would conduct jury selection that day but not start the State's case in chief until the next day so Ramirez's attorney could interview Guzman and A.P. about the new allegations. *Id*. at 47-48. By noon of the first day of trial, the State gave Ramirez a redacted copy of A.P.'s forensic interview, and later that day, Ramirez expressly declined the opportunity to interview Guzman and A.P., stating, "Without having the opportunity for a continuance to talk to them and follow up with whatever they may say, there's just no value in talking with

them, because we can't do anything to corroborate or not, so that's why we're not talking [to them] . . . ." *Id*. at 190.

[17] At trial, A.P. testified that Ramirez touched her vaginal area over and under her clothing more than once. *Id*. at 227; *Tr. Vol. 3* at 25, 27-29, 33, 37-38, 46. Neither party introduced A.P.'s forensic interview, and A.P. admitted on cross-examination that she did not state in her forensic interview that Ramirez had touched her under her clothing. *Tr. Vol. 3* at 29-30, 35, 38. Allen County Department of Child Services investigator Kristie Simkins ("Simkins") and Blakey both testified over Ramirez's objections that A.P. made a "disclosure" during the forensic interview. *Id*. at 63, 65, 88. Blakey also opined that A.P. used "script memory" during the interview, a general memory of something that often recurs. *Id*. at 83-85, 90.

[18] At the close of trial, Ramirez objected to the State's proposed jury instruction that "time of occurrence of an act is not an element nor is it essential to proving a criminal violation in crimes involving children" on the basis that it was covered by other instructions, that it was not relevant, and that it would improperly instruct the jury what it could not do. *Id*. at 107-08. The trial court gave the instruction over Ramirez's objection. *Id*. at 160; *Appellant's App. Vol. 2* at 211.

[19] On July 9, 2020, the jury found Ramirez guilty of child molesting as a Level 4 felony, and on August 6, 2020, the trial court sentenced Ramirez to six years executed at the Indiana Department of Correction. *Tr. Vol. 3* at 179-81, 195-96;

Appellant's App. Vol. 2 at 27-29, 179-81. On September 8, 2020, Ramirez filed a motion to correct error, which the trial court denied on October 8, 2020. *Appellant's App. Vol. 3* at 62-73, 77-85, 92. Ramirez now appeals. We will supply additional facts as necessary.

Discussion and Decision

I. Discovery Rulings

[20] Ramirez claims the trial court abused its discretion in denying his requests for a copy of the DVD recording of the forensic interview of A.P. The grant or denial of a discovery motion is within the trial court's discretion and will be overturned only for an abuse of discretion. *Rogers v. State*, 60 N.E.3d 256, 260 (Ind. Ct. App. 2016), *trans. denied*. An abuse of discretion occurs when a trial court's ruling is against the logic and effect of the facts and circumstances. *Id*.

[21] The trial court's discretion is rooted in its duty to promote discovery of the truth and to guide and control the proceedings. *Williams v. State*, 959 N.E.2d 360, 364-65 (Ind. Ct. App. 2012).

> Due to the fact-sensitive nature of discovery matters, the trial court's ruling is cloaked in a strong presumption of correctness on appeal. We may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though this was not the reason enunciated by the trial court.

Id. at 365 (quoting *Moore v. State,* 839 N.E.2d 178, 182 (Ind. Ct. App. 2005), *trans. denied*).

[22] Ramirez argues that the trial court's denial of his request to obtain a copy of the DVD was an abuse of discretion, that he was entitled to a copy of the DVD under the trial rules and case law and that the contents of the DVD were relevant and not privileged. In support, he refers to *In re WTHR-TV* 693 N.E.2d 1 (Ind. 1998), which held:

> Our discovery rules are designed to allow liberal discovery with a minimum of court involvement in the discovery process. Trial Rule 34 enables parties to a lawsuit to request information or material directly from both parties and non-parties. The scope of discovery is governed by Rule 26(B):
>
> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

693 N.E.2d at 5-6.

Ramirez also cites *Beville v. State*, 71 N.E.3d 13 (Ind. 2017), which ruled, in part:

> Under Trial Rule 26(B), if a defendant makes a specific request for an item that is relevant to his defense and is not privileged, he may obtain discovery of that item. Ind. Trial Rule 26(B)(1). And Trial Rule 34(A) allows the defendant the opportunity not only to inspect the item but also to make a copy of it. T.R. 34(A).

> But the Trial Rules also impose certain limits, and when a discovery request is challenged, a court must balance the need for the information and the burden of supplying it.

Id. at 18 (cleaned up).

[23] "Any party may serve on any other party a request: (1) . . . to inspect and copy, any . . . designated documents or electronically stored information . . . ." *See* Ind. Trial Rule 34(A). Indiana Trial Rule 34(B) allows the responding party to object to such requests, and Indiana Trial Rule 26(B)(1) allows a trial court to limit the use of discovery methods under the following circumstances: "The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that . . . (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought . . . ." *Id*. When, as here, an objecting party refuses to provide the requested discovery, the party seeking discovery may file a motion to compel. *See* Ind. Trial Rule 37. Ramirez sought such relief, and the trial court denied the request. *See Appellant's App. Vol. 2* at 129-30.

[24] Ramirez also argues the trial court's denial of his motions to compel the prosecutor's office to provide a copy of the DVD was an abuse of discretion because the trial court erroneously relied on Allen County Local Rule LR02-TR26-1(B)(1). Rulings on motions to compel are reviewed for an abuse of discretion. *Beville*, 71 N.E.3d at 18. Allen County Local Rule LR02-TR26-

1(B)(1) requires a party to file a request with the trial court to obtain a copy of a recorded statement. In part, the rule provides:

> Other items shall be provided for examination, testing, copying, photographing, or other proper use either by agreement or at specified reasonable times and places. Defense counsel shall provide reasonable notice of such examination and shall schedule these examinations in cooperation with the State. An application to the court shall be made to obtain copies of audio or videotape. Said application shall state in specific terms the necessity for such copies.

https://www.in.gov/courts/files/allen-local-rules.pdf (last visited Apr. 26, 2021).

[25] Without citing a specific trial rule, Ramirez contends that Allen County Local Rule LR02-TR26-1(B)(1) is inconsistent with the trial rules because it "creates a presumption of non-disclosure that the defendant must overcome." *Appellant's Br.* at 19. Ramirez claims the local rule is void. *See Snell v. State*, 866 N.E.2d 392, 400 (Ind. Ct. App. 2007) (local rule that is inconsistent with trial rules is without force and effect.). We reject this argument. As the State observes, Trial Rule 34(A) requires that a party request a copy of discovery. Under both the trial rule and local rule, the trial court makes the final decision whether providing a copy of an item is appropriate.

[26] Ramirez argues the trial court's denial of his requests to get a copy of the DVD was an abuse of discretion because the trial court failed to balance the State's interest in non-disclosure with Ramirez's rights. Ramirez correctly observes

that one of the reasons the State refused to give Ramirez a copy of the DVD was to prevent potential embarrassment to A.P. if the video on the DVD was eventually posted on social media, which had occurred in a few prior Allen County cases. *Appellant's App. Vol. 2* at 124. Ramirez contends this rationale is a "general principle" that would allow the State to withhold copies of forensic interviews in all child molesting cases and that such general principles cannot be allowed to undermine a defendant's access to discoverable material. *See Beville*, 71 N.E.3d at 17 (where a defendant shows an exception to the informant's privilege, the State cannot rely solely on the general policy reasons underlying the informant's privilege to deny the defendant a copy of the recording; the State must make a showing specific to the case). Ramirez argues that under the State's reasoning, a protective order, which was used here, would swallow the rule that a party may discover relevant, non-privileged material.

[27] We disagree. The trial did not abuse its discretion in how it balanced the interests of Ramirez and the State during the discovery phase of this matter. The State's good cause for the protective order to prevent the disclosure of a copy of A.P.'s forensic interview to the defense was based on the fact that the interview involved a child discussing sexual acts by an adult; that the identity of children of sex crimes is confidential under Access to Court Records Rule 5(C)(2); and that there have been instances where a forensic interview and a deposition of a child victim had been posted on social media. *Appellant's App. Vol. 2* at 81, 124; *Tr. Vol. 2* at 8-9. Even though Ramirez's attorney was required to expend some effort to travel to the prosecutor's office to view the

DVD, this modest burden was outweighed by the State's aforementioned interests. As the trial court observed, even with the protective order in place, the forensic interview was available to Ramirez to view at the prosecutor's office as many times as Ramirez's attorney desired, for nearly eight months before trial. *Tr. Vol. 2* at 30; *Appellant's App. Vol. 2* at 64, 79, 83.

[28] Ramirez also contends that the requirement that his attorney could not redact the video himself but had to ask the prosecutor to prepare the redacted video violated the rule that an attorney cannot be forced to disclose his or her mental impressions. Trial Rule 26(B)(3) addresses the discoverability of an attorney's mental impressions. The rule provides:

> (3) *Trial Preparation: Materials*. Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id.

[29] We reject Ramirez's argument that requiring him to tell the prosecutor what parts of the forensic he wanted redacted forced him to disclose to the State his mental impressions. Indiana Trial Rule 26(B)(3) prohibits discovery of documents or materials prepared in anticipation of litigation that disclose the mental impressions of the person who prepared the document. Thus, this prohibition would apply only if the State had sought a document or material prepared by Ramirez's attorney and that that document disclosed Ramirez's attorney's mental impressions.

[30] Here, the State did not seek a document or material from Ramirez's attorney that was prepared in anticipation of litigation, but instead Ramirez sought information from the State. Thus, the prohibition in Indiana Trial Rule 26(B)(3) does not apply here because Ramirez was not asked to provide documentation that disclosed Ramirez's attorney's mental impressions. We acknowledge that requiring Ramirez to ask the State to redact selected portions of the DVD, instead of allowing Ramirez's attorney to get a copy of the DVD and to prepare a redacted version of the DVD on his own, likely gave some insight to the State about the questions that Ramirez would ask the State's witnesses during cross-examination. However, this did not constitute forcing Ramirez's attorney to disclose his mental impressions in the manner prohibited by Indiana Trial Rule 26(B)(3). Instead, Ramirez's attorney's situation was akin to a defense attorney who deposes the State's witnesses and in the course of questioning those witnesses, the defense attorney likely, perhaps even inevitably, reveals some aspects of the strategy he or she will employ later at

trial. Revealing such information to opposing counsel is often the cost of conducting discovery, but it does not constitute compelling any defense counsel to reveal their mental impressions of the case by providing a document or tangible item to opposing counsel. Ramirez's rights under Indiana Trial Rule 26(B)(3) were not violated.

[31] Ramirez argues that his inability to acquire his own copy of the DVD undermined his ability to impeach A.P., in particular, his ability to impeach her trial testimony with what she had stated during the forensic interview. Ramirez argues that his trial attorney needed the DVD the night before cross-examining A.P., so he could identify and redact the portions of the forensic interview he needed to play for the jury. *Tr. Vol. 2* at 42. Ramirez claims that the trial court's decision to not order the State to provide a copy of the DVD interfered with this process and is reversible error. *See Reed v. State*, 748 N.E.2d 381, 393 (Ind. 2001) (reversible error where "the problems in producing an edited version were largely attributable to the prosecution's and the trial court's withholding the tape until shortly before trial, and the inability of the defense to predict what the testimony would be due to the stonewalling of proper discovery.").

[32] The trial court's refusal to order the State to produce a copy of the DVD did not undermine Ramirez's right to impeach A.P. The forensic interview lasted only twenty minutes, and Ramirez had nearly eight months from the date the DVD was available to review the DVD at the prosecutor's office. *Tr. Vol. 2* at 30; *Appellant's App. Vol. 2* at 64, 79, 83. Moreover, the State provided a redacted

version that Ramirez could have used to impeach A.P. at trial, but Ramirez chose to not use that video. *Tr. Vol. 2* at 141. Furthermore, Ramirez did impeach A.P. at trial, getting her to acknowledge that while she testified that Ramirez had touched her vaginal area both over and under her clothes, that during the forensic interview she had stated that Ramirez touched her vaginal area only over her clothes. *Tr. Vol. 3* at 46-49. Ramirez contended that the fact that he had touched A.P. only over her clothes established that the touching was inadvertent and had no sexual motive. According to Ramirez, this was one of his key goals for impeachment, and he achieved that goal during his cross-examination of A.P. Thus, the fact that Ramirez did not have a copy of the DVD recording did not violate his right to impeach A.P.

[33] Based on the foregoing arguments, Ramirez contends the trial court abused its discretion in granting the State's motion for the trial court to grant a protective order regarding the DVD. A ruling on a motion for protective order is reviewed for an abuse of discretion. *Beville*, 71 N.E.3d at 18; *Est. of Lee ex rel. McGarrah v. Lee & Urbahns Co.*, 876 N.E.2d 361, 368 (Ind. Ct. App. 2007). Ramirez's arguments on this claim rely on the same arguments he raised in his arguments about the trial court's discovery ruling that we have addressed above. Thus, based on our disposition of those foregoing arguments, we conclude that the trial court did not abuse its discretion in granting the State's motion for a protective order of the DVD.

II. Constitutional Implications of Discovery Rulings

[34] Ramirez argues that the trial court's ruling denied him his constitutional rights and that his inability to acquire his own copy of the DVD violated his constitutional right to compulsory process.

> Both the federal and state constitutions guarantee criminal defendants the right to compulsory process for obtaining witnesses in their behalf. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. The right to compulsory process is subject to reasonable limitations; a criminal defendant does not enjoy an absolute right to subpoena anyone or anything for any purpose. When a defendant alleges that the right to compulsory process has been unconstitutionally limited, we must make two inquiries: 1) whether the trial court arbitrarily denied the Sixth Amendment rights of the defendant, and 2) whether the witness was competent, and his testimony was relevant and material.

Klagiss v. State, 585 N.E.2d 674, 680 (Ind. Ct. App. 1992), *trans. denied*. Ramirez served a subpoena and request for production on the prosecutor to obtain a copy of the forensic interview, but the trial court quashed the subpoena as "unreasonable." *Appellant's App. Vol. 2* at 70, 84, 95, 129. Ramirez argues that he had a compelling interest in possessing the DVD to prepare for trial and to use during impeachment. Thus, Ramirez concludes, the trial court violated his right to compulsory process by denying him access to evidence critical to cross-examination of the witness accusing him of molestation

[35] This claim has no merit. While Ramirez did not receive a copy of the DVD, he had nearly limitless opportunities to review the DVD from the date the State made it available, November 26, 2019, to the date of trial, July 8, 2020. *Id.* at

64, 79, 83. Because of this access, we reject Ramirez's claim that he was denied access to the DVD and that his efforts to prepare for trial, including his ability to cross-examine the State's witnesses, were undermined by the trial court's refusal to order the State to give Ramirez a copy of the DVD.

[36] Ramirez next claims that his inability to acquire his own copy of the DVD violated his constitutional right to confrontation. The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution. *Reed*, 748 N.E.2d at 391. It is "one of the fundamental rights of our criminal justice system." *Pigg v. State,* 603 N.E.2d 154, 155 (Ind. 1992). Here, as Ramirez's cross examination of A.P. illustrates, Ramirez did not need physical custody of the forensic interview to confront A.P. with statements in her forensic interview that contradicted her trial testimony. Nonetheless, by providing Ramirez with a redacted copy of the forensic interview, the State gave Ramirez a copy of the video that could have been offered as evidence at trial. Ramirez's attorney chose not to offer the video at trial. Even if not having actual possession of a copy of the full forensic interview for the days, weeks, and months leading up to trial undermined Ramirez's cross examination of A.P., and we believe it did not, Ramirez squandered the opportunity to buttress his cross-examination of A.P. by choosing not to use the redacted video while cross-examining A.P.

[37] Finally, Ramirez contends that the trial court's ruling that the deputy prosecutor would redact the DVD for Ramirez's use at trial violated his right to due process. More specifically, Ramirez argues that "the trial court's remedy of

having the prosecutor redact the DVD for Ramirez violated due process. It placed Ramirez's attorney in an unconstitutional box of choosing between disclosing his intentions on cross-examination to his adversary before direct examination occurred" and forgoing impeachment. *Appellant's Br.* at 23-24. It is well settled that the Due Process Clause requires the government to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *Rubalcada v. State*, 731 N.E.2d 1015, 1018 (Ind. 2000). This applies to both exculpatory and impeachment evidence. *Id*.

[38] Ramirez was not denied due process. The State provided him with a copy of the forensic interview to allow Ramirez to prepare for impeachment of A.P. The State satisfied the due process requirement that it provide Ramirez all exculpatory and impeachment evidence. *See Rubalcada*, 731 N.E.2d at 1018. As to Ramirez's argument that he was placed "in an unconstitutional box of choosing between disclosing his intentions on cross-examination to his adversary before direct examination occurred" and forgoing impeachment," *see Appellant's Br.* at 23-24, we reject this claim. Even before Ramirez informed the prosecutor's office about which parts of the video of the forensic interview needed to be redacted, Ramirez's intentions on cross-examination would have already been clear to the State. He observes that challenging a child's credibility is a key defense in most child molesting cases, and he acknowledges that was a key element of his strategy in his case. Ramirez's repeated requests from the onset of discovery to get a copy of the DVD from the State made apparent to the State the nature of Ramirez's defense. The State's disclosures

the day before trial about A.P.'s new allegations, including that Ramirez had also touched A.P. *under* her clothes, also made manifest to the State what issues Ramirez would focus on during cross-examination. Thus, because the focus of Ramirez's cross-examination would have been clear to the State, we reject Ramirez's contention that by telling the State which portions of the video that Ramirez needed to be redacted, that he was forced to choose between disclosing his intentions on cross-examination or forgoing impeachment. Ramirez's right to due process was not violated.

III. Denial of Motion for Continuance

[39] Ramirez also claims the trial court abused its discretion when it denied his motion to continue, which he filed so he would have more time to investigate the new evidence that the prosecutor had disclosed to Ramirez the day before trial. When a party moves for a continuance not required by statute, we review the trial court's decision for an abuse of discretion. *Zanussi v. State*, 2 N.E.3d 731, 734 (Ind. Ct. App. 2013). Continuances to allow more time for preparation are generally disfavored in criminal cases. *Id*. Such motions require a specific showing how the additional time would have aided counsel. *Id*. "[T]he trial court should give heed to the diverse interests of the opponent of the motion which would be adversely impacted by altering the schedule of events as requested in the motion, and give heed as well to the diverse interests of the movant to be beneficially impacted by altering the schedule." *Flowers v. State*, 654 N.E.2d 1124, 1125 (Ind. 1995) (quoting *Vaughn v. State*, 590 N.E.2d 134, 135 (Ind. 1992)).

[40] Ramirez argues the trial court's ruling was an abuse of discretion. Ramirez contends that granting his motion for continuance would not have prejudiced the State and claims that without a continuance, he did not have sufficient time to investigate A.P.'s and Guzman's new allegations. These new allegations included the following: 1) A.P. claimed Ramirez had also touched her *under* her clothing; 2) Ramirez admitted that he had touched A.P.; 3) Ramirez apologized to Guzman and A.P. and asked for A.P. to forgive him; 4) Ramirez pressured Guzman to persuade A.P. to lie at trial; 5) Ramirez promised Guzman money, a car, and the marital residence if Guzman persuaded A.P. to lie at trial; 6) Ramirez said that A.P. cried one of the times that he touched her; 7) Ramirez told A.P not to not tell Guzman that he had touched A.P; and 8) Ramirez said he had told his pastor that he had touched A.P. *Tr. Vol. 2* at 231, 234, 229-30 *Tr. Vol. 3* at 29, 35-37, 144; *Ex. Vol.* at 25-26.

[41] Ramirez observes that he acquired this information the afternoon before the trial, that the first day of trial ended at 3:00 p.m., and that the trial was set to recommence at 9:00 a.m. the next morning. *Tr. Vol. 2* at 189-90. Ramirez states that this did not give him enough time to interview Guzman and A.P. regarding the new allegations and view the recorded forensic interview at the prosecutor's office. Ramirez claims his attorney's decision to not interview Guzman and A.P. should not be held against Ramirez because the limited time that Ramirez's attorney had to investigate the new evidence put Ramirez's attorney in an impossible situation. Ramirez also states it was not unreasonable for his attorney to attend to other tasks, such as working on his opening

statement. Ramirez claims a continuance was vital to investigate the new allegations because A.P.'s new allegation that Ramirez also touched her under her clothes was damaging to his defense that the touching of A.P.'s vaginal area was inadvertent; i.e., while a defense of inadvertent touching was credible if Ramirez only touched A.P. over her clothes, such a defense was not credible if Ramirez actually did touch A.P. under her clothes.

[42] The trial court did not abuse its discretion in denying Ramirez's motion for continuance. Ramirez had from the period of time when jury selection was over at about 3:00 p.m. until the next day to interview A.P. and Guzman. *Id.* at 189-90. The trial court gave Ramirez an afternoon and evening to interview A.P. and Guzman, who had been listed on the State's witness listed during the entire proceeding. *Id.* at 190. Ramirez chose to not interview A.P. or Guzman. *Id*. He did not make a good faith effort to prepare given the time allotted to him and cannot show how he was prejudiced by the denial of a short continuance. *See Merry v. State*, 166 Ind. App. 199, 214, 335 N.E.2d 249, 258 (1975) ("we need not determine whether the amount of time granted [from an overnight continuance] was sufficient . . . as the defendant has not demonstrated how he was prejudiced by the short continuance). The trial court did not abuse its discretion in denying Ramirez request for a continuance.

IV. Offer of Proof

[43] Ramirez also contends that the trial court abused its discretion when it denied his offers of proof for the DVD of the forensic interview. Indiana Rule of

Evidence 103(a) describes the use of offers of proof to preserve an evidentiary issue for appeal:

> (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: . . . (2) If the ruling excludes evidence, a party informs the court of its substance by an offer of proof . . .

Id.

> Part of a judge's job is to listen. When a judge refuses to hear a party's offer to prove, she not only abdicates the duty to listen, but she calls into question the principle of fundamental fairness, which requires that parties, particularly those bearing the burden of proof, receive every reasonable opportunity to make their case.

Bedolla v. State, 123 N.E.3d 661, 663 (Ind. 2019). A trial court abuses its discretion when it denies a party's legitimate request to make an offer of proof. *Id*. A valid offer to prove must explain the testimony's substance and relevance and the grounds for admitting the testimony. *Id*. Offers of proof "are most beneficial when the trial court must decide whether to exclude proffered testimony." *Id*.

[44] Ramirez made two requests that could be construed as requests to make an offer of proof. First, on the morning of trial, the trial court held a hearing on Ramirez's motion for evidentiary hearing, which asked the trial court to, among other things, order the State to provide Ramirez a copy of the DVD of the forensic interview. *Appellant's App. Vol. 2* at 172. At the hearing, Ramirez

attorney stated, "we need to have [a copy of the DVD] to support our motion [for evidentiary hearing] for the record, in the event that the Court denies it, for appeal. In that regard, we [are] requesting that the DVD be played as an exhibit . . . ." *Tr. Vol. 2* at 31. And later, as part of his motion to correct error, Ramirez asked the trial court for copies of both the redacted and unredacted DVDs for "Ramirez's offer of proof." *Appellant's Conf. App. Vol. 3* at 75. At trial, Ramirez did not make an offer of proof of any sort. He neither tendered the redacted DVD as an offer of proof, nor did he request an offer of proof by which he would orally summarize the contents of the forensic interview.

[45] A valid offer to prove must explain the testimony's substance and relevance and the grounds for admitting the testimony. *Bedolla*, 123 N.E.3d at 666. Offers of proof "are most beneficial when the trial court must decide whether to exclude proffered testimony." *Id*. A trial court "may exercise reasonable discretion in determining the timing and extent" of an offer of proof. *Id*. at 667.

[46] Here, even though Ramirez did not have a copy of the full forensic interview, he could have made an offer of proof with the redacted DVD, but he chose not to do so. Furthermore, Ramirez could have offered a verbal summary of the contents of the forensic interview as an offer of proof. The interview, which was only twenty minutes long, was available for Ramirez's counsel to review for nearly eight months before trial. *Tr. Vol. 2* at 30; *Appellant's App. Vol. 2* at 64, 79, 83. Ramirez declined the option to make an offer of proof. Because

Ramirez had options for making an offer of proof at trial but chose not to, this issue provides no grounds for relief for Ramirez.[4]

V. Vouching Testimony

[47] Ramirez claims the trial abused its discretion in allowing Blakey to testify that during the forensic interview, A.P. was recalling past incidents of abuse through "script" memory because such testimony constituted vouching. A trial court has broad discretion in ruling on admissibility of evidence. *Dycus v. State*, 108 N.E.3d 301, 303 (Ind. 2018). We will disturb a trial court's rulings only where it has abused its discretion. *Id.* A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court or if it misapplies the law. *Id*.

[48] Ramirez argues that Blakey's testimony about script memory impermissibly vouched for A.P.'s statements in her forensic interview that Ramirez touched her vaginal area. "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Ind. Evidence Rule 704(b). When a witness's testimony even indirectly suggests that a child witness was telling the truth, such testimony violates the prohibition against

4 We observe that while the record is not clear, it appears that Ramirez's counsel may not have even reviewed the video until he needed to review it just before trial to tell the State which portions of the forensic interview needed to be redacted for Ramirez to offer the DVD as evidence at trial.

vouching in Indiana Rule of Evidence 704(b). *Hoglund v. State*, 962 N.E.2d 1230, 1236 (Ind. 2012). "Vouching testimony results in an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony." *Watson v. State*, 134 N.E.3d 1038, 1045 (Ind. Ct. App. 2019), *trans. denied*.

[49] Ramirez argues that while testimony about behavioral characteristics of child abuse victims in general does not constitute vouching, testimony about how a specific child's behavior conforms to those behavioral characteristics is impermissible vouching. In support, Ramirez cites *Norris v. State*, where we stated:

> Later, the State linked her general testimony to the specific question about identifying these general indicia in J.B.'s answers during the forensic interview. Although the State was careful to limit Smallwood's comments to her observations of these indicia without outright asking her whether she believed J.B. had been influenced prior to the interview, this was neither in response to defense questioning, nor to rebut an express claim that J.B. had been coached. Accordingly, by questioning whether J.B. fit the behavioral profile, Smallwood's testimony entered the realm of the invited inference. Accordingly, the trial court abused its discretion when it admitted Smallwood's impermissible vouching testimony.

53 N.E.3d 512, 524 (Ind. Ct. App. 2016) (cleaned up).

[50] We reject Ramirez's contention that Blakey's testimony about A.P.'s use of script memory constituted impermissible vouching. Blakey's testimony was not a comment on the truthfulness of A.P.'s allegations. Instead, Blakey's

testimony was a comment on how A.P. was able to remember the instances of abuse. In arguing that Blakey's testimony was a comment on A.P.'s truthfulness, Ramirez attempts to liken his case to appellate decisions where the Indiana Supreme Court and this court have found that certain kinds of testimony constituted impermissible vouching: 1) testimony addressing whether a child showed signs of being coached how to testify; *Sampson v. State*, 38 N.E.3d 985, 992 (Ind. 2015), *Norris*, 53 N.E.3d at 521 (Ind. Ct. App. 2016), and *Hamilton v. State*, 43 N.E.3d 628, 633 (Ind. Ct. App. 2015), *trans. denied*; 2) testimony addressing whether a child was sexually abused based on observations of child abuse syndrome; *Steward v. State*, 652 N.E.2d 490, 499 (Ind. 1995); and 3) testimony about whether a child was prone to exaggerate or fantasize about sexual matters; *Hoglund*, 962 N.E.2d at 1237.

[51] Here, Blakey's statement that A.P.'s method of recall was script memory did not even obliquely suggest that A.P. was telling the truth. This is especially apparent when contrasting Blakey's testimony with the cases where our courts have found impermissible vouching with testimony that either directly vouched for a child's truthfulness or invited a strong inference that the child was telling the truth. *See, e.g.*, *Sampson*, 38 N.E.3d at 992 (coaching); *Steward*, 652 N.E.2d at 499 (child abuse syndrome); *Hoglund*, 962 N.E.2d at 1237 (child's propensity to exaggerate or fantasize about sexual matters). Thus, Blakey's testimony did not constitute vouching.

[52] However, even if Blakey's testimony about script memory was an indirect comment on the truthfulness of A.P.'s statements during the forensic interview,

we do not find that the trial court abused its discretion in overruling Ramirez's objection. *Tr. Vol. 3* at 88-89. Once a child's credibility is called into question, testimony on the behavior patterns of child victims may be appropriate. *Steward*, 652 N.E.2d at 497. Testimony about behavioral characteristics of a child abuse victim is "far less controversial" when the child's credibility is challenged. *See Sampson*, 38 N.E.3d at 992. Thus, testimony about whether a child displayed such characteristics is permissible if a defendant has opened the door to such testimony. *Id*. (addressing testimony about whether a child showed signs of coaching). Here, Ramirez attacked A.P.'s credibility. *Tr. Vol. 3* at 46-49. Thus, even if Blakey's statement could be construed as vouching, Ramirez opened the door to that testimony by challenging A.P.'s version of events during cross-examination. *See Sampson*, 38 N.E.3d at 992 (testimony about behavioral characteristics of a child abuse victim is "far less controversial" when the child's credibility is challenged).

[53] Finally, even if the trial court abused its discretion in allowing Blakey to testify about script memory, the error was harmless. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." *Norris*, 53 N.E.3d at 524-25. Here, Blakey's testimony occurred after A.P. testified that Ramirez had touched her vaginal area and, in addition, after she had indicated that he had touched her vaginal area by circling her vaginal area in the picture in State's Exhibit 3. *Tr. Vol. 3* at 32-33, 45; *Ex. Vol*. at 23. Because the State elicited substantial testimony from

A.P. that Ramirez had molested her before Blakey testified, any error in the admission of the testimony was harmless.

VI. Hearsay

[54] Ramirez claims the trial court abused its discretion in allowing Simkins and Blakey to testify that the statements that A.P. made during the forensic interview were "disclosures" because such characterizations of A.P.'s statements were inadmissible hearsay. A trial court has broad discretion to admit or exclude evidence, including purported hearsay. *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011). We will disturb a trial court's ruling only if it amounts to an abuse of discretion, meaning the court's decision is clearly against the logic and effect of the facts and circumstances or it is a misinterpretation of the law. *Id*.

[55] Under Indiana Evidence Rule 801(a), a "statement" refers to "a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." "Hearsay" refers to a statement that: "(1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Under these definitions, the testimonies of Simkins and Blakey were not hearsay because their testimonies were not verbatim recitations of what A.P. had said or even approximate paraphrases of what she had said. Ramirez does not dispute this.

[56] Ramirez correctly posits that testimony summarizing another person's statement can constitute hearsay. "We find that this testimony is akin to a witness summarizing the content of an out-of-court statement. Such a summary would constitute hearsay." *Thornton v. State*, 25 N.E.3d 800, 804 (Ind. Ct. App. 2015). Thus, Ramirez argues:

> By claiming A.P. made a "disclosure of sexual abuse," the witnesses summarized A.P.'s statement in their own words. When the interviewer said A.P. had script memory, he summarized her accusations as repeating the same scenario over and over. Although the forensic interviewer did not specifically state that A.P. said Ramirez molested her over and over, he did so indirectly.

Appellant's Br. at 32-33.

[57] We reject Ramirez's argument that the testimonies about disclosures were inadmissible hearsay because those testimonies allegedly were summaries of A.P.'s statements during the forensic interview. Reviewing *Thorton*, the case that Ramirez cites for the proposition that summary of a person's statement can constitute hearsay, supports our decision. 25 N.E.3d at 804. In *Thornton*, a police officer testified regarding the statements given by the defendant and his accomplice, commenting on how those statements were similar and how they were different. *Id*. We observed:

> [The detective] then testified that when he previously stated that [the defendant's] and [the accomplice's] versions were somewhat consistent, he was referring to a "few similarities" "as far as [the victim] was involved, she was in the car, she was in his

> apartment, those few similarities," but "[o]ther than that, there were some major differences in what occurred that night."

Id.

[58] In *Tessely v. State*, 432 N.E.2d 1374, 1375-76 (Ind. 1982), the defendant alleged in his petition for post-conviction relief that trial counsel was ineffective for failing to introduce notes and a letter that allegedly proved the deputy prosecutor's animus toward the defendant. *Id*. More specifically, the notes and letter indicated that the defendant's cellmate overheard a conversation between the deputy prosecutor and a colleague from another county that the deputy prosecutor held a personal hostility toward defendant and was determined the defendant would be convicted and receive the maximum sentence possible. *Id*. In finding that trial counsel was not ineffective for failing to introduce the notes and letter into evidence at trial, our Supreme Court found that the summaries in the notes and letter constituted hearsay: "We note both written summaries of [the cellmate's] account of the conversation he overheard represent hearsay evidence in its classic form." *Id*. at 1376.

[59] The testimony of Simkins and Blakey about A.P.'s disclosure were not summaries of her statements in the forensic interview and did not paraphrase A.P.'s statement. *See In re O.G.*, 65 N.E.3d 1080, 1088 n.2 (Ind. Ct. App. 2016), *trans. denied* (noting that paraphrasing the child's out-of-court statement is hearsay). Thus, their testimonies were not hearsay, and the trial court did not abuse its discretion in overruling Ramirez's objection to those testimonies.

[60] Moreover, the error was harmless. The erroneous admission of hearsay testimony does not require reversal unless it prejudices a defendant's substantial rights. *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). The admission or exclusion of evidence that is merely cumulative is not grounds for reversal. *Tobar v. State*, 740 N.E.2d 106, 108 (Ind. 2000). Before Simkins's and Blakey's testimonies, A.P. testified that she gave an interview, that she told Blakey what Ramirez did to her, and she circled the picture in State's Exhibit 3. *Tr. Vol. 3* at 32-33, 45; *Ex. Vol.* at 23. Thus, there was independent evidence of Ramirez's guilt. *See Blount*, 22 N.E.3d at 568. Simkins's and Blakey's testimonies that A.P. made a disclosure was, at most, cumulative evidence to A.P.'s own testimony and, therefore, the admission of the testimony of Simkins and Blakey is not reversible error.

VII. Jury Instruction

[61] Ramirez contends that the trial court abused its discretion when it read Final Instruction 4 to the jury. The instruction stated, "Time of occurrence of an act is not an element, nor is it essential to proving a criminal violation in crimes involving children." *Tr. Vol. 3* at 160. The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury, allowing it to comprehend the case, and arrive at a just, fair, and correct verdict. *Isom v. State*, 31 N.E.3d 469, 484 (Ind. 2015). We review a trial court's instruction for an abuse of discretion. An abuse of discretion occurs when the instruction is erroneous and the instructions as a whole misstate the law or otherwise mislead the jury. *Id*. at 484-85. When evaluating instructions, we

evaluate whether: 1) the tendered instructions correctly state the law; 2) there is evidence in the record to support the instructions; and 3) the substance of the proffered instructions is covered by other instructions. *Id*. at 485.

[62] Ramirez argues that the trial court should have not allowed this instruction because it is based on language from appellate case law, and since our Supreme Court has cautioned against employing language from appellate decisions for jury instructions, instructing the jury with this language was an abuse of discretion. In support, Ramirez cites *Ludy v. State*, 784 N.E.2d 459, 460 (Ind. 2003). In *Ludy*, the trial court instructed the jury that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." *Id*. at 460. The Indiana Supreme Court held that the instruction was erroneous because "it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder." *Id*. at 461. The "mere fact that certain language or expression [is] used in the opinions of this Court to reach its final conclusion does not make it proper language for instructions to a jury." *Id*. at 462 (alteration in original). The Court also found the instruction problematic because by emphasizing one witness's testimony, the instruction invaded the jury's prerogative to determine the law and the facts. *Id*. at 461. "To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence." *Id*. at 462.

[63] Ramirez correctly observes that when the State proposed the language for Final Instruction 4, it directed the trial court to similar language in *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992) and *Baggett v. State*, 514 N.E.2d 1244, 145 (Ind. 1987). *Appellant's App. Vol. 2* at 170. Ramirez is correct that *Barger* dealt with sufficiency of evidence in a child molesting case, and *Baggett*, also a child molesting case, dealt, in part, with issues regarding an instruction related to the credibility of a minor as a witness. *See Barger*, 587 N.E.2d at 1307; *see also Baggett*, 514 N.E.2d at 1245.

[64] Even though Ramirez argues that it was improper to use language from an appellate case for Final Instruction 4, his primary argument is that the instruction here highlighted only one piece of evidence, that is, the time of Ramirez's acts of molestation. Ramirez contends:

> [I]t should be for the jury to decide the importance the timing of the occurrence has when determining if the State met its burden. The fact that A.P. could not provide any specifics about the timing of the alleged molestation potentially undermined her credibility with the jury. The jury had a duty to consider the vagueness of her accusations. . . . Just as the instruction in *Ludy* invaded the jury's duty to determine all of the evidence, so too did this instruction. The trial court abused its discretion in giving the instruction.

Appellant's Br. at 38.

[65] We reject Ramirez's argument that the trial court abused its discretion in instructing the jury that "time of occurrence of an act is not an element, nor is it essential to proving a criminal violation in crimes involving children." *Tr. Vol.*

3 at 160. First, there is no blanket prohibition against the use of appellate decision language in jury instructions. *Marks v. State*, 864 N.E.2d 408, 411 (Ind. Ct. App. 2007); *Gravens v. State*, 836 N.E.2d 490, 494 (Ind. Ct. App. 2005), *trans. denied*. Final Instruction 4 was a proper statement of the law. Time is not of the essence in the crime of child molesting. *Carter*, 31 N.E.3d 17, 26 n.6 ((Ind. Ct. App. 2005), *trans. denied*. This is so because "it is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases." *Barger*, 587 N.E.2d at 1307. Therefore, the precise time and date of the commission of a child molestation generally is not regarded as a material element of the crime. *Id*.

[66] The evidence showed that Ramirez molested A.P. when she was less than fourteen years old, *Tr. Vol. 3* at 26-29; thus, there was evidence in the record to support the giving of the instruction that time was not an element. *See* Ind. Code § 35-42-4-3 (stating that the offense of child molesting applies when a child is under the age of fourteen). Also, the substance of this instruction was not covered by other instructions, so the lack of this instruction would have left the jury inadequately instructed. The trial court did not abuse its discretion in reading Final Instruction 4 to the jury.

[67] Further, Final Instruction 4 was not problematic in the way that the instruction in *Ludy* was problematic. The instruction in *Ludy* was problematic because it emphasized a single witness's testimony. 784 N.E.2d at 461. Here, Final Instruction 4 did not emphasize one witness's testimony. *Tr. Vol. 3* at 160. In fact, the instruction did the opposite; it removed an irrelevant factor from the

State's burden of proof. Time was not an element of the child molesting charge, so the instruction properly advised the jury that the State was not required to prove the times that the instances of molestation occurred. The trial court did not abuse its discretion in reading Final Instruction 4 to the jury.

[68] Affirmed.

Altice, J., and Weissmann, J., concur.