

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

James L. Yarbrough,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



April 24, 2024

Court of Appeals Case No.
23A-CR-2188

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge
The Honorable Jane S. Craney, Senior Judge

Trial Court Cause No.
49D32-2009-FA-28896

Memorandum Decision by Judge Weissmann
Judges Mathias and Tavitas concur.

Weissmann, Judge.

- [1] Following a bench trial, James Yarbrough was convicted on seven counts of child molesting against several girls. He appeals only his conviction related to an act of sexual intercourse with a 13-year-old victim (Victim 1). During trial, the State used a transcript of Victim 1's prior interview with police to refresh her memory. On appeal, Yarbrough tries to frame this act as improper impeachment, claiming the trial court erred in using it as substantive evidence of his guilt. We reject his arguments and affirm.

Facts

- [2] Between 2006 and 2014, Yarbrough repeatedly molested his girlfriend's five daughters. He engaged in sexual intercourse, performed oral sex on the girls, and directed them to do the same to him. After Yarbrough's actions were reported in 2020, the State charged Yarbrough with five counts of Class A felony child molesting, two counts of Class C felony child molesting, and one count of Class D child solicitation.
- [3] At trial, Victim 1 testified about Yarbrough's crimes against her. During her testimony, Victim 1 forgot whether Yarbrough actually had sexual intercourse with her, or just attempted to do so. The State then showed the victim a transcript of her interview with a detective two years earlier. After Victim 1 reviewed the relevant portion of the transcript, the State again asked Victim 1 whether Yarbrough had "full blown sex" with her, to which Victim 1 replied, "Yes." Tr. Vol. II, p. 153.

- [4] The trial court found Yarbrough guilty of the child molesting charges but acquitted him of child solicitation. Yarbrough appeals only his child molesting conviction related to Victim 1.

Discussion and Decision

- [5] Yarbrough argues that sufficient evidence does not support the finding that he had sexual intercourse with Victim 1. He claims the State introduced Victim 1's prior statements as impeachment evidence, which the trial court improperly considered as substantive evidence. If true, and Victim 1's testimony cannot be considered, Yarbrough contends that the State failed to prove the sexual intercourse element of his charged crime beyond a reasonable doubt.

The State Did Not Impeach Victim 1

- [6] As has long been the rule in Indiana, "evidence that was introduced to impeach the credibility of a witness" at trial cannot be considered as substantive evidence of the defendant's guilt. *Humphrey v. State*, 73 N.E.3d 677, 686 (Ind. 2017) (quoting *Webster v. State*, 413 N.E.2d 898, 901 (Ind. 1980)). Hoping to find shelter under this rule, Yarbrough attempts to classify the State's proffering of Victim 1's prior statement as impeachment evidence. He is mistaken.
- [7] The State used the prior statement to refresh Victim 1's memory—not as an impeachment device. Our rules of evidence allow for a "writing or object to refresh the witness's memory." Ind. Evidence Rule 612(a)(1). The basic process requires the witness to "first state that [they do] not recall the information sought," then the questioner may use writings or other methods to refresh the

witness's memory. *Thompson v. State*, 728 N.E.2d 155, 160 (Ind. 2000). A "simple colloquy" establishing the witness's forgotten memory "is all that is required under Rule 612." *Id.* (quoting 13 Robert Lowell Miller, Jr., *Indiana Practice* § 612.101, at 225 (2d ed.1995)). The following exchange during Victim 1's testimony reflects exactly that:

Q: And what happened that time when you were 13?

A: I came home from school, and nobody was there except for him.

Q: When you say him, who do you mean?

A: Yarbrough

A: There's not really much I remember from that day. I remember him doing something to me though.

Q: Okay. You say you remember him doing something to you?

A: Yeah.

Q: What was that?

A: He kept trying to have sexual intercourse with me.

Q: Did he?

A: I don't remember.

Q: Tell me what you mean by trying?

A: He kept wanting me to do stuff. He kept wanting me to have sexual intercourse with him that day.

Q: How did you know that's what he wanted you to do?

A: Because he said it.

Q: Okay. You said—what did he say to you?

A: I don't remember.

Q: Do you really not remember, or do you not want to talk about it?

A: I don't remember.

Q: Do you remember giving a deposition with Mr. Neel?

A: Yes.

Q: And do you remember previously telling us that Yarbrough did have full blown sex with you that day?

A: No. I don't remember that.

Q: Sorry, I believe I misspoke. Do you remember speaking with Detective Guynn here, and giving a statement?

A: That detective?

Q: Yes.

A: No.

Q: Do you remember giving a statement?

A: Yes.

Q: Your Honor, may I approach?

The Court: You may.

Q: It's page 9 and into 10. I'm just going to have you read the bottom and then 10, okay?

(Witness reviews document)

Q: Did you read the bottom of page 9, page 10, and the top of page 11?

A: Yes.

Q: Okay. I'll take those back from you. Okay. So you gave that statement closer in time to when that happened, right?

A: Yeah.

Q: And did reading the transcript refresh your memory?

A: Yes.

Q: Did you previously say that Yarbrough did have full blown sex with you?

A: Yes.

Q: And that by full blown sex, you meant that he put his penis in your vagina?

A: Yes.

Tr. Vol. II, pp. 149-53 (cleaned up). Yarbrough did not object during this exchange.

[8] Victim 1 testified that she had forgotten the substance of the State's question. Thus, the State appropriately responded by trying to refresh her memory. This was not impeachment. *See Griffith v. State*, 31 N.E.3d 965, 969-72 (Ind. 2015) (discussing the procedure for impeachment evidence); *see also* Evid. R. 613(b). As Yarbrough only cites cases involving the impeachment of a witness with a prior inconsistent statement, instead of cases about refreshing a witness's memory, his argument here misses the mark. *See, e.g., Stoltmann v. State*, 793

N.E.2d 275, 281-82 (Ind. Ct. App. 2003) (citing *Humphrey v. State*, 680 N.E.2d 836, 838 (Ind. 1997)).

[9] Because the trial court properly relied on Victim 1’s testimony as evidence that Yarbrough had sexual intercourse with her, sufficient evidence exists establishing his guilt. Accordingly, we affirm.

Mathias, J., and Tavitas, J., concur.

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