MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Jacob D. Lichtsinn,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 24, 2024

Court of Appeals Case No.
23A-CR-2478

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No.
02D06-2202-F4-12

Memorandum Decision by Judge Bailey
Judges Crone and Pyle concur.

Bailey, Judge.

Case Summary

[1] Jacob Lichtsinn appeals his conviction for Child Molesting, as a Level 4 felony.[1] We affirm.

Issues

[2] Lichtsinn presents two issues for review:

I. Whether the trial court abused its discretion by declaring a potential defense witness who experienced a medical emergency during trial unavailable and admitting her deposition testimony into evidence; and

II. Whether Lichtsinn was entitled to a mistrial due to the absence of that witness.

Facts and Procedural History

[3] In 2020, Lichtsinn lived with his girlfriend, Viviana Perez, and several of Perez's relatives, including then-ten-year-old J.S. On two occasions while Perez was sleeping, Lichtsinn molested J.S. in the bed that he shared with Perez. On the first occasion, Lichtsinn touched J.S.'s breasts under her clothing; on the second occasion, he touched J.S.'s vagina under her clothing.

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[1] Ind. Code § 35-42-4-3(b).

Another time when Perez was asleep, Lichtsinn summoned J.S. to the pantry closet, forced a kiss upon her, and compelled her to touch his penis.

[4] In the spring of 2021, Lichtsinn and Perez moved from that residence. Several of the remaining family members and their friends went on a spring break vacation together. During the trip, J.S. disclosed the prior abuse to her friends, who repeated the disclosure to J.S.'s mother. J.S.'s mother then called the police, tendered to them J.S.'s cell phone for forensic examination, and produced J.S. for an interview. Based upon the results of that investigation, Lichtsinn was charged with Child Molesting and Dissemination of Matter Harmful to Minors, a Level 6 felony.[2]

[5] On August 8, 2023, Lichtsinn was brought to trial before a jury. The State elicited testimony from J.S. regarding the molestations and also elicited testimony from other witnesses that Perez sometimes drank to excess, suggesting that she may not have supervised all interactions between J.S. and Lichtsinn. When the State rested its case-in-chief on the second day of trial, Lichtsinn's counsel advised the trial court that he intended to call Perez as a defense witness and that Lichtsinn's mother had been dispatched to drive Perez to court. However, after the lunch break, defense counsel advised the court that Perez had been taken to the hospital, apparently suffering from complications of diabetes. The trial court informed the jury that a recess would be granted

[2] I.C. § 35-49-3-3(a)(1).

due to unavailability of a witness but that the "trial will finish tomorrow." (Tr. Vol. III, pg. 22.)

[6] The next day, in-court proceedings began with the parties discussing how best to present Perez's prior deposition testimony. Discussion between the trial court and defense counsel indicated that an in-chambers conference had been conducted and it had been learned that Perez was being discharged from the hospital with instructions to rest and avoid stressful situations. The bench conference culminated with agreement upon the procedure that Lichtsinn's mother would read aloud the deposition to the jury, after two redactions were made.

[7] The court instructed the jury that the trial would be "proceeding with the rules for unavailable witnesses." (*Id.* at 31.) Lichtsinn made no objection to the reading of the deposition but requested a mistrial "due to a material witness [absence]." (*Id.* at 32.) The motion for a mistrial was denied. Perez's deposition was read aloud, including her admission that she had sometimes come home drunk. The deposition also included Perez's assertion that she did not know any reason that J.S. would have accused Lichtsinn of child molestation.

[8] The jury convicted Lichtsinn of Child Molesting and acquitted him of the charge of Dissemination of Material Harmful to a Child. Lichtsinn was sentenced to six years imprisonment, with two years suspended to probation. He now appeals.

Discussion and Decision

Declaration of Unavailability

[9] Lichtsinn contends that the trial court abused its discretion by declaring Perez an unavailable witness pursuant to Indiana Evidence Rule 804(a)(4), which provides:

> A declarant is considered to be unavailable as a witness if the declarant: … cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness[.]

[10] Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless admitted pursuant to a recognized exception. Ind. Evidence Rule 802; *see also Blount v. State*, 22 N.E.3d 559, 565 (Ind. 2014) ("Hearsay is an out-of-court statement offered for the truth of the matter asserted, and it is generally not admissible as evidence.") (internal citations and quotations omitted).

[11] The decision to admit former testimony of an unavailable witness, as an exception to the hearsay rule, is within the sound discretion of the trial court. *Burns v. State*, 91 N.E.3d 635, 639 (Ind. Ct. App. 2018). We will reverse the decision of the trial court only upon "a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial." *Id.* In conducting our review, we "will only consider the evidence in favor of the trial court's ruling

and unrefuted evidence in the defendant's favor." *Id*. (internal citations omitted.)

[12] Lichtsinn's entire argument as to unavailability is as follows:

> The trial court never interviewed [Perez]. The trial court never questioned [Perez]. The trial court never had occasion to observe [her] behavior, demeanor, or appearance. There was no discussion as to any attempts made to get [Perez] to court. There was never an inquiry as to whether [Perez] could testify remotely. Instead, the trial court was primarily concerned with finishing the trial by Thursday, August 10th. Because there were no inquiries made as to whether or not [Perez] could testify later in the day on August 10th, if [Perez] could testify virtually, or if she could testify at any time on August 11th, the trial court prematurely declared [Perez] unavailable.

Appellant's Brief at 10.

[13] At his trial, Lichtsinn did not claim that there was an insufficient basis for the determination that Perez was unavailable. Indeed, he provided the factual basis for the determination by advising the trial court that Perez had been hospitalized for diabetic complications and was being released subject to the conditions of rest and stress avoidance. To the extent that he now suggests that the trial court was required to conduct a further inquiry, he is attempting to raise an issue not preserved for appellate review. Nevertheless, we observe that the plain language of Evidence Rule 804 does not include a requirement that the trial court must explore options for remote or delayed testimony. Lichtsinn does not point to any other legal authority for such a requirement.

Accordingly, he has failed to demonstrate a manifest abuse of the trial court's discretion.

Motion for Mistrial

[14] Lichtsinn contends that he was entitled to a mistrial because of the substitution of Perez's deposition for in-trial testimony. According to Lichtsinn, "the discovery deposition served as an inefficient substitute for live testimony, since the discovery deposition could not have contemplated J.R.'s testimony at trial." Appellant's Brief at 11.

[15] A mistrial is warranted only when a defendant has been placed in a position of grave peril. *Brown v. State*, 746 N.E.2d 63, 69 (Ind. 2001). Our standard of review is well-settled:

> On appeal, a trial judge's discretion in determining whether to grant a mistrial is afforded great deference, because the trial judge "is in the best position to gauge the surrounding circumstances of an event and its impact on the jury." *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989). We therefore review the trial court's decision solely for abuse of discretion. *Rodriquez v. State*, 270 Ind. 613, 388 N.E.2d 493 (1979). After all, a mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation. *Szpyrka v. State*, 550 N.E.2d 316, 318 (Ind. 1990) (citing *Lee v. State*, 531 N.E.2d 1165 (Ind.1988)).

Mickens v. State, 742 N.E.2d 927, 929 (Ind. 2001).

[16] Perez's deposition testimony indicated that Lichtsinn and J.S. were not left alone together but also that Perez was not always supervising interactions

between Lichtsinn and J.S. Perez admitted that she sometimes came home drunk. She also testified that Lichtsinn and J.S. would play video games while she was taking a shower and that Lichtsinn and J.S. would take the dog out together. However, Perez insisted that she knew of no reason J.S. would make any accusation of molestation against Lichtsinn.

[17] In contrast to an event that wrongly placed Lichtsinn in grave peril, the admission of Perez's deposition testimony was in accordance with our rules of evidence. Moreover, Lichtsinn does not identify any testimony that he hoped to elicit from Perez at trial that was not covered in her deposition. He has demonstrated no abuse of the trial court's discretion in its denial of a mistrial.

Conclusion

[18] Lichtsinn has not demonstrated an abuse of the trial court's discretion in its evidentiary rulings or in its denial of a mistrial.

[19] Affirmed.

Crone, J., and Pyle, J., concur.

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