

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 5-14-32

v.

MICHAEL E. THEIS,

OPINION

DEFENDANT-APPELLANT.

**Appeal from Hancock County Common Pleas Court
Trial Court No. 2013 CR 257**

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

***Scott B. Johnson* for Appellant**

***Elizabeth H. Smith* for Appellee**

SHAW, J.

{¶1} Defendant-appellant Michael E. Theis (“Theis”) appeals the November 4, 2014, judgment of the Hancock County Common Pleas Court sentencing Theis to 48 months in prison after Theis was found guilty in a jury trial of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree.

{¶2} The facts relevant to this appeal are as follows. On November 26, 2013, Theis was indicted for one count of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. (Doc. No. 1). The indictment alleged that on or about May 3, 2013, Theis engaged in sexual contact with I.C., who was less than thirteen years of age, having been born in May of 2005.¹ At the time of the alleged incident, Theis was living with the former stepmother of I.C.’s mother. I.C.’s mother, Tiffany, lived with her former stepmother, Shelly, and Theis for a brief period around the time of the alleged incident, and I.C. would thus stay at the same residence as Theis while Tiffany exercised her visitation with I.C.

{¶3} On December 11, 2013, Theis was arraigned on the charge against him and he pled not guilty.

¹ The original indictment erroneously listed the date of the incident as on or about May 3, 2012, but the indictment was later amended to the date of “on or about May 3, 2013.” (Doc. Nos. 9, 10).

{¶4} On January 14, 2014, Theis filed a motion for a hearing to determine the competency of I.C. (Doc. No. 11).

{¶5} On March 27, 2014, the court filed an entry reflecting a stipulation made by the parties to the use of a polygraph examination of Theis in this case. (Doc. No. 24).

{¶6} On July 30, 2014, the court filed an entry determining that I.C., who was 8 years old at the time of the alleged incident, and 9 years old at the time of the competency hearing, was competent to testify. (Doc. No. 54).

{¶7} The case proceeded to a jury trial, which was held September 29, 2014 – October 2, 2014. At trial the State called ten witnesses including the alleged victim, I.C. Theis called no witnesses and rested his case and the case was submitted to the jury.² The jury returned a guilty verdict on the sole count against Theis for Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree.

{¶8} On October 30, 2014, the case proceeded to sentencing. The State requested a maximum prison sentence of 60 months, while Theis's counsel argued for leniency due to a lack of a prior criminal record. The trial court ultimately

² Theis did attempt to call one witness, I.C.'s mother Tiffany, but he had been unable to secure her attendance at trial. Whether Tiffany's testimony from a prior hearing could be read to the jury in her absence is the subject of the second assignment of error in this appeal.

ordered Theis to serve 48 months in prison.³ A judgment entry memorializing this sentence was filed November 4, 2014.

{¶9} It is from this judgment that Theis appeals, asserting the following assignments of error for our review.

**ASSIGNMENT OF ERROR 1
THE DEFENDANT’S CONVICTION WAS NEITHER
SUPPORTED BY THE SUFFICIENCY NOR THE MANIFEST
WEIGHT OF THE EVIDENCE.**

**ASSIGNMENT OF ERROR 2
THE TRIAL COURT ERRED IN BARRING THE
ADMISSION OF CERTAIN HEARSAY STATEMENTS
PURSUANT TO EVIDENCE RULE 804(B).**

First Assignment of Error

{¶10} In his first assignment of error, Theis argues that there was insufficient evidence to convict him, and that his conviction was against the weight of the evidence. Specifically, Theis argues that there was no evidence that Theis touched any of the “erogenous zone[s]” of I.C. and that there was no evidence that it was done “for the purpose of sexually arousing or gratifying either person.” (Appt.’s Br. at 16).

{¶11} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* When an appellate court reviews a record upon a

³ Theis was also classified as a Tier II sex offender.

sufficiency challenge, “ ‘the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ ” *State v. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶12} The Ohio Supreme Court has “carefully distinguished the terms ‘sufficiency’ and ‘weight’ in criminal cases, declaring that ‘manifest weight’ and ‘legal sufficiency’ are ‘both quantitatively and qualitatively different.’ ” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380 (1997), paragraph two of the syllabus.

{¶13} Unlike our review of the sufficiency of the evidence, an appellate court’s function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins, supra*, at 387. In reviewing whether the trial court’s judgment was against the weight of the evidence, the appellate court sits as a “thirteenth juror” and examines the conflicting testimony. *Id.* In doing so, this Court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder “ ‘clearly lost its way and created such a manifest

miscarriage of justice that the conviction must be reversed and a new trial ordered.’ ” *State v. Andrews*, 3d Dist. Allen No. 1–05–70, 2006–Ohio–3764, ¶ 30, quoting *Thompkins* at 387.

{¶14} In this case Theis was convicted of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4), which reads,

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

* * *

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

{¶15} In order to convict Theis at trial, the State called ten witnesses beginning with Kim Jones, a child abuse coordinator at Mercy St. Vincent Hospital in Toledo, and Dr. Randall Scott Schlievert, a child abuse pediatrician/director of the child maltreatment program at Mercy Children’s Hospital. (Tr. at 338, 397). Both had been forensically trained to interview abused children and they worked together as a team as “child abuse consults.” (*Id.* at 341-343, 405).

{¶16} Dr. Schlievert and Jones testified that they met with I.C. at the Lucas County Children’s Advocacy Center in August of 2013, approximately three

months after the alleged incident. (Tr. at 346, 360, 425). They testified that they asked I.C. initial questions to establish a rapport, then asked I.C. if she knew why she was there, to which I.C. responded that she was touched “down there” on more than one occasion by Theis.⁴ (*Id.* at 351-52). Dr. Schlievert and Jones got I.C. to clarify that Theis touched I.C. in her privates (she had pointed to her vaginal area, according Jones), that the touching was under I.C.’s clothing, and that it was with Theis’s fingers. (*Id.* at 355, 437-438).

{¶17} According to Dr. Schlievert and Jones, I.C. said that Theis told her he was sorry, but also indicated that she should not tell anyone, and if she did, she would be put in a different family. (Tr. at 356, 437-438). Dr. Schlievert testified that at the time of the exam I.C. was mad because she was worried she would be put in a different family. (*Id.* at 438).

{¶18} I.C.’s visit with Dr. Schlievert and Jones lasted approximately an hour, and it included a physical examination. The physical examination, which occurred months after the alleged incident, was “normal;” however, Dr. Schlievert testified that was not unusual in situations such as these. (*Id.* at 450).

{¶19} Dr. Schlievert and Jones also spoke with I.C.’s father after they interviewed I.C. and after I.C. was physically examined. I.C.’s father related that I.C. was losing hair in clumps, that she was having nightmares and hallucinations,

⁴ Jones did the actual questioning of I.C. while Dr. Schlievert was present and transcribed the interview.

such as seeing people outside her windows. (Tr. at 438). Dr. Schlievert testified that he thought I.C. was potentially dealing with PTSD. (*Id.*)

{¶20} Following the interview and examination, Dr. Schlievert made the diagnosis to a reasonable degree of medical certainty that I.C. had been sexually abused. (*Id.* at 453-454).

{¶21} The State next called I.C. who testified that she was born in May of 2005, that she was in fourth grade and that she lived with her father and Jenny, who she called mom but was not her real mother. (Tr. at 503-506). I.C. testified that her real mother's name was Tiffany and that I.C. used to stay with Tiffany on weekends but does not anymore. (*Id.* at 506). Tiffany's step-mother, Shelly Theis, was married to Theis and Tiffany used to live with Theis and Shelly. (*Id.* at 508). When Tiffany was living with Theis and Shelly, I.C. had a bedroom at Theis's residence. (*Id.*)

{¶22} When asked about the incident in question, I.C. initially testified that she did not want to say what happened. (Tr. at 511). However, she ultimately testified that Theis "touched [her] in the wrong spot," that it was "down in [her] privates," "down low[.]" (*Id.* at 512). I.C. testified that Theis touched her in the front of her body with his hand under her clothes, specifically underneath her underwear. (*Id.* at 513-514). She testified that it happened more than once when I.C.'s mother was living with Theis in Theis's living room, in I.C.'s bedroom and

in Theis's bedroom. (*Id.* at 514-515). I.C. testified that it never happened outside the house or in the car. (*Id.* at 515).

{¶23} I.C. testified that she was scared when Theis touched her and that she told her mother in a whisper that Theis touched her in her privates, and then later told her father and Jennifer (her father's girlfriend). (Tr. at 516-520). I.C. testified that she also told Sarah Miller, her counselor. (*Id.* at 521). I.C. testified that she remembered meeting with Dr. Schlievert but not what was said. (*Id.* at 525).

{¶24} The State next called Deputy Terrell Brooks, a Deputy Sheriff from Hancock County, who testified that he responded to the residence where I.C. lived with her father David for a child sex offense complaint, but he did not question I.C. at the time per procedure. (Tr. at 538).

{¶25} The State next called Detective Lyle Harvitt of the Hancock County Sheriff's Department who testified that he was assigned to investigate I.C.'s case. (Tr. at 544). Detective Harvitt testified that he set up a meeting with I.C. along with children's services and its investigator Kate McGrain to investigate the case. (*Id.* at 552). Detective Harvitt testified that within three days after being assigned to the case he set up the interview with I.C. (*Id.* at 557). Detective Harvitt testified that I.C.'s father brought I.C. in for the interview, but during the interview only I.C., Kate McGrain, and Detective Harvitt were present. (*Id.* at 561).

Detective Harvitt testified that he went over what the truth versus a lie is with I.C. (*Id.* at 563). Following the interview Detective Harvitt thought I.C. should meet with Dr. Schlievert, and he also set up an interview with Theis. (*Id.* at 567-568).

{¶26} Detective Harvitt testified that Theis voluntarily met with him. (Tr. at 569-571). Detective Harvitt indicated that Theis was mirandized and that Theis indicated he understood his rights. (*Id.* at 570-571). Detective Harvitt testified that Theis informed him that I.C. periodically stayed at his residence along with her mother Tiffany around April or May of 2013. (*Id.* at 577). Theis indicated that he had hugged I.C., that he was a “hugger,” but he denied touching I.C. inappropriately. (*Id.* at 579).

{¶27} Theis indicated that he had separated from his wife, Shelly, and that Shelly did not “have the sex drive that he had.” (*Id.* at 580). Detective Harvitt testified that he then confronted Theis with the accusation that Detective Harvitt believed Theis had touched I.C. inappropriately, and Theis did not say anything. (*Id.* at 580). Detective Harvitt then brought up the possibility of Theis performing a polygraph examination, and Theis agreed to undertake a polygraph examination. (*Id.* at 581).

{¶28} The State next called Jennifer Thompson, the live-in girlfriend of I.C.’s father, David. Jennifer testified that she had a mother/daughter relationship with I.C., but that relationship had not developed at the time of the alleged

incident in April/May of 2013. (Tr. at 600-601). Jennifer testified that in the spring of 2013 I.C. began losing her hair and was having patches of bald spots so they took I.C. to a pediatrician. (*Id.* at 604-605). After I.C.'s blood tests came back normal, I.C. was referred to counseling with Sarah Miller. (*Id.* at 605-607). Jennifer testified that I.C. started having nightmares and started seeing things such as "a little girl who had no eyes, blood coming down the side of her face, and there was a little boy that followed her around at school that had black eyes as well." (*Id.* at 607).

{¶29} Jennifer testified that I.C. started seeing Sarah Miller for counseling in the last week of July in 2013. (Tr. at 608). Jennifer testified that after a meeting with Sarah, I.C. told Jennifer that she wanted to talk. (*Id.* at 609). Jennifer testified that was when I.C. informed her of the incident with Theis.

{¶30} Jennifer testified that she and David then contacted Sarah Miller to find out what needed to be done, and that she then called the police. (Tr. at 610). Jennifer testified that Deputy Brooks initially responded, and that she was put in contact with Detective Harvitt. (*Id.* at 611-612).

{¶31} Jennifer testified that I.C. was still seeing Sarah Miller at the time of trial for counseling, and that I.C. still has hair loss when she gets stressed. (Tr. at 613). Jennifer also testified that I.C. still has sleeping problems and that she wakes with nightmares. (*Id.* at 614). Jennifer testified that I.C. was eventually

admitted to the Kobacker Center for psychiatric treatment. (*Id.* at 615). Jennifer testified that she was not aware of any similar mental problems with I.C. prior to April of 2013. (*Id.* at 617).

{¶32} On cross-examination Jennifer testified that I.C.'s mother's residence had burnt down prior to the incidents in this case and that I.C. was home when the fire occurred and it scared her. (Tr. at 621). Jennifer testified that I.C.'s mother did not have any place to go with the children so she brought the children to David and then I.C.'s mother had "disappeared" for a year. (*Id.* at 621).

{¶33} On re-direct Jennifer testified that she thought I.C.'s hallucinations began around August of 2013, after the alleged incident with Theis, and that they got worse when I.C. learned she had to go to court. (Tr. at 643-644).

{¶34} The State next called I.C.'s father, David. David testified that he separated from I.C.'s mother Tiffany in October 2010. (Tr. at 650). David testified that at the end of June of 2013, I.C. began losing her hair so they took her to see Dr. Huffman at the Caughman Clinic. (*Id.* at 658-659). Due to I.C.'s hair loss and sleep issues, I.C. was referred to counseling with Sarah Miller. (*Id.* at 662). David testified that Jennifer took I.C. to her first visit with Sarah Miller because he was working and could not attend. (*Id.* at 664).

{¶35} David testified that one evening after meeting with Sarah Miller, I.C. informed him that Theis had touched her inappropriately. (*Id.* at 667). David

testified that he called Sarah Miller and then called the police. (*Id.* at 668-669). David testified that he met with children's services and Detective Harvitt, that he gave statements, and eventually took I.C. to meet with Dr. Schlievert. (*Id.* at 670-676).

{¶36} On cross-examination David testified that his divorce from Tiffany was difficult for I.C. and that I.C.'s mother struggled with mental issues such as "bipolar" and "depression." (Tr. at 689). In addition, David testified that Tiffany's boyfriend was a violent person and that I.C. was scared of him because I.C. witnessed physical aggression between Tiffany and her boyfriend. (*Id.* at 690).

{¶37} The State next called Dr. Cheryl Huffman, a pediatrician at the Caughman Clinic. Dr. Huffman testified that she saw I.C. in July of 2013 for hair loss and that at the time David thought the hair loss was perhaps due to the parents' divorce. (Tr. at 717). Dr. Huffman testified that after the blood tests came back negative she felt that I.C. needed counseling so she recommended Sarah Miller. (*Id.* at 721). Dr. Huffman testified that she saw I.C. one more time in September of 2013 when Sarah was on maternity leave. (*Id.* at 724). Dr. Huffman testified that I.C.'s father brought her in concerned with I.C.'s hallucinations, which included seeing someone following her around and seeing spiders on the wall. (*Id.* at 724-725).

{¶38} On cross-examination, Dr. Huffman testified that multiple things could have caused I.C. to exhibit PTSD symptoms or hallucinations that were not limited to the alleged acts in this case such as the house fire, the difficult divorce, and the aggression I.C. witnessed between her mother and her boyfriend. (*Id.* at 737-742).

{¶39} The State next called Sarah Miller, a social worker at the Caughman Clinic who provided mental health counseling and social work case management. (Tr. at 744-45). Miller testified that I.C. was referred to her for stress, anxiety and hair loss by Dr. Huffman. (*Id.* at 751). Miller testified that she first came into contact with I.C. on July 23, 2013 and that Jennifer brought I.C. to that first visit. (*Id.* at 752-53). Miller testified that she did not schedule a follow-up visit with I.C. after the first visit due to her impending maternity leave. (*Id.* at 754). Miller testified that after the first visit, Jennifer contacted her and revealed that I.C. had made allegations of inappropriate touching. (*Id.*) Miller testified that she then set up a second appointment with I.C., and that I.C., David and Jennifer were present for that visit. (*Id.* at 755). Miller testified that I.C. told her that Theis touched her in the wrong places. (*Id.* at 757). Miller also testified that I.C. told her that she had told her mother multiple times and that Theis told I.C. he would take her out of her family if she told anyone. (*Id.* at 758).

{¶40} Miller testified that her next visit with I.C. was in November of 2013 after her maternity leave. Miller testified that I.C. was exhibiting PTSD symptoms at that time. (Tr. at 764). According to Miller, I.C. reported seeing and hearing things that were not reality. (*Id.* at 765). Miller testified that “a common theme was fear, kind of someone or something out to get her, whether it was a Tarantula spider, or a person with a knife.” (*Id.*) Miller testified that I.C. was referred to the Kobacker Center due to her hallucinations, and that I.C. stayed there for a few days, “up to a week.” (*Id.* at 767). Miller testified that I.C. does not meet “the full criteria for [PTSD] at this time,” but symptoms still present themselves when “she’s triggered[.]” (*Id.* at 768).

{¶41} On cross-examination, Miller testified that I.C. had been examined by Dr. Chen in October of 2012, prior to the alleged incident with Theis, for hair loss and biting her right hand. (Tr. at 771). Miller testified that I.C. was referred to her for counseling then but I.C. never came, and that Dr. Chen indicated I.C. was having “adjustment reaction,” which Miller defined as “when any life event happens that causes difficulty in coping.” (*Id.* at 773). During cross-examination Theis’s counsel extensively cross-examined Miller about her interactions in therapy sessions with I.C., and about I.C.’s reported hallucinations.

{¶42} On re-direct, Miller testified that she did not know what was causing I.C.’s hallucinations. (Tr. at 809). Miller testified that none of I.C.’s

hallucinations involved any other allegations of abuse. (*Id.* at 814-815). Miller testified that I.C. was highly insightful, and that she understood that her hallucinations were not actual reality. (*Id.* at 816).

{¶43} The State next called Steven Stechschulte, a polygraph examiner for BCI. Stechschulte testified that Theis willingly and voluntarily agreed to be examined. (Tr. at 856). Stechschulte testified to his training in administering polygraph examinations, how a polygraph is performed, and to how it was performed in this case. (*Id.* at 827-866). Stechschulte testified that he asked four “relevant” questions as to whether Theis had touched I.C. inappropriately. (*Id.* at 859). Those questions were, “Did you ever touch [I.C.]’s butt, bare butt? The other one was, Did you ever touch [I.C.]’s bare vagina? Did you ever rub [I.C.]’s bare vagina? And did you ever commit any sex act upon [I.C.]?” (*Id.*) Theis denied that he had done any of these things. Stechschulte ultimately determined that Theis was being deceptive, and that Theis did not tell the truth throughout the exam for the relevant questions. (*Id.* at 864).

{¶44} At the conclusion of Stechschulte’s testimony, the State rested its case, and Theis made a Crim.R. 29 motion for acquittal, arguing that the State failed to prove that Theis touched I.C. “erogenous zones” and that the State failed to prove that any touching was done for the purpose of sexually arousing either

person. The trial court overruled Theis's motion, and Theis now renews these arguments on appeal.

{¶45} Despite Theis's arguments, there was testimony, when looked at in the light most favorable to the State, to indicate that Theis touched I.C.'s erogenous zones. I.C. herself testified that Theis touched her in her privates, in the front, underneath her underwear with his hand. Other witnesses testified that I.C. consistently related the same story to them in the past. Theis claims that I.C.'s story was not credible due to her hallucinations, but that is a question concerning weight (which we will deal with next) rather than sufficiency. Theis cites no law where a victim's testimony such that we have here is insufficient to convict a defendant and we cannot find that I.C.'s testimony is insufficient here.

{¶46} Theis's argument that there was insufficient evidence presented to establish that he touched I.C. for the purpose of sexually gratifying either party is similarly not well-taken. A reasonable fact-finder could infer from the circumstances and the nature of the touching that the purpose was satisfied in this instance. Again, Theis cites no law to the contrary where similar circumstances were found not to be adequate; therefore, this argument is also not well-taken.

{¶47} Theis next argues that his conviction was against the manifest weight of the evidence. Specifically, Theis argues that there were no witnesses to the

acts, that there was no physical evidence of the crime, and Theis challenges I.C.'s credibility due to her mental issues.

{¶48} Theis argues that testimony at trial revealed that I.C. suffered from psychological issues and that she occasionally experienced disturbing hallucinations, that she had nightmares, and that she exhibited some potential psychological issues before the incidents with Theis were alleged to have happened.

{¶49} Although the testimony was clear that I.C. did suffer from some psychological problems, there was no indication that I.C. ever hallucinated anything remotely comparable to the incidents with Theis. Moreover, Sarah Miller testified that I.C. understood that her hallucinations were not actual reality and that I.C. was highly insightful. Miller testified that I.C.'s hallucinations usually involved fear of harm to herself or family members and that they never involved any other allegations of abuse.

{¶50} Dr. Schlievert, who diagnosed I.C. as being sexually abused, also testified that even if I.C. was having hallucinations before the incident with Theis it would not change his diagnosis of sexual abuse, it would merely change the way that he would recommend that she be treated psychologically as he would not focus solely on PTSD. However, Dr. Schlievert did testify that he was aware of some of I.C.'s mental issues at the time of diagnosis. (Tr. at 438, 466). In

addition, Dr. Schlievert testified that everything I.C. had been through would make her at a much higher risk “for all sorts of bad things, sexual abuse, mental health problems, school problems, bad relationships as she gets older[.]” (*Id.* at 497). Thus Dr. Schlievert testified that I.C.’s mental issues actually made her statistically more likely to be at risk for abuse. (*Id.* at 491).

{¶51} As Theis himself points out, this case primarily turned on the credibility of I.C. Credibility of witnesses falls squarely within the realm of the factfinder. Dr. Schlievert believed that I.C. had been sexually abused and the jury elected to believe I.C.’s story, despite hearing all of the testimony regarding her mental issues. Simply because I.C. was having mental difficulties does not overcome the fact that her story was told and believed by the trier-of-fact.

{¶52} Moreover, on top of I.C.’s testimony, Theis took a polygraph examination, which indicated that Theis was being deceitful or untruthful on all relevant questions, which included questions as to whether Theis had ever touched I.C. sexually or inappropriately. While the polygraph examiner admitted on cross-examination that polygraph examinations were not 100% accurate, the examination does tend to corroborate I.C.’s testimony.

{¶53} On the basis of the record before us, we cannot find that the jury clearly lost its way in convicting Theis or that it created a manifest miscarriage of

justice. Accordingly Theis's arguments are not well-taken and his first assignment of error is overruled.

Second Assignment of Error

{¶54} In his second assignment of error, Theis argues that the trial court erred by barring the admission of certain hearsay statements pursuant to Evid.R. 804(B). Specifically, Theis argues that the trial court erred by excluding a transcript of prior testimony of Tiffany C., I.C.'s mother, from being read to the jury when Tiffany was "unavailable" for trial.

{¶55} "The trial court has broad discretion in the admission or exclusion of evidence and, in the absence of an abuse of discretion which results in material prejudice to a defendant, an appellate court should be slow to reverse evidentiary rulings." *State v. Phelps*, 10th Dist. Franklin No. 14AP-4 2015-Ohio-539, ¶ 27 citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66 (1991). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶56} The hearsay exception for former testimony is codified in Evid.R. 804(B)(1), and reads,

(B) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

{¶57} The admission of prior testimony under this rule requires that the witness be unavailable. Unavailability of a witness is defined in Evid.R. 804(A), as

(A) Definition of unavailability

“Unavailability as a witness” includes any of the following situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement;**
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so;**
- (3) testifies to a lack of memory of the subject matter of the declarant’s statement;**
- (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;**
- (5) is absent from the hearing and the proponent of the declarant’s statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under division**

(B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

{¶58} In this case, after the State had rested, Theis proceeded to his case-in-chief, where his attorney stated that he had intended to call Tiffany C. as his only witness. Theis indicated that Tiffany had been subpoenaed but on four separate occasions the subpoena was unable to be served. Theis's counsel indicated that the public defenders office's investigator had made reasonable efforts to locate Tiffany and secure her attendance at trial. The investigator, Susan Secrist, testified outside of the presence of the jury regarding her efforts to secure Tiffany's attendance.

{¶59} Secrist testified that in the week before the trial she conducted numerous computer searches including using Facebook, Google, and the auditor's website. She testified that she subpoenaed the post office for a forwarding address for Tiffany. (Tr. at 889). Secrist also indicated that she contacted the Sheriff's Department to confirm that all four times they attempted to serve Tiffany a subpoena at her last known address they were unable to serve her. The Sheriff's Department indicated that when they tried the first two times to serve the subpoena on Tiffany at her last known address there was no answer, and on the

third time they were informed that she had moved. (Tr. at 890). On the fourth attempt they were similarly informed that Tiffany had moved and there was no forwarding address.

{¶60} The State cross-examined Ms. Secrist and Secrist testified that she did not contact the Child Support Enforcement Agency or local hospitals, or the Findlay Police Department in her search. (Tr. at 890-91). Secrist also indicated that she had only been attempting to locate Tiffany for four days, despite the fact that the jury trial date had been set for months. (Tr. at 892). In addition, Secrist testified that she did not know that Tiffany was also known by another last name, and Secrist testified that she did not use Tiffany's other last name to try and locate her in her searches.

{¶61} On the basis of Secrist's testimony, Theis claimed that reasonable efforts had been made to secure Tiffany's attendance at trial, that Tiffany was unavailable for purposes of the hearsay rule, and that Tiffany's testimony from a prior hearing on a motion in limine should be read to the jury in its entirety. According to Theis, this testimony would question whether I.C. told her mother that there was "inappropriate touching."

{¶62} The State objected to the inclusion of the prior testimony, arguing that the State did not have a "similar motive" to develop Tiffany's testimony at the prior hearing.

{¶63} Tiffany's testimony from the prior hearing on the motion in limine that Theis desired to introduce consisted of the following examination.

Q [Prosecutor]: Okay. All right. Where were you living at on – in April of 2013?

A [Tiffany C.]: In April? With Mike Theis and Shelly Todd.

*** * ***

Q: Okay, and when did you start living with Shelly and Mike?

A: I think it was in – I'm saying March or – no, actually, February.

Q: February of 2013?

A: Yeah.

Q: Okay, and who is Shelly Todd?

A: My ex-stepmother.

Q: And who is Michael to Shelly?

A: I assume they're still married, so I guess it's her husband.

*** * ***

Q: Okay. How long did you live at that address with them?

A: Only a couple months.

Q: Do you remember the date it was that you moved out?

A: No.

Q: Do you remember an approximate month that you moved out?

A: April or May.

Q: You don't recall?

A: No.

*** * ***

Q: Okay, so you stated that you lived with -- you lived with Michael and Shelly from February until April or May --

A: Yes.

Q: -- of 2013.

A: Yes.

Q: Okay, and who had -- who had custody of [I.C.] [in] April of 2013?

A: It was supposed to be split where I would get her only every -- on Wednesdays and every other weekend and then during the summertime.

Q: And is that how it actually worked out?

A: No.

Q: Okay. How -- how did visitation go between you and David regarding [I.C.]?

A: It was fine at the beginning, and then once everything started happening, I pretty much lost my visitations with her.

Q: So April, 2013, were you still getting her on the Wednesday and every other weekend like you were supposed to?

A: April? Yeah, pretty much.

Q: So things were going along with the visitation agreement, then.

A: Yeah.

Q: When you had visitation with [I.C.], where did that visitation take place?

A: At Mike and Shelly's house.

*** * ***

Q: What type of relationship did [I.C.] have with Michael?

A: I thought they were grandpa and granddaughter.

Q: Okay. Is that what [I.C.] called him?

A: Yeah.

*** * ***

Q: At any time, did [I.C.] come to you and have a talk with you about Michael?

A: No. She – the only thing that I ever said to her was if anybody ever touches her inappropriately, to come to me.

She – the only time that she came to me and said anything was she said, "Grandpa, when he gives me a hug, he pats me on the butt and tells me to be good," so I didn't think anything of it.

Q: When did that conversation with [I.C.] take place?

A: Probably like a month before everything went down, so about April.

Q: Okay, so when you keep saying, "when everything went down," what – what are you --

A: When I found out everything that was going on – on with David, David told me --

Q: You have to be a little bit more specific.

A: I'm sorry.

Q: It's okay.

A: David told me that she was being touched, and that's when I found out about everything.

**Q: Okay. When did that occur between you and David?
When did you find out?**

A: In May, probably towards the end, I think it was. I'm sorry. Yeah, I think it was towards the end of May.

Q: Okay, so you were – so you were living with – you were living with Michael and Shelly, and [I.C.] came to you and made some statements to you.

A: (Witness nodded.)

Q: Were you still living with Michael and Shelly at the time that those statements were made?

A: When she said about the whole hug and then the patting on the butt, yes.

Q: Okay, so you were still living at --

A: Yes.

Q: -- at the address in McComb?

A: Yes.

Q: Where were you at when she made those statements to you?

A: I was living with my fiancé at the time.

Q: Were you at the house when she made those statements to you?

A: Actually, I was – I was actually approached by David about the other statements and stuff that she had told him.

The only other statement that she ever told me was the whole pat on the butt. That was it.

*** * ***

Q: -- when those statements were made, and how did she approach you to make those statements?

A: She just came up to me and said, “Mom, you told me if anything would – if anything – if anybody touched me in an inappropriate way, to say something,” and then that’s what she told me.

Q: Okay, so she came up to you first and said that, and then what was it that she specifically said happened?

A: She just said that he – “When he hugs me, he pats me on the butt,” and – and told me, but that’s pretty much it.

*** * ***

Q: Okay, and did you make any inquiry of her? Did you ask her any followup questions?

A: I asked her if she got touched anywhere else, and he – and she said, “No,” and then I just kind of left it at that.

Q: Okay. Did you ever make any statements to her not to tell anybody that?

A: No.

Q: Okay. Did you ever tell her that – that – that you guys would have to move if she made statements like that?

A: No, I did not.

Q: Okay. Now, you have referred to some conversations that you had with David at a later time; is that right?

A: (Witness nodded.)

Q: Do you recall when those conversations took place?

A: The end of May.

Q: Okay. Are you definite on that time frame?

A: Possibly. It was like the middle, end of May --

Q: Okay.

A: -- is when --

Q: Okay, and what – what was the nature of that – that conversation with David?

A: He pretty much texted me and said that he needed to talk to me, and then we ended up talking, and that's when he told me that, supposedly, [I.C.] was touched. I guess she – she came up to him and started crying and whatever and –

Q: Were you living with Michael and Shelly at the time that David had this conversation?

A: No.

*** * ***

Q: Now, when – when [I.C.] was visiting you, lived with Michael and Shelly, was she – did she have any type of medical problems when she was living or coming to visit?

A: No, she did not.

Q: Did David tell you about any type of medical problems?

A: No, not really. Not at that time, no.

Q: After you moved out from David and Shelly's house, did – did [I.C.] start having any type of medical problems?

A: Yes.

Q: Do you know when those problems started?

A: By probably right around May.

Q: Okay, May of 2013?

A: Yes.

Q: And what were those medical problems?

A: She started losing her hair, seeing things, hearing things, bad dreams, pretty much – pretty much a lot of not-so-good things.

Q: So not just medical problems but also some psychological issues.

A: Yes.

Q: Okay. Did you ever take her to the doctor?

A: David took her.

*** * ***

Q: Okay. How would you describe [I.C.]'s personality prior to April, 2013?

A: She was happy, sometimes a little quiet and sad. I think that was due to me and him divorcing and stuff but other than that, a pretty happy child.

Q: Okay, and then you still had visitation with [I.C.] after April, 2013; is that right?

A: For a little bit, yeah.

Q: How would you describe her personality during that time frame?

A: Starting to go downhill, more quiet, crying a lot, not really – not my daughter, not the way that she used to be.

Q: Okay, and when would – when would you say that personality change took place?

A: Right around the May area.

* * *

[The State concluded its questioning and then Theis's attorney proceeded to cross-examination.]

* * *

Q [Theis's attorney]: Some of my questions might be a little difficult, but you can bear with me, okay?

Would it be fair to say that you're kind of bad with dates?

A [Tiffany]: Do what? I'm sorry.

Q: Bad with dates?

* * *

A: A little bit, yeah.

Q: Okay. Do you remember approximately when you saw the deputy and the caseworker?

A: No, I do not.

Q: Can you give a rough idea of when that occurred?

A: No.

Q: Okay. Your testimony for Mrs. Smith indicated that [I.C.]’s father told you about the allegations around May, correct?

A: Yes.

Q: Would you say that you saw the deputy and the caseworker shortly after David disclosed to you?

A: Yeah, shortly after, that’s true.

Q: Are you aware that you saw the deputy and the caseworker on August 5th?

A: I – I – yeah, I guess --

Q: Would you --

A: -- but I know I did see them, yes.

Q: Would you dispute it was August 5th?

A: Yes.

Q: You would dispute that?

A: No. I’m sorry.

Q: And if I told you that [I.C.] disclosed to her father the allegation was July 23rd, would you dispute that date?

A: I thought it was in May but --

Q: Okay. Well, are you aware it was July 23rd?

A: No.

Q: Okay. Now, you had an interview with the deputy and the caseworker, and they indicated that the child disclosed allegations to you.

You denied that she made any allegations other than a hug and a pat on the butt, correct?

A: Yes.

Q: Okay. When you spoke with the deputy and the caseworker, your response was – at the time, which was August 5th, is that [I.C.] told you two weeks prior to interviewing with the cops. Do you remember – the deputy and the caseworker.

Do you remember saying that?

A: I probably did but I – yeah, I probably did.

Q: You probably did?

A: (Witness nodded.)

Q: So [I.C.] telling you anything was way after you moved out of my client's residence.

Would that be fair to say?

A: She did say something to me while I was living there, yes.

Q: Which was that he hugged her and patted her --

A: Yes.

Q: -- on the butt, and you indicated that you didn't think that was anything too bad.

A: Yeah.

Q: Did she make any other allegations?

A: No, she did not, not to me.

Q: And you don't remember the allegations that you told the deputy and the caseworker that happened, that [I.C.] told you something two weeks earlier.

You don't remember what was said that was two weeks earlier?

A: No.

Q: Okay. Now, I indicated to you that the father indicated that [I.C.] disclosed to him on July 23rd.

You lived with my client from February till approximately the beginning of May; would that be correct?

A: Pretty much, yeah.

Q: Okay, and then from what you told the officers, the caseworker and the deputy, and when David told you about it, it was at least two months from the time of the allegations, correct?

A: Yes.

Q: So this was two months later. He eventually told you something two weeks before August 5th.

That was a considerable time period before [I.C.] said anything other than while she was living there, that he patted her on the butt when he was hugging her, correct?

A: Yes.

Q: Now, when [I.C.] told you that he hugged her, and patted her on the butt, how did she disclose that to you?

What were the circumstances?

A: She just pretty much came up to me and said that – I mean, it wasn't – she didn't seem upset about it or anything. She was more open with me about it.

* * *

Q: And she wasn't cryin'.

A: She was upset but not crying, no.

* * *

Q: * * * [D]oes your family have any history of mental health illnesses?

A: Yes.

Q: What kind of history does your family have?

A: P.T.S.D., bipolar, schizophrenia.

Q: Okay, and you're aware that [I.C.]'s having hallucinations?

A: Yes.

Q: Okay. How were you made aware that [I.C.]'s been having hallucinations?

A: I was told by David.

Q: Okay. Did you have any firsthand experience of [I.C.] having hallucinations?

A: No, I did not.

(Court's Ex. 1, pp 52-72).⁵

⁵ The entire transcript from the earlier hearing on the motion in limine was not included in the record submitted to this court. This excerpt was provided and proffered as a "Court Exhibit."

{¶64} When Theis's attorney finished cross-examining Tiffany, her testimony at the hearing on the motion in limine concluded as the State did not conduct re-direct.

{¶65} The trial court ultimately found that the preceding testimony from the prior hearing should not be introduced into the record at Theis's trial. The trial court conducted the following reasoning in making this finding.

So I read the transcript. And the issue I'm having is the fact that the prior testimony, while it specifically does relate to the nature of the touching, it – it's – it's – does not paint a complete picture of the situation. What do I mean by that? The State called Tiffany [C.] on direct. The State talked about the incident of the touching, talked about the two children, talked about the basics.

You, in cross-examination, obviously cross-examined her on lots and lots and lots of issues. The State was here on the issues raised in the motion in limine, not a lot of the other areas that you cross-examined her about. So my concern is that the party against whom the statement is, or the testimony is going to be used, the State, has not had the opportunity to fully develop the issue that is going to come to the jury in the context of your present theory of the case and your desire to elicit the Tiffany [C.] testimony.

So I'm not sure that we need to get to the issue of did you use reasonable efforts under the rule to obtain the presence of [Tiffany] by way of subpoena, or by way of other matters. That's my concern, and that's the nature of my ruling.

(Tr. at 894-895).

{¶66} The trial court thus never determined whether Theis conducted "reasonable efforts" in order to secure Tiffany's attendance to make her

“unavailable,” and decided the matter on the State not having a “similar motive” to develop Tiffany’s testimony at the prior hearing.

{¶67} On our own review, at the outset, we would note there are significant questions regarding whether Theis did establish that reasonable efforts were undertaken to show that Tiffany was “unavailable” for trial. The public defender’s investigator indicated that she only began attempting to secure Tiffany’s presence for four days before trial, that she did not contact the Child Support Enforcement Agency, and that she did not use Tiffany’s other last name in attempting to find her. Thus it is questionable whether Theis established reasonable efforts.

{¶68} Nevertheless, assuming that Theis had established that Tiffany was unavailable, and even assuming that the prior testimony should have been admitted under Evid.R. 804(B)(1), we do not find that any error was prejudicial to the outcome of the trial. Tiffany’s testimony was ambiguous regarding timing of when things were told to her. While Tiffany’s prior testimony may have challenged I.C.’s testimony at trial that she told her mother about the events in question, that alone does not create prejudicial, reversible error such that we think a new trial must be ordered. Tiffany testified at the earlier hearing that I.C. told her something but that she was later informed of more specific, criminal allegations by I.C.’s father, David.

{¶69} The jury heard I.C. testify and heard all of the other testimony at trial, including Theis's polygraph examination, and found Theis to be guilty. Given the weight of the evidence toward conviction, we cannot find that, even assuming it was error for the trial court to deny the admission of the prior testimony, any error here was prejudicial. Therefore, Theis's second assignment of error is overruled.

{¶70} For the foregoing reasons Theis's assignments of error are overruled and the judgment of the Hancock County Common Pleas Court is affirmed.

Judgment Affirmed

ROGERS, P.J., concurs in Judgment Only.

PRESTON, J., concurs.

/jlr