2019 IL App (2d) 180241-U
Nos. 2-18-0241 & 2-18-0242 cons.
Order filed April 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARVEL SNIDER, Petitioner-Appellee, v. JEREMY BATES, Respondent-Appellant.	)))))))))	Appeal from the Circuit Court of Boone County. No. 17-OP-88 Honorable Stephen E. Balogh, Judge, Presiding.

JOSHUA BULLARD, Petitioner-Appellee, v. JEREMY BATES, Respondent-Appellant.	)))))))))	Appeal from the Circuit Court of Boone County. No. 17-OP-89 Honorable Stephen E. Balogh, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in admitting hearsay statements under section 8-2601(a), as the record supported its conclusions that the

> statements were reliable, that the child was unavailable, and that the statements were corroborated; (2) the trial court did not abuse its discretion in basing its finding of unavailability on the recording of an interview that it considered *in camera* and did not release to the parties.

¶ 2 Respondent, Jeremy Bates, appeals from the entry of two orders of protection in the circuit court of Boone County, contending that the trial court abused its discretion in admitting the out-of-court statements of a sexual abuse victim and denied him due process when it viewed *in camera* a video recording that was not in evidence. Because the victim's hearsay statements were properly admitted and respondent was not denied due process, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Marvel Snider and Joshua Bullard each filed a petition for an order of protection against respondent. Snider sought an order of protection on behalf of her granddaughter, L.P., and Bullard sought an order of protection on behalf of his daughter, K.B., based, respectively, on respondent's alleged sexual abuse of L.P. and his risk of abusing K.B. The trial court initially entered emergency orders of protection in each case and subsequently conducted an evidentiary hearing.

¶ 5 At the hearing, Snider testified that, on the evening of June 18, 2017, L.P., who was six years old, and L.P.'s father, Brandon Peterson, were spending the night with Snider. Snider went to bed, while Peterson and L.P. watched a movie in another room.

¶ 6 At some point, Peterson woke Snider and told her that she needed to hear what L.P. had just told him. L.P. then told Snider that, when L.P.'s mother would leave the house, respondent, who was L.P.'s stepfather, would put his hands in L.P.'s pants. L.P. showed Snider how he did so. L.P. also got on her hands and knees on the floor and raised her rear end in the air and said that respondent made her do that.

¶ 7 Snider immediately called the police and reported what L.P. had told her. Snider filed her petition the following morning.

¶ 8 According to Snider, L.P. had previously told her that respondent's son, Cody, who was about a year older than L.P., had made her remove her clothes and that he put his "pee-pee" in her mouth. Snider had conveyed that information to L.P.'s mother, Jaclyn Bates.

¶ 9 After Jaclyn spoke to L.P. about the incident with Cody, she texted Snider to say that L.P. would tell Snider the complete story. Thereafter, L.P. told Snider that the incident with Cody was partly L.P.'s fault.

¶ 10 According to Peterson, on June 18, 2017, he and L.P. were watching a movie at Snider's house. One of the characters was a social worker. When L.P. asked what a social worker does, Peterson explained. As they continued to watch the movie, L.P. volunteered "[t]hat's why [respondent] likes my butt." When Peterson repeated to L.P. what she had just said, L.P. added that respondent had put his hands down her pants. When Peterson asked L.P. if respondent had put his hands in her pee-pee or butt, L.P. said yes. When he asked her if respondent had put his hand inside of her underwear, she said yes. When Peterson asked her for more details, L.P. got on her hands and feet and raised her rear end in the air. She told Peterson that respondent had made her do that. After telling that to Peterson, she began to cry. Peterson then woke Snider to tell her what L.P. had told him. Peterson admitted that, based on L.P.'s story, he had filed a petition to obtain sole custody of L.P.

¶ 11 The next morning, after Snider had filed her petition, Peterson called Joshua Bullard, whose daughter, K.B., was also respondent's stepchild. Peterson repeated what L.P. had told him about respondent. Bullard, in turn, filed a petition for an order of protection against respondent.

¶ 12 Bullard testified that K.B.'s mother was Jaclyn Bates. According to Bullard, K.B. had never told him that respondent had touched her inappropriately. However, when he would ask K.B. about respondent, she would become anxious and start to cry. He filed his petition because he feared that respondent would sexually assault K.B.

¶ 13 Bullard took K.B. for an evaluation with the Department of Children and Family Services (DCFS) at the Carrie Lynn Center. Bullard admitted that DCFS did not direct him to seek an order of protection.

¶ 14 Jaclyn Bates testified that Snider had called her and said that she would be allowed to see L.P. only if she would admit that respondent had sexually abused L.P. Snider accused Jaclyn of not believing L.P. and told her that she was keeping L.P. from Jaclyn to protect L.P. Subsequently, a judge ordered L.P. returned to Jaclyn.

¶ 15 When asked about Snider's telephone call to her about L.P. and Cody, Jaclyn said that she had spoken to L.P. about the incident. According to Jaclyn, L.P. told her that she and Cody had pulled their pants down and looked at each other.

¶ 16 Jane Whitaker, a child-protection investigator for DCFS, was assigned to investigate L.P.'s allegations of sexual abuse. As part of her investigation, she reviewed the report of the medical examination of L.P., which showed that there was no physical evidence of sexual abuse. The report included statements L.P. made during the exam, which were consistent with her other statements about the abuse. L.P. told the medical examiner that respondent had touched her butt and pee-pee. L.P. also said that respondent never took his pants off.

¶ 17 Whitaker described L.P. as having told very consistent versions of the sexual abuse to various people.

¶ 18 When Whitaker spoke to a school nurse, the nurse indicated that L.P. had told her that respondent had touched L.P.'s butt and pee-pee. Whitaker also spoke with several teachers at L.P.'s school, including a special education teacher. The special education teacher told her that L.P. had a learning disability and an IQ of 80 on a normal range of 90-110. Her ability to express herself, however, was at a level of 93.

¶ 19 Other teachers at L.P.'s school told Whitaker that L.P. would sometimes provide false information. Peterson, on the other hand, told Whitaker that L.P. never lied or told stories.

¶ 20 When asked if L.P. had displayed any sexualized behavior, L.P.'s teachers said no. They also indicated that L.P. had not exhibited any change in her overall behavior. When Whitaker asked Peterson if L.P. had shown any change in behavior, he told her that L.P. had stopped wearing underwear. Whitaker did not consider that sexualized behavior.

¶ 21 When asked if L.P. could have confused respondent and Cody, Whitaker said that L.P. knew the difference between the two. At one point, L.P. told Whitaker that Peterson had gotten in her head and that she was not sure if the incident had happened. However, according to Whitaker, L.P.'s counselor told Whitaker that such comments were common in the healing process.

¶ 22 When asked if L.P. was susceptible to being influenced, Whitaker answered that any child is susceptible to the influence of her parents and grandparents. Whitaker added that, in her 6½ years of experience, she had never seen a child tell a story as consistently as L.P. She opined that L.P. was credible. She did not think that it was advisable that L.P. testify, however, because of L.P.'s young age and the trauma that it would cause her.

¶ 23 Whitaker testified that the investigation "indicated" that respondent had sexually abused L.P., and, because of that abuse, he presented a substantial risk of abusing K.B. Whitaker

admitted that she had had a "very hard time with [the case]." According to Whitaker, she persuaded her supervisor to send a letter to Jaclyn and respondent saying that respondent could not have any contact with L.P.

¶ 24 Kim Larson, a forensic interviewer at the Carrie Lynn Center, conducted a victim sensitivity interview (VSI) of L.P., while Whitaker observed the interview from another room. The VSI was video-recorded.

¶ 25 On November 17, 2017, the trial court advised the parties that, pursuant to their request, it had viewed *in camera* the VSI recording. No one, including respondent, objected. The court added that it would not allow the parties to view the recording. Respondent, in turn, filed a motion to obtain access to the VSI recording, which the court denied. Subsequently, respondent sought to subpoena from the Carrie Lynn Center, among other things, any video recordings related to L.P. The court quashed the subpoena. On February 26, 2018, respondent filed a motion seeking either access to the VSI recording or the exclusion of any witness from the Carrie Lynn Center regarding the recording. The court denied that motion, noting that it had viewed the VSI recording at the state's attorney's office and that the recording would not be provided to the parties.

¶ 26 According to Larson, during the VSI, L.P. stated that, on more than one occasion, respondent had touched her butt and pee-pee. L.P. also said that respondent had put his hands in her pants. L.P. said that respondent had touched her under her clothes. She told Larson that the touching occurred in the living room when Jaclyn was gone. According to Larson, L.P. indicated that respondent's "pee-pee was up." Larson interpreted that to mean that respondent had an erection.

¶ 27 When asked if she had an opinion as to whether L.P. had been sexually abused, Larson answered that that was not her job. When the trial court asked Larson if she thought that L.P. was credible, Larson responded that she had not seen any signs of coaching that would make her believe that L.P. was not credible.

¶ 28 Larson also interviewed K.B. There was no indication that K.B. had been sexually abused.

¶ 29 According to Jaclyn, on June 15, 2017, L.P. suffered an injury while practicing softball. The next day, when respondent arrived home from work, L.P. told him that her leg hurt. Respondent put ice on her leg. When asked where respondent put the ice, Jaclyn testified that it was on L.P.'s "hip area." Respondent, who was in the courtroom, said to Jaclyn "[g]roin," to which Jaclyn corrected her testimony to "[L.P.'s] groin area." When the attorneys for Snider and Bullard pointed out to the trial court what respondent had said to Jaclyn, the court instructed respondent to keep quiet.

¶ 30 The trial court found that L.P. was unavailable to testify, based on its *in camera* review of the video recording of the VSI, comments of the parents and grandparents regarding L.P.'s sensitivity, L.P.'s age, and Whitaker's opinion that L.P. would be traumatized if she testified.

¶ 31 The trial court next found that L.P.'s out-of-court statements were reliable. In that regard, the court characterized L.P.'s statement to Snider as an excited utterance or outcry that was consistent with her subsequent statements.

¶ 32 The trial court also found that L.P.'s out-of-court statements were corroborated by Whitaker's testimony that L.P. used language typical of a child her age to describe the incident. The court further noted that L.P. had repeated the story at least eight times and that Whitaker had never experienced statements that were so consistent.

¶ 33 The trial court found that a preponderance of the evidence established that respondent had sexually abused L.P. The court added that, because of the sexual abuse of L.P., there was a risk of sexual abuse of K.B. Thus, the court entered a plenary order of protection against respondent as to both L.P. and K.B. Respondent, in turn, filed a timely notice of appeal in each case. We consolidated the appeals.

¶ 34 II. ANALYSIS

¶ 35 On appeal, respondent contends that the trial court erred in admitting the hearsay statements of L.P., because (1) they were not excited utterances and (2) they were not otherwise admissible. He also asserts that the court denied him due process when it considered the VSI recording, even though it was never admitted into evidence.

¶ 36 We begin by noting that neither petitioner has filed a brief. However, because the issues are easily disposed of, we will consider the merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 37 We first determine whether L.P.'s hearsay statements were properly admitted. They were.

¶ 38 Section 205(a) of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/205(a) (West 2016)) governs any proceeding to obtain an order of protection. *Trinidad C. v. Augustin L.*, 2017 IL App (1st) 171148, ¶ 21. Such proceedings, including the admission of statements by victims of sexual abuse, are conducted under the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2016)). *Trinidad C.*, 2017 IL App (1st) 171148, ¶ 21 (citing *In re Marriage of Flannery*, 328 Ill. App. 3d 602, 606 (2002)). Under section 8-2601(a) of the Code, the following two requirements must be met to admit an out-of-court statement of a child under the age of 13 involving an unlawful sexual act: (1) the court conducts a hearing outside the jury's presence and

finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability and (2) the child either testifies or is unavailable to testify and there is corroborating evidence of the act that is the subject of the statement. 735 ILCS 5/8-2601(a) (West 2016). We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Trinidad C.*, 2017 IL App (1st) 171148, ¶ 21.

¶ 39 The reliability of an out-of-court statement is based on the time, content, and circumstances surrounding the making of the statement. 735 ILCS 5/8-2601(a)(1) (West 2016); *People v. Stechly*, 225 Ill. 2d 246, 313 (2007). Factors relevant to determining reliability include (1) the spontaneity and consistent repetition of the statement, (2) the use of terminology unexpected for a child of similar age, and (3) the lack of a motive to fabricate. *Stechly*, 225 Ill. 2d at 313.

¶ 40 We first agree with the trial court that L.P.'s out-of-court statements were reliable. The evidence showed that L.P. spontaneously reported the abuse to her father while they were watching a movie. There is no indication that L.P. was prompted to make the initial statements about respondent.

¶ 41 L.P.'s statements, which she made to several people, were substantially consistent. Indeed, Whitaker testified that she had never seen such consistency.

¶ 42 Finally, although her teacher said that L.P. would sometimes convey false information, L.P.'s father testified that she never lied or told stories. Moreover, there was no indication that L.P. had any motive to fabricate her story about respondent. Based on the foregoing, the trial court did not err in finding that L.P.'s statements were reliable.

¶ 43 The record also supports the trial court's finding that L.P. was unavailable to testify. As the court noted, she was only seven years old at the time of the hearing. More importantly,

Whitaker opined that L.P. would be further traumatized by testifying. Thus, we agree that L.P. was unavailable.[1] See *Stechly*, 225 Ill. 2d at 313.

¶ 44 That leaves the issue of whether L.P.'s out-of-court statements were sufficiently corroborated by evidence independent of those statements. They were.

¶ 45 Corroboration of an out-of-court statement of sexual abuse requires independent evidence that would support a logical and reasonable inference that the abuse described in the statement actually occurred. *Trinidad C.*, 2017 IL App (1st) 117148, ¶ 27 (citing *Flannery*, 328 Ill. App. 3d at 610). Put another way, corroborating evidence is that which makes it more probable that a minor was abused. *Trinidad C.*, 2017 IL App (1st) 117148, ¶ 27. The form of corroboration is case-specific and can include physical or other circumstantial evidence. *In re A.P.*, 179 Ill. 2d 184, 199 (1997); see also *In re Marriage of Gilbert*, 355 Ill. App. 3d 104, 114 (2004) (noting that corroborative evidence is not limited to physical evidence from the victim's body or testimony from other witnesses to the abuse). Evidence that is itself hearsay, however, cannot corroborate a victim's out-of-court statement. *Flannery*, 328 Ill. App. 3d at 614.

¶ 46 Here, there was sufficient corroboration of L.P.'s out-of-court statements. When Whitaker asked Peterson if he had observed any behavioral changes in L.P., he stated that L.P. had stopped wearing underwear. That change of behavior was notable, as it occurred after L.P. had reported the sexual abuse.

¶ 47 Also corroborating L.P.'s statements was her persistent reporting of the sexual abuse to several people, including a school nurse. Because those statements were hearsay, we do not

[1] The finding of unavailability was proper, irrespective of the trial court's reliance on the VSI.

consider them for their substance. Rather, the mere fact that L.P. persistently reported the abuse to multiple people corroborated her statements.

¶ 48 Further, when Jaclyn testified that respondent put ice on L.P.'s hip, respondent corrected her that it was L.P.'s groin. Respondent's directing Jaclyn how to testify, and Jaclyn's changing her testimony accordingly, implied that Jaclyn's testimony about the injury was orchestrated. Such orchestration further corroborated L.P.'s statements.

¶ 49 Additionally, Bullard testified that, when he asked K.B. about respondent, K.B. became anxious and cried. K.B.'s obvious discomfort with being asked about respondent further corroborated L.P.'s statements about respondent's sexual abuse.

¶ 50 Also, respondent did not testify. Considering the probative evidence against him, the trial court could draw an adverse inference from respondent's failure to testify. See *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 106 (fifth amendment does not forbid adverse inference against party to civil action who fails to testify in response to probative evidence against him). That adverse inference further corroborated L.P.'s statements.

¶ 51 When we view the corroborating evidence collectively, it was sufficient to support the admission of L.P.'s out-of-court statements. Thus, the trial court did not abuse its discretion in admitting those statements.[2]

¶ 52 Finally, we note that the facts here are readily distinguishable from those in *Flannery*. In *Flannery*, there was no nonhearsay evidence independent of the victim's out-of-court statements.

[2] Because we have determined that L.P.'s hearsay statements were admissible under section 8-2601(a) of the Code, we need not decide whether they were admissible as excited utterances.

Flannery, 328 Ill. App. 3d at 610-14. Here, however, there was ample nonhearsay evidence corroborating L.P.'s statements.

¶ 53 Respondent next contends that he was denied due process when the trial court viewed *in camera* the VSI recording for the purpose of assessing whether L.P. was available to testify, even though the recording was not admitted into evidence. We disagree.

¶ 54 Here, pursuant to a request of the parties, the trial court viewed *in camera* the VSI for the limited purpose of determining whether L.P. was available to testify. After doing so, the court ruled that the parties would not be allowed to view the recording. That decision was a matter of the court's discretion. See *In re Adrian B.*, 2011 IL App (2d) 090841-U, ¶ 32 (citing *People v. Santos*, 211 Ill. 2d 395, 401 (2004)) (decision to withhold disclosure of confidential records is reviewed for an abuse of discretion). Respondent does not contend, nor does the record show, that the court abused its discretion in that regard. Further, the record does not indicate that the trial court considered the VSI for any purpose beyond that of determining whether L.P. was available to testify. Thus, respondent was not denied due process.

¶ 55 Respondent relies on *People v. Wallenberg*, 24 Ill. 2d 350 (1962), and *People v. Thunberg*, 412 Ill. 565 (1952). Those cases do not support respondent's position, however, as neither one involved the *in camera* review of, and concomitant discretionary decision to prohibit access to, a child interview regarding sexual abuse.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the judgments of the circuit court of Boone County.

¶ 58 Affirmed.