

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

FILED

01/12/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. BRENDAN NATHAN MORGAN

Appeal from the Circuit Court for Decatur County
No. 20-CR-130 Charles C. McGinley, Judge

No. W2021-01179-CCA-R3-CD

Following a bench trial, the Defendant, Brendan Nathan Morgan, was convicted in the Decatur County Circuit Court of aggravated sexual battery and sentenced to ten years at 100 percent in the Department of Correction. On appeal, he contends that the trial court abused its discretion in admitting testimony that a police investigator saw search history for pornographic material on the Defendant's cell phone because the evidence violated the best evidence rule and the rule against hearsay. Based on our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Samuel W. Hinson, Lexington, Tennessee (on appeal) and Terry Dicus, Savannah, Tennessee (at trial), for the appellant, Brendan Nathan Morgan.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Neil Thompson, District Attorney General; and K. Michelle Morris and Morgan Reynolds, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

On November 19, 2020, six-year-old J. L.¹ reported to his kindergarten teacher that the Defendant, a family friend, had touched his penis over his clothes that morning before school. The victim provided consistent accounts of the abuse in subsequent interviews with a police investigator, a social worker with the Department of Children's Services ("DCS"), and a forensic interviewer at the Carl Perkins Center in Parsons. The victim related that the Defendant carried him into the Defendant's bedroom and showed him pornographic images on the Defendant's cell phone before rubbing the victim's penis through the victim's clothing. The Decatur County Grand Jury returned an indictment charging the Defendant with one count of aggravated sexual battery based on the incident with the victim, and two counts of arson. The arson counts were later severed, and the Defendant proceeded to a bench trial on May 6, 2021, on the aggravated sexual battery count of the indictment.

Four witnesses testified at the trial: Dan Martin, the former Parsons Police Department Investigator who investigated the case; the victim; the Defendant's mother; and the Defendant. Mr. Martin testified that he interviewed the victim on November 19, 2019, was present when the victim was interviewed at his elementary school by DCS employee Nicole Madariaga the next morning, and watched the victim's subsequent forensic interview at the Carl Perkins Center in Parsons. He stated that the victim's account of the abuse remained essentially consistent throughout his interviews. As part of his investigation, Mr. Martin also spoke with the Defendant, obtained the Defendant's written consent to search his cell phone, and observed on the phone "[a] lot of search history for pornographic material" that was timestamped around the same time as the incident.

On cross-examination, Mr. Martin acknowledged that he was present for the forensic interview with the victim's younger brother, who was asleep in the Defendant's home at the time of the alleged abuse. He acknowledged that the victim's brother said in that interview that the victim bullied him and had slapped him in his face. When asked to explain the complicated family dynamics, Mr. Martin stated that the victim's mother, "Mikayla," and the Defendant's girlfriend at the time of the incident, "Jodi," had both been married to the same man.

The victim, who was seven years old at the time of trial, testified that the Defendant gave him a "bad touch" in his "no-no square[,] " which he identified as his crotch area, one morning before school when he was in the Defendant's bed. He recalled that he was in Ms. Dixie's kindergarten class at that time and that he was at the Defendant's house that morning because his mother had to go to work. He also recalled that he had not been there for very long when the incident happened. He testified that the Defendant first showed

¹ In accordance with the policy of this court, we refer to the child victim by his initials only.

him photographs on his cell phone of little girls' "no-no squares" and then touched him on his penis over his clothes. He demonstrated that the Defendant moved his hand rapidly back and forth in a side-to-side motion. He said he asked the Defendant to stop, but the Defendant continued for "a little bit."

The victim testified that he told his kindergarten teacher about the incident immediately after he finished eating his school breakfast. He said he told the truth to his teacher, to the police investigator, and to the forensic interviewer, and that he was testifying truthfully to the trial court. He denied that anyone told him what to say. On cross-examination, he testified that the Defendant picked him up and carried him into his bedroom. He denied that he had ever lived in the Defendant's home. Finally, he acknowledged that he had slapped his six-year-old brother's face, testifying that they were both "mean" to each other.

Sheila Morgan, the Defendant's mother, testified that the Defendant had brought the victim to her home several times, but that the victim had "behavioral issues" and would not listen, so she told the Defendant not to bring him back. She stated that the Defendant had formerly lived with his girlfriend Jodi in the same home as the victim and the victim's family.

The Defendant testified that he had lived with the victim's family for close to a year in the past, but at the time of the alleged incident he lived in a separate residence. He recalled that either the victim's mother or Jodi asked him if he would take the victim to school on November 19, 2019, because the victim's grandmother could not, and that the victim and his brother were dropped off at his home on the night of November 18. He said he awakened the children the next morning, gave the victim a bowl of cereal, and then took him to school. He denied carrying the victim into his bedroom, showing the victim pornographic images, or touching the victim. He did not deny that Mr. Martin might have seen a search history for pornographic images on his cell phone, testifying that he "[a]bsolutely" might have had pornography on his cell phone at the time but could not know for certain because he did not have the cell phone or the search history. He said that he was in the victim's home on the afternoon of November 19, when the victim ran up to him and hugged him. The Defendant speculated that the allegations against him were motivated by jealousy.

On cross-examination, the Defendant explained his belief that the victim's mother, her husband, and Jodi were all jealous of him because he was earning a lot of money at the time of the allegations. He said it would surprise him to learn that the victim's mother initially defended him after the allegations were first raised. He acknowledged he had prior criminal convictions for criminal impersonation and making a false report, as well as an

active violation of probation warrant out of Perry County based on the allegations in the instant case.

At the conclusion of the bench trial, the trial court found the Defendant guilty as charged and subsequently sentenced him to ten years at 100 percent in the Department of Correction. This appeal followed.

ANALYSIS

On appeal, the Defendant contends that the trial court violated the best evidence rule, the rule against hearsay, and his right to due process by allowing Mr. Martin to testify about the time-stamped search history for pornographic images on the Defendant's cell phone without having the contents of the phone introduced at trial. He argues that Mr. Martin's testimony about what he saw constituted hearsay within hearsay. The State points out that the Defendant did not raise a hearsay objection to the evidence at trial and argues that the trial court acted within its discretion in allowing the officer to testify about his observations. The State additionally notes that Mr. Martin's testimony about the pornographic search history was but one in a number of different factors recited by the trial court in support of its finding that the victim's testimony was credible. We agree with the State.

"Generally, the admissibility of evidence rests within the trial court's sound discretion, and the appellate court does not interfere with the exercise of that discretion unless a clear abuse appears on the face of the record." *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)). A trial court is found to have abused its discretion when it applies "an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *Lewis*, 235 S.W.3d at 141 (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006))

Tennessee Rule of Evidence 1002, commonly referred to as the "best evidence rule," provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or the Tennessee Legislature." However, "[t]he best evidence rule is a rule of preference rather than exclusion. It does not exclude evidence but rather requires the introduction of the best available form of the evidence." *Iloube v. Cain*, 397 S.W.3d 597, 602 (Tenn. Ct. App. 2012) (citations and internal quotation marks omitted). "[T]he satisfaction of one rule of evidence does not necessarily preclude the exclusion of evidence pursuant to another rule." *State v. Carroll*, 36 S.W.3d 854, 867 (Tenn. Crim. App. 1999). Thus, evidence that is found to be admissible under the best evidence rule may still be inadmissible if it violates the rule against hearsay. *Id.*

The record reflects that defense counsel raised a best evidence objection immediately after Mr. Martin testified that he observed a search history for pornographic materials on the Defendant's phone time-stamped around the time of the offense. Defense counsel did not object on the basis of hearsay. Because the Defendant failed to raise a hearsay objection at trial, we agree with the State that we need not address the Defendant's argument that the testimony violated the rule against hearsay. *See* Tenn. R. App. P. 36(a) (providing that the failure to make a contemporaneous objection waives the issue on appeal).

We further agree with the State that the trial court did not abuse its discretion in admitting the testimony. It is not clear from the record why the cell phone was not available at trial. However, the Defendant himself acknowledged that he had pornography on his cell phone, testifying that he would not dispute Mr. Martin's testimony that he had seen a search history for pornographic materials. The Defendant cites the trial court's characterization of Mr. Martin's testimony about the pornographic search history as "very significant corroboration" to argue that the trial court "may very well have issued a different verdict had the [S]tate been required to adhere to the best evidence rule." We respectfully disagree. While the trial court referenced Mr. Martin's testimony about the pornographic search history as corroborating evidence that "would support the allegation that [the touching] was for the purpose of [sexual] gratification[,]" it also noted that as factors in its decision the fact that the victim was consistent in his accounts to the various interviewers, was forthright with the trial court, and did not appear to the trial court to exhibit behavioral concerns. With respect to the latter, the trial court observed that there was nothing unusual in young siblings fighting with each other. We, therefore, conclude that the trial court did not abuse its discretion in admitting the testimony.

CONCLUSION

Based on our review, we affirm the judgment of the trial court.

JOHN W. CAMPBELL, SR., JUDGE