

Lemual Carr, (“Carr”) appeals after a jury trial from his conviction for child molesting,¹ a Class A felony. Carr presents the following restated issues for our review:

- I. Whether the trial court abused its discretion when it admitted hearsay evidence under the excited utterance exception and the medical diagnosis exception;
- II. Whether there is sufficient evidence of penetration to sustain a conviction for child molesting as a Class A felony.

We affirm.

FACTS AND PROCEDURAL HISTORY

Patricia Hockaday (“Hockaday”) and Carr were friends and performed in a singing group together. On June 4, 2007, Hockaday allowed her nine-year-old daughter, A.W., to stay overnight at Carr’s house, which he shared with his girlfriend, Tanya Benson. That night A.W. slept on the couch in the living room. The next day, while Carr was at work, A.W. watched television at Carr’s house, while Benson went to visit with a neighbor. When Carr returned home from work, he lay down on the couch with A.W. and watched television with her. At some point, Carr began “feeling on [A.W.]” with his hand. *Tr.* at 210. Carr lifted her skirt and touched her “private” under her underwear, inserting his finger into her vagina. *Tr.* at 210, 212, 217, 240-41, 283. Carr then stuck his tongue in A.W.’s ear. *Tr.* at 213. A.W. left the couch and tried to call her mother, but received no answer. A.W. then walked to Benson’s friend’s house, and told Benson that she wanted to go home. Benson told A.W. that she was not ready to take her home and

¹ See Ind. Code § 35-42-4-3.

sent her back to Carr's house. A.W. went back to Carr's house and told him that she wanted to go home.

Carr took A.W. home, went into the house with A.W. and chatted with A.W.'s parents. A.W. jumped into bed with Hockaday, her mother, and began crying and shaking. Hockaday repeatedly asked A.W. what was wrong, but A.W. would not tell her anything while Carr was still in the house. As soon as Carr left, A.W. told her mother about the incident.

Hockaday took A.W. to the emergency room of Memorial Hospital in South Bend, where she was examined by Nurse Jennifer Reasor. Nurse Reasor took down A.W.'s patient history during which time A.W. told Nurse Reasor about the incident, including the fact that Carr had penetrated A.W.'s vagina with his finger. Nurse Reasor took forensic swabs of A.W., and Dr. Mark Monahan performed an examination of A.W. at the hospital. Nicole Keeling, a forensic DNA analyst, tested the right ear swab taken from A.W. and concluded that the major DNA profile was that of Carr. The major DNA profile of A.W.'s left ear was A.W.

The State charged Carr with one count of child molesting as a Class A felony. At the conclusion of the jury trial, Carr was found guilty as charged. The trial court sentenced Carr to forty years executed in the Department of Correction, finding Carr's criminal history and abuse of a position of trust while committing the offense to be aggravating factors. Carr now appeals.

DISCUSSION AND DECISION

Carr argues that the trial court committed reversible error by admitting hearsay testimony pursuant to both the excited utterance and medical diagnosis exceptions to the hearsay rule. Carr argues that without this erroneously admitted testimony there is insufficient evidence to support his conviction.

I. Hearsay Evidence

The admission or exclusion of evidence is a matter within the trial court's discretion, and we will reverse only upon an abuse of that discretion. *Sargent v. State*, 875 N.E.2d 762, 766 (Ind. Ct. App. 2007). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Moreover, a claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. *Id.*

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered 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.

A. Excited Utterance

Ind. Evidence Rule 803(2) provides that an excited utterance is not excluded by the hearsay rule even though the declarant is available as a witness. For a hearsay statement to be admitted as an excited utterance, three elements must be present: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Brown v. State*, 683 N.E.2d 600, 603 (Ind. Ct. App. 1997). Under this test, the issue is

whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. *Id.* Furthermore, the statement must be trustworthy under the facts of the particular case, and the trial court should focus on whether the statement was made while the declarant was under the influence of the excitement engendered by the startling event. *Id.*

The trial court admitted A.W.'s statements to her mother, Hockaday, under the excited utterance exception. Carr does not dispute that A.W.'s statement refers to a startling event and is about the startling event. What Carr does dispute is that A.W. was still under the stress of the event when she made statements to her mother about the molestation. The amount of time that has passed between the event and the statement is relevant but not dispositive of the issue. *Noonjin v. State*, 730 N.E.2d 672, 676 (Ind. 2000). Consequently, the only issue here is whether A.W. was still under the stress of the event when she told her mother about the molestation.

Carr argues that there was no evidence presented establishing how much time had elapsed between the startling event and A.W.'s declarations to her mother. Further, Carr contends that the evidence at trial did not establish that A.W. remained under the stress of the startling event without time for thoughtful reflection or deliberation, and that her statements lacked spontaneity.

First, Carr testified that he laid down on the couch with A.W. at approximately 4:00 p.m. on June 5th. A.W. testified that Carr began to "feel on her with his hand." *Tr.* at 211. A.W. got up from the couch and tried to call her mother. When A.W. was unable to reach her mother, she walked to Benson's friend's house, and told her that she wanted

to go home. Benson sent A.W. back to Carr's house. Once at Carr's house, A.W. told Carr that she wanted to go home. Carr drove A.W. to her house between 4:00 p.m. and 5:00 p.m. When they arrived at A.W.'s house, Carr walked inside with A.W. and began talking with her parents. A.W., who was crying, jumped into her mother's bed with her mother. Carr stood in the doorway of the room and continued to talk with Hockaday. A.W. refused to tell her mother why she was crying as long as Carr stood in the doorway. When Carr left the room to speak with A.W.'s father in another room, A.W. told her mother that she was too scared to tell her mother anything at that time. *Tr.* at 235-36. A.W. then told her mother what had happened as soon as Carr left A.W.'s house.

We do not find that the trial court abused its discretion when it determined that A.W. was still under the stress of the excitement of the startling event. A.W. waited until she was completely freed from Carr's presence to tell her mother what had happened. Moreover, this case is not like *Bryant v. State*, 802 N.E.2d 486, 496 (Ind. Ct. App. 2004), where statements were properly excluded because there was no evidence relating to the amount of time between the upsetting event and the victim's statement about it to another person. In the present case, the evidence shows that A.W. made her statements to her mother roughly within an hour of the occurrence, immediately after she was no longer in Carr's presence. There was evidence that A.W. was crying and shaking, and threw down her bag of clothes upon entering her house. Any supposed lack of spontaneity to Hockaday's questions can be explained by Carr's continued presence in A.W.'s home. The trial court did not err.

B. Medical Diagnosis or Treatment

In order for a hearsay statement to be admissible as a statement made for purposes of medical diagnosis or treatment, the following elements must be established: (1) it must be made for the purpose of medical diagnosis or treatment; (2) it must describe medical history, symptoms, pain, sensations, “or the inception or general character of the cause or external source;” and (3) it must be “reasonably pertinent to diagnosis or treatment.” Ind. Evidence Rule 803(4). Hearsay is admitted under this exception because the reliability of the out-of-court statement is assured based upon the belief that a declarant’s self-interest in seeking medical treatment renders it unlikely the declarant will mislead the person that she wants to treat her. *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996). A two-step analysis is employed when evaluating whether a statement is properly admitted pursuant to Evid. R. 803(4): (1) whether the declarant is motivated to provide truthful information in order to promote diagnosis and treatment; and (2) whether the content of the statement is such that an expert in the field would reasonably rely upon it in rendering diagnosis or treatment. *Id.*

Carr challenges the trial court’s admission of Nurse Reasor’s testimony about statements A.W. made during her medical examination on June 5, 2007, under this exception. Carr contends that there was no evidence that A.W. knew that she was talking to the nurse for the purpose of diagnosis or treatment. Carr cites to *McClain*, for the proposition that there must be evidence that the child understood that the medical practitioner’s role is to diagnose and treat medical issues in order for the exception to apply. 675 N.E.2d at 331. However, that such a subjective belief exists may be inferred from the circumstances. *In Re Paternity of H.R.M.*, 864 N.E.2d 442, 446 (Ind. Ct. App.

2007). Carr also challenges the admission of the unredacted medical records because he claims they contain inadmissible hearsay statements.

The record does not specifically reveal that A.W. was aware of Nurse Reasor's role in gathering information for treatment. However, the notes contained details of the incident which caused A.W. to seek treatment. The patient history details given by A.W. were consistent with her complaint of vaginal pain, and that Nurse Reasor needed to perform a rape kit, in addition to conducting other tests.

Carr alleges that the fact that Dr. Monahan did not perform a speculum exam on A.W. supports his argument that the medical records were not necessary for his diagnosis or treatment of A.W. Carr claims that Nurse Reasor's purpose in creating those medical records was to collect forensic evidence. However, Dr. Monahan testified that the nurse's role in a sexual assault case is two-fold: (1) collection of evidence; and (2) getting the patient's history and story. Dr. Monahan testified that the emergency room physician validates the main parts of the history and the patient's story and then does the exam. Last, Dr. Monahan testified that he does a speculum examination in most cases involving allegations of penetration. However, the speculum examination is avoided in cases involving young patients in order to avoid following one traumatic event with another. The record establishes that Dr. Monahan did rely on the medical records for the purpose of diagnosis and treatment of A.W.

Further, the information contained in the medical records, at that point in the trial, was cumulative of the testimony of A.W. and Hockaday. Assuming that the trial court erroneously admitted the medical records, an error in its admission is harmless if the

erroneously admitted evidence is cumulative of other appropriately admitted evidence. *Collins v. State*, 826 N.E.2d 671, 679 (Ind. Ct. App. 2005). The trial court did not err.

II. Sufficiency of the Evidence

Last, Carr argues that there is insufficient evidence of penetration to support his conviction. Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When reviewing claims of insufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Rather, we examine only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.* It is the function of the trier of fact to determine the weight of the evidence and the credibility of the witnesses and as a result, the jury is “ ‘free to believe whomever they wish.’ ” *Id.* (quoting *Michael v. State*, 449 N.E.2d 1094, 1096 (Ind.1983)).

“Where circumstantial evidence is used to establish guilt, the question for the reviewing court is whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence.” *Id.* at 274-75. (quoting *Maxwell v. State*, 731 N.E.2d 459, 462 (Ind. Ct. App. 2000)). “Furthermore, we ‘need not determine whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but rather whether inferences may be reasonably drawn from that evidence which supports the verdict beyond a reasonable doubt.’ ” *Id.* at 275. (citing *Maxwell*, 731 N.E.2d at 463).

Carr's argument is based upon the premise that Hockaday's testimony and Reasor's testimony and medical records were erroneously admitted. Because our decision is adverse to Carr on those issues, we find that there is sufficient evidence to sustain Carr's conviction.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.