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IN THE
COURT OF APPEALS OF INDIANA

RICHARD SULLIVAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1011-CR-1195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-1001-FA-5803

July 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Richard Sullivan appeals his conviction of Child Molesting[1] as a class A felony. Sullivan presents the following restated issues for review:

1. Did the trial court err in admitting into evidence the victim's hearsay statement?

2. Did the trial court err in admitting Sullivan's confession into evidence?

We affirm.

The facts favorable to the conviction are that Sullivan lived with his wife, Zina. Also living with the Sullivans at the time was Zina's adult daughter, T.G., and T.G.'s four-year-old daughter, A.G. On the evening of January 24, 2010, Zina and T.G. were working at a restaurant while Zina's son, Monty Mulroney, and his girlfriend Kandis Wade were babysitting several children, including A.G. Sullivan was home that evening. At about 9:30 p.m., Wade walked to Sullivan's bedroom to ask for a cigarette. She knocked on the door and then entered without waiting for a response. She observed a child sitting up on Sullivan's bed completely covered by a blanket. Wade initially assumed it was her four-year-old daughter, who was in the home at the time. Sullivan was standing next to the bed pulling up his pants. His pants were low enough when Wade entered the room that she could see where his pubic hair began. Concerned that something was amiss, Wade returned to the kitchen to speak with Mulroney. While Wade was talking with Mulroney, her daughter came into the kitchen, so Wade knew that the child under the blanket was A.G. Wade told Mulroney they needed to get A.G. out of Sullivan's room. They immediately went to Sullivan's room and instructed A.G. to go upstairs to bed.

[1] Ind. Code Ann. § 35-42-4-3 (West, Westlaw through 2011 Pub. Laws approved & effective through

Wade and Mulroney followed A.G. upstairs. Once there, Wade "asked her what her and Papaw [i.e., Sullivan] were doing[.]" *Transcript* at 56. A.G. responded that "Papaw humped her and she humped Papaw" and "Papaw's peepee went in her mouth and stuff went on his belly." *Id*. at 60. As she talked with Wade, A.G. was visibly scared and crying because she thought she was going to be in trouble. Wade telephoned T.G. at work and told her what had transpired. T.G. left work before midnight, picked up A.G., and took her to the hospital for an examination.

At 4:00 a.m. the following morning, Detective Rob Chappell, the child abuse detective for the Indianapolis Metropolitan Police Department (IMPD) who was on call at the time, received a page advising him that a sexual molestation had just occurred. He called IMPD officer Musselman and someone from the Department of Child Services and informed them of the allegations. He traveled to the Sullivans' house, arriving at approximately 5:00 a.m. By the time he arrived, IMPD officer Musselman had responded to the Sullivans' house and detained Sullivan. Sullivan was taken to the police station and interviewed. Ultimately, he gave a statement in which he claimed that he and A.G. were in bed together and she was rubbing his stomach, which caused him to get an erection, resulting in his penis protruding out of the waistband of his pants. At that time A.G.'s head was laying on his stomach and she was facing his partially exposed penis. He stated that he inadvertently forced her head down so that her mouth touched his penis.

Sullivan was charged with two counts of child molesting, one as a class A felony and one a class C felony. He was found guilty on both counts following a jury trial. The trial

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6/28/2011).

court merged the two counts at sentencing and imposed a forty-year executed sentence for the class A felony conviction.

1.

Sullivan contends the trial court erred in admitting into evidence Mulroney's and Wade's testimony concerning what A.G. told them had happened in Sullivan's room on the night in question.

Our standard of review for the admissibility of evidence is well established. A trial court's decision to exclude evidence is accorded great deference on appeal, and we will reverse only for a manifest abuse of discretion that denies the defendant a fair trial. *Lovitt v. State*, 915 N.E.2d 1040 (Ind. Ct. App. 2009). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id*. We review the admissibility of evidence by considering only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Edelen v. State*, 947 N.E.2d 1024 (Ind. Ct. App. 2011).

The State called A.G. as a witness at trial. After a dialogue between A.G. and the prosecuting attorney, the trial court determined that A.G. was not competent to testify. Later, over Sullivan's objection, the court permitted Wade and Mulroney to testify about what A.G. told them that Sullivan had done to her on the evening in question. Specifically, Wade was permitted to testify that A.G. told her "Papaw humped her and she humped Papaw" and "Papaw's peepee went in her mouth and stuff went on his belly." *Transcript* at 60. Mulroney testified that A.G. said essentially the same thing, i.e., "That her and Papaw was humping her, and she was humping Papaw, and then she – he put his mouth – his peepee in

his [sic] mouth and white stuff came out." *Id*. at 86.

Hearsay is generally not admissible except as provided by the Indiana Rules of Evidence. Ind. Evidence Rule 802. In the instant case, the trial court ruled that the statements in question were admissible under two separate exceptions to the hearsay rule: as an excited utterance and present sense impression. *See* Evid. R. 803(1) & (2). We will focus upon the latter exception. Hearsay statements may be admitted into evidence if they qualify as a present sense impression, which is defined as "[a] statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter." Ind. Evidence Rule 803(1). To be admissible under Evid. R. 803(1), the statement must describe or explain the event or condition during or immediately after its occurrence and must be based upon the declarant's perception of the event. *Palacios v. State*, 926 N.E.2d 1026 (Ind. Ct. App. 2010). Thus, in order for A.G.'s statement to be admissible, it must meet the following three requirements: (1) It must describe or explain an event, (2) during or immediately after its occurrence, and (3) must be based on the A.G.'s perception of the event. *Id.*

Sullivan challenges only the second element set out above, i.e., that A.G.'s statement was made immediately after the occurrence. Sullivan contends:

> Here, according to the testimony of [Wade] and [Mulroney] A.G.'s statement did not occur during the event. There was no testimony to show that A.G. made her statement immediately after the event. Moreover, there was no testimony from which one could determine how long [Sullivan] and A.G. were alone in the bedroom. … There was no testimony or other evidence to show what time A.G. went into [Sullivan's] room. It is possible, even likely that A.G. was in [Sullivan's] room for several hours prior to [Wade] entering the room. Thus, it cannot be assumed that the statement was made immediately after the event.

Appellant's Brief at 15. We cannot agree that the record lacks evidence that A.G.'s statement was made immediately after the molestation.

Wade testified that she knocked on the door to Sullivan's bedroom, hesitated, and then entered. She observed Sullivan standing next to his bed and pulling up his pants. She also observed a small child, who turned out to be A.G., sitting up on Sullivan's bed completely covered by a blanket. These circumstances permit a reasonable inference that the molestation occurred just before Wade opened the door. Thus, the State presented sufficient evidence to establish the second element for admissibility of a hearsay statement under the present sense impression exception. The trial court did not err in permitting Wade and Mulroney to testify as to the statement A.G. made about the molestation incident.

2.

As indicated above, when Sullivan was questioned by police shortly after the incident, he claimed that while he and A.G. were lying on the bed together, she rubbed his stomach, causing him to get an erection that resulted in the end of his penis protruding out of the waistband of his pants. Sullivan further indicated that he inadvertently forced her head down in such as way that her mouth touched his penis. Sullivan contends the trial court erred in admitting into evidence his statement to police because a crime may not be proven solely by confession and, absent Sullivan's statement, "the only evidence in this case against Mr. Sullivan was the erroneously admitted testimony of Ms. Wade and Mr. Mulroney." *Appellant's Brief* at 19.

For our purposes here, Sullivan's statement was tantamount to a confession. Sullivan

correctly notes that an extra-judicial confession may not be admitted into evidence unless the State produces evidence other than the extra-judicial confession that establishes the *corpus delicti*. *Reynolds/Herr v. State*, 582 N.E.2d 833 (Ind. Ct. App. 1991) (citing *Dennis v. State*, 230 Ind. 210, 102 N.E.2d 650 (1952)). We note that the *corpus delicti* may be established by circumstantial evidence. *Reynolds/Herr v. State*, 582 N.E.2d 833.

As explained in our resolution of Issue 1, leaving aside Sullivan's confession, A.G.'s statement to Wade and Mulroney was *not* the only evidence of molestation. Sullivan was in his bedroom with A.G. and the door was closed. He did not respond to Wade's knock. When she entered the room unbidden, Wade was standing beside his bed pulling up his pants and A.G. was sitting up on the bed completely covered by a blanket on the bed - an unusual set of circumstances to say the least. Moreover, the scene that confronted Wade when she opened the door was generally consistent with A.G.'s description of what had occurred. This circumstantial evidence constituted sufficient independent evidence of the offense and justified the admission of Sullivan's confession.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.