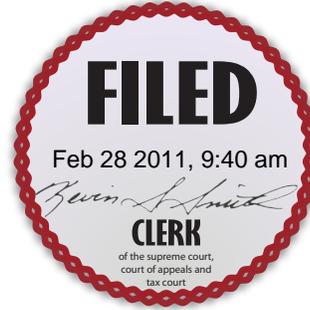


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

D.H.,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-1005-JV-540
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Scott B. Stowers, Magistrate
Cause No. 49D09-0908-JD-2409

February 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

D.H., a juvenile, appeals a true finding that he committed an act that would be Class C felony child molesting¹ if committed by an adult. The court did not err by admitting D.H.'s videotaped confession, and there was sufficient evidence to support the true finding. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

D.H., who was twelve years old at the time of the offense, lived in a house with his four-year-old cousin C.J. The two were taking a bath together when D.H. asked C.J. to sit on his lap. D.H.'s penis was erect, and he touched C.J.'s anus with it. D.H. so admitted in a videotaped interview with a detective. The State alleged D.H. committed child molesting, a Class C felony if committed by an adult. The juvenile court found that allegation to be true, adjudicated D.H. a delinquent, and placed him on probation.

DISCUSSION AND DECISION

1. The Videotaped Statement

A detective interrogated D.H. for about an hour and the interrogation was videotaped. D.H.'s mother was present during most of the hour, but D.H. made the admissions on which the true finding is based while his mother was not in the room. The detective had suggested several times during the interrogation that D.H. might be more comfortable discussing the incident if his mother were not present, and at one point D.H. and his mother agreed she would leave the room. D.H. alleges this videotaped statement was inadmissible because it

¹ Ind. Code § 35-42-4-3.

was coerced and thus involuntary, and it cannot support the true finding because it was uncorroborated.

A. Voluntariness of Statement²

D.H. asserts his admissions in the videotaped interview with a detective were obtained by coercion and intimidation. The State bears the burden to prove beyond a reasonable doubt that a defendant's confession was voluntary. *Scalissi v. State*, 759 N.E.2d 618, 621 (Ind. 2001). Where the State meets its burden and the trial court admits the confession, we review for an abuse of discretion. *Id.* We do not reweigh the evidence, but instead examine the record for substantial, probative evidence of voluntariness. *Id.*

Coercive police activity is a necessary prerequisite to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Id.* A confession is voluntary if, in light of the totality of the circumstances, it is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will. *Id.* The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence. *Id.* Various interrogation techniques -- such as "good cop, bad cop,"

² The State correctly notes D.H. waived any challenge to the admissibility of the videotape by stipulating to its admission at the hearing. *See, e.g., Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003) (failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal). As we find the statement was voluntary, we need not address D.H.'s argument his trial counsel was ineffective for failure to object at trial to the admission of the tape. *See, e.g., Pruitt v. State*, 903 N.E.2d 899, 928 (Ind. 2009) (to prevail on a claim of ineffective assistance due to the failure to object, a petitioner for post-conviction relief must show an objection would have been sustained if made).

providing a morally acceptable answer, blaming the victim, and bargaining -- do not necessarily produce an involuntary statement. *Wilkes v. State*, 917 N.E.2d 675, 681 (Ind. 2009), *reh'g denied, cert. denied* ___ U.S. ___, 131 S.Ct. 414 (2010).

The record contains probative evidence sufficient to establish there was no improper police influence or coercion in obtaining D.H.'s admission. While it is apparent throughout the interview of twelve-year-old D.H. that the detective applied some of the interrogation techniques addressed in *Wilkes*, the videotape does not suggest those tactics overcame D.H.'s free will; nor is there any indication of "physical abuse [or] psychological intimidation." See *Scalissi*, 759 N.E.2d at 621. The detective explained D.H.'s rights to him and his mother, and we cannot say the trial court abused its discretion to the extent it determined the detective's tactics did not produce an involuntary statement.

B. Corroboration of D.H.'s Statement

In Indiana, a crime may not be proven based solely on a confession. *Workman v. State*, 716 N.E.2d 445, 447 (Ind. 1999). Admission of a confession requires independent evidence of the crime, including evidence of the specific kind of injury and that criminal conduct was the cause of the injury. *Id.* This evidence need not prove that a crime was committed beyond a reasonable doubt, but merely provide an inference that a crime was committed. *Id.* at 447-48. The inference of a crime may be established by circumstantial evidence. *Id.* at 448.

The four-year-old victim testified someone touched him on his "bootie." (Tr. at 11.)

He initially testified he forgot who touched him, then he testified his cousin T.T. did it. However, he also testified the touching happened while he was taking a bath with D.H., and that he and D.H. were the only people in the bathtub. While we decline to adopt the State's characterization of this corroborating evidence as "abundant," (Br. of Appellee at 10), it does "provide an inference that a crime was committed." *See Workman*, 716 N.E.2d at 447-48. Thus, C.J.'s statements provided sufficient independent evidence to permit consideration of D.H.'s confession.

2. Sufficiency of Evidence

When reviewing a delinquency adjudication, we consider only the evidence and reasonable inferences supporting the judgment. *B.R. v. State*, 823 N.E.2d 301, 306 (Ind. Ct. App. 2005). We do not reweigh evidence or judge witness credibility. *Id.* If there is substantial evidence of probative value from which a reasonable trier of fact could conclude beyond a reasonable doubt that the juvenile committed the delinquent act, we will affirm the adjudication. *Id.*

To find D.H. delinquent, the State had to prove the victim was under fourteen years of age and D.H. performed or submitted to any fondling or touching with intent to arouse or to satisfy the sexual desires of either the victim or D.H. *See* Ind. Code § 35-42-4-3(b). In his videotaped statement to a detective, D.H. admitted that while he was taking a bath with C.J., his penis became erect and touched C.J.'s anus after he had instructed C.J. to sit on his lap.

We acknowledge the numerous inconsistencies in C.J.'s testimony. He testified

someone had touched him inappropriately, but he could not remember who. He then testified someone other than D.H. had touched him inappropriately while he was in the bathtub with D.H. He then testified D.H. touched him inappropriately, but it happened when they were outside playing. Then he testified nobody touched him while he was in the bathtub. However, he also testified the touching happened while he was taking a bath with D.H., and he and D.H. were the only people in the bathtub.

While the trial testimony was fraught with inconsistent statements, it was for the trier of fact, here the court, to assess witness credibility. The trier of fact is free to believe one part of a witness' testimony and disbelieve another part. *Foulks v. State*, 582 N.E.2d 374, 377 (Ind. 1991). We must decline D.H.'s invitation to reweigh the evidence or judge the credibility of the witnesses.

D.H. also claims there was no evidence to establish his specific intent to arouse or satisfy his sexual desires. Because specific intent is a mental state not generally susceptible of direct proof, it may be inferred from all the surrounding circumstances. *Hammond v. State*, 479 N.E.2d 629, 632 (Ind. Ct. App. 1985). "Evidence of the intentional touching of the victim's genital area justifie[s] an inference that the defendant acted with the intent to arouse or gratify sexual desires." *Id.* Thus, there was sufficient evidence of intent. *See id.* (affirming child molesting conviction of 27-year-old who was mentally disabled and functioned at a second to third grade level).

As we cannot find an abuse of discretion in admission of the videotaped interview and

there was sufficient evidence to support the true finding, we affirm the juvenile court.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.