

STATEMENT OF THE CASE

Appellant-Defendant, Devlyn R. Bowen (Bowen), appeals his conviction for sexual battery, a Class D felony, Ind. Code § 35-42-4-8.

We affirm.

ISSUES

Bowen raises two issues for our review, which we restate as follows:

- (1) Whether the trial court abused its discretion by excluding evidence that on a prior occurrence, the victim's breasts became exposed to repairmen; and
- (2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Bowen committed sexual battery.

FACTS AND PROCEDURAL HISTORY

On May 4, 2007, M.L. had scheduled an appointment to have cable service installed in her apartment. Bowen, an employee of the cable company, arrived at M.L.'s apartment to complete the installation at approximately 12:15 p.m. M.L., who had worked late the day before, was still asleep when Bowen arrived. M.L. awoke when she heard Bowen knock on the door. When she answered the door, M.L. was wearing shorts and a sleeveless shirt. M.L. led Bowen first into the living room, and then into her bedroom, to show Bowen where she wanted the cable installed. In her bedroom, M.L. pulled the computer desk away from the wall in order to show Bowen where the modem from the previous cable was located. Bowen then pushed her against the wall and grabbed her breast. Bowen told M.L. that he "would

like to get [her] in [her] bed.” (Transcript p. 13). M.L. pushed his hand away from her chest. Bowen moved away from M.L., apologized and left the apartment.

M.L. then dressed before walking out to her balcony. While outside, M.L. saw Darrell Jones (Jones), the apartment maintenance man. At M.L.’s request, Jones came up to M.L.’s apartment. While Jones remained in her apartment, M.L. went to a neighbor’s apartment to call the police. Bowen returned to the apartment to continue with the cable installation. At some point, Bowen went outside to the parking lot where his vehicle was located. Bowen was still outside when Detective James Allison (Detective Allison) of the Evansville Police Department arrived. When Detective Allison approached Bowen for a statement, Bowen told him that “[he didn’t] know what got into [him].” (Tr. p. 73). Three days later, on May 7, 2007, Bowen met with Detective Brian Turpin (Detective Turpin) of the Evansville Police Department at the Evansville Police Department Headquarters. After Detective Turpin read Bowen his Miranda rights, Bowen provided a recorded statement. In his statement, Bowen maintained that while he was in M.L.’s bedroom, one of her breasts fell out of her top. Bowen admitted that he “grabbed it . . . and then jerked back.” (Tr. p. 144). On May 17, 2007, Detective Turpin met with M.L. to obtain her statement regarding the events that had occurred nearly two weeks earlier.

On July 18, 2007, the State filed an Information charging Bowen with sexual battery, a Class D felony, I.C. § 35-42-4-8. On January 9, 2008, the State filed an amended Information, which added additional elements of the charging statute, but left the nature of the offense unchanged. On February 25, 2008, the trial court conducted a jury trial. After a

juror indicated that he was acquainted with one of the State's witnesses and would likely give the witness's testimony greater weight, Bowen moved for a mistrial. The trial court granted Bowen's motion and declared a mistrial. On July 2 through 3, 2008, the trial court conducted a second jury trial. At the trial, the State presented several witnesses, including M.L., who testified as to the events that occurred inside her apartment, and Detectives Allison and Turpin, who testified as to the statements they received from M.L. and Bowen. During the trial, Bowen attempted to introduce the testimony of Jones, who had allegedly encountered M.L. on a previous occasion in which M.L. was wearing a similar top where her breasts became exposed while Jones and another maintenance man were performing repairs in M.L.'s apartment. In sustaining the State's objection to this testimony, the trial court determined that Jones' testimony regarding the prior event was irrelevant to the present case.

At the conclusion of the evidence, the jury convicted Bowen of sexual battery, a Class D felony. On August 8, 2008, the trial court sentenced Bowen to eighteen months in the Department of Correction, which was suspended to probation, with credit for one day served in confinement. The trial court also ordered Bowen to register as a sex offender for ten years, and to have no contact with M.L. prior to the expiration of the no contact order on August 10, 2009.

Bowen now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Evidence of Prior Occurrence

Bowen argues that the trial court abused its discretion by excluding evidence that on a prior occurrence, M.L.'s breasts became exposed to Jones while he and another maintenance man were working in her apartment. Specifically, Bowen argues that this evidence was relevant to prove that M.L.'s breasts were also exposed while Bowen was in her apartment, thereby validating Bowen's account of what had happened during his encounter with M.L.

In reviewing the admission or exclusion of evidence at trial, we defer to the decision of the trial court. As our supreme court has recognized, it is within the sound discretion of the trial court to admit or exclude evidence. *Hardiman v. State*, 726 N.E.2d 1201, 1203 (Ind. 2000). Likewise, this court will not reverse the trial court absent an abuse of that discretion. *Id.* "A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts and circumstances presented." *Id.*

According to the Indiana Rules of Evidence, "[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Indiana Evidence Rule 401. Likewise, relevant evidence is generally admissible, while irrelevant evidence is inadmissible. Evid. R. 403. "In cases where the admission of evidence is an issue, whether such evidence is relevant is a matter of trial court discretion. Absent clear error or manifest abuse of discretion, such rulings do not constitute reversible error." *Johnson v. State*, 480 N.E.2d 600, 602 (Ind. Ct. App. 1985).

Bowen suggests that the proffered evidence was relevant, as the alleged experience of Jones was similar to the incident involving Bowen. Although Jones' testimony may have a tendency to show that M.L. had previously experienced "wardrobe malfunctions," the existence of this fact is not of consequence to the determination of the present action: whether or not Bowen committed sexual battery. Even if M.L.'s breast accidentally fell out of her shirt in the presence of Bowen, it in no way justifies Bowen's subsequent actions. In support of its decision to exclude the proffered evidence, the trial court noted that Bowen's attempt to use Jones' testimony as relevant evidence in the present case was "too far fetched." (Tr. p. 124). We agree with the trial court's determination that this evidence is irrelevant. Thus, we conclude that the trial court acted within its discretion to exclude the proffered evidence.

II. *Sufficiency of the Evidence*

Bowen also argues that the State did not present sufficient evidence to sustain his conviction for sexual battery, a Class D felony, beyond a reasonable doubt. Specifically, he argues that the evidence presented at trial failed to establish that M.L. was compelled to submit to his touching by force or the imminent threat of force. Our standard of review with regard to sufficiency claims is well settled:

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. [] Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied* (citations omitted). Furthermore, “the uncorroborated testimony of a victim is generally sufficient to sustain a criminal conviction.” *Buckner v. State*, 857 N.E.2d 1011, 1017 (Ind. Ct. App. 2006).

Indiana Code section 35-42-4-8 provides in pertinent part: “(a) A person who, with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person, touches another person when that person is: (1) compelled to submit to the touching by force or the imminent threat of force . . . commits sexual battery, a Class D felony.” Thus, to convict Bowen of sexual battery as a Class D felony, the State needed to prove beyond a reasonable doubt that, with the intent to arouse his own sexual desires, Bowen touched M.L. when she was compelled to submit to the touching by force or the imminent threat of force.

The fact that Bowen touched M.L.’s breast to arouse his own sexual desires remains uncontested; however, Bowen argues that the evidence was insufficient to show that M.L. was compelled to submit to the touching of her breasts by force or the imminent threat of force. We disagree. Our supreme court has recognized that the language of Indiana Code section 35-42-4-8 “demonstrates that it is the victim’s perspective, not the assailant’s, from which the presence or absence of forceful compulsion is to be determined.” *Tobias v. State*, 666 N.E.2d 68, 72 (Ind. 1996). Furthermore, “[t]his is a subjective test that looks to the victim’s perception of the circumstances surrounding the incident in question. The issue is thus whether the victim perceived the aggressor’s force or imminent threat of force as compelling her compliance.” *Id.*

In the present case, the State presented the testimony of M.L. in support of its contention that M.L. was compelled to submit to the touching of her breast by force or the imminent threat of force. M.L. testified that before Bowen touched her breast, he pushed her against the wall. She further testified that when he pushed her against the wall, she was “scared, [because she] didn’t know what he was going to do.” (Tr. p. 13). M.L. stated that she felt as though she “[had] no where [sic] to go” when she was confined between Bowen and the wall. (Tr. p. 14). M.L. then testified that after pushing her against the wall, Bowen grabbed M.L.’s breast, and told her he “would like to get [her] in [her] bed.” (Tr. p. 13). We find M.L.’s testimony unambiguous as to the sequence of events that occurred in her bedroom: first, Bowen pushed M.L.; second, M.L. was scared; and finally, Bowen touched M.L.’s breast. Even on cross-examination, M.L. refuted defense attorney’s suggestion that the events were in fact “simultaneous” by clarifying that she experienced fear when Bowen pushed her, which occurred before he touched her breast. (Tr. p. 53). This evidence was sufficient to show that M.L. was compelled to submit to the touching of her breast by force or threat of force. As such, the evidence is sufficient to support Bowen’s conviction.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by excluding Jones’ testimony regarding a prior occurrence in which M.L.’s breasts were

exposed. Furthermore, we conclude that the evidence is sufficient to support Bowen's conviction for sexual battery, a Class D felony, beyond a reasonable doubt.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.