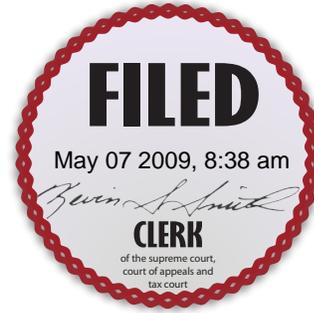


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL L. BROWN, )

Appellant-Defendant, )

vs. )

No. 45A05-0809-CR-526

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE LAKE SUPERIOR COURT

The Honorable Thomas Stefaniak, Jr., Judge

Cause No. 45G04-0501-FC-00008

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**MAY 7, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

Michael L. Brown (“Brown”) appeals his conviction after a jury trial of one count of child molesting<sup>1</sup> as a Class A felony, and one count of child molesting<sup>2</sup> as a Class C felony. Brown presents the following restated issue for our review: whether the trial court abused its discretion by admitting into evidence statements made by the victim about the incidents of child molesting to relatives and a police detective.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

W. W. and her daughter, T.W., lived in Chicago with T.W.’s great-grandmother, E. W., until T.W. was three years old. Late in 2003, W.W. and T.W. moved to Hammond, Indiana, and lived in an apartment with W.W.’s boyfriend, Brown, but E.W. took care of T.W. during the work week. On March 14, 2004, while in E.W.’s care, T.W. told E.W. that Brown had touched her vagina and that her vagina hurt. E.W. had taught all of the children to use exact terminology when referring to parts of their bodies. E.W. examined T.W.’s vaginal area and discovered that it was very inflamed. E.W. immediately took T.W. to the University of Chicago Hospital Emergency Room where T.W. told the staff that Brown had touched her vagina while her mother was away at work. T.W. was found to be free from venereal disease at that time.

Detective Sue Pruzin of the Hammond Police Department interviewed T.W. the following day. T.W. told Detective Pruzin that Brown had touched her vagina three times over her clothes. After this interview, while T.W. was still living in Hammond

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<sup>1</sup> See Ind. Code § 35-42-4-3(a)(1).

<sup>2</sup> See Ind. Code § 35-42-4-3(b).

with her mother and Brown, T.W. told her great-aunt, A.W., that Brown had touched her vagina. On one occasion, T.W. told E.W. and A.W. that Brown had placed his penis in her mouth, but that she could not swallow it, and on another occasion she told E.W. that Brown had placed his penis in her vagina. A.W. and E.W. told W.W. about the allegations against Brown, but W.W. did not believe them. T.W. continued to live with her mother and Brown in Hammond, and the relationship between W.W. and her family became strained.

On April 21, 2004, T.W. was visiting her grandmother in Wisconsin, when T.W. complained of a foul-smelling discharge from her vagina and painful urination. T.W.'s grandmother took her to the Children's Hospital of Wisconsin. While there, T.W. told staff that Brown had touched her private area with his finger. Tests revealed that T.W. had gonorrhea of the throat, vagina, and anus.

T.W. did not return home to her mother after being examined in Wisconsin. Sometime shortly after T.W. was examined at the hospital, W.W. was informed that T.W. had gonorrhea. After learning about the test results, W.W. ended her relationship with Brown, and he moved out of her apartment. W.W. subsequently learned that she also had contracted gonorrhea. Since their move to Hammond, Brown was the only adult male in T.W.'s life.

On January 18, 2007, the State charged Brown with child molesting as a Class C felony for fondling T.W. On February 20, 2007, the State added one count of child molesting as a Class A felony for performing sexual intercourse with T.W., and another count of child molesting as a Class A felony for performing criminal deviate conduct

with T.W. The State also filed an allegation that Brown was a habitual offender, but that enhancement was not pursued at trial. Brown filed a motion to suppress certain statements made by T.W. The State filed a petition seeking to admit T.W.'s statement to others at trial under the Protected Persons Statute, Indiana Code section 35-37-4-6. After a hearing on the State's petition, the trial court found T.W. to be a protected person, granting the State's petition, and effectively denying Brown's motion to suppress.

At the conclusion of Brown's jury trial, Brown was acquitted of the count of child molesting charged as a Class A felony alleging that Brown performed sexual intercourse with T.W. However, Brown was convicted of the remaining counts. The trial court sentenced Brown to forty years at the Indiana Department of Correction for his Class A felony conviction, and to six years for his Class C felony conviction, with the sentences to be served concurrently. Brown now appeals.

### **DISCUSSION AND DECISION**

Brown argues that the trial court abused its discretion by admitting into evidence the statements T.W. made to E.W., A.W., and Detective Pruzin about the incidents of child molesting. Brown claims that the trial court erred by granting the State's petition to admit the statements under the "protected person" statute, because the statements were inadmissible hearsay.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1071, 1068 (Ind. Ct. App. 2006). The same is true when evaluating the admissibility of evidence under the "protected person" statute. *See M.T. v. State*, 787 N.E.2d 509, 511-12 (Ind. Ct. app. 2003). "Because we are considering the issue after a

completed trial, we review the admission of evidence for an abuse of discretion.” *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will consider the conflicting evidence most favorable to the trial court’s ruling and any uncontested evidence favorable to the defendant. *Id.* An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *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.

However, Indiana Code section 35-37-4-6, often referred to as the “protected person” statute, is an exception to the general rule that hearsay is inadmissible. Pursuant to the statute, the statement at issue must be made by a child who is less than fourteen-years-old. Ind. Code § 35-37-4-6(c)(1). Additionally, the trial court must conduct a hearing outside the presence of the jury and find that the hearsay statement is sufficiently reliable. IC § 35-37-4-6(e)(1). The trial court may consider the following factors in determining the reliability of a statement being offered at trial: 1) time and circumstances of the statement; 2) whether there was opportunity for coaching; 3) whether there was a motive to fabricate; 4) use of age-appropriate terminology; 5) spontaneity; and 6) repetition. *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997). Last, the protected person must testify at trial. IC § 35-37-4-6(e)(2)(A).

Here, T.W.'s first statement about the molesting was to E.W., her great-grandmother, who was babysitting T.W. T.W. made the statement spontaneously as she was seeking relief for pain she was experiencing, and used appropriate terminology her great-grandmother had previously taught the family's children to use, and the physical evidence supported T.W.'s statement. T.W. made the same statements to healthcare workers when E.W. took T.W. to the emergency room. T.W. told Detective Pruzin that Brown had touched her vagina over her clothes.

Between March 15, 2004 and the end of April 2004, T.W. told E.W. that Brown had placed his penis in T.W.'s mouth and vagina. T.W. and her mother were both found to have contracted gonorrhea, and Brown was the only male who had access to both of them. When T.W. was being examined at the hospital in Wisconsin, she told healthcare workers that Brown had touched her vagina with his finger.

After the police investigation commenced, T.W. made the same statements to A.W., while in A.W.'s care. A.W. testified that the morning after spending the night at A.W.'s house, T.W. whispered in her ear that she had something to tell A.W., but did not want to tell her mother.

We note that the challenged evidence was admitted at trial without objection. The failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal. *Jackson v. State*, 735 N.E.2d 1146, 1152 (Ind. 2000). However, waiver notwithstanding, we find that the trial court did not abuse its discretion in the admission of the challenged statements. T.W. consistently identified Brown as the person who committed the offenses, the statements were made in the period of time

between March 14, 2004 and April 21, 2004, and appear to have been initiated each time by T.W. The statements made by T.W. were supported by the physical evidence and Brown was the only male to have access to both T.W. and her mother. T.W. testified at trial, was found to be able to distinguish between the truth and a lie, and was cross-examined. T.W. did not have a motive to fabricate or lie.

Brown's argument about the uncertainty as to the timing of T.W.'s statements to others in relation to the occurrences of child molesting is of no moment here. We note that even though some time passed between the molestations and the statements, this is just one factor to be considered in determining the reliability of the statements, and is not necessarily dispositive. *See Mishler v. State*, 894 N.E.2d 1095, 1100 (Ind. Ct. App. 2008)(citing *Trujillo v. State*, 806 N.E.2d 317, 328 (Ind. Ct. App. 2004)). T.W.'s statements were spontaneously made, and not the product of leading questions.

Further, Brown's attack on the reliability of T.W.'s statements based upon the difference between T.W.'s testimony at a deposition and the protected person hearing regarding her recollection of her age at the time of the molestations, and that Brown was living with them, fails here. T.W. did not testify that she was told what to say, and E.W. testified that she did not tell T.W. what to say. Further, T.W. was cross-examined at trial. Any supposed coaching by E.W. between the time of deposition and the protected person hearing in 2008, would not impact the reliability of T.W.'s statements made when the molestation was first coming to light in 2004.

Last, any alleged error in the admission of the challenged statements is harmless. Any error caused by the admission of evidence is harmless error for which we will not

reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted. *Payne v. State*, 854 N.E.2d 7, 17 (Ind. Ct. App. 2006). T.W.'s statements to others about Brown touching her vagina were cumulative of the statements in her medical records, which are not challenged here on appeal. Further, T.W.'s statements to others about Brown placing his penis in her mouth and vagina were cumulative of her trial testimony. The trial court did not abuse its discretion.

Affirmed.

RILEY, J., and BROWN, J. concur.