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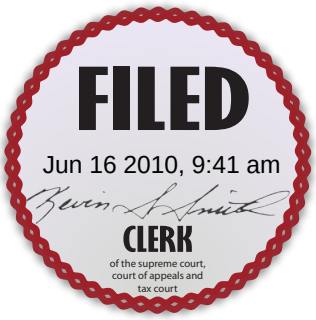

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COURT OF APPEALS OF INDIANA

JASON WELLS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1004-CR-377
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G02-0902-FC-25213

June 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jason Wells appeals following his conviction for Child Molesting,[1] a class C felony. Wells argues that the trial court erroneously admitted his statement to police, that the trial court erroneously barred certain evidence based on the Rape Shield Statute[2] and Indiana Evidence Rule 412, and that the evidence is insufficient to support the conviction. Finding no error and finding sufficient evidence, we affirm.

FACTS

In February 2009, thirteen-year-old A.W. was living with her family, including her father, Wells. On February 12, 2009, A.W. told her brother and a friend that Wells had been touching her inappropriately. Her brother and friend encouraged her to report the incidents to the police, and she did so.

A.W. described three different instances in which her father touched her. On one occasion, A.W. stated that she was in her bedroom when Wells came in. She had lost over forty pounds, and her father touched her breasts, rubbing her chest area underneath her shirt, telling her that she had turned out really pretty. Wells pulled her tank top down, rubbed outside her bra, and then removed her bra and rubbed her breasts and nipples. While touching A.W., Wells made comments, saying "nice," and "damn, girl." Tr. p. 20.

After speaking with A.W., Indianapolis Metropolitan Police Sergeant Kevin Kinder took a statement from Wells. Before taking the Statement, Sergeant Kinder advised Wells of his rights and gave Wells a form explaining those rights. Wells signed

[1] Ind. Code § 35-42-4-3.

[2] Ind. Code § 35-37-4-4.

the form, indicating that he understood his rights, including his right to an attorney, and chose to waive them. During the interview, Wells admitted to touching A.W.'s breasts but denied doing so to arouse or satisfy any sexual intent or desire. He admitted telling A.W. that she was beautiful and stated that he thought she was very attractive. He admitted that he "may have" touched A.W. "inappropriately." Id. at 19.

On February 15, 2009, the State charged Wells with three counts of class C felony child molesting. Before trial, Wells moved to suppress his statements to police, and following a hearing, the trial court denied the motion. Wells also filed a motion to admit evidence consisting of a past rape allegation made by A.W., and the trial court denied that motion based on the Rape Shield Statute.

Wells's bench trial began on September 30, 2009. At the conclusion of the State's case-in-chief, Wells moved for a directed verdict on all three counts, arguing that the State had failed to prove that Wells had acted with the intent to arouse or satisfy sexual desire. The trial court granted the motion with respect to Counts 1 and 2 and denied the motion with respect to Count 3, which was based upon the incident in which Wells touched A.W.'s breasts. The trial proceeded on Count 3, and Wells testified, admitting that he had touched A.W. but denying that he had done so with any criminal intent. At the conclusion of the trial, the trial court found Wells guilty of one count of class C felony child molesting. On November 13, 2009, the trial court sentenced Wells to four years, all suspended, with two years of probation. Wells now appeals.

DISCUSSION AND DECISION

I. Wells's Statement to Police

Wells first argues that the trial court erred by admitting his statement to Sergeant Kinder into evidence. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. Payne v. State, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Smith v. State, 889 N.E.2d 836, 839 (Ind. Ct. App. 2008). In making this determination, we do not reweigh evidence and consider conflicting evidence in a light most favorable to the trial court's ruling. Id. We also consider uncontroverted evidence in the defendant's favor. Id.

Wells contends that his statement was involuntary because after he signed the waiver of rights form, Sergeant Kinder became aggressive and intimidating. When a defendant challenges the admission of his statement into evidence, the State must prove the voluntariness of the statement beyond a reasonable doubt. Jackson v. State, 735 N.E.2d 1146, 1153-54 (Ind. 2000). The statement is admissible if, based on the totality of the circumstances, it was made voluntarily. Griffith v. State, 788 N.E.2d 835, 841 (Ind. 2003). We focus on "whether the waiver or confession was free and voluntary and not induced by any violence, threats, promises, or other improper influences." Jackson, 735 N.E.2d at 1153.

Here, the record reveals that before taking Wells's statement, Sergeant Kinder advised him of his rights. Sergeant Kinder then provided Wells with a waiver of rights

form, which Wells reviewed and signed. Wells indicated that he understood his rights. Sergeant Kinder tape recorded and transcribed the interview. Having reviewed the transcript, we see no evidence of any violence, threats, promises, or other improper influences during the interview. Indeed, there is no evidence tending to establish that Wells's statement was anything other than free and voluntary. Therefore, we find that the trial court did not err by admitting this statement into evidence.

Additionally, we note that even if the trial court had erred by admitting Wells's statement into evidence, the error would have been harmless. Wells testified at his trial, and his testimony was entirely consistent with the content of his police interview. Therefore, Wells's statement was merely cumulative of other evidence provided at trial. Under these circumstances, we find no error in this regard.

II. A.W.'s Prior Accusation

Next, Wells argues that the trial court erred by refusing to admit into evidence the fact that A.W. had accused someone of rape in the past. The trial court denied Wells's motion to admit this evidence based upon the Rape Shield Rule and the Rape Shield Statute.

Indiana has enacted a Rape Shield Statute, I.C. § 35-37-4-4, and a Rape Shield Rule, Evid. R. 412. The Rape Shield Rule embodies the basic principles of Indiana's Rape Shield Statute, but to the extent that there are any differences, Rule 412 controls. Fugett v. State, 812 N.E.2d 846, 848-49 (Ind. Ct. App. 2004). The Rape Shield Rule provides, in pertinent part, as follows:

> In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:
>
> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
>
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
>
> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
>
> (4) evidence of conviction for a crime to impeach under Rule 609.

Evid. R. 412(a). There is also a common law exception to this rule when a defendant seeks to introduce evidence of a prior false accusation of rape. Fugett, 812 N.E.2d at 849. Thus, evidence of prior false accusations may be admitted, but only if (1) the complaining witness admits he or she made a prior false accusation of rape; or (2) the accusation is demonstrably false. Id. Prior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved. Id.

Here, during A.W.'s deposition, she stated that she had accused someone other than Wells of rape around the same time that she reported the other touching incidents. A.W. did not report the alleged rape to police and did not bring charges. None of the exceptions enumerated in Rule 412 apply, so the only possible exception that would permit this evidence to be introduced is the common law exception for a prior false accusation of rape. Here, however, A.W. has not admitted that her accusation is false and there is no other evidence in the record tending to establish that the accusation was

demonstrably false. Thus, the evidence was not admissible under the exception for prior false accusations of rape.

Nonetheless, Wells argues that the application of the Rape Shield Rule here violates his rights to confrontation and due process. See U.S. Const., amend. VI, XIV. As another panel of this court has explained, "Indiana's Rape Shield Statute has repeatedly been found constitutional on its face so long as it does not violate a defendant's right to cross-examination." Fugett, 812 N.E.2d at 850. The constitutionality of the statute as applied to preclude specific evidence must be examined on a case-by-case basis to ensure that no violation of the right to cross-examination has occurred. Id. In other words, the exclusion of the evidence must not prevent the defendant from conducting a full, adequate, and effective cross-examination. Id.

Here, the primary reason that Wells sought to introduce this evidence was to undermine A.W.'s credibility as a witness. During the trial, however, Wells was able to elicit testimony from A.W. that she has lied to her mother before, from A.W.'s mother that she believes her daughter is a liar, and from A.W.'s grandmother that A.W. lies. Therefore, even without this evidence, Wells was able to provide evidence that A.W. was capable of lying, and this additional evidence of the past rape accusation was not needed to present this defense. Wells was able to cross-examine A.W. and all other witnesses about the alleged molestation and A.W.'s general character, and it was Wells's failure to present relevant evidence establishing the falsity of her prior rape allegations that led to the exclusion of the proffered evidence. Under these circumstances, we find that the

application of the Rape Shield Rule did not violate Wells's constitutional rights and that the trial court did not err by excluding this evidence.

III. Sufficiency

Finally, Wells argues that the evidence is insufficient to support his conviction for class C felony child molesting. In reviewing the sufficiency of the evidence supporting a conviction, we will neither reweigh the evidence nor assess witness credibility, instead looking to the evidence and the reasonable inferences that may be drawn therefrom that support the judgment. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). We will affirm if evidence of probative value exists from which a reasonable factfinder could find the defendant guilty beyond a reasonable doubt. Id.

To convict Wells of class C felony child molesting, the State was required to prove beyond a reasonable doubt that he performed fondling or touching of A.W., who was under fourteen years of age, with the intent to arouse or to satisfy the sexual desire of either A.W. or himself. I.C. § 35-42-4-3.

Here, A.W. told police officers that her father had touched her breasts, rubbing her chest area underneath her shirt and telling her that she had turned out really pretty. Wells pulled her tank top down, rubbed outside her bra, and then removed her bra and rubbed her breasts and nipples. While touching A.W., Wells made comments, saying "nice," and "damn, girl." Tr. p. 20. Wells admitted to touching A.W.'s bra, though he denied touching her nipples, and admitted that he "may have" touched A.W. "inappropriately." Id. at 19. Wells also admitted that he found his daughter attractive. Although Wells

consistently denied touching A.W. with the intent to arouse or satisfy his sexual desire, it was reasonable for the trial court to infer from Wells's comments during the touching and his statement that he found his daughter attractive that Wells did, in fact, act with criminal intent.

Wells's arguments to the contrary focus almost entirely on the credibility of A.W. as a witness. As stated above, on appeal we do not engage in the practice of assessing witness credibility. That is the province of the factfinder. Here, the trial court had the opportunity to observe all witnesses and hear all testimony in person, and we will not second-guess the trial court's decision to credit A.W.'s testimony over her father's.[3] We find that the evidence is sufficient to support Wells's conviction.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.

[3] To the extent that Wells seeks the application of the incredible dubiosity doctrine, we note that this doctrine applies only where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. Newson v. State, 721 N.E.2d 237, 240 (Ind. 1999). Here, Wells testified in addition to A.W. and admitted that he touched her breasts. Thus, her testimony is not uncorroborated. Furthermore, her testimony is not inherently contradictory, equivocal, or the result of coercion. Therefore, the rule of incredible dubiosity does not apply.