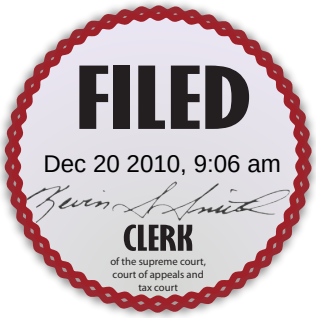
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ANNA ONAITIS HOLDEN
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

J.P.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0910-JV-1050
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0804-JD-001224

DECEMBER 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Respondent-Appellant J.P. appeals the juvenile court's true finding that he is a delinquent child who committed two counts of child molesting, Class C and Class B felonies if committed by an adult. Ind. Code § 35-42-4-3 (1998). We affirm.

ISSUES

J.P. raises two issues for our review, which we restate as:

I. Whether the trial court abused its discretion in admitting the victim's statement made during a videotaped child forensic interview.

II. Whether the victim's testimony was sufficient to establish beyond a reasonable doubt that while J.P. was molesting the victim, his penis touched the victim's anus.

FACTS AND PROCEDURAL HISTORY

On or around April 19, 2008, the victim told his mother that a relative, J.P., had inappropriately touched him on successive days at a time when he was nine years old. The victim's mother told at least three family members, who talked to the victim about J.P.'s actions.

On April 19, 2008, the victim's mother contacted the police to report what had happened. Jill Karr, a forensic interviewer with the Marion County Prosecutor's Office, interviewed the victim on April 22, 2008. During the child forensic interview, Karr showed the victim drawings of the front and back sides of a boy and girl and asked the victim to circle body parts that no one should touch. The victim circled the chest area; the genitalia, which he called the "pee pee" or "thing"; and the "butt." Exhibit 1.[1] The

[1] Exhibit 1 is the videotape of the child forensic interview.

victim stated that J.P., who was then fifteen years old, had reached into the victim's boxer shorts and moved his hand while touching the victim's penis. The next morning, J.P. pulled down the victim's boxers as he slept on his stomach. J.P. began "humping" the victim by sticking his "thing" in the victim's butt. Exhibit 1. The victim felt pain during the encounter. The victim stated that the molestations occurred in his mother's bedroom in an Indianapolis residence. The victim further stated that J.P. told him "don't tell anyone or I'll hit you in the mouth." Exhibit 1.

Following the parties' presentations of evidence during a child hearsay hearing, J.P. objected to the admission of the mother's testimony regarding the victim's statements to her. The court ruled that the evidence was unreliable, primarily because of the circumstances surrounding the statements. The court found that the mother's testimony was unreliable because she had frequently asked the victim whether bad touching had occurred. Indeed, the mother had been molested as a child and often asked groups of children whether they had been inappropriately touched.

J.P. also objected to the admission of the victim's statements to Karr during the videotaped child forensic interview. The court admitted the videotaped child forensic interview as reliable because, unlike in the encounter with his mother, the victim had been questioned by a professional child interviewer following a protocol that involved the use of open-ended questions. In making its ruling, the court noted that there were sufficient indications of reliability, notwithstanding the victim's prior questioning by family members.

During the denial hearing, J.P. again objected to the admissibility of the videotape of the victim's statements to Karr. The objection was denied. The victim's testimony at the bench proceeding was substantially similar to his statements to Karr, although he did not testify to the pain caused by the insertion of J.P's penis into his "butt."[2] After the victim testified, the victim was cross-examined by J.P.'s counsel. The court subsequently made a true finding that J.P. had committed both acts. J.P. now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF STATEMENTS MADE TO KARR AT VIDEOTAPED CHILD FORENSIC INTERVIEW

J.P. contends that the juvenile court abused its discretion in determining that the victim's videotaped statements to Karr, made during the child forensic interview, showed sufficient indications of reliability. J.P. argues that the circumstances preceding the forensic interview point to a lack of reliability. J.P. further argues that it was not logical for the court to find the statement to the victim's mother to be unreliable while finding the subsequent statement in the child forensic interview to be reliable. J.P. cites *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003), in support of his contentions.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Surber v. State*, 884 N.E.2d 856, 862 (Ind. Ct. App. 2008), *trans. denied*. We reverse only where the decision is clearly against the logic and effect of the facts and

[2] The compact disc upon which J.P.'s denial hearing was recorded became corrupted, and the court reporter was unable to transcribe that recording. Pursuant to Indiana Appellate Rule 31, J.P. filed a "Motion to Certify the Statement of the Evidence." The juvenile court subsequently certified a statement. Appellant's App. pp. 110-21.

circumstances before the trial court. *Id.* We will not reweigh the evidence and will consider conflicting evidence in favor of the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*.

The juvenile court admitted the videotaped interview after holding a hearing pursuant to Indiana Code section 35-37-4-6 (2005), commonly referred to as the "Protected Person's Statute" ("PPS"), which requires the trial court to exercise a "special level of judicial responsibility." See *Carpenter*, 786 N.E.2d at 703. The statute allows statements of child sex crime victims, among others, to be admissible at trial when certain conditions are met. A "protected person" under the statute includes "a child who is less than fourteen (14) years of age." Ind. Code § 35-37-4-6(c)(1). The parties agree that the victim is a "protected person" under the statute.

The statute provides in pertinent part:

> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
>
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
>
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for [child molesting] if the requirements of subsection (e) are met.
>
> (e) a statement or videotape described in subsection (d) is admissible in evidence in a criminal action [for child molesting] if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> (1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial . . . .

As stated above, J.P. argues that the victim's statement to Karr at the child forensic interview is rendered unreliable by the circumstances that preceded the statement. As the PPS states, sufficient indications of reliability are provided by the time, content, and circumstances of the videotaped statement. Specific factors for making the reliability determination under the statute include: (1) the time and circumstances of the statement; (2) whether there was significant opportunity for coaching; (3) the nature of the questioning; (4) whether there was a motive to fabricate; (5) use of age appropriate terminology; and (6) spontaneity and repetition. *Surber*, 884 N.E.2d at 862. There are "undoubtedly many other factors in individual cases." *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997).

Here, J.P. focuses on the length of time between the molestations and the victim's statement to his mother. J.P. further focuses on the opportunity for coaching or cleansing during the days between the victim's statements to his mother and the statement to Karr in the child forensic interview. J.P. emphasizes that four family members spoke with the victim prior to his interview with Karr.

The first of J.P.'s concerns does not render the victim's statements unreliable per se. The juvenile court could have reasonably concluded that the victim's delay in making a statement was caused by J.P.'s threat to hit the victim in the mouth, which is not a factor that goes to the reliability of his statement. The juvenile court also could have reasonably concluded that there was no indication that the victim was coached or his story cleansed when his concerned relatives spoke to him. Indeed, there were small discrepancies in the statement to Karr and the denial hearing statement that would indicate the lack of coaching. More importantly, the victim testified at the denial hearing and the juvenile judge had the opportunity to observe the victim as he testified on direct and on cross-examination.

The record in this case does not show any motive to fabricate. The record also shows that the victim used age appropriate language in his statement to Karr. Furthermore, this case is distinguishable from *Carpenter*, as the victim in the present case was ruled competent to testify and did testify on both direct and on cross-examination. As we noted in *M.T. v. State*, 787 N.E.2d 509, 513 (Ind. Ct. App. 2003), a case similar to the case before us, "[t]he assumption is that the trial court, as factfinder, correctly applies and follows the law." Thus, we can be "confident that the presiding judicial officer correctly weighed [the victim's] hearsay."[3] *Id*.

[3] In *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009), our Supreme Court exercised its supervisory power to hold that a party may not introduce testimony via the PPS "if the same person testifies in open court as to the same matters." The Court noted that the admission of both a child's live testimony and consistent videotaped statement is cumulative evidence that can be unfairly prejudicial. *Id*. at 467 (citing *Modesitt v. State*, 578 N.E.2d 649, 650-52 (Ind. 1991)). The Court ultimately held that the admission of the victims'

J.P. contends that it is illogical for the juvenile court to find the victim's statements to his mother unreliable, yet find his subsequent statement to Karr shows sufficient indications of reliability. Our review of the child hearing transcript discloses that the victim's mother was confused by questions by both the prosecution and the defense and that it was very difficult to ascertain the exact content and nature of the victim's statements to her. The same does not apply to the statement to Karr.

The trial court did not abuse its discretion when it found that the victim's statement to Karr contained sufficient indications of reliability.

II. SUFFICIENCY OF THE EVIDENCE

J.P. contends that the State failed to present sufficient evidence to support the court's true finding. The standard of review for a juvenile adjudication is the same as if the crime had been committed by an adult. *D.D. v. State*, 668 N.E.2d 1252 (Ind. Ct. App. 1996). In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003), *trans. denied.* We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences drawn therefrom. *Id*. at 269-70. The conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Id*. at 270.

---

live testimony and their statements in that case constituted harmless error. *Id*. Most importantly, the Court held that the case was not applicable to proceedings conducted prior to its publication. *Id*. at 467. Here, the proceedings were conducted some two years before *Tyler* was published.

To prove child molesting as a Class B felony, the State must show that the accused performed or submitted to sexual intercourse or deviate sexual conduct with a person under fourteen years of age. Ind. Code § 35-42-4-3(a) (1998).[4] "Deviate sexual conduct" is an act involving the sex organ of one person and the mouth or anus of another person. Ind. Code § 35-41-1-9 (1984). The "anus," or anal orifice, has been defined as "the lower opening of the digestive tract, lying in the fold between the nates (buttocks), through which fecal matter is extruded." *Downey v. State*, 726 N.E.2d 794, 797 (Ind. Ct. App. 2000) (citing *Stedman's Medical Dictionary* 95 (4th ed. 1976)).

Although evidence of penetration of a child's anus by a defendant's penis will establish deviate sexual conduct, the State is not required to introduce evidence of penetration. *Wisneskey v. State*, 736 N.E.2d 763, 764 (Ind. Ct. App. 2000). Instead, the State is required only to establish that the defendant "committed a sex act with his penis involving the child's anus." *Id*. Our supreme court has noted that in child molestation cases a detailed anatomical description by the victim is unnecessary and undesirable. *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind 1996). The court reasoned that many people are unable to precisely describe anatomical features, and further, that such a requirement would subject victims to unwarranted questioning and cross-examination. *Id*. Thus, despite a child's unfamiliarity with anatomical terms and his limited sexual vocabulary, a

[4] The offense is a Class A felony if committed by a person who is "at least twenty-one years (21) of age." Ind. Code § 35-42-4-3(a)(1).

conviction for child molesting may rest solely upon the child's uncorroborated testimony. *Wisneskey*, 736 N.E.2d at 765.

J.B. cites *Downey* in support of his contention that the State failed to prove that J.B.'s penis touched the victim's anus. In *Downey*, the victim testified that Downey had rubbed his penis up and down between her "butt cheeks." 726 N.E.2d at 797. A police detective and child sexual abuse counselor testified that Downey admitted that he had rubbed his penis between the child's "butt cheeks" and was "humping" her, but that he did not penetrate her. *Id*. Because there was no explicit evidence of contact with the anus, a two-judge panel of this court concluded that there was insufficient evidence to convict Downey of child molesting.[5]

J.P emphasizes that the victim in the present case testified that J.P. humped his "butt." Exhibit 1. J.P. further emphasizes that the words "buttocks" or "butt" are not synonymous with "anus." He denies that any reasonable inference of contact with the anus can be made from the victim's testimony.

The facts of the present case differ from those of *Downey*. Here, the victim testified that it "hurt" when J.P. humped him by placing his penis in the victim's butt.

[5] The dissenting judge in *Downey* concluded that the majority had not given sufficient weight to our Supreme Court's statement in *Spurlock* regarding unwarranted questioning and cross-examination regarding anatomical details. 726 N.E.2d at 800. The judge reasoned that the fact-finder was in the best position to consider the likelihood of contact between the defendant's erect penis and the child's anus during the act of "humping." *Id*. The dissenting judge stated that the fact-finder's conclusion "that some part of Downey's penis came into contact with [the victim's] anus while he 'humped' her is, if not explicit from the testimony, an inference that may be reached beyond reasonable doubt." *Id*.

Exhibit 1. As we held in *Wisneskey*, the fact-finder can infer that pain is the result of contact between the defendant's penis and the anus.

In his reply brief, J.P. argues that the victim's statement is too nuanced to allow a fact-finder to infer that the pain was caused by contact between J.P.'s erect penis and the victim's anus. He reasons that the pain could have been caused by his weight as he straddled the prone victim. Our viewing of the videotaped statement discloses that the victim's statement was more specific than J.P.'s interpretation. Indeed, the videotaped statement reveals the following dialogue between Karr and the victim:

> Q: Was this [touching or humping] on the outside of your butt or the inside of your butt?
>
> A: Inside of the butt.
>
> Q: What did that feel like?
>
> A: It hurt.

Exhibit 1.

The evidence is sufficient to allow an inference beyond a reasonable doubt that J.P. committed child molesting by causing his erect penis to make contact with the victim's anus.

CONCLUSION

The trial court did not abuse its discretion in admitting the victim's statement made during a videotaped child forensic interview. Furthermore, the State presented sufficient testimony to establish that J.P. committed child molesting as a Class B felony.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.