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**IN THE
COURT OF APPEALS OF INDIANA**

D.A.,)
)
Appellant-Respondent,)
)
vs.) No. 49A05-1006-JV-448
)
STATE OF INDIANA,)
)
Appellee-Petitioner.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey A. Gaither, Magistrate
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0912-JD-4086

January 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issues

D.A. was adjudicated a juvenile delinquent for committing two counts of class B felony child molesting if committed by an adult. At the delinquency hearing, the trial court admitted, over his objection, D.A.'s confession to a police detective. On appeal, D.A. asserts that the trial court abused its discretion in admitting his confession because his and his mother's waiver of rights was not knowing and voluntary. He also contends that the evidence is insufficient to support the trial court's finding that he committed two counts of class B felony child molesting if committed by an adult. Based on the totality of the circumstances, we find that D.A.'s and his mother's waiver of rights was knowing and voluntary, and therefore the trial court did not abuse its discretion in admitting his confession. We also conclude that the evidence is sufficient to support the trial court's finding that D.A. committed both counts of child molestation. Accordingly, we affirm D.A.'s adjudication as a delinquent.

Facts and Procedural History

The facts most favorable to the adjudication show that sometime in September 2009, D.A. spent the night at his aunt's Indianapolis apartment. That evening fourteen-year-old-D.A. went into a bedroom where his six-year old cousin R.L. was lying on her stomach in her pajamas. He took off her pajamas and sat on top of her. He put his penis inside her anus and inside her vagina. R.L. thought that it did not feel good. R.L.'s mother was in another room using the computer. R.L.'s mother noticed that when R.L. came out of her bedroom, she had a scared expression and was silent.

On September 14, 2009, R.L.'s mother learned what had occurred between D.A. and R.L. She took R.L. to the hospital. Also, a forensic child interviewer talked to R.L. and her mother.

In October 2009, police detective Eli McAllister phoned D.A.'s mother and asked to interview her and D.A. in conjunction with his investigation of R.L.'s allegations. They agreed, and during the interview D.A. admitted that his penis went inside R.L.'s butt. Respondent's Ex. 1.

On December 21, 2009, the State filed a petition alleging that D.A. was a delinquent child based on two counts of class B felony child molesting if committed by an adult and one count of class C felony child molesting if committed by an adult. On June 8, 2010, the juvenile court held the disposition hearing. D.A. objected to the admission of his statement to Detective McAllister, and the juvenile court overruled the objection. The juvenile court found that D.A. had committed two acts of class B felony child molesting if committed by an adult. The juvenile court adjudicated D.A. a delinquent and placed him on probation. D.A. appeals.

Discussion and Decision

I. Knowing and Voluntary Waiver of Rights

Prior to questioning D.A. and his mother, Detective McAllister read them the following rights from a preprinted advisement of rights form:

1. You have the right to have one or both parents present.
2. You have the right to remain silent.

3. Anything you may say can be used against you in court.
4. You have the right to have a lawyer present now.
5. If you do not have the money to retain a lawyer, you have the right to have one appointed for you by the court before any questions are asked.
6. If you decide to answer questions now without a lawyer present, you still have the right to stop the questioning anytime.

State's Ex. C.

After reading each right, Detective McAllister asked D.A. and his mother whether they understood the right and, if so, put a check in front of the number on the form. D.A. and his mother did not understand number 4 and asked whether D.A. was being arrested. Detective McAllister assured them that D.A. was not being arrested at that time but was just being questioned. After he read all six rights and D.A. and his mother had indicated that they understood those rights, Detective McAllister asked D.A. and his mother to sign the acknowledgment of advisements of rights, which they did. *Id.* He then informed them that they had a right to a conference to discuss whether they were willing to talk to him. They told Detective McAllister that they wanted to talk to him. Accordingly, Detective McAllister read the waiver of rights to them: "I have read the above and understand it fully. I, with the consent of my parents, expressly waive the above rights and will answer any questions asked of me by the officer." *Id.* Both D.A. and his mother agreed and signed their names below. At one point in the interview, Detective McAllister asked mother to step out of the room, and

she complied.¹ D.A. then confessed that his penis went inside R.L.'s butt. Respondent's Ex.

1.

D.A. contends that the trial court erred in admitting his statement to Detective McAllister because his and his Mother's waiver of rights was not knowing and voluntary.

Our standard of review is well settled:

The admission or exclusion of evidence is a matter left to the sound discretion of the trial court, and a reviewing court will reverse only upon an abuse of that discretion. When reviewing a trial court's decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the trial court's decision.

B.K.C. v. State, 781 N.E.2d 1157, 1162 (Ind. Ct. App. 2003).

The waiver of rights guaranteed to a child is governed by Indiana Code Section 31-32-5-1, which provides in relevant part,

Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:

...

(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver.

In reviewing whether the requirements of Indiana Code Section 31-32-5-1 have been met, we observe that

¹ "It is not necessary that the parent or guardian be present at every instance in which the juvenile voluntarily talks to the police." *Shepard v. State*, 273 Ind. 295, 301, 404 N.E.2d 1, 5 (1980).

[t]he State bears the burden of showing that a juvenile defendant received all of the protections of the foregoing statute. However, as with any review of the admissibility of a confession, we review the evidence in the light most favorable to the trial court's decision. We review a trial court's ruling as to the voluntariness of a waiver by looking to the totality of the circumstances. Pursuant to Indiana Code section 31-32-5-4, a review of the totality of the circumstances in a juvenile case includes consideration of the child's physical, mental and emotional maturity; whether the child or parent understood the consequences of the child's statements; whether the child and parent had been informed of the delinquent act; the length of time the child was held in custody before consulting with his parent; whether there was any coercion, force, or inducement; and whether the child and parent were advised of the child's right to remain silent and to the appointment of counsel.

Borton v. State, 759 N.E.2d 641, 645-46 (Ind. Ct. App. 2001) (citations omitted), *trans. denied* (2002).

Considering the totality of the circumstances present here, we note that at the time of his interview with Detective McAllister, D.A. was fourteen years old. Both D.A. and his mother were apprised of R.L.'s allegations against D.A. before coming to the interview, and D.A. was not questioned until after he and his mother were informed of his rights (including his right to remain silent and the appointment of counsel), asked whether they understood those rights, and given an opportunity to discuss whether they were willing to talk to Detective McAllister. The crux of D.A.'s argument is that his mother did not understand the consequences of his statements to Detective McAllister. He directs our attention to her testimony that she thought Detective McAllister just wanted to get D.A.'s side of the story, not to interrogate or question him. Tr. at 103. However, our review of the evidence shows that Detective McAllister specifically told D.A. and his mother that anything D.A. said to him could be used in court. Respondent's Ex. 1. They stated that they understood. *Id.*

Considering the evidence in the light most favorable to the trial court's ruling, we conclude that D.A. and his mother understood the consequences of talking to Detective McAllister. Based on the totality of the circumstances, we conclude that D.A.'s and his mother's waiver of rights was knowing and voluntary. We therefore find no abuse of discretion in the admission of D.A.'s statement.

II. Sufficiency of the Evidence

D.A. argues that the evidence is insufficient to support his delinquency adjudication for committing two counts of what would be considered class B felony child molesting if committed by an adult. When the State seeks to have a juvenile adjudicated as a delinquent child for committing an act that would be a crime if committed by an adult, the State must prove every element of the crime beyond a reasonable doubt. *J.S. v. State*, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), *trans. denied*. In reviewing a juvenile adjudication, this court will consider only the evidence and reasonable inferences supporting the judgment and will neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* If there is substantial evidence of probative value from which a reasonable trier of fact could conclude that the juvenile was guilty beyond a reasonable doubt, we will affirm the adjudication. *Id.*

To obtain a finding that D.A. committed what would be class B felony child molesting if committed by an adult, the State was required to prove beyond a reasonable doubt that D.A., with a child under fourteen years of age, performed or submitted to sexual intercourse or deviate sexual conduct. Ind. Code § 35-42-4-3(a). Here, the State alleged that D.A. committed one act of sexual intercourse and one act of deviate sexual conduct. Sexual

intercourse is defined as an act that includes any penetration of the female sex organ by the male sex organ. Ind. Code § 35-41-1-26. Deviate sexual conduct is defined as “an act involving (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-41-1-9.

This Court has stated that

[a]lthough evidence of the penetration of a child’s anus with a defendant’s penis will establish deviate sexual conduct, the State is not required to introduce evidence of penetration. Instead, the State need only establish that the defendant committed a sex act with his penis involving the child’s anus. Further, our supreme court has noted that in child molestation cases a detailed anatomical description by the victim is unnecessary and undesirable. 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. Thus, despite a child’s unfamiliarity with anatomical terms and limited sexual vocabulary, a conviction for child molesting may rest solely upon the uncorroborated testimony of the child.

Wisneskey v. State, 736 N.E.2d 763, 764-65 (Ind. Ct. App. 2000) (citations omitted).

In her testimony at the delinquency hearing, R.L. used “thing” to refer to D.A.’s penis and “cat-cat” to refer to her vagina. Tr. at 6-7. D.A. acknowledges that R.L. testified that his “thing” was “inside” her “butt.” *Id.* at 15. However, he argues that we cannot reasonably interpret “butt” as anus. We disagree because R.L. specifically said that D.A.’s thing went *inside* her butt. Thus, we can reasonably infer that R.L. was referring to her anus. *See Wisneskey*, 736 N.E.2d at 765 (concluding that child victim could not have been referring strictly to his buttocks when testifying about his “butt” because the buttocks contain no orifice to stick a penis in); *but cf. Downy v. State*, 726 N.E.2d 794, 797 (Ind. Ct. App. 2000) (concluding evidence insufficient to convict defendant of sexual deviate conduct where

victim testified that defendant had rubbed his penis “up and down” between her “butt cheeks”), *trans. denied*.

R.L also testified that D.A.’s “thing” touched her “inside” her “cat-cat.” Tr. at 15-16. D.A. asserts that her testimony is insufficient to meet the State’s burden of proof. He argues that it “cannot just be assumed that R.L. meant that penetration had occurred.” Appellant’s Br. at 11. Again we disagree because R.L. said his thing touched her *inside*, thereby supporting a reasonable inference of penetration. We conclude that there is sufficient evidence to support D.A.’s adjudication as a delinquent.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.