IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE INTEREST OF: T.R.T.,	)	
	)	
Appellant,	)	
	)	
v.	)	WD84167
	)	
JUVENILE OFFICER,	)	Opinion filed: December 14, 2021
	)	
Respondent.	)	

APPEAL FROM THE JACKSON COUNTY CIRCUIT COURT
THE HONORABLE JALILAH OTTO, JUDGE

Division One: W. Douglas Thomson, Presiding Judge,
Alok Ahuja, Judge and Karen King Mitchell, Judge

T.R.T. ("Juvenile") appeals from the trial court's judgment adopting the Jackson County Family Court commissioner's finding and recommendation that Juvenile committed what would have been, if he were an adult, the felony of statutory sodomy in the first degree, in violation of Section 566.062.[1] Juvenile was placed on probation under the supervision of the Family Court. In his three points on appeal, Juvenile challenges the sufficiency of the evidence and argues the trial court abused its discretion in admitting hearsay statements. We affirm.

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[1]All statutory references are to RSMo. (2016), as updated by supplement, unless otherwise indicated.

Factual and Procedural History

Juvenile, age thirteen at the time of the offense, was in the bathroom helping his three-year-old cousin, J.B. ("Victim"), after Victim used the restroom. During this time, Juvenile's adoptive mother ("Mother")[2] heard a sharp cry from Victim in the bathroom. Seconds later, Victim ran out of the bathroom to Mother and gave her a hug. Mother told him to put his pants on and Victim left the room.

Moments later, Victim returned clothed, but now with a heavily soiled diaper. When Mother took Victim to the bedroom to change him, Victim told her, "[Juvenile] hurt my booty." Mother noticed that Victim's anus and surrounding skin appeared swollen and red and that Victim appeared to be in pain. Juvenile was standing in the bedroom doorway at the time and heard Victim's statement that Juvenile hurt him. Mother asked Victim how Juvenile hurt him, to which Juvenile interjected, stating that he spanked Victim because "he wouldn't be still for me to put his diaper on." Victim stated immediately thereafter, "[Juvenile] put two fingers in my booty." In response, Juvenile said his finger accidentally got caught when he was pulling up Victim's diaper. Upon further conversation with Juvenile, Juvenile told Mother "[s]omething bad is in me. Something bad is in me." Juvenile stated further that "[s]omething dark in me made me do it." Mother called the police.

When Independence Police Officer Josko Wrabec ("Officer Wrabec") arrived, Mother told Juvenile to "tell the police officer what you did." Juvenile responded stating, "I did it," but would not say what it was that he did. Mother then explained

[2] Mother began fostering Juvenile in 2018 and adopted him approximately four months prior to this incident.

to Officer Wrabec that Juvenile touched Victim. Juvenile repeatedly stated to Officer Wrabec, "I did it" and that he was sorry. Juvenile requested to be removed from Mother's residence and said he wanted to go "home." Officer Wrabec separated Juvenile from Mother and asked Juvenile, "[w]hat's going on? Why are you upset?" Juvenile responded, "I did what she's saying I did, and I'm sorry." Juvenile was transported to police headquarters. Upon arrival, Juvenile and Mother were placed in a room together. There, Mother asked Juvenile, "[y]ou hurt him . . . [w]hy?" Juvenile stated that he stopped when Victim cried.

A petition was filed by the juvenile officer charging Juvenile with having deviate sexual intercourse with Victim, a minor less than age 12,[3] by inserting his fingers into Victim's anus.[4] The petition alleged Juvenile's conduct if committed by an adult would warrant a charge of felony statutory sodomy in the first degree in violation of Section 566.062.

An adjudication hearing was held on July 31, 2020, during which the Family Court received evidence in the form of testimony from Mother and Officer Wrabec. Thereafter, the court entered an order finding the evidence proves the allegations of the petition beyond a reasonable doubt and set the matter for a disposition hearing.

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[3] Section 566.062 provides that "[a] person commits the offense of statutory sodomy in the first degree if he or she has deviate sexual intercourse with another person who is less than *fourteen years of age*." (emphasis added). Nevertheless, here, juvenile officer alleged in its petition that Juvenile "had deviate sexual intercourse with . . . [Victim], who is less than *twelve years old*, . . . in violation of Section 566.062 RSMo." Although this inconsistency was not raised by either party, it had no effect on the action as Victim in this case was just three years old.

[4]A first amended petition was later filed adding a second count alleging Juvenile was at risk of neglect as Mother was not allowing him to return home. Accordingly, Juvenile was placed in a kinship placement and this count was voluntarily dismissed by the Juvenile Officer, as noted in the court's judgment.

On October 26, 2020, the Family Court commissioner issued findings and recommendations placing Juvenile on probation under the supervision of the Family Court. The Family Court commissioner's findings and recommendations were adopted as the circuit court's final judgment on November 3, 2020.

Juvenile appeals.

Standard of Review

"Juvenile proceedings are reviewed 'in the same manner as other court-tried cases.'" *In the Interest of D.C.M.*, 578 S.W.3d 776, 786 (Mo. banc 2019) (quoting *C.G.M., II v. Juvenile Officer*, 258 S.W.3d 879, 882 (Mo. App. W.D. 2008)). "This Court will affirm a judgment in a juvenile proceeding unless it is not supported by evidence, is against the weight of evidence, or erroneously declares or applies the law." *Id.* (citing *In re A.S.W.*, 226 S.W.3d 151, 153 (Mo. banc 2007)); *see also Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "The credibility of the witnesses and the weight their testimony should be given is a matter to be determined at the hearing by the circuit court, 'which is free to believe none, part, or all of their testimony." *Id.* (quoting *C.L.B. v. Juvenile Officer*, 22 S.W.3d 233, 236 (Mo. App. W.D. 2000)).

"For a sufficiency of the evidence challenge, '[t]he evidence, including all reasonable inferences therefrom, is considered in the light most favorable to the judgment, disregarding all contrary inferences.'" *Id.* (quoting *State v. Pike*, 162 S.W.3d 464, 473-74 (Mo. banc 2005)). "When a juvenile is alleged to have committed an act that would be a criminal offense if committed by an adult, the standard of proof, like that in criminal trials, is beyond a reasonable doubt." *Id.* (citing *C.L.B. v.*

Juvenile Officer, 22 S.W.3d at 239). "Consequently, we must determine 'whether there is sufficient evidence from which the fact finder could have found the defendant guilty beyond a reasonable doubt." *I.D. v. Juvenile Officer*, 611 S.W.3d 869, 873 (Mo. App. W.D. 2020) (quoting *J.N.C.B. v. Juvenile Officer*, 403 S.W.3d 120, 124 (Mo. App. W.D. 2013)).

"A trial court's decision to admit hearsay evidence is reviewed for an abuse of discretion." *State v. Gott*, 523 S.W.3d 572, 576 (Mo. App. S.D. 2017) (citing *State v. Hosier*, 454 S.W.3d 883, 896 (Mo. banc 2015)). An abuse of discretion occurs when the court's decision "is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.* (quoting *State v. Gonzales*, 153 S.W.3d 311, 312 (Mo. banc 2005)). "We will not reverse for an error in the admission of evidence unless 'there is a reasonable probability that the error affected the outcome of the trial.'" *Id.* (citation omitted).

Analysis

Juvenile raises three points on appeal. In his first point, Juvenile argues that that the Family Court erred in finding him guilty because there was insufficient evidence to prove beyond a reasonable doubt that he committed a "sexual act" by inserting his finger in Victim's anus. In his second point, Juvenile contends that the court erred in finding him guilty because there was insufficient evidence to prove beyond a reasonable doubt that he inserted his finger in Victim's anus "for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." In his third point, Juvenile argues that the court abused its

discretion in admitting Victim's hearsay statements that "[Juvenile] hurt my booty" and "[Juvenile] put two fingers in my booty" under the excited utterance exception to the hearsay rule. For the sake of clarity and the ease of analysis, we have chosen to address Juvenile's third point first. Additionally, because Juvenile's first two points focus on the sufficiency of the evidence, we address these points together.

Point III

In his third point on appeal, Juvenile claims that the court abused its discretion in admitting Mother's testimony that Victim told her after the incident that "[Juvenile] put two fingers in my booty" and "hurt my booty." Specifically, Juvenile asserts that Victim's statements to Mother did not fall within the excited utterance exception to the hearsay rule because: (1) Victim was "relatively calm" at the time of disclosure; (2) Victim made the statements after the independent intervening event of soiling his diaper; and (3) enough time had elapsed for the three-year-old Victim to fabricate his statement to explain why he soiled his diaper. We disagree.

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." *State v. Kemp*, 212 S.W.3d 135, 146 (Mo. banc 2007) (quoting *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006)). "Hearsay statements are, as a rule, inadmissible." *State v. Gray*, 347 S.W.3d 490, 500 (Mo. App. E.D. 2011) (citing *State v. Douglas*, 131 S.W.3d 818, 823 (Mo. App. W.D. 2004)). "In order to be admissible, a hearsay statement must fall under an exception to the general rule against hearsay

evidence." *State v. Thomas*, 272 S.W.3d 421, 428 (Mo. App. E.D. 2008) (citing *State v. Kemp*, 212 S.W.3d at 146). "The excited utterance exception to the rule against hearsay applies when: (1) a startling event or condition occurs; (2) the statement is made while the declarant is still under the stress of the excitement caused by the event and has not had an opportunity to fabricate the story; and (3) the statement relates to the startling event." *State v. Gray*, 347 S.W.3d at 500 (quoting *State v. Hedges*, 193 S.W.3d 784, 788 (Mo. App. E.D. 2006)).

> Courts have determined that excited utterances are inherently trustworthy because the startling nature of the event is speaking through the person instead of the person speaking about the event. Because the statement is spontaneous and made under the influence of events, the statement is assumed trustworthy because it is unadorned by thoughtful reflection. Among the factors to be considered in determining whether an excited utterance exists are [1] the time between the startling event and the declaration, [2] whether the declaration is in response to a question, [3] whether the declaration is self-serving, and [4] the declarant's physical and mental condition at the time of the declaration. While no one factor necessarily results in automatic exclusion, all should be considered in determining whether the declaration was the result of reflective thought.

State v. Kemp, 212 S.W.3d at 146 (quoting *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 122 (Mo. banc 1995)).

Here, we preliminarily note that Victim's two statements at issue are, absent an applicable exception, inadmissible hearsay as each is an out-of-court statement which were offered at trial to prove the truth of the matter asserted. Thus, in order to have been properly admitted, each statement must have fallen within the excited utterance exception or another recognized exception to the hearsay rule. Further, because the evidence clearly supports, and Juvenile does not dispute, a finding that

a startling event occurred and that Victim's statements relate to that startling event, we will apply the *Kemp* factors to determine whether Victim was still under the excitement of the event at the time of his declarations. *State v. Kemp*, 212 S.W.3d at 146.

We begin with Victim's first statement to Mother that "[Juvenile] hurt my booty." Although the record does not reveal exactly how much time elapsed between Victim's scream and his subsequent statement, we can infer from the record that Victim's statement to Mother occurred shortly after the startling event. Mother's testimony indicates the event and Victim's statement occurred within minutes of each other. Victim's statement was made spontaneously rather than in response to questions. Victim's statement was not self-serving as Victim, a three-year-old child, was not attempting to get anything out of the situation other than help. *See State v. Gott*, 523 S.W.3d at 578 ("A victim's identification of the defendant as the perpetrator of the crime is not self-serving.").

Finally, Victim's mental and physical state at the time support the conclusion that he was under the immediate and uncontrolled domination of his senses when he made the statement. *State v. Van Orman*, 642 S.W.2d 636, 639 (Mo. 1982). After the incident occurred, Victim screamed, ran to Mother for comfort, and ultimately soiled his diaper. Mother observed "obvious swelling to the area" which caused Victim "discomfort," demonstrated by Victim's unwillingness to allow Mother to wipe or touch him. Despite Mother's testimony, on which Juvenile heavily relies, that Victim was "remarkably . . . calm . . . for the situation," it is evident that Victim did not make

his remark after reflective thought and gives us no reason to find such statement lacking any indicia of trustworthiness. Accordingly, the trial court did not abuse its discretion in admitting Victim's statement to Mother that "[Juvenile] hurt my booty," pursuant to the excited utterance exception to the hearsay rule.

We must next analyze Victim's subsequent statement to Mother that "[Juvenile] put two fingers in my booty." Following Victim's statement that "[Juvenile] hurt my booty," Juvenile stood in the doorway of the bedroom where Mother was changing Victim. Mother asked Victim, "[h]urt you how?" to which Juvenile interjected, stating that he "gave [Victim] a spanking because he wouldn't be still for me to put his diaper on." Immediately thereafter, and without further prompting, Victim stated to Mother, "[Juvenile] put two fingers in my booty."

Our analysis of this statement is similar to our analysis above. Though the record is lacking as to specifically how much time elapsed between Victim's scream and his statement to Mother that "[Juvenile] put two fingers in my booty," we can infer that such statement occurred not long after the startling event. Further, Juvenile was standing in the doorway where Victim was having his diaper changed, and interjected himself into Mother's conversation with Victim with a justification as to what had occurred. Certainly, Victim was "under the immediate and uncontrolled domination of his senses." *See State v. Van Orman*, 642 S.W.2d at 639.

Further, though Victim's statement was made in response to Mother's follow-up question, "[h]urt you how?" it was also rebutting Juvenile's assertion that he had simply spanked Victim. Victim's statement was made as his Mother cleaned his

tender and swollen anus area while his tormenter looked on and made yet another excuse for his actions. Under these circumstances, the Victim's age, three years old, is also a consideration with respect to the influence of his emotions, the excitement of his statements, and his lack of deliberation in making the statements. It is without doubt that at that moment and under such circumstances, Victim was under the immediate and uncontrolled domination of his senses.

Importantly, "[t]he essential test for admissibility of a spontaneous statement or excited utterance is neither the time nor place of its utterance but whether it was made under such circumstances as to indicate it is trustworthy." *State v. Kemp*, 212 S.W.3d at 146. For the reasons stated above, we find nothing in the record that indicates a lack of trustworthiness related to Victim's second statement to Mother. We further note that nothing about Victim's statement is self-serving. In addition, we note that "where there have been sexual assaults of young children the courts have recognized the necessity of the application of the exception of spontaneous exclamations [or excited utterances]." *State v. Van Orman*, 642 S.W.2d at 639.

Accordingly, the trial court did not abuse its discretion in admitting both of Victim's statements to Mother pursuant to the excited utterance exception to the hearsay rule.

Point III is denied.

Points I and II

In his first and second points, Juvenile challenges the sufficiency of the evidence to support the court's finding him guilty beyond a reasonable doubt of what

would be, if he were tried as an adult, the offense of first-degree statutory sodomy. In his first point, Juvenile argues there was insufficient evidence to prove beyond a reasonable doubt that he engaged in a "sexual act" by inserting his fingers into Victim's anus. Similarly, in his second point, Juvenile argues there was insufficient evidence to prove beyond a reasonable doubt that he inserted his fingers into Victim's anus "for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." Fundamentally, both points challenge the sufficiency of the evidence as it relates to Juvenile's intent. Accordingly, the same evidence defeats both points.

"A person commits the offense of statutory sodomy in the first degree if he or she has deviate sexual intercourse with another person who is less than fourteen years of age." Section 566.062. Deviate sexual intercourse is defined, in pertinent part, as:

> [A] *sexual act* involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done *for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim*[.]

Section 566.010(3) (emphasis added). "In assessing whether a defendant touched another 'for the purpose of arousing or gratifying the sexual desire of any person,' a [trier of fact] may infer intent from the surrounding circumstances or from 'the sexual nature of the act itself.'" *State v. Holmes*, 626 S.W.3d 339, 342 (Mo. App. E.D. 2021) (quoting *State v. Ganzorig*, 533 S.W.3d 824, 830 (Mo. App. E.D. 2017)). "Because direct evidence of a defendant's intent is rarely available, the State most often proves intent through circumstantial evidence." *Id.* "The purpose of requiring proof of

defendant's intent is to 'exclude innocent contacts from being deemed criminal conduct.'" *Id.* (quoting *State v. Gaines*, 316 S.W.3d 440, 456 (Mo. App. W.D. 2010)). "The defendant's mental state may be determined from evidence of the defendant's conduct before the act, from the act itself, and from the defendant's subsequent conduct." *State v. Davidson*, 521 S.W.3d 637, 644 (Mo. App. W.D. 2017) (quoting *State v. Holleran*, 197 S.W.3d 603, 611 (Mo. App. E.D. 2006)).

Here, there was substantial evidence presented at trial that Juvenile was aware that by inserting his fingers into Victim's anus he was engaging in a sexual act and that he was doing so for the purpose of arousing or gratifying a sexual desire. The evidence reflected that Juvenile was interested in sex at a young age. Mother testified that, throughout the two-year period that Juvenile lived with her, "[Juvenile] would steal devices so that he could watch pornography." When Mother took Juvenile's electronic devices, "he would either take them back or he would take them from family members' or friends' homes and bring more into the house. Every time I would find it with . . . a ton of pornography." Mother also testified that on at least two occasions, Juvenile came out of his room with an erection.

Furthermore, Juvenile made several statements indicating his awareness of his conduct. After Victim told Mother that Juvenile had "hurt [his] booty" and "put two fingers in [his] booty," Mother asked Juvenile, "[w]hy did you do it?" After first uttering multiple excuses, Juvenile told Mother, "[s]omething bad is in me. Something dark in me made me do it." Moreover, when Officer Wrabec arrived, Mother told Juvenile to tell the police what he did. In response, Juvenile repeatedly

stated, "I did it," without explaining what it was that he did. Mother then told Officer Wrabec what Victim had told her, to which Juvenile stated, "I did it. I just want to go home." In order to speak with Mother outside the presence of Juvenile, Officer Wrabec escorted Juvenile outside. When Juvenile appeared scared and upset, Officer Wrabec asked him, "[w]hat's going on? Why are you upset?" Juvenile told Officer Wrabec, "I did what she's saying I did and I'm sorry." Finally, at the police station, Mother asked Juvenile "[y]ou hurt him . . . [w]hy?" Juvenile responded that he stopped when Victim cried.

In light of the substantial evidence presented at trial of Juvenile's prior conduct and his statements about this incident, we find that a reasonable fact finder could have found beyond a reasonable doubt that Juvenile engaged in a "sexual act" by inserting his finger into Victim's anus "for the purpose of arousing or gratifying [his] sexual desire."

Juvenile incorrectly relies on *In re J.A.H.*, 293 S.W.3d 116, 122 (Mo. App. E.D. 2009), to assert the court improperly inferred his intent from the act of touching alone. In *J.A.H.*, the Eastern District held that acting for the purpose of sexual arousal or gratification could not be inferred from the act alone when an *eight or nine-year-old* boy touched the genitals of and placed his penis in the mouth of his five or six-year-old cousin. *Id.* at 121. In so finding, the court noted that "there was no evidence regarding the Juvenile's behavioral development or knowledge of sexual subject matter." *Id.* The court concluded stating that "[w]ithout such evidence or more detailed information regarding the circumstances of the touchings, we are

unwilling to find that an eight or nine year old touches his penis to the mouth of a five or six year old for no discernable reason other than sexual arousal or gratification." *Id.*

Here, unlike *J.A.H.*, not only was Juvenile thirteen years old as opposed to being pre-pubescent, but significant evidence was presented at trial regarding Juvenile's behavioral development and knowledge of sexual subject matter. As stated above, Mother testified that, throughout the two-year period that Juvenile lived with her, "[Juvenile] would steal devices so that he could watch pornography." When Mother took Juvenile's electronic devices, "he would either take them back or he would take them from family members' or friends' homes and bring more into the house. Every time I would find it with . . . a ton of pornography." Mother also testified that on at least two occasions, Juvenile came out of his room with an erection. Thus, here, there was evidence indicating Juvenile's general knowledge of sexual subject matter and his behavioral development from his viewing of pornography, and literally stealing electronic devices from others so that he could do so. *See id.* Based on this evidence, in concert with Juvenile's acknowledgement that he had done something wrong, a fact finder could permissibly infer from these acts and surrounding circumstances Juvenile touched Victim for the purpose of arousing or gratifying his sexual desire. Section 566.010(3).

Accordingly, there was sufficient evidence at trial from which a reasonable finder of fact could have found beyond a reasonable doubt that Juvenile engaged in a "sexual act" by inserting his finger into Victim's anus and that Juvenile acted with

"the purpose to arouse or gratify [his] sexual desire." The court did not err in finding Juvenile guilty of what would have been, had he been an adult, first-degree statutory sodomy.

Points I and II are denied.

Conclusion

The trial court's judgment is affirmed.

W. DOUGLAS THOMSON, JUDGE

All concur.