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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-22-263

	Opinion Delivered October 18, 2023
JEREMY DURKIN APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. 17CR-21-580]
V.	HONORABLE MARC MCCUNE, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED; REMANDED TO CORRECT SENTENCING ORDER

KENNETH S. HIXSON, Judge

Appellant Jeremy Durkin was convicted in a jury trial of two counts of second-degree sexual assault and was sentenced to two concurrent ten-year prison terms. Durkin's counsel originally filed a no-merit brief and motion to withdraw as counsel, and we ordered rebriefing due to deficiencies in the brief. *See Durkin v. State*, 2023 Ark. App. 340. In ordering rebriefing, we expressed no opinion as to whether the substituted brief should be a no-merit brief or should be filed asserting meritorious grounds for reversal. After we ordered rebriefing, Durkin's counsel filed a merit brief, which is now before this court.

On appeal, Durkin raises three arguments. First, he argues that there was insufficient evidence to support his convictions. Next, he contends that the trial court erred in allowing a police officer's hearsay testimony about what the victims said in a forensic interview.

Finally, Durkin argues that a portion of his sentence was illegal in that it ordered him to utilize the AA program while incarcerated in the Arkansas Department of Correction. We affirm Durkin's convictions, but because the trial court lacked authority to require AA treatment during Durkin's incarceration, we remand to correct the sentencing order.

A person commits second-degree sexual assault if the person engages in sexual contact with another person who is incapable of consent because he or she is physically helpless. Ark. Code Ann. § 5-14-125(a)(2)(A) (Supp. 2019). "Sexual contact" means "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(11) (Supp. 2019). Pursuant to Ark. Code Ann. § 5-14-101(7)(A) (Supp. 2019), "[p]hysically helpless" means that a person is unconscious.

When an appellant challenges the sufficiency of the evidence on appeal, we address the sufficiency argument prior to a review of other alleged trial errors. *Holland v. State*, 2020 Ark. App. 434. In reviewing a sufficiency challenge, we assess the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Armstrong v. State*, 2020 Ark. 309, 607 S.W.3d 491. We will affirm a judgment of conviction if substantial evidence exists to support it. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.* Circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Collins v. State*, 2021 Ark. 35, 617

S.W.3d 701. Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* Further, the credibility of witnesses is an issue for the jury, not the court; the trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Armstrong*, *supra*.

The victims in this case were minor child 1 (MC1), age fourteen, and minor child 2 (MC2), age seventeen. The sexual assaults occurred in the early-morning hours of May 23, 2021, when MC2 was spending the night at MC1's trailer. MC1 lived in the trailer with her mother, Kathleen Cox; her mother's boyfriend, appellant Durkin; MC1's brother; and Durkin's son.

MC2 testified that MC1 is her best friend and that she had spent the night at MC1's trailer several times before. On this occasion, MC1 and MC2 slept on a pallet on the living room floor while Durkin slept in a recliner in the living room. According to MC2, Durkin had been drinking that night. MC2 testified that she awakened to find Durkin's hand on the side of her bottom over her blanket and his other hand on top of her head. She froze, then moved away from him and acted like she was still asleep. Durkin then tried to move his hand to her upper kneecap, and MC2 rolled over and grabbed the blanket and "kind of barricaded his hand between the ground and [her] blanket." MC2 stated that Durkin then sat up and was sitting with his hand inside the front of his pants. Next, Durkin went to MC1 and "hovered over her." MC2 could not tell what Durkin was doing to MC1, and MC2 kicked MC1 in her rib cage to wake her up. MC2 stated that MC1 sat up and that Durkin sat there for a few minutes before returning to his recliner. MC2 stated that she

could see it was Durkin because light was coming through the window blinds from a streetlight. When asked if there was any possibility that the perpetrator was someone else inside the trailer, MC2 replied no. MC2 stated that after Durkin returned to his recliner, MC1 could not talk and was crying "her eyes out" and that they both went outside. Once outside, MC2 started "blowing up [her] mom's phone," but she could not reach her mother on the phone despite repeated attempts. MC2 then called her mother's sister-in-law, Rosa, who lived a half a block from MC2's house, and asked Rosa if she would go get her mother. MC2 stated that, as they waited outside, both she and MC1 were "crying and shaking and rocking back and forth."

MC1 testified that after going to sleep very late that night, she was awakened by MC2 kicking her in the rib cage. MC1 testified that when she woke up, her bra had been unzipped and her tank top was pulled down. MC1 felt someone's hands groping her breasts. MC1 stated further that there was a wet spot on her chest and she felt Durkin's mouth on her chest. MC1 stated that she knew it was Durkin because of the smell of alcohol and the specific cologne that he wears. MC1 froze and just "laid there . . . in shock." Durkin kept his hand on MC1's breast and stuck the other in the side of his pants. Durkin sat beside MC1 for four or five minutes and then went back to his recliner. MC1 stated that she and MC2 then went outside and called for help.

Sarah English, MC2's mother, testified that in the early-morning hours of May 23, 2021, she was awakened by her sister-in-law, Rosa, who was standing in the doorway of Sarah's bedroom yelling at her to wake up and to call MC2. Sarah saw on her phone that

there were several missed calls from MC2. When Sarah called MC2, MC2 asked Sarah to come and get her. Sarah and her wife, Cheyenne English, went to Durkin's trailer and found the two girls sitting in the driveway, rocking back and forth and crying. Sarah stated that MC2 was crying "really hysterical[ly]" and that MC1 was crying, upset, and stunned. Over appellant's hearsay objection, Sarah testified that MC2 told her that Durkin "touched her" and that she wanted to go home.[1] Sarah then called the police.

Cheyenne English testified that when she accompanied Sarah to the trailer that morning, she entered the trailer and turned the light on. According to Cheyenne, she saw Durkin sitting in his recliner in the living room. Durkin's eyes were open and he was looking at her.

Officer Austin Wilkins testified that he was on patrol at 5:20 a.m. on May 23, 2021, when he received a call in reference to a sexual-assault report at the trailer. Upon arrival, Officer Wilkins made contact with Kathleen Cox, Sarah English, and Cheyenne English. Officer Wilkins stated that MC1 and MC2 were already in Sarah's vehicle and that they were crying and were very upset. Officer Wilkins testified that he could tell that MC1 and MC2 had been through a traumatic event. Officer Wilkins had Sarah drive the girls to the police department, where he took their statements. Before leaving the trailer, Officer Wilkins looked inside from the porch and saw Durkin, who was "passed out" in the recliner.

[1]The trial court allowed this testimony as an excited-utterance exception to the hearsay rule, and this ruling is not being challenged on appeal.

Detective Jeremy Caldwell set up forensic interviews with MC1 and MC2, which were conducted two days later on May 25. Detective Caldwell observed the interviews, and he described the girls' demeanor as extremely nervous and almost in shock. Over appellant's hearsay objection, Detective Caldwell was permitted to testify as to what the girls said in the interviews.[2] According to Detective Caldwell's testimony, the statements MC1 and MC2 made in the forensic interviews were consistent with what they testified to at trial.

Detective Caldwell interviewed Durkin, and a video of the interview was admitted into evidence and played for the jury. Durkin told Detective Caldwell that on the night of May 22, 2021, he and his son were at their home along with Kathleen Cox, MC1, and MC1's brother. Durkin stated that he was watching TV and drinking Evan Williams bourbon mixed with Mountain Dew. Durkin explained that he would sleep in his chair in the living room, while Kathleen, MC1, and MC1's brother usually stayed in the back bedroom. Durkin stated that MC2 arrived at about 9:00 p.m. to spend the night with MC1. Durkin continued to drink throughout the night and had eight or nine drinks before falling asleep in his chair in the living room. Durkin stated that everyone went to the back of the house to sleep except MC1 and MC2, who slept on the living-room floor. According to Durkin, the next thing he remembered was waking up the next day with Kathleen standing there

[2]Although the trial court overruled appellant's hearsay objection, it did so without explanation. However, when appellant renewed the hearsay objection at the close of the trial, the trial court again overruled the objection and clarified that Detective Caldwell's testimony was being admitted under the excited-utterance exception to the hearsay rule.

asking him if he could remember anything from the previous night. Durkin stated that he could not remember anything.

Captain Brett Hartley conducted a second interview with Durkin, and a video of this interview was admitted into evidence and played for the jury. In this interview, Durkin again stated that he had gone to sleep in his chair in the living room with the two girls present. Durkin stated that he had ten to twelve drinks that night and was "the drunkest [he'd] been in a good while." When asked about the girls' allegations and whether it could have happened but Durkin did not remember, Durkin replied, "When I get so drunk, I don't know exactly what I'm capable of and what I'm not." Durkin stated, "I don't know what I'm capable of when I start drinking, because I've been told by so many friends of mine that when I start drinking that I've flirted with friends of mine when I drink." Durkin further stated:

> There's a chance that it could have happened and there's a chance that it didn't happen. . . . I don't know if it happened or didn't and I've said I will take whatever consequences and just say I did it. . . . I'm willing to sacrifice everything and just say, "Hey it happened." I mean they say it happened so—

Captain Hartley testified that in the interview, Durkin never denied molesting the girls.

On the basis of this evidence, the jury convicted Durkin of two counts of second-degree sexual assault. On appeal, Durkin raises three arguments.

I. *Sufficiency of the Evidence*

Durkin first argues that there was insufficient evidence to support his convictions. There are two prongs to his argument.

Under the first prong, Durkin argues that there was insufficient evidence that he engaged in sexual contact with MC1 because there was a failure of proof as to her identification of him as the person who committed the assault.[3] Durkin notes that MC1's identification of him was based solely on the smell of alcohol and cologne, and he posits that this identification was based on speculation and conjecture. Durkin asserts that there were other people in the trailer at the time of the incident who could have just as likely been involved.

Having reviewed the evidence presented, we conclude that Durkin's identity as the perpetrator was sufficiently proved. In his police interviews, Durkin acknowledged that he was alone in the living room with the girls that night while the other occupants of the trailer slept in the back of the trailer. MC2 testified that, as Durkin assaulted her, she could tell it was him from the light coming in through the blinds. MC2 stated further that she then saw Durkin hovering over MC1, who was also able to identify Durkin from the smell of alcohol and Durkin's "specific cologne that only he wears in the house." Both girls testified that, after the assaults, Durkin returned to his recliner. Moreover, in his interview with Captain Hartley, Durkin never denied molesting the girls but stated that the girls "say it happened" and that "I'm willing to sacrifice everything and just say, 'Hey, it happened.'" We hold that there was substantial evidence that Durkin was the person who assaulted both MC1 and MC2.

[3]Under this prong, Durkin does not appear to challenge his identification as the person who assaulted MC2.

For the second prong of his sufficiency argument, Durkin argues that there was insufficient evidence of sexual contact with either MC1 or MC2 because there was a lack of proof that he touched either one of them for sexual gratification. "Sexual contact" is defined as "any act of *sexual gratification* involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(11) (Supp. 2019) (emphasis added). Durkin argues that there was no evidence that the acts were sexual in nature or that his intent was to sexually gratify himself. Durkin contends that the evidence demonstrated nothing more than a physical battery.

Although "sexual gratification" is not defined in the statute, the words are construed in accordance with their reasonable and commonly accepted meanings. *Ford v. State*, 2020 Ark. App. 526. The State does not have to provide direct proof of purpose if it can be assumed that the desire for sexual gratification is a plausible reason for the act. *Id.* Sexual gratification is rarely capable of proof by direct evidence and must usually be inferred from the circumstances. *Id.*

MC2 testified that she awoke to find Durkin's hand on her buttocks, and then he sat up with his hand inside his pants. MC1 testified that when she awoke, she noticed that her clothing had been removed to expose her breasts and that Durkin groped her breasts and placed his mouth on her chest, leaving a wet spot. MC1 stated that Durkin kept one hand on her breast and stuck the other hand in his pants. The jury could reasonably conclude that Durkin's groping of two sleeping girls while putting his hand inside his pants satisfied

the element of sexual gratification. Therefore, we hold that there was substantial evidence to support both of Durkin's second-degree sexual-assault convictions.

II. *Hearsay Testimony*

Durkin next argues that the trial court erred in admitting the hearsay testimony of Detective Caldwell regarding the statements made by MC1 and MC2 during their forensic interviews conducted two days after the alleged assaults. The trial court permitted this testimony under the excited-utterance exception to the hearsay rule. Arkansas Rule of Evidence 803(2) provides that an excited utterance is not excluded by the hearsay rule, even though the declarant is available as a witness, and that an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Durkin maintains that when MC1 and MC2 made these statements, they were no longer under the stress of excitement caused by the events and that this exception was not applicable.

We discussed the excited-utterance exception in *Jones v. Currens*, 104 Ark. App. 187, 192–93, 289 S.W.3d 506, 510–11 (2008):

> The theory of the excited-utterance exception is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. In ruling on this exception, the circuit court should consider all the relevant circumstances: the lapse of time between the events and the statement; the declarant's age, mental condition, and physical condition; the characteristics of the event; and the statement's subject matter. The record must show that the declarant's condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation.

> The statement need not be contemporaneous with the provoking event. But the statement must be close enough in time that it may reasonably be considered a product of the stress of the accident, rather than of intervening reflection or deliberation. The trend in the law is toward relaxing the time element. Nonetheless, an excited utterance must have been made before there was time to contrive and misrepresent; that is, it must have been made before reflective and deliberative senses took over.

(Internal citations omitted.)

The decision to admit or exclude evidence is within the sound discretion of the trial court, and this court will not reverse a trial court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Jones v. State*, 2011 Ark. App. 324, 384 S.W.3d 22. An abuse of discretion is a high threshold that does not simply require error in the trial court's decision but requires that the trial court acted improvidently, thoughtlessly, or without due consideration. *Id.* Moreover, an appellate court will not reverse a trial court's evidentiary ruling absent a showing of prejudice. *Id.*

The statements made by MC1 and MC2 in the forensic interviews were clearly hearsay, and we conclude under these circumstances that the trial court abused its discretion in applying the excited-utterance exception. MC1's and MC2's statements were given two days after the assaults, and the statements were not spontaneous but were, rather, in response to questions in an interview. The record does not show that MC1's and MC2's condition at the time was such that the statements were spontaneous, excited, or impulsive rather than the product of reflection and deliberation. We thus hold that the trial court erred in admitting this testimony.

This, however, does not end our analysis because evidentiary rulings are subject to a harmless-error analysis. Our supreme court has held that even when an appellant has demonstrated error, when the evidence of guilt is overwhelming and the error is slight, we can declare the error harmless and affirm. *Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001). Our supreme court has also held that prejudice is not presumed and that no prejudice results when the evidence erroneously admitted was merely cumulative. *Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007).

We hold that Durkin has failed to show that the trial court's error resulted in prejudice. Detective Caldwell's testimony was cumulative to the testimony of MC1 and MC2, who testified in detail about the sexual assaults committed against them by Durkin. In addition, there was other evidence corroborative of Durkin's guilt. When MC2's mother arrived at the trailer on the morning of the assaults, she found MC1 crying, upset, and stunned and stated that MC2 was crying "really hysterically" and that MC2 told her Durkin had touched her, prompting MC2's mother to immediately call the police.[4] And finally, in Durkin's second police interview, Durkin did not deny he had molested the girls but, instead, stated, "[T]hey say it happened," and "I'm willing to just sacrifice everything and just say, 'Hey it happened.'" Considering MC1's and MC2's testimony and the remaining evidence demonstrating Durkin's guilt, we hold that the error in admitting MC1's and

[4]As previously noted, this statement by MC2 was admitted under the excited-utterance exception, and Durkin makes no challenge to that ruling on appeal.

MC2's statements in the forensic interviews was harmless. Therefore, Durkin's convictions are affirmed.

III. *Illegal Sentence*

Finally, Durkin argues that even if we affirm his convictions, one aspect of his sentence was illegal and must be corrected. The State concedes error under this point, and we agree.

As noted by both Durkin and the State, the sentencing order contains the requirement that Durkin utilize the AA program while he is incarcerated in the Arkansas Department of Correction. In *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909, the Arkansas Supreme Court held that there is no statute authorizing drug-or-alcohol treatment as a condition of incarceration, making any sentence containing such a condition illegal on its face. *Holmes-Childers v. State*, 2016 Ark. App. 464, 504 S.W.3d 645. Once the trial court enters a judgment and sentence of incarceration, jurisdiction transfers to the Arkansas Department of Correction, a part of the executive branch of government, to determine any conditions of that incarceration. *Richie*, *supra*. Although the argument was not raised below, it is well settled that an appellant may challenge an illegal sentence for the first time on appeal. *Id.* We therefore remand for the trial court to correct the error described and enter an amended order removing the requirement that Durkin utilize the AA program while he is incarcerated in the Arkansas Department of Correction.

IV. *Conclusion*

For the reasons stated herein, we hold that substantial evidence supports Durkin's two convictions for second-degree sexual assault. We further hold that, although the trial court erred in admitting hearsay testimony about statements made by MC1 and MC2 in their forensic interviews, the error was harmless in light of MC1's and MC2's testimony at trial and the other evidence demonstrating Durkin's guilt. Therefore, we affirm Durkin's convictions. However, we remand for the trial court to correct the sentencing error and enter a sentencing order removing the requirement that Durkin utilize the AA program while he is incarcerated in the Arkansas Department of Correction.

Affirmed; remanded to correct sentencing order.

ABRAMSON and VIRDEN, JJ., agree.

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Leslie Rutledge, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.