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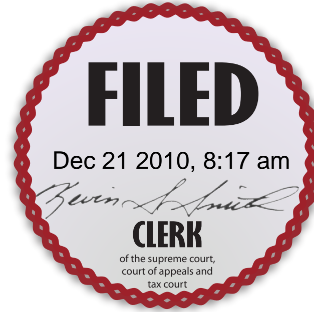

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER M. SUTTON,

Appellant-Defendant,

vs. No. 01A05-1002-CR-75

STATE OF INDIANA,

Appellee-Plaintiff.

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick A. Schurger, Judge
Cause No. 01C01-0807-FA-9

December 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Christopher Sutton appeals his conviction for child molesting as a class A felony.[1] Sutton raises two issues which we revise and restate as:

I. Whether the trial court abused its discretion by admitting Z.H.'s statements; and

II. Whether the trial court abused its discretion by admitting portions of Sutton's recorded statement.

We affirm.

The relevant facts follow. Seven-year-old Z.H. lived with her mother S.C., her three-year old brother, and thirty-two-year-old Sutton. S.C. and Sutton had lived together for "about 2, 2 ½ years," and Z.H. called Sutton "daddy." Transcript at 276, 288, 373. On July 8, 2008, Z.H. and her brother were in bed with S.C. and Sutton. Z.H. had an issue with wetting herself at night and wore a pull-up diaper. S.C., who is a sound sleeper, did not hear Sutton leave the next morning.

S.C. woke up around 7:00 a.m., and Z.H. was already awake. Z.H. went into the bathroom and her mother told her to take off her clothes so that she could take a bath. Z.H. told S.C. that her vagina hurt. S.C. told Z.H. that she "probably peed [her] pants, um go ahead and take your clothes off you'll be fine," and Z.H. stated "no mom my vagina hurts because . . . daddy stuck his penis in my vagina." Id. at 279.

Without talking to Z.H. about what had happened, S.C. called her mother. S.C.'s mother and sister arrived, and her sister called the police. Later that day, Danielle Goewert of the Fort Wayne Child Advocacy Center interviewed Z.H. and the interview

[1] Ind. Code § 35-42-4-3 (Supp. 2007).

was recorded. Z.H. informed Goewert that Sutton put his penis in her vagina the previous night. Z.H. stated that Sutton was asleep because his eyes were closed. Z.H. stated that Sutton's penis touched her pull-up diaper and that her pull-up diaper went into her vagina. Z.H. also stated that her brother once smacked her in her vagina.

After her interview, Z.H. was examined at the Fort Wayne Sexual Assault Treatment Center by Sharon Robinson, the chief administrative officer and a sexual assault nurse examiner. Robinson asked Z.H. what had happened to her, and Z.H. stated that her "daddy put his penis inside [her] vagina and that he pushed [her] pull up inside with his penis . . . ." Id. at 342. Robinson observed Z.H.'s "internal female sex organ" and "her labia minera," which she described as "beefy regnant" or "beefy like in red meat, so it's really dark red . . . ." Id. at 344. Robinson also observed petechiae, which is "pin point bruising," on Z.H.'s labia minera and above her urethra. Id.

When Sutton arrived home, Berne Police Detective James Newbold identified himself to Sutton and asked him if he would come to the police department with him. Sutton said that he would and asked if he was going to jail. During the interview, Detective Newbold told Sutton that the interview related to the fact that Z.H. had told her mother that her vagina hurt. Sutton stated that Z.H. had complained about her vagina hurting for probably the last year. Detective Newbold asked Sutton if there was a particular reason why Z.H.'s vagina would be hurting, and Sutton stated that over the weekend Z.H. complained that she had been hurt on the "swings or something," but Z.H.'s aunt checked her and determined that she was only scratched. State's Exhibit 11.

Sutton denied placing his penis in Z.H.'s vagina. When asked why Z.H. would say that he had placed his penis in her vagina, Sutton stated that he is erect in the mornings and that he must roll over Z.H. to exit the bed but that his penis did not touch her. Sutton also indicated that he attempts to be sure that he is "clear" of the children and is "careful" because he knows the children are usually in the bed. Id.

At one point during the interview, Detective Newbold asked Sutton if there was any reason why a pubic hair would be found inside of Z.H.'s vagina, and Sutton stated that he was bald because he shaves his pubic area. Detective Newbold indicated that he was not sure whether pubic hairs were found or not, and Sutton indicated that it would not matter because he shaves. At some point during the interview, Sutton pulled his pants down to show Detective Newbold his pubic area, and Detective Newbold observed that Sutton had pubic hair of "maybe a half inch to three quarters" in length. Transcript at 326.

On July 14, 2008, the State charged Sutton with child molesting as a class A felony. On December 29, 2008, the State filed a notice of intent to introduce Z.H.'s statement at trial pursuant to Ind. Code § 35-37-4-6, the Protected Persons Statute, and later filed amended notices. On January 5, 2009, the State filed an amended information for child molesting as a class A felony. On June 16, 2009, the court held a protected person hearing on the State's motion, which Sutton attended. Sutton's counsel questioned Z.H. Barbara Gelder, a psychologist at the Center for Neuro-Behavioral Services, testified that she had previously met Z.H., reviewed her medical file, and

believed that Z.H. would suffer harm by testifying. On June 23, 2009, the court entered an order concluding that Z.H. was a protected person, was unavailable to testify at the trial, and was made available for and was cross-examined by defense counsel during the protected person hearing.

At a jury trial, the State moved to admit a DVD of the interview of Z.H. by Danielle Goewert which occurred at the Child Advocacy Center, and Sutton's attorney stated: "No objection." Id. at 249. The court admitted the exhibit which was later played for the jury. The court also played Z.H.'s testimony from the protected person hearing. S.C. testified without objection that Sutton did not shave his pubic hair frequently and that Sutton had shaved his pubic hair "[m]aybe twice in the two and a half years" they were together. Id. at 282. S.C. also testified that she would be surprised if Sutton said that Z.H. had complained of vaginal pain for over a year.

The State moved to admit the videotaped interview of Sutton, and Sutton objected on relevancy under Ind. Evidence Rule 402, prejudice under Ind. Evidence rule 403, and that "there's drama about regarding whether he shaved his pubic region, how shaved his public [sic] region was, whether he was honest about that" and "that's attempted to put specific incident of conduct in terms of honest [sic] into issue and I believe that that's forbidden under 608b of the Indiana Rules of Evidence." Id. at 317. The prosecutor stated in part that "[t]he nurse will testify about the fiber, how that she [sic] observed it,

she doesn't know what it was, the child took it and flicked it off before she recovered it."[2] Id. at 318. After a discussion, the trial court overruled Sutton's objection, and the interview was played for the jury. After the playing of the interview, Detective Newbold testified that Sutton had pubic hair of "maybe a half inch to three quarters." Id. at 326. Sutton testified and denied that he touched Z.H. in any sexual fashion.

The jury found Sutton guilty as charged. The court sentenced Sutton to forty-five years in the Department of Correction with five years suspended.

I.

The first issue is whether the trial court erred by admitting evidence of Z.H.'s recorded statements and hearsay statements. Sutton argues that the trial court abused its discretion in admitting Z.H.'s statements to her mother and Z.H.'s statements in the interview recorded at the Fort Wayne Child Advocacy Center. The State argues that Sutton waived these arguments because he failed to lodge timely objections at trial.

The record reveals that the State moved to admit the DVD of the interview of Z.H. by Danielle Goewert which occurred at the Child Advocacy Center, and Sutton's attorney stated: "No objection." Transcript at 249. The court admitted the exhibit which was later played for the jury without objection. S.C. also testified, without objection, that Z.H. stated that her vagina hurt because Sutton "stuck his penis in [her] vagina." Id. at 279. Accordingly, Sutton has waived this issue. See Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010) ("A contemporaneous objection at the time the evidence is introduced at trial

[2] Robinson did not later testify regarding a fiber.

is required to preserve the issue for appeal, whether or not the appellant has filed a pretrial motion to suppress."), reh'g denied.

"A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred." Id. "The fundamental error exception is 'extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'" Id. (quoting Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006)). "The error claimed must either 'make a fair trial impossible' or constitute 'clearly blatant violations of basic and elementary principles of due process.'" Id. (quoting Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009), reh'g denied). "This exception is available only in 'egregious circumstances.'" Id. (quoting Brown v. State, 799 N.E.2d 1064, 1068 (Ind. 2003)).

We will address Sutton's arguments to the extent that he argues that fundamental error occurred. Sutton argues that fundamental error occurred because: (A) Z.H. was unavailable to be effectively cross-examined; and (B) the admission of "every out-of-court statement made by" Z.H. resulted in a "highly prejudicial drum beat repetition." Appellant's Brief at 12.

A. Z.H.'s Statements

Sutton argues that fundamental error occurred when the forensic interview statement was admitted because "the trial court's finding that [Z.H.] was unavailable to

testify in front of Mr. Sutton necessarily made her unavailable to be effectively cross-examined on those statements in front of Mr. Sutton, thereby denying Mr. Sutton his confrontation rights under the Sixth Amendment." Appellant's Brief at 9.

The Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." "The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him." Howard v. State, 853 N.E.2d 461, 465 (Ind. 2006) (citing State v. Owings, 622 N.E.2d 948, 950 (Ind. 1993)). In Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004), the United States Supreme Court held that "the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." Howard, 853 N.E.2d at 465. "The Court emphasized that if testimonial evidence is at issue, then 'the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.'" Id. (quoting Crawford, 541 U.S. at 68, 124 S. Ct. at 1374).

We first observe that there has been no claim in this case that the challenged statements in Z.H.'s interview at the Fort Wayne Child Advocacy Center or at the protected person hearing were anything other than testimonial. See Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-2274 (2006) (holding that statements are

testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to the criminal prosecution"). Accordingly, we will address: (1) whether Z.H. was unavailable; and (2) whether Sutton lacked a prior opportunity for cross-examination.

1. Unavailability

The Crawford Court "neither defined nor addressed the meaning of 'unavailability.'" Howard, 853 N.E.2d at 465-466. The Indiana Supreme Court has addressed whether a witness is unavailable for purposes of the Confrontation Clause under Crawford. See id.; Fowler v. State, 829 N.E.2d 459, 465-471 (Ind. 2005), reh'g denied, cert. denied, 547 U.S. 1193, 126 S. Ct. 2862 (2006), abrogated in part by Giles v. California, 128 S. Ct. 2678 (2008). In discussing Crawford, the Indiana Supreme Court held that "[v]ictims of domestic abuse . . . and child victims of sexual abuse, by virtue of their age, are by far the most likely candidates to be unable or unwilling to testify at the trial of the person accused of abusing them." Fowler, 829 N.E.2d at 461. The Court held that "[i]n recognition of the problem presented by the very young victim, our legislature, along with those of many other states, has enacted specific provisions intended to preserve the confrontation rights of the accused but minimize the additional burden that a trial imposes on a child victim." Id. "With Indiana Code section 35-37-4-6, sometimes referred to as the protected person statute, our legislature has enacted specific provisions intended to preserve the confrontation rights of the accused while at the same time

'reducing the trauma for child victims in sexual abuse cases and easing the task of prosecuting the perpetrators.'" Howard, 853 N.E.2d at 466 (citation omitted). We will examine the Protected Person Statute ("PPS") to determine whether Z.H. was unavailable for Crawford purposes. Cf. Howard, 853 N.E.2d at 468 ("Because [the victim] was present at trial and took the stand but refused to testify, we conclude that in the absence of an unavailability finding pursuant to the protected person statute, [the victim] was not 'unavailable.'").

The PPS "allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are deemed 'protected persons.'" Tyler v. State, 903 N.E.2d 463, 465 (Ind. 2009). The PPS applies in this case because child molesting is a specified crime, Ind. Code § 35-37-4-6(a)(1),[3] and children under fourteen years of age are deemed "protected persons." Ind. Code § 35-37-4-6(c).[4] See Tyler, 903 N.E.2d at 466 (holding that the PPS applied because child molesting and fondling were specified crimes and children under fourteen years of age were deemed protected persons). The PPS provides in relevant part:

> (d) A statement or videotape that:
>
> > (1) is made by a person who at the time of trial is a protected person;

[3] Ind. Code § 35-37-4-6(a)(1) provides that "[t]his section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2): (1) Sex crimes (IC 35-42-4)."

[4] Ind. Code § 35-37-4-6(c)(1) provides that "[a]s used in this section, 'protected person' means . . . a child who is less than fourteen (14) years of age . . . ."

(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 an offense listed in subsection (a) or (b) 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 listed in subsection (a) or (b) 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; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) *From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate*.

(ii) The protected person cannot participate in the trial for medical reasons.

(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

Ind. Code § 35-37-4-6 (Supp. 2007) (subsequently amended by Pub. L. No. 137-2009, § 10 (eff. July 1, 2009)) (emphasis added).

Sutton argues that "[w]hile the psychologist was able to testify that [Z.H.] could be emotionally harmed from testifying in front of Mr. Sutton, she never testified that the emotion[al] disturbance would render [Z.H.] incapable of reasonably communicating as required by statute." Appellant's Brief at 6-7. Sutton also argues that "[t]here is simply no evidence from which the trial court could find that [Z.H.] was unavailable because she would suffer such emotion[al] distress that she would not be able to reasonably communicate." Id. at 8.

After the protected person hearing, the court issued an order which stated:

FINDINGS OF FACT

* * * * *

4. The State of Indiana called Barbara C. Gelder, Ph.D. to testify at said hearing.

5. Dr. Gelder is a psychologist licensed to practice in the State of Indiana and is employed by CNS in Fort Wayne, Indiana.

6. [Z.H.] has been treated at CNS for several years and has been undergoing regular therapy with Rebecca Harding, a therapist with CNS.

7. Prior to the court hearing, Dr. Gelder met with [Z.H.] personally on June 12, 2009, reviewed [Z.H.]'s medical and counseling records

maintained by CNS, and discussed [Z.H.'s] situation with Rebecca Harding.

8. In November 2008, while this case was pending, [Z.H.] stated that she wanted to harm herself.

9. In early May 2009, [Z.H.] again threatened to harm herself this time actually puncturing her skin with scissors. Dr. Gelder attributed this self-mutilation to [Z.H.'s] report of an unexpected encounter between [Z.H.] and [Sutton].

10. [Z.H.] has been diagnosed with cognitive and language disabilities by Dr. Gelder and functions below that of a normal eight year old child.

11. *Dr. Gelder stated, in her professional opinion, that [Z.H.'s] testifying in the physical presence of [Sutton] at trial would cause [Z.H.] to suffer serious emotional distress such that [Z.H.] would not reasonably communicate.*

12. Dr. Gelder further stated that it would be harmful to [Z.H.] psychologically to testify at a trial in the Defendant's presence based upon [Z.H.'s] prior actions.

13. [Z.H.] was called as a witness by [Sutton] at the hearing and cross-examined by defense counsel regarding her previous statements in the presence of [Sutton]. Counsel for [Sutton] videotaped said cross-examination.

14. While [Z.H.] appeared open when discussing matters irrelevant to the issue presented in this case, [Z.H.] became withdrawn and at times non-verbal when asked to testify about the acts of [Sutton] and circumstances of her statements even with her mother standing beside her during the hearing.

* * * * *

CONCLUSIONS OF LAW

1. [Z.H.] is eight (8) years of age and is the alleged victim of child molesting and she is a protected person.

2. [Z.H.] is unavailable to testify at the trial of this cause of action.

Appellant's Appendix at 82-83 (emphasis added).

The record reveals that Barbara Gelder, a psychologist at the Center for Neuro-Behavioral Services, testified at the protected persons hearing that she had previously met Z.H. and reviewed her medical file. Gelder testified that Z.H. experienced an increase of "self harm behaviors and other difficulties" and attempted to stab herself with scissors. Transcript at 58. The following exchange also occurred during direct examination of Gelder:

> Q: And the ultimate question, and under the statute says [sic] that, and I'm going to ask you if you have an opinion based upon your meeting with her, do you have, I guess, an opinion if [Z.H.'s] testifying in the physical presence of the perpetrator, Mr. Sutton, will cause [Z.H.] to suffer serious emotional distress such that [Z.H.] could not reasonably communicate at trial? Do you have an opinion?
>
> A: I think it would cause her considerable harm. When I first met with [Z.H.] on Friday and her regular therapist was also in the room, because although I see [Z.H.] kind of in passing in the waiting room, she and I have not met in quite some time . . .
>
> Q: And that would be Rebecca Harding, is that correct?
>
> A: Correct. That is correct.
>
> * * * * *
>
> So we decided to have Rebecca in the room so that she would, so that [Z.H.] would feel more comfortable. She was quite anxious initially when I came in and during the course, first few minutes of being in the room with her, as we were kind of talking about Court and different things related to that, in very general terms, I had

> mentioned to her that it was my understanding that you had met with her and instead of saying your name what I said was Chris and there was this instant panic and deer in headlight look on her face and at that point, she had been kind of playing with some paints, that [Z.H.] likes to do and comforts her. All she could do at that point was blobs of color and paper which is very A typical [sic] for [Z.H.] because [Z.H.] is a pretty good artist and likes to draw and we have lots of samples of her drawing throughout the years and these were pretty regressed kinds of marks on paper. She was eventually able to recover later in the session and go back to some of her more typical kinds of drawings. That's a pretty A typical [sic] response for a child and it's unfortunate that your first name is the same as the other person's but just that mention produced a considerable amount of panic on her so . . .

Id. at 59-60. On cross-examination, Gelder testified that when she tested Z.H. in November 2006, Z.H. had "some language problems, in particular, expressive language problems" and "a lot of difficulty with cognitive flexibility" or "[t]he ability to shift from one thought or idea to another . . . ." Id. at 62. Gelder also testified:

> [I]f someone attempted to deal with [Z.H.] according to her calendar age rather than her functioning age, it's going to be very easy to confuse her, to use inferential language that we typically use with eight year olds and so for someone to talk with her, question her, even in school, it really needs to be language that is appropriate to her functioning age rather than to her calendar age.

Id. Based upon the record, we cannot say that the court erred in finding that Gelder indicated that Z.H. would suffer serious emotional distress such that Z.H. could not reasonably communicate if she testified at trial or in concluding that Z.H. was unavailable.

2. Opportunity for Cross-Examination

We must next determine whether Sutton was afforded an opportunity to cross-examine Z.H. Sutton was allowed to cross-examine Z.H. at the trial court's hearing conducted to fulfill the requirements of the PPS. See Ind. Code § 35-47-4-6(f) (allowing protected person's out-of-court statement to be admitted only if, *inter alia*, protected person "was available for cross-examination").

Sutton argues on appeal that the trial court found Z.H. "to be unavailable to testify not because she was incompetent, but because testifying in Mr. Sutton's presence would cause her such emotional distress that she could not reasonably communicate," and that "[i]f [Z.H.] could not reasonably communicate to effectively testify at trial, she could not reasonably communicate to be effectively cross-examined for *Crawford* purposes." Appellant's Brief at 11. Sutton argues: "Stated the other way, if her cross-examination was effective for *Crawford* purposes, then it follows that she could reasonably communicate to testify in the presence of Mr. Sutton and the trial court erred in finding she was unavailable." Id. Sutton argues that the reasoning in Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005), trans. denied, cert. denied, 547 U.S. 1026, 126 S. Ct. 1580 (2006), applies.

In Purvis, the defendant was allowed to cross-examine the victim at the trial court's hearing conducted to determine the victim's competence to testify and to fulfill the requirements of the PPS. 829 N.E.2d at 580-581. The court held that the hearing satisfied the requirements of the PPS, but that the victim's testimony at the hearing did not constitute cross-examination for Crawford purposes because the trial court

determined that the victim was unable to understand the nature and obligation of an oath. Id. at 581. The court held that "[s]ince [the victim] was incompetent to testify, [the defendant's] cross-examination of [the victim] at the hearing did not satisfy the requirements of Crawford because [the defendant] lacked an opportunity for 'full, adequate, and effective cross-examination.'" Id. The court also held: "We cannot set forth a precise test for determining what constitutes 'full, adequate, and effective cross-examination,' but we conclude that, at least in the circumstances of this case, a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes." Id.

Here, we conclude that Sutton was afforded an opportunity to cross-examine Z.H. and find the reasoning in Purvis to be instructive. Unlike in Purvis, the trial court asked Z.H. questions at the hearing regarding whether she understood the difference between telling the truth and lying. The court then swore Z.H. in as a witness "ON THE BASIS THAT [SHE] UNDERSTAND[S] THE DIFFERENCE BETWEEN TELLING THE TRUTH AND TELLING A LIE" without objection from Sutton. Transcript at 71-72. Sutton's counsel then questioned Z.H. regarding her nightmares. Z.H. testified that she did not tell anybody that Sutton laid on top of her, but then stated that she had told "the lady up in Ft. Wayne that . . . ." Id. at 76. Z.H. testified that Sutton was asleep when he laid on top of her. Z.H. did not remember if she and Sutton were laying "back to back or back to front." Id. at 79. Sutton's counsel explored other possibilities for Z.H.'s injuries such as bicycles or monkey bars.

The court's June 23, 2009 order stated:

FINDINGS OF FACT

17. When asked if she knew the difference between the truth and a lie by the Court, [Z.H.] responded that she did not, but upon further questioning by the Court, [Z.H.] demonstrated that she could distinguish between a truth and a lie through an example given by the Court.

* * * * *

CONCLUSIONS OF LAW

* * * * *

2. [Z.H.] is unavailable to testify at the trial of this cause of action.

3. [Z.H.] was made available for and was cross-examined by defense counsel during the protected person hearing.

Appellant's Appendix at 83-85.

To the extent that Sutton argues that because the court found that Z.H. could not reasonably communicate at trial that she was not available for cross-examination, we disagree. We cannot say that the trial court's finding that Z.H. would suffer serious emotional distress such that she could not reasonably communicate equates to a lack of an opportunity to cross-examine Z.H. under Crawford, especially in light of the fact that Z.H.'s testimony was given in the context of a protected person hearing with her mother standing beside her and in light of Gerard's testimony. Based upon the record, we cannot say that fundamental error occurred when Sutton, without objection, had the opportunity to and did cross-examine Z.H. at the hearing. Cf. Anderson v. State, 833 N.E.2d 119,

125 (Ind. Ct. App. 2005) (holding that the victim's testimony at the protected persons hearing did not constitute cross-examination for Crawford purposes because the trial court determined that the victim was incapable of understanding the nature and obligation of an oath); Purvis, 829 N.E.2d at 581 (holding that "[s]ince [the victim] was incompetent to testify, [the defendant's] cross-examination of [the victim] at the hearing did not satisfy the requirements of Crawford because [the defendant] lacked an opportunity for 'full, adequate, and effective cross-examination'").

B. Drumbeat

Sutton argues that "[f]undamental error occurred when the State was allowed to admit every out-of-court statement made by [Z.H.], including statements made by [Z.H.] during her medical exam, because it resulted in a highly prejudicial drum beat repetition." Appellant's Brief at 12. Sutton points to Z.H.'s statements made to her mother and Robinson and Z.H.'s statements during the forensic interview. Sutton argues that Robinson, the sexual assault nurse examiner, "repeated [Z.H.'s] allegation that 'Daddy' pushed her pull-up in her vagina with his penis no less than six times." Id.

Sutton argues that his case is like Stone v. State, in which we reversed a conviction for child molesting because the State used multiple witnesses to produce a "drum beat repetition" of the child victim's story. 536 N.E.2d 534, 541 (Ind. Ct. App. 1989), trans. denied. In Stone, the State had four adult witnesses and the child's sister testify to out-of-court statements made by the child, and at least one of the adults testified before the child took the stand. Id. at 537. The child's story was repeated a total of seven

times during the trial. Id. We found that the child's credibility "became increasingly unimpeachable as each adult added his or her personal eloquence, maturity, emotion, and professionalism to [the child's] out-of-court statements," so that the "presumption of innocence was overcome long before [Stone] got to the stand." Id. at 540.

We find Stone distinguishable. Here, the video of Z.H.'s interview at the Fort Wayne Child Advocacy Center and the video of Z.H. testifying at the protected persons hearing were played before either S.C. or Robinson testified. Unlike the four adult witnesses in Stone, Sutton points to the testimony of only two witnesses. S.C.'s testimony regarding Z.H.'s statements was brief. S.C. testified that Z.H. stated that her vagina hurt "because daddy stuck his penis in [her] vagina." Transcript at 279. S.C. later testified that she asked Z.H. "what did you say," and Z.H. "told [her] again." Id. at 280. Regarding Robinson's testimony, the pages cited by Sutton reveal that Robinson testified that she asked Z.H. what had happened to her, and Z.H. stated that her "daddy put his penis inside [her] vagina and that he pushed [her] pull up inside with his penis . . . ." Id. at 342. Robinson testified that, at one point during the exam, Z.H. took her fingers and "touched her major's" and said "I told him to stop, but he didn't and it hurted." Id. at 344. Robinson testified that Z.H. stated that "every time he does it, he doesn't (inaudible) and that she said she had to pull it out" and that when Robinson asked her "what it was," Z.H. stated that it was "her pull up and his penis." Id. Robinson also testified that Z.H.'s injuries were consistent with Z.H.'s version of the events.

Under the circumstances, we conclude that any error did not amount to fundamental error. See McGrew v. State, 673 N.E.2d 787, 796 (Ind. Ct. App. 1996) (holding that the improper admission of hearsay testimony from two witnesses whose testimony was "brief and consistent with" the victim's testimony did not "constitute drumbeat repetition of the victim's statements"), reh'g denied, summarily affirmed by 682 N.E.2d 1289, 1292 (Ind. 1997).

II.

The next issue is whether the trial court abused its discretion by admitting portions of Sutton's recorded statement. Generally, we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. Roche v. State, 690 N.E.2d 1115, 1134 (Ind. 1997), reh'g denied. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995) (citing Ind. Trial Rule 61; Hardin v. State, 611 N.E.2d 123, 131 (Ind. 1993)). "[A]n error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Id. at 1142.

Sutton appears to challenge the portion of his videotaped statement in which he indicated that he shaved his pubic area. Sutton argues that "his statement that he shaves his pubic hair is not relevant to any fact that is of consequence in determining whether he

molested [Z.H.].” Appellant’s Brief at 16. Sutton argues that “[i]f in fact a pubic hair had been recovered from [Z.H.] it would be relevant to establish whether Mr. Sutton had pubic hair. But, no such evidence was found and there was no evidence before the jury concerning pubic hair.” Id.

To be admissible, evidence presented at trial must be relevant. Ind. Evidence Rule 402. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ind. Evidence Rule 401. Relevant evidence is not always admissible, however, as it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. In addition, evidence of crimes, wrongs, or acts is not admissible “to prove the character of a person in order to show action in conformity therewith.” Ind. Evidence Rule 404(b). It may be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Id. Ind. Evidence Rule 608(b), which was cited by Sutton to the trial court and on appeal, provides in part that “[f]or the purpose of attacking or supporting the witness’s credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence.” “[A] trial court’s evidentiary rulings are presumptively correct, and defendant bears the burden on appeal of persuading us that the court erred in weighing prejudice and probative value under Evid. R. 403.” Anderson v. State, 681 N.E.2d 703, 706 (Ind. 1997).

Evidence of consciousness of guilt has historically been admissible as relevant evidence. Robinson v. State, 720 N.E.2d 1269, 1272 (Ind. Ct. App. 1999) (citing Serano v. State, 555 N.E.2d 487 (Ind. Ct. App. 1990) (holding that false information defendant provided to law enforcement was admissible to show consciousness of guilt), trans. denied; Washington v. State, 273 Ind. 156, 402 N.E.2d 1244 (1980) (holding that defendant's attempt to conceal incriminating evidence was admissible to show consciousness of guilt); McKinstry v. State, 660 N.E.2d 1052 (Ind. Ct. App. 1996) (holding that defendant's false alibi was admissible to show consciousness of guilt); Jorgensen v. State, 567 N.E.2d 113 (Ind. Ct. App. 1991) (holding that defendant's escape from custody was admissible to show consciousness of guilt), adopted in part by 574 N.E.2d 915 (Ind. 1991)). Sutton's false statement that his pubic area was bald because he shaved could reasonably be interpreted by the jury as evidence of consciousness of guilt. The evidence was therefore relevant. See id. Sutton's statements were not so inflammatory as to result in the substantial unfair prejudice required by Ind. Evidence Rule 403. See id. We conclude that the trial court did not abuse its discretion when it permitted Sutton's statement regarding his pubic hair to be admitted into evidence. See West v. State, 755 N.E.2d 173, 182 (Ind. 2001) (addressing a deputy's statement that the defendant stated: "You see him, I'm going to kill him, too," rejecting the defendant's argument that the testimony was inadmissible under Indiana Rules of Evidence 403 and 404(b), and agreeing with the State that argument that the statement was not relevant went to the weight to be given the evidence rather than its admissibility and that

"attempts to conceal or suppress evidence are admissible as bearing upon knowledge of guilt").

Even assuming that the court erred in admitting the portion of the videotape including Sutton's statement that he shaves, we cannot say that the admission must have affected Sutton's substantial rights to constitute reversible error. Z.H. consistently stated that her vagina hurt because Sutton placed his penis in her vagina. Z.H.'s mother testified that Z.H. had not complained of pain in her vagina and would be surprised if Sutton had stated otherwise, while Sutton stated during a portion of his interview that Z.H. had complained of pain in her vagina for the last year. Robinson testified that Z.H.'s injuries were inconsistent with an innocent explanation and consistent with Z.H.'s statements. Considering this independent evidence of guilt, we are satisfied that the probable impact of Sutton's statement regarding his pubic hair, in light of all of the evidence, did not affect Sutton's substantial rights.

For the foregoing reasons, we affirm Sutton's conviction for child molesting as a class A felony.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.