MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Marvin Leeric Sykes, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 22, 2022

Court of Appeals Case No. 21A-CR-1940

Appeal from the St. Joseph Superior Court

The Honorable John M. Marnocha, Judge

Trial Court Cause No. 71D02-2006-F3-38

Brown, Judge.

[1] Marvin Leeric Sykes, Jr., appeals his conviction for sexual misconduct with a minor as a level 4 felony. Sykes claims the trial court erred in admitting certain evidence and in instructing the jury. We affirm.

Facts and Procedural History

[2] On June 22, 2020, South Bend Police Officer Alexander Gutierrez and other officers were dispatched to a residence in response to a report of a sexual assault. Sykes lived at the residence with his girlfriend and her five children, including K.W. who was fifteen years old. I.S., who was K.W.'s sister, had called 911, and K.W. later joined the call. The officers made contact with the suspect, Sykes, and placed him in handcuffs. Officer Gutierrez transported Sykes to the Special Victims Unit.

[3] K.W. was transported by ambulance to St. Joseph Regional Medical Center. K.W. was seen by Ashley Crawford ("Nurse Crawford"), who was a registered nurse who worked in the emergency room and the forensics department. During the examination, K.W. reported "[w]e had sex." Transcript Volume II at 33. Nurse Crawford asked what she meant, and K.W. "said that her mom's boyfriend put his penis in her vagina and also licked her vagina." *Id*. Detective Brittany Bayles interviewed Sykes at the Special Victims Unit, and the interview was recorded. During the interview, Sykes "admitted to briefly penetrating K.W.'s vagina with the tip of his penis and putting his face and mouth by her vagina, possibly leaving saliva by the edge of her vagina." Appellant's Brief at 11 (citation omitted). He also "acknowledged knowing that K.W. was fifteen and that he was thirty." *Id*.

[4] On June 24, 2020, the State charged Sykes with Count I, rape as a level 3 felony, and Count II, sexual misconduct with a minor as a level 4 felony. Count I alleged Sykes "did knowingly or intentionally have sexual intercourse or other sexual conduct with Victim No. 1; when such person was compelled by force." Appellant's Appendix Volume II at 18. Count II alleged Sykes, "a person at least twenty-one (21) years of age, did perform or submit to sexual intercourse or other sexual conduct . . . with Victim No. 1, a child at least fourteen (14) years of age but less than sixteen (16) years of age." *Id*.

[5] In July 2021, the court held a jury trial. In its preliminary instructions to the jury, the trial court provided the allegations under Counts I and II, the statute governing the offense of sexual misconduct with a minor, and the statutory definitions for sexual intercourse and other sexual conduct.[1] The State presented the testimony of Officer Gutierrez, Nurse Crawford, and Detective Bayles. Officer Gutierrez testified "[w]e were dispatched for a sexual assault called in by a juvenile" and "[t]he mother wasn't home, supposedly the boyfriend was." Transcript Volume II at 19. Nurse Crawford testified she is a registered nurse who worked in the emergency room and the forensic department. She indicated that, in the forensic department, she functioned as a

[1] Ind. Code § 35-42-4-9 provides that a person "who knowingly or intentionally performs or submits to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with a child less than sixteen (16) years of age, commits sexual misconduct with a minor" and that the offense is a level 4 felony if it is committed by a person at least twenty-one years of age. Ind. Code § 35-31.5-2-221.5 provides: "'Other sexual conduct' means an act involving: (1) a sex organ of one (1) 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."

nurse and also helped collect forensic evidence, and the department saw adult and pediatric sexual assaults, domestic violence, child abuse, elder abuse, strangulations, and human trafficking. She testified that, during a sexual assault examination, she obtains the patient's history, assesses the patient from head to toe for any immediate injuries which might need medical attention, and then collects the sexual assault kit based on the patient's history. She testified, "based on their history, we swab where they say that they might have injuries or where they could have been touched or kissed or licked." *Id*. at 27. Nurse Crawford testified she treated K.W. on June 22, 2020. She testified K.W. arrived by ambulance with her mother and sister. She indicated that, after K.W. was registered, she went into her room, introduced herself, explained her role as the nurse, and asked K.W. the reason for her visit, and K.W. said she had just been sexually assaulted. Sykes's defense counsel objected on the basis of hearsay and Sykes's confrontation rights, and the court stated that it would permit the witness to testify as to K.W.'s statements that she had been sexually assaulted and that her mother's boyfriend placed his penis in her and performed oral sex on her, which may trigger medical protocols and treatment, and that it would not permit a narrative statement as to other statements K.W. may have made which went beyond statements for medical diagnosis and treatment.

[6] The prosecutor asked Nurse Crawford "I'm going to ask you for a very limited answer – what specific acts did [K.W.] report were performed upon her or perpetrated upon her?" *Id*. at 33. Nurse Crawford testified: "She said that, 'We had sex.' And I asked what she meant by that. And she said that her mom's

boyfriend put his penis in her vagina and also licked her vagina." *Id*. When asked, "[b]ased on what she told you, what did you do with your examination," she replied "when she says that he touched her and licked on her genitals, we do DNA swabs; and we also look for injury. We take pictures if we see any injury. And she also had included that he had touched her breasts under her shirt; so we would check for DNA there as well." *Id*. When asked, "[w]hen you're conducting a sexual assault examination, do you ask who the assailant or the perpetrator is," she answered affirmatively, and when asked "[w]hat is the purpose for doing so," she replied "[w]e need to make sure that the patient is safe to go home. And also, she's 15 years old; and so, we need to see, like, if she's able to legally consent." *Id*. at 34.

[7] Detective Bayles testified I.S., who is K.S.'s younger sister, was the person who called 911. She testified she listened to the 911 call and I.S. "was hysterical to the point that the dispatcher could not understand what she was saying and had to get somebody else on the phone to find out what was happening." *Id*. at 47. When asked what else happened on that 911 call, Detective Bayles indicated "[a]nother female . . . came on the line and identified herself as K.W.," "[s]he – in her voice she seemed very distraught," "from what I could hear, you could tell that there was concern in her voice and she was distraught," and "I could not tell whether or not she was crying." *Id*. The court admitted a recording of Sykes's interview statement over Sykes's objection based on the *corpus delicti* rule. Detective Bayles testified that, during her investigation, she determined

that, at the time of the offense, Sykes was thirty years old, K.W. was fifteen years old, and Sykes was the boyfriend of K.W.'s mother.

[8] After the State rested its case, Sykes's defense counsel moved for a directed verdict with respect to the charge of rape under Count I and argued there was no evidence that K.W. was compelled by force to submit to the charged acts, and the court granted the motion.

[9] Sykes testified that, when he was interviewed at the Special Victims Unit, "I felt, at that point in time, that I was being pressured into saying something that I know I wasn't comfortable with." *Id*. at 93. His defense counsel stated "you were told . . . there was a sexual assault examination . . . and there is a discussion with respect to DNA . . . it is almost immediately, after those statements were made to you, that you then start talking to the detective about having sexual contact with [K.W.]," and Sykes stated, "[a]t that point in time, I was already in an uncomfortable state when they was asking me the questions; so I just gave them what they asked for." *Id*. When asked "[d]id the fact that they were representing to you that DNA was going to be there, did that have any impact on the decision that you made as far as what information you were sharing with them," Sykes answered "I wasn't worried about the information. I was pretty confident that nothing even happened for me to even give my DNA tested in the first place," and when asked "is it a situation that you thought that the DNA would actually clear things up for you," he answered "[y]es." *Id*. at 93-94. The jury found Sykes guilty of sexual misconduct with a minor as a level 4 felony. The court sentenced Sykes to five years.

Discussion

[10] Sykes argues the trial court abused its discretion in admitting his statement containing his confession in violation of the *corpus delicti* rule. He asserts, "[a]ssuming arguendo that there was sufficient foundation to admit [his] statement, the foundation was based on evidence that should not have been admitted at trial," specifically, Nurse Crawford's testimony regarding K.W.'s statements. Appellant's Brief at 25. He also argues the principle of jury unanimity was violated and resulted in fundamental error.

[11] We generally 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*. We may affirm a trial court's decision if it is sustainable on any basis in the record. *Barker v. State*, 695 N.E.2d 925, 930 (Ind. 1998), *reh'g denied*. When a defendant challenges the admission as a constitutional violation of his rights, we review the issue *de novo*. *Cardosi v. State*, 128 N.E.3d 1277, 1286 (Ind. 2019).

A. *Nurse Crawford's Testimony*

[12] Ind. Evidence Rule 801(c) provides that hearsay means a statement that is not made by the declarant while testifying at the trial or hearing and is offered to prove the truth of the matter asserted. Ind. Evidence Rule 802 provides that

hearsay is not admissible unless the rules or other law provides otherwise. Ind. Evidence Rule 803 provides in part:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> * * * * *
>
> (4) Statement Made for Medical Diagnosis or Treatment. A statement that:
>
> (A) is made by a person seeking medical diagnosis or treatment
>
> (B) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and
>
> (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

[13] "The rationale underlying the exception is that a declarant's self-interest in seeking treatment reduces the likelihood that she will fabricate information that she provides to those who treat her." *Perry v. State*, 956 N.E.2d 41, 49 (Ind. Ct. App. 2011) (citation omitted), *reh'g denied*. In determining the admissibility of hearsay under Ind. Evidence Rule 803(4), courts evaluate (1) whether the declarant's motive was to provide truthful information to promote diagnosis and treatment and (2) whether the content of the statement is such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment. *Id*.

[14] Statements establishing a perpetrator's identity are typically inadmissible under the exception, as identification of the person responsible for the declarant's

condition or injury is often irrelevant to diagnosis and treatment. *Id*. However, in cases involving child abuse, sexual assault, and/or domestic violence, courts may exercise their discretion in admitting medical diagnosis statements which relay the identity of the perpetrator. *Id*. This Court has stated:

> All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. In the domestic sexual abuse case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere. In short, the domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes "reasonably pertinent" to the victim's proper treatment.

Id. at 49-50 (citing *Nash v. State*, 754 N.E.2d 1021, 1024-1025 (Ind. Ct. App. 2001) (citation omitted), *trans. denied*). "The extent to which a statement as to cause is pertinent to diagnosis or treatment rests within the discretion of the trial judge, who may consider the health care provider's testimony in making that determination." *Id*. at 50 (citation omitted).

[15] The record reveals that K.W. was transported to the St. Joseph Regional Medical Center and examined by Nurse Crawford. Nurse Crawford explained her role as the nurse to K.W., who was fifteen years old, and asked K.W. the reason for her visit, and K.W. stated that she had just been sexually assaulted. The trial court specifically instructed the prosecutor regarding the testimony the

State was permitted to elicit from Nurse Crawford regarding K.W.'s statements. The prosecutor asked for a limited response from Nurse Crawford consistent with the court's ruling, and the State did not elicit testimony as to other statements K.W. may have made which were not reasonably pertinent to diagnosis and proper treatment. We find that K.W.'s statements "[w]e had sex" and that "her mom's boyfriend put his penis in her vagina and also licked her vagina" were admissible pursuant to Ind. Evidence Rule 803(4). *See Perry*, 956 N.E.2d at 50 (holding the victim's statements to a nurse, including identifying the assailant and the assailant's acts of sexual assault, were admissible pursuant to Ind. Evidence Rule 803(4)). Further, considering the context, we find that K.M.'s statements to Nurse Crawford, including her identification of her mother's boyfriend, were for the primary purpose of medical treatment and were not barred by the Confrontation Clause. *See Ward v. State*, 50 N.E.3d 752, 759-764 (Ind. 2016) (holding the victim's statements to the forensic nurse identifying the defendant as the assailant, considering their context, were for the primary purpose of medical treatment and thus were not barred by the Confrontation Clause and noting there is no need to confine valid medical purposes to treatment of only physical injuries). The trial court did not abuse its discretion in admitting Nurse Crawford's testimony.

B. *Sykes's Statement*

[16] We turn to the admission of Sykes's statement. The Indiana Supreme Court has held:

> In Indiana, a person may not be convicted of a crime based solely on a nonjudicial confession of guilt. Rather, independent proof of the *corpus delicti* is required before the defendant may be convicted upon a nonjudicial confession. Proof of the *corpus delicti* means proof that the specific crime charged has actually been committed by someone. Thus, admission of a confession requires some independent evidence of commission of the crime charged. The independent evidence need not prove that a crime was committed beyond a reasonable doubt, but merely provide an inference that the crime charged was committed. This inference may be created by circumstantial evidence.
>
> The purpose of the *corpus delicti* rule is to prevent the admission of a confession to a crime which never occurred. The State is not required to prove the *corpus delicti* by independent evidence prior to the admission of a confession, as long as the totality of independent evidence presented at trial establishes the *corpus delicti*.

Shinnock v. State, 76 N.E.3d 841, 843 (Ind. 2017) (citations and internal quotations omitted).

[17] "For the preliminary purpose of determining whether the confession is admissible, the State must present evidence independent of the confession establishing that the specific crime charged was committed by someone." *Id.* (citing *Harkrader v. State*, 553 N.E.2d 1231, 1232 (Ind. Ct. App. 1990), *trans. denied*). "The degree of proof required to establish the corpus delicti for admission of a confession is that amount which would justify the reasonable inference that the specific criminal activity had occurred. It is not necessary to make out a prima facie case as to each element of the offense charged, and the corpus delicti may be shown by circumstantial evidence." *Id*. (citing *Harkrader*, 553 N.E.2d at 1232-1233).

[18] Here, in order to make Sykes's statement admissible, all the State had to present was independent evidence that provided an inference that the crime charged was committed. *See id*. at 844. Further, there is no requirement that all of the elements of the crime be proven prior to introduction of the confessions. *Id*. Nurse Crawford testified as set forth above. Detective Bayles testified that, during her investigation, she determined that Sykes was the boyfriend of K.W.'s mother. She also testified regarding the demeanor of I.S. and K.W. during the 911 call. The record reveals that the State presented independent evidence which provided an inference that the crime charged was committed and that Sykes committed the crime, and thus the requirements of the *corpus delicti* rule were satisfied. We cannot say the trial court abused its discretion in admitting Sykes's statement into evidence. *See Shinnock*, 76 N.E.3d at 844 ("All the facts taken together suffice to demonstrate both that the dog was a victim and that Shinnock committed the crime. Accordingly, the trial court properly found that the *corpus delicti* rule was satisfied and admitted the confessions into evidence.").

C. *Jury Unanimity*

[19] To the extent Sykes asserts the lack of a specific instruction on jury unanimity resulted in fundamental error, the Indiana Supreme Court has held:

> [T]he State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the

> defendant committed all of the acts described by the victim and included within the time period charged.

Baker v. State, 948 N.E.2d 1169, 1177 (Ind. 2011), *reh'g denied*.

[20] In *Baker*, the defendant was convicted of three counts of child molesting, and on appeal "[i]n essence he complain[ed] that some jurors may have relied on different evidence than the other jurors to convict on each of the three counts." *Id*. The Court noted the State had not designated which specific act or acts of child molestation that it would rely upon to support the three-count charging information and the trial court had not advised the jury that in order to convict the defendant the jury must either unanimously agree that he committed the same act or acts or that he committed all of the acts described by the victim and included within the time period charged. *Id.* at 1178. The Court then noted the defendant had not objected or offered an instruction of his own, held the issue was waived, and reviewed the issue for fundamental error. *Id*. It stated that, in order to be fundamental, the error must represent a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process and the error must be so prejudicial to the defendant's rights as to make a fair trial impossible. *Id*. The Court concluded:

> In this case the only issue was the credibility of the alleged victims. The only defense was to undermine the young women's credibility by, among other things, pointing out inconsistencies in their statements, and advancing the theory that they were lying in retaliation for Baker getting C.B. into trouble. Essentially "this case

> is about whether or not these kids will lie about [Baker] and make stuff up about him. . . ." *See State v. Muhm*, 775 N.W.2d [508, 521 (S.D. 2009)] (internal citation omitted) (rejecting on harmless error grounds a claim that trial court erred in failing to give jury unanimity instruction in child sexual assault case where defendant requested no such instruction). "Ultimately the jury resolved the basic credibility dispute against [Baker] and would have convicted the defendant of *any* of the various offenses shown by the evidence to have been committed." *See id.* (emphasis in original). We conclude Baker has not demonstrated that the instruction error in this case so prejudiced him that he was denied a fair trial.

Id. at 1179.

[21] Here, the State alleged that Sykes committed sexual misconduct with a minor as a level 4 felony. The State could prove Sykes committed the offense by showing that he committed either of the acts described in the statute—sexual intercourse or other sexual conduct. *See* Ind. Code § 35-42-4-9. The prosecutor argued in closing argument: "This is a case where she said there was intercourse, and she said there was oral sex. And then Mr. Sykes volunteered that there was intercourse and there was oral sex." Transcript Volume II at 125. Thus, the State referred the jury to the evidence of the specific acts of both sexual intercourse and other sexual conduct to prove the charge of sexual misconduct with a minor.

[22] Even assuming the State did not designate a specific act or acts on which it relied to prove the charge, we cannot say reversal is warranted. Sykes did not object or request his own jury unanimity instruction. Accordingly, this issue is waived, and in order to obtain relief Sykes must establish fundamental error.

See Baker, 948 N.E.2d at 1178. The issues in this case were whether K.W.'s statements to Nurse Crawford were credible and Sykes's statement to Detective Bayles was truthful. K.W. stated during her sexual assault examination that "her mom's boyfriend put his penis in her vagina and also licked her vagina." Transcript Volume II at 33. In his statement to Detective Bayles, Sykes "admitted to briefly penetrating K.W.'s vagina with the tip of his penis and putting his face and mouth by her vagina, possibly leaving saliva by the edge of her vagina." Appellant's Brief at 11. In light of the evidence, there is no reason why the jury would have been divided as to which specific act or acts were committed. The Court in *Baker* found no fundamental error because the jury "resolved the basic credibility dispute against [Baker] and would have convicted the defendant of *any* of the various offenses shown by the evidence to have been committed." 948 N.E.2d at 1179 (quotation omitted). The same rationale applies here. We conclude that Sykes has not demonstrated fundamental error.

[23] For the foregoing reasons, we affirm Sykes's conviction.

[24] Affirmed.

Mathias, J., and Molter, J., concur.