

STATEMENT OF THE CASE

Defendant-Appellant Derek Morris appeals his conviction by jury of child molesting as a Class A felony. We affirm.

ISSUES

Morris raises two issues for our review:

1. Whether the trial court erred in admitting evidence; and
2. Whether the trial court erred in instructing the jury.

FACTS AND PROCEDURAL HISTORY

In August 2005, Morris spent the night at his girlfriend's home. When his girlfriend left for work the following morning, Morris held her thirteen year-old daughter down by her arms and removed her clothing. He then placed his penis inside the daughter's vagina. After the victim told her mother what happened, Morris was charged with Class A felony child molesting.

At trial, the victim's mother testified over objection that she knew Morris was forty-two years old because she was dating him and was with him on his birthday. Also at trial, the trial court instructed the jury as follows:

To establish sexual intercourse, the slightest penetration of the female sex organ by the male sex organ is sufficient, and it is not necessary that the vagina be entered or that the hymen be ruptured. Entering the vulva or labia is sufficient.

Proof of emission is not necessary to establish sexual intercourse.

A jury convicted Morris as charged, and he now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

A trial court has broad discretion in ruling on the admissibility of evidence. *Jones v. State*, 800 N.E.2d 624, 626 (Ind. Ct. App. 2003). We will reverse a trial court's ruling on the admissibility of evidence only when the trial court has abused its discretion. *Id.* at 627. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Morris argues that the trial court erred in admitting evidence. Specifically, Morris claims that the victim's mother's testimony that he was forty-two years old was inadmissible hearsay because it "came from an unknown out-of-court declarant, whom Morris could not cross-examine" Appellant's Br. at 6.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). We agree with the State that the victim's mother's testimony did not contain hearsay. The mother simply testified that she knew Morris was forty-two years old because she dated him and was with him on his birthday. The mother did not testify regarding what someone else had told her, and we find no abuse of the trial court's discretion.

We further note that any error in the admission of this testimony would have been harmless because the testimony was merely cumulative of a detective's testimony that Morris'

birthday was June 20, 1965. *See Oldham v. State*, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002), *trans. denied*, (stating that any error in the admission of evidence is harmless and not grounds for reversal where the evidence is merely cumulative of other evidence).

II. Jury Instruction

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Ray v. State*, 846 N.E.2d 1064, 1066 (Ind. Ct. App. 2006), *trans. denied*. Instructing the jury is within the trial court's discretion and is reviewed only for an abuse of that discretion. *Id.* When we review a trial court's decision to give or refuse tendered jury instructions, we consider: 1) whether the instruction clearly states the law; 2) whether there is evidence in the record to support the giving of the instruction; and 3) whether the substance of the tendered instruction is covered by other instructions which are given. *Id.*

Ind. Code § 35-41-1-26 defines sexual intercourse as any penetration of the female sex organ by the male sex organ. In *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002), *trans. denied*, we further explained that the statute does not require that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated. *See also Short v. State*, 564 N.E.2d 553, 559 (Ind. Ct. App. 1991).

Morris argues that in *Smith*, this court incorrectly determined that sexual intercourse could occur without penetration of the vagina and urges us to reconsider our interpretation of the statute. We deny his request and find no error in the instruction.

CONCLUSION

The trial court did not err in admitting evidence or in instructing the jury.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.