

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2010AP861-CR

Cir. Ct. No. 2008CF1923

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE LEE HIGGINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Jimmie Lee Higgins appeals from a judgment of conviction entered after a jury found him guilty of second-degree sexual assault of a child. He argues that the trial court erred when it: (1) sustained the State's hearsay objection to the admission of the victim's statement to police that she was

awakened the night of the assault by fighting between her mother and Higgins; and (2) admitted into evidence certain statements the victim made to a sexual assault nurse the night of the assault. Because even if the trial court erred in both respects, the trial court's errors were harmless, we affirm.

BACKGROUND

¶2 On April 11-12, 2008, Destiny T., her mother Gloria Baxter, and her mother's boyfriend Higgins, lived together in the City of Milwaukee. Destiny, who was thirteen years old in April 2008, testified at trial that the night of April 11 she went to sleep in her bedroom wearing capri-like pajama pants, a t-shirt, underwear, and a bra. She later awoke to Higgins pulling down her pants and her underwear. Destiny testified that Higgins told her "[d]on't say nothing" and he got on top of her as she was lying on her back. Higgins' unclothed "private" was on her "private" and he began "moving around." Destiny testified that her mother, Baxter, walked in the bedroom, "went crazy," and told Destiny to call the police.

¶3 Milwaukee Police Officer Michael Fasulo responded to the call. According to his testimony, when he arrived at the scene Higgins was no longer there and Baxter let him in the house. Officer Fasulo then proceeded upstairs because he heard "wailing." Once upstairs Officer Fasulo observed Destiny "[c]rying ... [and] curled up ... into the fetal position on the bed." After speaking briefly with Destiny, Officer Fasulo called for an ambulance, and Destiny was taken to the hospital.

¶4 At the hospital, Destiny was examined by Taryn Wieland, a sexual assault nurse examiner. Nurse Wieland testified that her job is to "tak[e] care of sexual assault victims, obtain[] evidence, [perform] a medical exam ... and [a] medical forensic exam."

¶5 Upon meeting with Destiny at the hospital on April 12, Nurse Wieland followed the protocol set forth by the hospital for assessing victims of sexual assault. First, she spent “quite a bit of time talking” with Destiny about the assault. Nurse Wieland testified that she typically begins by asking victims questions such as: “[W]hat happened, who brought them [to the hospital] today, you know, the biggest concerns that they have.” Then Nurse Wieland asks for medical information and goes “through [a] whole checklist of exactly what body parts have been touched and ... any clothing that’s been changed so have they gone to the bathroom, have they eaten, pretty much very, very specific.” Nurse Wieland then discusses with victims their “options of care, do they want treatment for sexually transmitted infection, do they want evidence collection. Do they want an exam. There’s plan B. Do they need to be seen by an emergency room doctor.”

¶6 Nurse Wieland testified that this narrative with a sexual assault victim is important because it “help[s] [her] ... in terms of the medical exam of the person to ... know where to focus [her] attention.” She further testified that going through the checklist of body parts is important because “when people are telling us what happened they don’t always think to say, oh, this was touched or this was touched or they’re too embarrassed to say that was touched.”

¶7 Nurse Wieland testified, over Higgins’ objection, that during her initial conversation with Destiny that Destiny identified Higgins as her assailant, and that Destiny said that Higgins “was having sex with [her]” and that the assaults had occurred multiple times over the course of several months. Nurse Wieland also testified, over Higgins’ objection, that Destiny told her that Higgins made “contact to her neck by his mouth, that he kissed her neck, that there was

contact to her vagina, external contact of the vagina with the penis and the hand, and then internal or penetration to the vagina with the penis and fingers.”

¶8 Destiny told Nurse Wieland that right after the assault “her private parts hurt” and that at the time she spoke with Nurse Wieland she had pain “right above the pubic bone in [her] lower abdom[en].” When performing the medical exam, Nurse Wieland observed a cut in Destiny’s posterior forchette, near her vaginal opening. Nurse Wieland also took DNA swabs from areas where Destiny said Higgins touched her, including Destiny’s neck and vagina.

¶9 The State charged Higgins with three counts of first-degree sexual assault of a child for allegedly sexually assaulting Destiny in March 2007, April 2007, and December 2007, and with one count of second-degree sexual assault for the April 12, 2008 assault. The case went to trial, and a jury found Higgins not guilty on all three counts of first-degree sexual assault, but guilty of second-degree sexual assault on April 12. Higgins appeals.

¶10 Additional facts are included in the discussion as necessary.

DISCUSSION

¶11 Higgins asks us to vacate the judgment of conviction and remand this case back to the trial court for retrial because he contends the trial court erred when it: (1) sustained the State’s hearsay objection and prohibited Officer Fasulo from testifying that Destiny told him on April 12 that she was awakened by fighting between her mother and Higgins; and (2) admitted into evidence certain statements Destiny made to Nurse Wieland upon her admission to the hospital. We address each contention in turn.

A. *Standard of Review*

¶12 Both of Higgins' arguments ask us to review the trial court's evidentiary rulings. More specifically, Higgins asks us to review the trial court's application of the hearsay rule and its exceptions. A trial court's decision to receive or exclude evidence is vested in its reasoned discretion. *State v. Sullivan*, 216 Wis. 2d 768, 779-80, 576 N.W.2d 30 (1998). We will sustain an evidentiary ruling if we find that the trial court "examined the relevant facts[,] applied a proper standard of law[,] and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id.* at 780-81.

¶13 However, a trial court erroneously exercises its discretion when it makes an error of law. *State v. Peters*, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991). Therefore, we review the trial court's admission of an out-of-court statement pursuant to WIS. STAT. § 908.01 or WIS. STAT. § 908.03 (2007-08)¹ *de novo*. See *Peters*, 166 Wis. 2d at 175. Whether a statement is admissible under a hearsay exception is also a question of law that we review *de novo*. *State v. Stevens*, 171 Wis. 2d 106, 112, 490 N.W.2d 753 (Ct. App. 1992).

B. *Destiny's Statement to Officer Fasulo*

¶14 Higgins first argues that the trial court erred when it sustained the State's hearsay objection and did not permit Officer Fasulo to testify that Destiny told him the night of the assault that she awoke when she heard her mother and Higgins fighting. Higgins contends that Officer Fasulo's testimony regarding

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

what Destiny told him is not hearsay because Destiny's statement to Officer Fasulo was inconsistent with her testimony on the stand, and inconsistent statements are not hearsay pursuant to WIS. STAT. § 908.01(4)(a)1. Because even if the statement was improperly excluded, the exclusion was harmless, we affirm.

¶15 WISCONSIN STAT. § 908.01(3) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial ... offered in evidence to prove the truth of the matter asserted.” Hearsay statements are not generally admissible at trial. WIS. STAT. § 908.02.

¶16 However, WIS. STAT. § 908.01(4)(a)1. states that a “statement is not hearsay if ... [t]he declarant testifies at the trial ... and is subject to cross-examination concerning the statement, and the statement is ... [i]nconsistent with the declarant's testimony.” Higgins argues that Destiny's statement to Officer Fasulo falls within this exemption because: (1) Destiny (the declarant) testified at trial; (2) Destiny was subject to cross-examination; and (3) Destiny's statement that she awoke the night of the assault when she heard her mother and Higgins fighting at her bedroom door is inconsistent with her testimony that she awoke when Higgins began taking off her pants. We need not address the merits of Higgins' assertion because, even if true, exclusion of Officer Fasulo's testimony regarding Destiny's statement was harmless error.

¶17 An error is harmless if the beneficiary of the error proves “beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *State v. Harris*, 2008 WI 15, ¶43, 307 Wis. 2d 555, 745 N.W.2d 397 (footnote omitted). Here, the State has demonstrated that the verdict was not affected by the trial court's decision to prohibit Officer Fasulo from testifying

about Destiny’s statement because that information was otherwise elicited during Destiny’s cross-examination.²

¶18 Indeed, Destiny testified during direct examination that on the night of the assault she went to bed alone and awoke when Higgins began taking off her pants. That testimony is at odds with the statement Higgins asserts that Destiny made to Officer Fasulo—that the night of the assault she awoke to Higgins and her mother fighting. However, in the following exchange during cross-examination, Destiny admitted that when the police arrived she told the police that she awoke to Higgins and her mother fighting at her bedroom door.

[HIGGINS’ COUNSEL]: That night when the police came to your house, did the police ask you what happened?

[DESTINY]: Yes.

[HIGGINS’ COUNSEL]: Did you tell them that you woke up to your mom and [Higgins] fighting?

[DESTINY]: Yes.

[HIGGINS’ COUNSEL]: That was the first thing you told [the police], right?

[DESTINY]: Yes.

[HIGGINS’ COUNSEL]: ‘Cause that’s the truth, isn’t it?

² The State also argues that Higgins forfeited this claim when his counsel failed to set forth any legal basis for the statement’s admissibility after the State objected to its admission. See *State v. Jenkins*, 168 Wis. 2d 175, 187-88, 483 N.W.2d 262 (Ct. App. 1992) (“A party objecting to the admission of evidence need not specify the rule into which the evidence does *not* fit. Rather, the proponent has the burden to show why the evidence is admissible.”) (citation omitted); *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed waived); see also *State v. Ndina*, 2009 WI 21, ¶¶28-30, 315 Wis. 2d 653, 761 N.W.2d 612 (stating that while case law sometimes uses the words interchangeably, “forfeiture” describes “the failure to make the timely assertion of a right,” whereas “waiver” describes “the intentional relinquishment or abandonment of a known right”). Because the parties thoroughly briefed the issue and because it is clear that any purported error is harmless, we chose to address this issue on its merits.

[DESTINY]: No.

[HIGGINS' COUNSEL]: You lied to the police officer?

[DESTINY]: Yes.

[HIGGINS' COUNSEL]: Yes? Why did you lie to the police officer?

[DESTINY]: 'Cause I was scared.

[HIGGINS' COUNSEL]: What were you afraid of?

[DESTINY]: I don't like officers.

....

[HIGGINS' COUNSEL]: Isn't it the truth that you did, in fact, wake up that night in April to [Higgins] and your mom fighting?

[DESTINY]: No.

[HIGGINS' COUNSEL]: And you lied to the police officers about that because you don't like police officers?

[DESTINY]: I was scared.

¶19 Because Destiny testified that she told the police that she awoke the night of the assault when she heard her mother and Higgins fighting, Officer Fasulo's testimony of the same would be cumulative. The jurors were aware of the contradictory statements and were free to consider their affect on Destiny's credibility as they saw fit. Consequently, the omission of Officer Fasulo's testimony of Destiny's statement did not contribute to the verdict obtained. *See Harris*, 307 Wis. 2d 555, ¶43.

C. Destiny's Statements to Nurse Wieland

¶20 Next, Higgins argues that the trial court erred in admitting into evidence Nurse Wieland's testimony concerning the statements Destiny made to her the night of the April 12 assault. Higgins argues that Nurse Wieland's

testimony about what Destiny told her was hearsay and that the trial court erred in finding that the testimony fell within the hearsay exception for statements made for purposes of medical diagnosis or treatment, as set forth in WIS. STAT. § 908.03(4).

¶21 According to Higgins, the medical diagnosis exception to the hearsay rule applies only to statements that the declarant makes with the necessary state of mind—that is, “when the declarant appreciates the need for accuracy when speaking with medical personnel and is motivated by it”—and that there was “an absence of evidence in the record” demonstrating that Destiny made her statements to Nurse Wieland “with an appreciation that it was in her best interest to tell the truth.”

¶22 In response, the State contends that Higgins forfeited the issue because his objection before the trial court was on other grounds. In the alternative, the State argues that Nurse Wieland’s testimony regarding what Destiny told her fits within the hearsay exception for statements made for purposes of medical diagnosis or treatment, and if not, is harmless error. We need not address whether Higgins forfeited the claim because we conclude that Destiny’s statements to Nurse Wieland are either admissible pursuant to the medical diagnosis exception or that their admission was harmless.

1. The Challenged Statements

¶23 Before this court, Higgins does not specify with particularity those portions of Nurse Wieland’s testimony that he deems inadmissible. However, the State sets forth three statements that Higgins objected to before the trial court that it asserts are the focus of Higgins’ claim on appeal. Higgins does not dispute the

State's representation of those statements he argues should have been suppressed. Consequently, we address only those three statements.

¶24 First, at trial Higgins challenged the admission of Nurse Wieland's testimony of Destiny's statement to her as to what occurred the night of the assault:

[STATE]: And in your conversation with [Destiny], what did she indicate had been done to her?

[HIGGINS' COUNSEL]: Again, I object on the grounds that this is not—these are not statements made for the purpose of medical treatment or diagnosis. It's a legal investigation so I—

THE COURT: The objection is overruled. [Nurse Wieland] indicated that part of this was for medical treatment.

[NURSE WIELAND]: She said there was contact to her neck by his mouth, then he kissed her neck, that there was contact to her vagina, external contact of the vagina with the penis and the hand, and then internal or penetration to the vagina with the penis and fingers.

¶25 Second, at trial Higgins challenged the admission of Nurse Wieland's testimony that Destiny identified Higgins as the individual who assaulted her:

[STATE]: Did [Destiny] describe to you at all who the assailant was in relationship to her?

[HIGGINS' COUNSEL]: Same objection.

THE COURT: Overruled.

....

[NURSE WIELAND]: She said it was her—She said it was Jimmie Higgins and that it was mommy's I believe fiancé[] or boyfriend.

¶26 And third, at trial Higgins challenged the admission of Nurse Wieland’s testimony that Destiny told her that Higgins had assaulted her on prior occasions:

[STATE]: In this particular case as you were talking with [Destiny], did she indicate that this was a single event or multiple events?

[HIGGINS’ COUNSEL]: I’m going to object on the grounds of hearsay, that that is not a statement made for the purposes of medical diagnosis. It’s a legal investigation.

....

THE COURT: The objection is overruled....

[NURSE WIELAND]: I had written down [“]patient reports sexual abuse by assailant over months.[”]

¶27 Without question, all three statements constitute hearsay. Accordingly, we turn to whether the statements fall within the exception for statements made for the purposes of medical diagnosis or treatment or whether their admission was harmless error.

2. Statements Made for Purposes of Medical Diagnosis or Treatment

¶28 The first two challenged statements—Nurse Wieland’s testimony of Destiny’s description of what occurred the night of the assault and her identification of Higgins as her assailant—are both statements that the trial court admitted pursuant to the hearsay exception for statements made for purposes of medical diagnosis or treatment. Higgins argues on appeal that the statements were

not admissible on that basis because the State failed to show that Destiny appreciated the need to be truthful when talking to Nurse Wieland.³ We disagree.

¶29 The hearsay exception for statements made for purposes of medical diagnosis or treatment is set forth in WIS. STAT. § 908.03(4) and permits into evidence “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

¶30 When applying the exception we “remain cognizant of the ... underlying basis for all hearsay exceptions: the presence of sufficient guarantees of trustworthiness.” *See State v. Huntington*, 216 Wis. 2d 671, 693, 575 N.W.2d 268 (1998). “The primary guarantee of trustworthiness surrounding a declarant’s statements offered for purposes of medical diagnosis or treatment is that, because any proposed treatment will be based in part on the exactitude and veracity of those statements, the declarant has a substantial self-interest in being truthful.” *Id.* “[S]tatements made for the purposes of medical diagnosis or treatment are sufficiently reliable to be admissible without any additional indicia of trustworthiness.” *State v. Nelson*, 138 Wis. 2d 418, 435, 406 N.W.2d 385 (1987).

¶31 Destiny’s first statement to Nurse Wieland, recounting what occurred during the April 12 assault, falls squarely within the exception. Nurse

³ Higgins made a different argument before the trial court. There he argued that the statements were not made for the purposes of medical diagnosis or treatment because Nurse Wieland was collecting evidence as part of a legal investigation. Higgins has abandoned that argument on appeal. *See State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (issues not briefed or argued are deemed abandoned).

Wieland testified that she was a sexual assault nurse examiner and that her job was to “tak[e] care of sexual assault victims, obtain[] evidence, [and perform] medical ... and medical forensic exam[s].” She testified that when first meeting with a sexual assault victim she spends a good deal of time up front speaking with the victim and collecting a medical history “because [the victim is] first and foremost a patient.” Nurse Wieland testified that engaging in a narrative with the victim about the assault is important to performing the medical exam because it helps identify “where to focus [her] attention.”

¶32 Nurse Wieland testified that when speaking with Destiny, Destiny complained of pain “right above [her] pubic bone in [her] lower abdom[en]” and in her “private parts.” During her physical examination of Destiny, Nurse Wieland noted “a half centimeter linear laceration ... in the posterior forchette,” near the vaginal opening.

¶33 In other words, Destiny was at a hospital, answering questions posed to her by a nurse who was going to physically examine her, and Destiny was experiencing at least some physical discomfort. Destiny had “a substantial self-interest in being truthful.” See *Huntington*, 216 Wis. 2d at 693. She knew that the questions Nurse Wieland posed to her about the assault and her physical condition were meant to ensure she was receiving the best possible care for her ailments, and therefore the statements were “made for the purposes of [medical] diagnosis or treatment.” See *Nelson*, 138 Wis. 2d at 431. And “statements made for the purposes of medical diagnosis or treatment are sufficiently reliable to be admissible without any additional indicia of trustworthiness.” *Id.* at 435.

¶34 Higgins’ argument—that the trial court was required to make a finding that Destiny appreciated the need to be truthful—requires the court to go

above and beyond what the statutory exception for statements made for purposes of medical diagnosis or treatment requires. *See* WIS. STAT. § 908.03(4). Section 908.03(4) merely dictates that a court find that a statement was made “for purposes of medical diagnosis or treatment” before the statement is *admissible*. Of course whether a statement is *believable* is a matter for the trier of fact to determine. In ruling on admissibility, we look to determine whether a statement has “sufficient guarantees of trustworthiness.” *See Huntington*, 216 Wis. 2d at 693. And § 908.03(4) tells us that statements made to medical personnel for purposes of medical diagnosis or treatment are *sufficiently* trustworthy to be admitted into evidence.

¶35 Higgins further contends that a discrepancy between a statement that Destiny purportedly made to the emergency responders who transported her to the hospital—that she awoke to her mother and Higgins fighting—and her statement to Nurse Wieland—that she awoke to Higgins taking off her pants—demonstrates that Destiny did not appreciate the importance of telling Nurse Wieland the truth. Higgins argues that both the emergency responders and Nurse Wieland were medical personnel and the fact that Destiny gave them contradictory statements—both of which could not be true—demonstrates that she did not appreciate the need to be truthful. Higgins argues that the contradictory statements rebut the statute’s presumption of trustworthiness for statements made for purposes of medical diagnosis or treatment. We disagree.

¶36 First, it is unclear from the record whether Destiny told the emergency responders that she awoke to her mother and Higgins fighting. In support of that assertion, Higgins relies on a page in Destiny’s medical records, which were not included in the record on appeal. Nurse Wieland testified that although the page was included in Destiny’s medical records, she did not write the

report, she did not rely on the report, and she “assum[ed]” the report was written “by ... the ambulance” personnel. Nurse Wieland then read out loud that portion of the report that stated: “Patient stated she was sleeping and woke up to a 49 year-old man standing in the doorway with her mother hitting him.” However, without the testimony of the report’s writer it is unclear whether that statement was elicited from Destiny herself or was obtained second-hand from Officer Fasulo, and, therefore, the report does not demonstrate that Destiny made conflicting statements to medical personnel.

¶37 Second, WIS. STAT. § 908.03(4) states that statements “are not excluded by the hearsay rule” if they are “made for purposes of medical diagnosis or treatment.” That is to say, once the court determined the Destiny made the statements for purposes of medical diagnosis or treatment they were admissible. And while Higgins was free to challenge the credibility of those statements, their admissibility was no longer at issue and there was nothing for him to rebut.

¶38 Destiny’s second statement to Nurse Wieland, identifying Higgins as her attacker, is also admissible under the medical diagnosis exception. While it is true “that statements as to who was at fault are ordinarily inadmissible under the exception for statements made for purposes of [medical] diagnosis or treatment,” the Wisconsin Supreme Court has carved out an exception for cases involving child abuse. *Nelson*, 138 Wis. 2d at 433. In *Nelson*, the court held that when the declarant is the victim of child abuse “disclosure of the identity of the assailant is reasonably necessary to provide treatment” because of the unique emotional and psychological injuries that are involved. *Id.* at 433-34. Such is the case here. Consequently, Destiny’s identification falls within the exception.

¶39 Higgins argues that this case is distinguishable from *Nelson* because in *Nelson*, the four-year-old child abuse victim: (1) had no motive to lie; (2) identified her attacker to a mental health professional, as opposed to a physician; and (3) was taken to the psychologist by her parents, as opposed to by the police. We are unpersuaded that this case is distinguishable from *Nelson*.

¶40 First, Higgins argues that Destiny was motivated to lie because she wanted to “support her mother who had reason to be disillusioned with a two-timing Mr. Higgins.” However, Higgins cites to no evidence supporting his speculation that Destiny was aware that Higgins was involved in a relationship with another woman. Because this argument is undeveloped, we decline to address it. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶41 Second, the Wisconsin Supreme Court held in *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d. 77 (1988), that a child abuse victim’s identification of her assailant to a physician who is not a mental health care provider is admissible under the exception for statements made for purposes of medical diagnosis and treatment. *Id.* at 251-52.

¶42 And third, we are unpersuaded that the mere accompaniment to the hospital by police led Destiny to believe that her statements to Nurse Wieland were not otherwise statements given for medical diagnosis or treatment given what we have set forth above.

3. Harmless Error

¶43 Even if Destiny’s first and second statements to Nurse Wieland, discussed above, were not admissible pursuant to the hearsay exception for

statements made for purposes of medical diagnosis or treatment, their admission was harmless because the testimony was cumulative to other credible evidence supporting conviction. *See Harris*, 307 Wis. 2d 555, ¶43 (An error is harmless if the beneficiary of the error proves “beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”) (footnote omitted).

¶44 Nurse Wieland’s testimony of Destiny’s statements to her merely mirrored Destiny’s testimony at trial. At trial, Destiny described in detail and was cross-examined about what Higgins did to her the night of the assault and identified him as the assailant. Nurse Wieland’s testimony of the same added nothing to the discourse. Moreover, even if Nurse Wieland’s testimony bolstered Destiny’s credibility by demonstrating that she had consistently recalled the events of April 12 and consistently identified Higgins as her attacker, there was ample evidence on which to otherwise convict Higgins.

¶45 To begin, Baxter testified, as an eyewitness to the assault, that she walked into Destiny’s bedroom on April 12 and saw Higgins, naked and with an erection, standing over Destiny, and saw Destiny lying on the bed with her pants around her ankles and crying.

¶46 Second, the State introduced two audio recordings at trial of phone conversations between Baxter and Higgins recorded after Higgins’ first court appearance. In the recordings, Higgins called Baxter to tell her that he was “sorry for all the things [he] caused,” “sorry for everything.” And Higgins did not protest or otherwise deny assaulting Destiny when Baxter made statements such as “you took my baby’s innocence”; “you was having sex with her”; and “I seen it with my own eyes.” Higgins’ failure to respond amounted to a tacit admission of his guilt.

¶47 Third, the State presented DNA evidence that Higgins' DNA profile matched: (1) the DNA profile of a semen stain found on the fitted sheet of Destiny's bed; and (2) the DNA profile of a swab taken from Destiny's neck. Neither Baxter's eyewitness account nor the audio recordings nor the forensic evidence was affected by the admission of Destiny's statements to Nurse Wieland.

¶48 The admission of Destiny's third statement to Nurse Wieland—that Higgins had assaulted her on previous occasions—is harmless error because the jury found Higgins not guilty of the charges for the alleged assaults occurring prior to April 12, 2008. Higgins was originally charged with first-degree sexual assault of a child for allegedly engaging in sexual intercourse with Destiny in March 2007, April 2007, and December 2007, and second-degree sexual assault for engaging in sexual intercourse with Destiny on April 12, 2008. The jury found Higgins not guilty of all counts except the second-degree sexual assault count for the April 12 assault. Consequently, Nurse Wieland's statement that Destiny told her that Higgins assaulted her on numerous occasions was harmless.

¶49 For all those reasons, even if admission of the statements had been in error, any such error was harmless.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

