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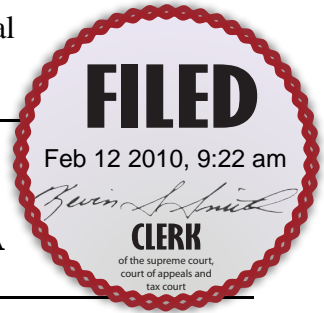
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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM BYERS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0907-CR-619

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
The Honorable Stanley Kroh, Commissioner
Cause No. 49G04-0812-FB-284251

February 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

William Byers appeals his convictions for Class B felony attempted rape and Class A misdemeanor domestic battery. We affirm.

Issue

Byers raises one issue, which we restate as whether he was denied his constitutional right to cross-examine the witnesses against him.

Facts

On December 13, 2008, B.A. and her best friend, Kristen Furgason, took B.A.'s two children to visit her ex-boyfriend and the children's father, Byers, in Cumberland. While Furgason waited in the car, B.A. took the four-year-old and two-year-old inside Byers's apartment. Byers told B.A. that he wanted to talk, B.A. followed Byers into the bathroom, and Byers shut the bathroom door. While they were in the bathroom, Byers unhooked B.A.'s bra, touched her breast, pulled down her pants, and removed her tampon. Byers unzipped his own pants and tried to penetrate B.A.'s vagina with his penis. B.A. physically resisted Byers and told him no.

Furgason waited in the car for approximately five minutes and, when B.A. did not return to the car, Furgason went to Byers's apartment. The front door was locked, and Furgason instructed the four-year-old how to unlock the door. Furgason heard noises coming from the bathroom and tried to open the bathroom door. Byers put his weight against the bathroom door to keep Furgason from opening it. Furgason pushed and kicked the door, causing damage to the door and injuries to her hands. As she tried to

push the door open, Furgason could see B.A.'s reflection in the bathroom mirror. B.A. was crying, her clothes were half off, she was pulling at her pants, and Furgason had never seen her that upset. Unable to get into the bathroom, Furgason left the apartment with the children and called the police. B.A. eventually left Byers's apartment and waited in the car for the police.

On December 17, 2008, the State charged Byers with Class B felony attempted rape, Class D felony sexual battery, Class D felony criminal confinement, Class A misdemeanor domestic battery, and Class A misdemeanor battery. Both B.A. and Furgason testified against Byers at trial, and a jury found him guilty as charged. The trial court entered convictions for Class B felony attempted rape and Class A misdemeanor domestic battery. Byers now appeals.

Analysis

Byers argues that the trial court committed fundamental error by excluding evidence of the sexual relationship between him and B.A. and evidence of the previous sexual relationship between him and Furgason. He claims that the exclusion of this evidence based on Indiana Evidence Rule 412 violated his due process rights and his confrontation rights under the United States and Indiana constitutions.¹ As Byers explains, “the essence of Defendant’s case, which simply put, is that hell hath no fury like a woman—or women—scorned.” Appellant’s Br. p. 16.

¹ Because Byers makes no separate analysis under the Indiana Constitution, we address these arguments together.

The State first argues that any issue regarding Byers's sexual history with B.A. or Furgason is waived because he did not timely file his notice of intent to introduce such evidence. Indiana Evidence Rule 412(b)(1) requires a party proposing to offer evidence of past sexual conduct to file a written motion at least ten days before trial describing the evidence. "For good cause, a party may file such motion less than ten days before trial." Ind. Evidence Rule 412(b)(1). Defense counsel explained that she filed the motion late because she was preparing for another trial. After hearing arguments on this issue, the trial court acknowledged the violation of the procedure set out in Indiana Evidence 412 but stated it was "not inclined to deny it for that reason." Tr. pp. 18-19. Based on this ruling, we assume the trial court found good cause for the delay and conclude that the issue is not waived because the motion was untimely filed.

Regarding B.A.'s sexual relationship with Byers, the trial court ruled at a pretrial hearing that defense counsel would be permitted to inquire about the past sexual conduct. During trial, B.A. was cross-examined regarding her relationship with Byers. The following exchange occurred between B.A. and defense counsel:

Q Although the relationship ended, you continued with a physical relationship with him; is that right?

A Yes.

Q You had sex with him?

A Yes.

Q After you had broke up?

A Yes.

Q And you had sex with him in 2008?

A 2007.

Q 2007?

A Yes.

Q Months before this incident; fair to say?

A Yes.

Q He was married?

A Yes. Oh, no, not at the time.

Q He was with someone?

A Yes.

Id. at 58. Defense counsel then began questioning B.A. about the night of the offense.

The record does not show that the trial court somehow prohibited Byers from cross-examining B.A. about the timing of their sexual relationship. Further, nothing in the record suggests that Byers was prohibited from exploring his claim that “he was lying to [B.A.] once again and was actually married to someone else.” Appellant’s Br. p. 16. Byers has not established that his Sixth Amendment right to confront B.A. was violated or that any evidence was improperly excluded.

Regarding Furgason, at the pre-trial hearing, the trial court concluded that Furgason’s 2005 sexual relationship with Byers was too remote in time to be relevant to the December 2008 allegations involving B.A. During trial, defense counsel briefly cross-examined Furgason but did not reassert this issue or make an offer of proof.

“Indiana practice on preservation of error about exclusion of evidence requires the proponent, out of the hearing of the jury, to propose certain questions and give the court a chance to rule, and make an offer of proof.” Baker v. State, 750 N.E.2d 781, 786 (Ind. 2001). This procedure allows the trial court to reconsider admissibility at that time and creates a record for appeal. Id. “Failure to follow this practice forfeits appellate review even when the trial court earlier granted a motion in limine.” Id. Because Byers did not make a timely offer of proof, this issue is forfeited.

Forfeiture notwithstanding, “A defendant’s Sixth Amendment right of confrontation requires that he be afforded an opportunity to conduct effective cross-examination of state witnesses in order to test their believability.” McQuay v. State, 566 N.E.2d 542, 543 (Ind. 1991). “However, this right is subject to reasonable limitations placed at the discretion of the trial judge.” Id. “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 106 S. Ct. 1431, 1435 (1986)). 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.” Evid. R. 401. “Evidence which is not relevant is not admissible.” Evid. R. 402.

Here, the 2005 sexual relationship between Furgason and Byers, without more, has nothing to do with Furgason’s credibility as a witness or whether Byers committed the

offense against B.A. in 2008. Byers was free to question Furgason's objectivity as B.A.'s best friend and did so at trial. Thus, even if evidence of the past sexual relationship was admissible under Indiana Evidence Rule 412(a)(1)² as evidence of a witness's past sexual conduct with the defendant, it was within the trial court's discretion to determine that the evidence was inadmissible because it was irrelevant. Further, because the evidence was irrelevant, Byers has not established that he was denied his Sixth Amendment right to confront Furgason.

² Indiana Evidence Rule 412 provides:

(a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:

(1) evidence of the victim's or of a witness's past sexual conduct with the defendant;

(2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;

(3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or

(4) evidence of conviction for a crime to impeach under Rule 609.

(b) If a party proposes to offer evidence under this rule, the following procedure must be followed:

(1) A written motion must be filed at least ten days before trial describing the evidence. For good cause, a party may file such motion less than ten days before trial.

(2) The court shall conduct a hearing and issue an order stating what evidence may be introduced and the nature of the questions to be permitted.

(c) If the state acknowledges that the victim's pregnancy is not due to the conduct of the defendant, the court may instruct the jury accordingly, in which case other evidence concerning the pregnancy may not be admitted.

Conclusion

Byers has not established that certain evidence was improperly excluded or that he was denied the right to confront B.A. or Furgason. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.