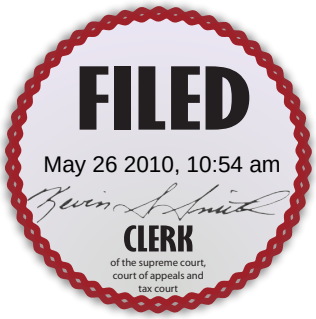

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COURT OF APPEALS OF INDIANA

JOHN PEMBERTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0910-CR-1054
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0902-FA-26393

May 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant John Pemberton appeals following his conviction for Child Molesting,[1] a class A felony. Pemberton raises the following arguments: (1) the trial court erroneously admitted evidence of prior bad acts in violation of Indiana Evidence Rule 404(b); (2) the prosecutor committed misconduct during the trial; (3) the evidence was insufficient to support the conviction; (4) the trial court ran afoul of the rule in Blakely v. Washington[2] by finding a sentencing aggravator without the assistance of a jury; and (5) Pemberton received the ineffective assistance of trial counsel. Finding no reversible error, we affirm.

FACTS

Pemberton's cousin, Melinda, has a daughter, R.B., who is approximately twenty-six years younger than Pemberton. R.B. and her family lived in Nebraska but traveled to Speedway frequently to visit their extended family, including Pemberton. When R.B. was young, she and Pemberton, who called her his "little angel," were very close. Tr. p. 269, 272.

In 1998, when R.B. was approximately seven years old, Pemberton shared a bed with R.B. and her little brother. R.B. awoke with Pemberton's hand in her underwear, his finger moving inside her vagina. R.B. pretended to be asleep and eventually, Pemberton stopped and went to sleep.

[1] Ind. Code § 35-42-4-3.

[2] 542 U.S. 296 (2004).

In 2000, when R.B. was approximately nine years old, Pemberton and R.B. were alone together. Pemberton pulled R.B.'s shirt up over her head and asked whether she would like a massage. As Pemberton massaged R.B.'s back, his hand began moving to her breasts. He asked her if she wanted a stomach massage and she told him no.

In August 2003, R.B. and her family were again visiting Indiana. She stayed with Pemberton and his wife, Rachel Johns. R.B. shared a bed with Pemberton and Rachel, positioned in between them. Rachel had taken sedatives and was soundly asleep. As R.B. was trying to go to sleep, Pemberton pulled down her pants and pulled up her shirt. R.B. pretended to be asleep. Pemberton tried to put his penis in her mouth but she kept her mouth shut. He then knelt over R.B. and tried to place his penis in her vagina, first using his fingers to penetrate her, then using his penis. His penis penetrated past the inner lips of R.B.'s vagina. She remained still, continuing to feign sleep. At some point, Pemberton apparently gave up, pulled R.B.'s nightclothes back into place, rolled over, and went to sleep.

For years, R.B. did not tell anyone about the incidents, though she made sure she was never alone with Pemberton again. In March 2008, when R.B. was about to graduate from high school, her older sister gave R.B. advice about what to expect from men at college. The conversation reminded R.B. of Pemberton's molestation nearly five years earlier, and R.B. began to cry. She told her sister what had happened and her sister later told their mother, Melinda. Melinda was horrified and called Pemberton, who admitted

that he had been "touching" R.B. for the past several years, did not know why, and apologized. Id. at 374-75.

Eventually, Nebraska and Indiana authorities became involved and conducted a joint investigation. Nebraska State Patrol Investigator Monty Lovelace decided to conduct a controlled telephone call, which required R.B. to telephone Pemberton to ask him about the crime from the police station.[3] Police officers were present and recorded the conversation. During the call, Pemberton said that he "regretted" the incident and that he only "remember[ed] bits and pieces" of what had happened on the night that R.B. was in bed with Pemberton and Rachel. State's Ex. 3 p. 2. Pemberton said, "I didn't even realize the whole time that it was even you," id. at 3, elaborating that "at some point I woke up, I remember being on top of you, and I touched an area on you that had pubic hair and that freaked me because Rachel did not, she shaved, and I was like holy sh*t what is going on here?" Id. at 4. He repeatedly apologized for "all the pain that's been caused." Id. at 4-5, 7.

On February 18, 2009, the State charged Pemberton with class A felony child molesting and class C felony child molesting for the 2003 incident. The State later added a third count of class C felony child molesting for the 1998 incident. The State eventually dismissed the two counts of class C felony child molesting because they were outside the statute of limitations. On February 19, 2009, Speedway Police Officer Trent Theobald interviewed Pemberton, and during the interview Pemberton admitted to

[3] This is a common investigative technique in Nebraska. Tr. p. 431.

touching R.B.'s pubic area, claiming that he touched her by mistake, believing her to have been his wife.

On July 29, 2009, the State filed a notice of its intent to use Rule 404(b) evidence, specifically citing the incidents that had occurred in 1998 and 2000. On September 18, 2009, the trial court issued an order permitting the State to introduce the evidence, noting that Pemberton had raised a claim of contrary intent and concluding that the evidence was "relevant and probative to the issue of absence of mistake or accident and/or the issue of intent." Appellant's App. p. 173. The trial court stated that a limiting instruction would be given to the jury when the evidence was introduced and during final instructions.

Pemberton's jury trial began on October 5, 2009. At the start of the trial, Pemberton renewed his motion to exclude the Rule 404(b) evidence, which the trial court denied. Pemberton did not object to the evidence when it was actually introduced. On October 6, 2009, the jury found Pemberton guilty as charged.

On October 14, 2009, the trial court held a sentencing hearing, finding that Pemberton's violation of a position of trust was an aggravator. The trial court also found the following mitigators: Pemberton's strong support network, the strong likelihood that he would be productive and respond well to rehabilitation, his lack of prior criminal history, and the fact that he voluntarily submitted to counseling before charges were filed. Pemberton did not raise a Blakely objection. The trial court imposed a thirty-year sentence, with twenty years executed, ten years suspended, and three years on sex offender probation. Pemberton now appeals.

DISCUSSION AND DECISION

I. Rule 404(b) Evidence

Pemberton first argues that the trial court erred by admitting the State's Rule 404(b) evidence. The admission of evidence is within the sound discretion of the trial court, and we will not reverse absent an abuse of that discretion. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2000).

Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." To admit Rule 404(b) evidence, the trial court must determine that (1) the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged offense and (2) the probative value of the evidence outweighs its prejudicial effect. Hooper v. State, 779 N.E.2d 596, 601 (Ind. Ct. App. 2002). Otherwise inadmissible evidence may become admissible where the defendant opens the door to questioning on that evidence. Kubsch v. State, 784 N.E.2d 905, 919 n.6 (Ind. 2003).

Here, we initially note that Pemberton failed to raise a contemporaneous objection to the admission of the evidence of his other uncharged molestations of R.B. during the trial. Thus, this issue has been waived. Swaynie v. State, 762 N.E.2d 112, 113 (Ind. 2002) (holding that rulings on motions in limine are not final decisions and do not preserve errors for appeal).

Waiver notwithstanding, we observe that Pemberton indicated from the beginning of the investigation that he intended to raise a defense of mistake or accident—specifically, he claimed that when he molested R.B. in 2003, he believed that he was touching his wife, not R.B. He said as much to R.B. when she phoned him from the Nebraska police station, and he also raised the same claim to Officer Theobald. Thus, the trial court concluded that the Rule 404(b) evidence, which tended to establish that Pemberton had molested R.B. on two past occasions, was relevant to dispute Pemberton's claim of mistake or accident. We cannot say that the trial court abused its discretion in this regard.

We note, also, that Pemberton's attorney raised this same defense in opening statements; thus, it was evident from the start that Pemberton intended to pursue this argument throughout the trial. Pemberton argues that he was forced to raise this defense by the State's references to the 404(b) evidence in its opening statements, but we cannot agree. The State reasonably relied upon Pemberton's consistent pretrial statements establishing his intent to raise the defense of mistake or accident; thus, it was entitled to include the Rule 404(b) evidence in its opening statements. Moreover, there is no evidence in the record supporting Pemberton's argument that he did not intend to raise this defense at trial. Therefore, we do not find that the trial court abused its discretion by admitting this evidence.

Pemberton also points to the fact that the trial court failed to give a limiting instruction to the jury at the time this evidence was introduced, notwithstanding its

pretrial promise to do so. Pemberton, however, failed to object to the absence of this instruction; thus, he has waived the argument. In any event, the trial court included a limiting instruction as part of the final jury instructions, which remedies its earlier failure to offer such an instruction. Therefore, any error was harmless and we decline to reverse on this basis.

II. Prosecutorial Misconduct

Next, Pemberton argues that the prosecutor committed misconduct in a number of different ways. In reviewing a claim of prosecutorial misconduct, first, we must determine whether, in fact, the prosecutor committed misconduct. Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). If we find that misconduct occurred, we must consider whether, under all circumstances of the case, the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. Surber v. State, 884 N.E.2d 856, 865 (Ind. Ct. App. 2008). The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

Here, Pemberton failed to raise contemporaneous objections to any of the alleged instances of prosecutorial misconduct. Thus, he has waived this issue on appeal. See Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (providing that to preserve a claim of prosecutorial misconduct, the defendant must raise a contemporaneous objection and request that the jury be admonished). Furthermore, on appeal, Pemberton's argument is

devoid of any citation to any rule of law that the prosecutor is alleged to have violated, which waives the argument in yet another way. Ind. Appellate Rule 46(A)(8)(A).

Waiver notwithstanding, Pemberton first argues that the prosecutor committed misconduct by referring to the Rule 404(b) evidence in its opening statement and closing argument. We disagree. The trial court had explicitly ruled that this evidence was admissible, and Pemberton had made it clear in his pretrial statements that he intended to claim that when he molested R.B., he believed that he was touching his wife. Furthermore, in describing this evidence to the jury, the prosecutor was merely fulfilling the purpose of the opening statement—"to inform the jury of the charges and the contemplated evidence." Vanyo v. State, 450 N.E.2d 524, 526 (Ind. 1983). Likewise, a closing argument may be based on any facts admitted into evidence at trial. Lambert v. State, 743 N.E.2d 719, 734 (Ind. 2001). Here, the Rule 404(b) evidence was, in fact, admitted into evidence. Thus, the prosecutor did not commit misconduct by referring to it during closing argument.

Next, Pemberton directs our attention to the portion of the opening statement in which the prosecutor highlighted Pemberton's silence. Pemberton, who did not testify at trial, argues that these statements run afoul of his right not to incriminate himself and constitute prosecutorial misconduct. When taken in context, however, it is evident that the prosecutor was not, in fact, referring to Pemberton's failure to testify:

> Let's go back to the phone call [between R.B. and Pemberton]. R.B. pauses after each statement. She gives the defendant an opportunity

> to say something. She wants to know what he's going to say. He stays silent.
>
> ***
>
> After each and every statement she makes, she pauses. Does the defendant correct her? No. He adopts her statements by staying silent.
>
> ***
>
> And again, put yourself in that place. If someone is accusing you of molest and you didn't do it, you say, "I didn't do it. No, I didn't put my penis to your mouth. No, I didn't try to have sex with you. No, I didn't use a vibrator."
>
> Never in that whole call do you hear that. And he was given plenty of opportunity to do so.

Tr. p. 504-05; 523. It is evident that the prosecutor was referring to Pemberton's silence in the face of R.B.'s questions on the telephone call rather than Pemberton's silence at trial. Thus, Pemberton has failed to establish misconduct on this basis.

Pemberton also argues that the prosecutor committed misconduct by arguing, during closing argument, that Pemberton had groomed R.B. and formulated a plan to molest her over the years. Attorneys are permitted, however, to argue for any logical or reasonable conclusions that may be drawn from the admitted evidence. Cooper, 854 N.E.2d at 835-37. Thus, there was no misconduct for this reason.

Additionally, Pemberton contends that the prosecutor improperly vouched for R.B.'s credibility during closing argument. Specifically, the prosecutor said that R.B. is "credible," "consistent," and "never once changed her details." Tr. p. 501. An attorney may voice a personal opinion regarding witness credibility during closing argument if the

opinion is clearly based upon the facts admitted into evidence. Lopez v. State, 527 N.E.2d 1119, 1127 (Ind. 1988). Here, the prosecutor's remarks about R.B. were based upon the evidence; thus, there was no misconduct in this regard.

Pemberton argues that the State improperly vouched for its own prosecutor's office, implying that only factually verified cases are filed. During Officer Theobald's testimony, the prosecutor asked him to describe how a case was investigated, screened, and brought to trial. Inherent in the officer's testimony was the simple fact that law enforcement officers at all stages of the investigation found R.B.'s accusations to be credible. This evidence, which helped the jury to understand the course of the investigation, was relevant, and the prosecutor did not commit misconduct by eliciting the testimony.

Finally, Pemberton contends that the State elicited irrelevant evidence. Specifically, he points to testimony regarding a video camera that was in Pemberton's room on the night of the molestation.[4] The State asked Officer Theobald if the State had investigated whether a videotape of the incident existed; Officer Theobald testified that the State had investigated but had found no evidence of a recording. Initially, we note that we find no misconduct in the introduction of this testimony. Furthermore, this evidence, which establishes that no video recording was made, inures to Pemberton's benefit rather than his detriment. Thus, he has failed to establish that he was subjected to grave peril in this regard.

[4] Pemberton referred to the camera during his telephone conversation with R.B.

III. Sufficiency of the Evidence

Pemberton next argues that there is insufficient evidence supporting his conviction. In reviewing the sufficiency of the evidence supporting a conviction, we will neither reweigh the evidence nor assess witness credibility, respecting the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We will affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable factfinder to find the defendant guilty beyond a reasonable doubt. Id. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Hampton v. State, 921 N.E.2d 27, 28 (Ind. Ct. App. 2010).

To convict Pemberton of class A felony child molesting, the State was required to prove beyond a reasonable doubt that he performed or submitted to sexual intercourse or deviate sexual conduct with R.B. when she was under fourteen years of age and he was over twenty-one years of age. I.C. § 35-42-4-3(a). "Sexual intercourse" is defined as "an act that includes any penetration of the female sex organ by the male sex organ." Ind. Code § 35-41-1-26. "Deviate sexual conduct" means, in relevant part, an act involving the penetration of the sex organ of a person by an object. I.C. § 35-41-1-9; see, e.g., Low v. State, 580 N.E.2d 737, 740 n.2 (Ind. Ct. App. 1991) (holding that a finger is an "object" within the meaning of this statute).

The uncorroborated testimony of a victim, alone, is ordinarily sufficient to sustain a conviction for child molesting. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000).

We will make an exception to the rule and reevaluate witness credibility only in cases of "incredible dubiosity," that is, "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt." Id.

Here, Pemberton argues that R.B.'s testimony qualifies as incredibly dubious. We cannot agree. Despite R.B.'s sister's encouragement to tell their mother and Melinda's decision to confront Pemberton and call the authorities, there is no evidence that R.B.'s testimony is the result of coercion. Instead, the record reveals that R.B. was reluctant to voice her accusation against a beloved family member and was also reluctant to revisit such a painful part of her past. By the time proceedings were instituted and R.B. testified at trial, there is no evidence whatsoever that she was reluctant to do so or testifying under duress.

Furthermore, R.B.'s testimony that Pemberton inserted his penis into her vagina was unequivocal. Specifically, she testified repeatedly that Pemberton knelt over her, penetrating the inner lips of her vagina with his penis. Tr. p. 280, 336. At no point during direct or cross-examination did she contradict that version of events. Therefore, we decline to apply the incredible dubiosity rule herein and will not assess R.B.'s credibility.

Turning to the evidence in the record, the State established that at the time of the incident, Pemberton was over twenty-one years of age and R.B. was under fourteen. On the night in question, Pemberton pulled down R.B.'s pants, knelt over her, and inserted

his penis past the inner lips of her vagina. That evidence is sufficient to sustain his conviction.

Pemberton points out that R.B. testified that he did not have an erection at the time of the molestation, arguing that there is no way penetration could have occurred in the absence of an erection. The State is not required to prove that the defendant had an erection, however, and R.B. testified unequivocally that Pemberton inserted his penis into her vagina. Pursuant to the statutory definition, therefore, a reasonable factfinder could have concluded that sexual intercourse occurred. I.C. § 35-41-1-26; see also Spurlock v. State, 675 N.E.2d 312, 315 (Ind. 1996) (holding that "[p]roof of the slightest penetration is sufficient to sustain convictions for child molesting and incest").

Pemberton also argues that the State failed to prove that he acted knowingly. See Louallen v. State, 778 N.E.2d 794, 797 (Ind. 2002) (holding that the State must prove that the defendant acted knowingly, rather than intentionally, to convict the defendant of class A felony child molesting). Our Supreme Court has explained that "[t]he intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." Bowles, 737 N.E.2d at 1152.

Here, twelve-year-old R.B. was in bed between Pemberton and his wife. Pemberton pulled down her pants and pulled up her shirt, tried to put his penis in her mouth, inserted his fingers into her vagina, and then inserted his penis into her vagina. There is undisputed evidence in the record that Pemberton also molested R.B. on at least

two prior occasions. Given this evidence, it was reasonable for the jury to infer that Pemberton acted knowingly during the incident in question. Pemberton's arguments to the contrary amount to a request that we reweigh the evidence, which we may not do. We find that the evidence supports the conviction.

IV. Sentencing

Pemberton next argues that the trial court's sentencing order ran afoul of the rule announced in Blakely v. Washington because it found an aggravator without the assistance of a jury. Although the Indiana General Assembly has since amended the criminal sentencing statutes to an advisory sentencing scheme, the older, presumptive scheme applies to Pemberton because he committed the crime in 2003, when the older sentencing scheme was in place. Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). Thus, Pemberton is correct that Blakely applies, so any aggravating factors should have been found by a jury rather than the trial court. Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005).

That said, Pemberton did not raise a contemporaneous objection on these grounds. Given that he was tried and sentenced in October 2009, years after Blakely and Smylie were decided, he should have raised this objection and has waived the argument as the result of his failure to do so.

Waiver notwithstanding, we note that even though the aggravator should have been found by a jury, the error is harmless. The trial court imposed a thirty-year sentence on Pemberton, which was the presumptive term for a class A felony under the prior

sentencing scheme. Because no judicially-found facts were used to enhance the sentence above the presumptive term, the sentence herein does not run afoul of Blakely. Therefore, we decline to remand on this basis.

V. Assistance of Trial Counsel

Finally, Pemberton contends that he received the ineffective assistance of trial counsel. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. If a claim of ineffective assistance is made on the basis of the defense attorney's failure to object, the defendant must establish that a proper objection would have been sustained by the trial court. Lowery v. State, 640 N.E.2d 1031, 1042 (Ind. 1994).

Pemberton argues that trial counsel was ineffective in the following ways: (1) failing to object to the Rule 404(b) evidence at trial or to seek to have the transcripts of the telephone conversation between R.B. and Pemberton redacted; (2) eliciting additional Rule 404(b) testimony that was not contained in the transcript; (3) failing to object to the alleged instances of prosecutorial misconduct detailed here; (4) failing to seek limiting instructions regarding the State's label of R.B. as a "victim" and to deny the "drum beat parade of witnesses that testified that R.B. told them Pemberton touched her inappropriately in the past," appellee's br. p. 29; (5) failing to request a jury for sentencing; and (6) failing to request a jury instruction on mens rea that included a requirement that the State prove intentional conduct.

Initially, we note that Pemberton merely lists all of these alleged deficiencies without explanation. He includes no citation to authority or explanation as to why the conduct was allegedly ineffective or how he was prejudiced as a result. He has, therefore, waived this argument.

Waiver notwithstanding, we note that we have already found herein that the Rule 404(b) evidence was properly admitted, that Pemberton has failed to establish prosecutorial misconduct, that any error resulting from the absence of a jury at sentencing was harmless, and that the State was only required to prove that Pemberton acted knowingly, rather than intentionally. Consequently, he has failed to establish that he was prejudiced as a result of his trial counsel's alleged ineffectiveness on these matters.

As to counsel's decision to elicit additional Rule 404(b) evidence, we note that on cross-examination, counsel asked R.B. about an occasion on which Pemberton visited her in Nebraska and went swimming with R.B. and her siblings. They played a game in which one person stood in the middle of the pool with his or her legs apart and challenge the others to swim from one end of the pool to the other, swimming through the challenger's legs in the process. Pemberton played the game, and when he swam through R.B.'s legs, he flipped over and swam facing up. Although we acknowledge that in the context of the other evidence in the record, this incident takes on a somewhat sinister tone, this evidence was most likely elicited to show the innocent nature of the acts R.B. was claiming made her uncomfortable. We will defer to counsel's trial strategy and tactics herein and decline to find ineffective assistance on this basis. Moreover, in light of the compelling evidence establishing Pemberton's guilt, including R.B.'s testimony and Pemberton's admission that he touched her genitals on the night in question, Pemberton has failed, in any event, to establish that he was prejudiced as a result of this evidence.

As to the label of R.B. as a "victim," Pemberton has failed to explain why this label is improper. Moreover, he has failed to establish that if his trial counsel had requested a limiting instruction or objected in some fashion, the request or objection would have been granted. Thus, we decline to find ineffective assistance on this basis.

Moreover, Pemberton similarly fails to elaborate on his argument that the State offered an inappropriate "drum beat parade of witnesses" testifying that R.B. had told

them that Pemberton molested her in the past. Appellee's Br. p. 29. The record reveals that, to the contrary, only R.B.'s sister and mother testified in that regard. The investigating police officers also testified and related what R.B. had told them during course of the investigation. This hardly constitutes a "drum beat parade of witnesses" such that the trial court would have granted a request for a limiting instruction. Thus, we decline to find ineffective assistance in this regard.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.