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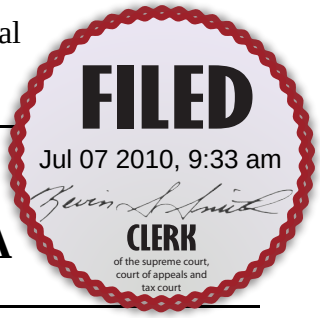

IN THE COURT OF APPEALS OF INDIANA

BRIAN L. RIKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 14A01-0909-CR-451
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobecki, Judge
Cause No. 14D01-0806-FB-526

July 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Brian L. Riker was convicted after a jury trial of two counts of sexual misconduct with a minor,[1] each as a Class B felony, one count of attempted sexual misconduct with a minor[2] as a Class B felony, one count of sexual battery[3] as a Class D felony, and six counts of contributing to the delinquency of a minor,[4] each as a Class A misdemeanor and was given a twenty-year aggregate sentence. He appeals, raising the following restated issues:

I. Whether the trial court erred when it excluded evidence regarding the sexual history of the victims;

II. Whether the State committed prosecutorial misconduct during its closing argument;

III. Whether impeachment evidence was improperly excluded;

IV. Whether sufficient evidence was presented to support Riker's convictions; and

V. Whether the trial court properly instructed the jury.

We affirm.

FACTS AND PROCEDURAL HISTORY

On Friday, January 19, 2008, P.H. and C.M., who at the time were sixteen and fourteen respectively, spent the night at the home of their friend, A.Y., who is Riker's daughter. Riker's wife was out of town for the weekend. During this sleepover, Riker opened a bottle of Goldschlager liquor and poured shots for P.H. and C.M., who had a

[1] *See* Ind. Code § 35-42-4-9(a)(1).

[2] *See* Ind. Code §§ 35-42-4-9(a)(1), 35-41-5-1.

[3] *See* Ind. Code §35-42-4-8.

[4] *See* Ind. Code § 35-46-1-8.

drinking contest. P.H. "won" the drinking contest by consuming at least seven shots. *Tr.* at 228-29, 360. After the other girls went to sleep, P.H. and Riker were sitting on the sofa, and Riker grabbed P.H.'s arm and placed her hand on his crotch on the outside of his pants. P.H. pulled her arm away.

The next night, Saturday, January 20, P.H., C.M., L.S., T.S., and A.Y. attended a dance at Riker's dance hall, La Bamba. La Bamba is located in Washington, Indiana, open to all ages, and does not allow alcohol inside. After the dance, the girls spent the night at Riker's house. When Riker drove them to his house, there was a package of Corona beer in the vehicle. Riker offered the girls some of the beer when they arrived at the house, and L.S., who was fifteen at the time, accepted. L.S. drank three bottles of beer and three shots of Goldschlager, which Riker poured from the previously-opened bottle. Riker had previously commented to T.S. that her sister, L.S., looked older than she was. *Id*. at 332. L.S. had never drunk as much before and felt "a little tipsy" afterwards. *Id*. at 190. All of the other girls had fallen asleep, and Riker suggested that he take L.S. to the bathroom. L.S. could not walk on her own. When they reached the bathroom, L.S. leaned against the sink, and her pants were down. Riker put his penis in L.S.'s vagina and was going "back and forth." *Id*. at 191. He then turned L.S. around and attempted to insert his penis in her "butt." *Id*. at 192. L.S. screamed and told Riker that it hurt. *Id*. Riker then put his penis in L.S.'s mouth, and she vomited on him. Riker attempted to pull L.S.'s pants back up, but he was unable to properly latch her belt.

L.S. went to the kitchen and vomited in the kitchen sink. She then went and lay down on the sofa. Riker sat down beside her and told her that she was prettier than P.H.

Id. at 194. He then asked L.S. her age, and she told him she was fifteen years old. *Id*. at 195. P.H. awoke and saw L.S. lying on the sofa with Riker next to her. P.H. observed Riker touching L.S.'s face with a washcloth. The next morning, L.S. was sitting on the sofa listening to her iPod and did not want to talk to anyone. L.S. told A.Y. that she had gotten sick, and A.Y. offered to let her wash her clothes and take a shower, but L.S. declined. All of the girls except for L.S. cleaned up the house before Riker's wife came home so she would not be angry.

Although Riker had told L.S. not to tell anyone about what had happened, L.S. eventually told C.M., who urged her to tell her parents. L.S. did not tell her parents at that time and tried to forget about the incident. Between the time of the incident and Easter, L.S. was quieter more than usual, more of a loner, and seemed to be emotionally "blocking everything." *Id*. at 162. On Easter morning, L.S. told her mother about what Riker had done.

On June 17, 2008, the State charged Riker with two counts of sexual misconduct with a minor, each as a Class B felony, one count of attempted sexual misconduct with a minor as a Class B felony, one count of sexual misconduct with a minor as a Class C felony, six counts of contributing to the delinquency of a minor, each as a Class A misdemeanor, and six counts of furnishing alcohol to a minor, each as a Class C misdemeanor. The State later amended the six counts of furnishing alcohol to a minor to Class B misdemeanors and the C felony sexual misconduct with a minor count to one count of sexual battery as a Class D felony. A jury trial was held, at the conclusion of which Riker was found guilty as charged. At the sentencing hearing, the trial court

vacated the six counts of furnishing alcohol to a minor because of double jeopardy concerns and sentenced Riker to an aggregate sentence of twenty years on the remaining counts. Riker now appeals.

DISCUSSION AND DECISION

I. Exclusion of Evidence

The admission or exclusion of evidence is entrusted to the discretion of the trial court. *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004), *trans. denied* (2005). We will reverse a trial court's decision only for an abuse of discretion. *Id.* We will consider the conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.*

Riker argues that the trial court erred when it excluded any evidence concerning the sexual activity, or lack thereof, of any of the State's witnesses. He contends that this was error because the trial court's ruling prohibited the presentation of any defense testimony to rebut the State's evidence. Riker claims that this case involved sex, and he should have been allowed to present evidence to rebut the State's evidence regarding such activity.

Initially, we note that Riker failed to object or make any offer of proof regarding the exclusion of evidence. In fact, prior to trial, when the trial court discussed the State's motion in limine to exclude evidence pertaining to the subject of L.S.'s virginity, Riker's

counsel stated, "We don't object to that, Your Honor." *Tr*. at 60. "Generally, the failure to object, and thereby properly preserve an issue for appeal, results in waiver." *Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004). However, in an effort to avoid waiver, Riker contends that the exclusion of evidence constituted fundamental error. We note that the fundamental error rule is extremely narrow. *Kimbrough v. State*, 911 N.E.2d 621, 634 (Ind. Ct. App. 2009). "Fundamental error occurs only when the error 'constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'" *Id*. (quoting *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002)).

A defendant's right to present a defense is not absolute. *Well v. State*, 904 N.E.2d 265, 271 n.1 (Ind. Ct. App. 2009) (citing *Roach v. State*, 695 N.E.2d 934, 939 (Ind. 1998)), *trans. denied*. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. *Id*. (quotations omitted).

Indiana Evidence Rule 412 states in pertinent part:

> (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.

See also Ind. Code § 35-37-4-4(a), (b). Additionally, the rule sets out certain procedures that must be followed in order to introduce evidence allowed by the rule, including a written motion and a hearing. Ind. Evidence Rule 412(b).

Here, Riker appears to argue that he should have been allowed to present evidence regarding past sexual conduct of the victims in order to rebut the evidence presented by the State. In his brief, he asserts that the "four complaining witnesses are most certainly not virgins" and that the "defense had sex partners [of the victims] ready to testify." *Appellant's Br*. at 13. He makes no contention that the evidence he wished to present at trial fell within any of the listed exceptions of Evidence Rule 412. It merely appears that Riker wanted to be allowed to present evidence of the past sexual history of the victims for purposes not allowed under the rule. The trial court did not preclude Riker from attacking the witnesses' credibility; it only properly limited the manner in which he could do so. The evidence of prior sexual history sought to be admitted by Riker fell within the scope of Evidence Rule 412 and failed to meet any of the exceptions. We therefore conclude that the trial court did not err in excluding the evidence.

II. Prosecutorial Misconduct

Riker argues that the State committed prosecutorial misconduct in its closing argument. He specifically contends that the State's use of a demonstrative exhibit and a comment made by the State during its closing argument rose to the level of misconduct. In reviewing a claim of prosecutorial misconduct, we must first determine whether the prosecutor engaged in misconduct. *VanWanzeele v. State*, 910 N.E.2d 240, 249 (Ind. Ct.

App. 2009), *trans. denied*. If so, we then determine whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. *Id*. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006).

Riker argues that the State committed prosecutorial misconduct in its use of a demonstrative exhibit during its closing argument, arguing that nothing in the record supported the demonstration. During its closing, the prosecutor poured Corona beer and Goldschlager into a container as a demonstration of the amount of alcohol that L.S. consumed on the night of January 20, 2008. This demonstration was based on the testimony of L.S. that she drank three bottles of Corona beer and three shots of Goldschlager that night. *Tr*. at 190. Riker objected, and the trial court overruled the objection, stating that the demonstration properly characterized the evidence presented during the trial. *Id*. at 575. Riker has not shown how this demonstration by the State placed him in a position of grave peril or what persuasive effect it had on the jury's decision. We therefore conclude that the use of this demonstrative exhibit by the State did not constitute prosecutorial misconduct.

Riker next contends that the State committed prosecutorial misconduct in a comment made by the prosecutor during the closing argument. "When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury." *Cooper*, 854 N.E.2d at 835. If the party is not satisfied with the admonishment, then he or she should move for mistrial. *Id*. Failure to request an

admonishment or to move for mistrial results in waiver of the issue on appeal. *Id.* Here, Riker did not object to the prosecuting attorney's comment, and there is no indication in the record that he ever requested that the jury be admonished. As such, he has waived this argument for purposes of appeal.

III. Impeachment Evidence

Riker argues that certain impeachment evidence was improperly excluded from his trial. As previously stated, the admission or exclusion of evidence is entrusted to the discretion of the trial court and will only be reversed for an abuse of that discretion. *Farris*, 818 N.E.2d at 67. Riker first contends that the trial court erred when it did not allow him to use as impeachment evidence a "retraction" letter allegedly written by P.H. recanting her story. He next asserts that the State committed a *Brady*[5] violation by withholding evidence of P.H.'s participation in alleged criminal activity and a police report regarding the truthfulness of L.S.'s statement to the police.

Generally, error may not be predicated upon a ruling which excludes evidence unless the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked. Ind. Evidence Rule 103(2). In order to preserve the exclusion of evidence for appellate review, a defendant must make an offer of proof, setting forth the grounds for admission of the evidence and the relevance of the testimony. *Farmer v. State*, 908 N.E.2d 1192, 1201 (Ind. Ct. App. 2009). To the extent that Riker is arguing that the trial court erred in

[5] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

excluding the evidence, in our review of the record, we do not find that Riker made an offer of proof regarding any of the evidence he now claims was improperly excluded. By failing to make an offer of proof, Riker has failed to preserve any error with regard to this evidence.

Further, to the extent Riker is arguing that the State committed a *Brady* violation by failing to disclose certain evidence, we find that this argument has been waived. Pursuant to Indiana Appellate Rule 46(A)(8)(a), "[t]he argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." Here, Riker fails to include any citations to authority or to the record to support his argument regarding the State's failure to disclose evidence. Therefore, this argument is waived.

IV. Sufficient Evidence

Our standard of reviewing claims of sufficiency of the evidence is well settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Mork v. State*, 912 N.E.2d 408, 411 (Ind. Ct. App. 2009) (citing *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)). We do not reweigh the evidence or assess witness credibility. *Id*. We consider conflicting evidence most favorably to the trial court's ruling. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id*. The evidence is sufficient if an inference may reasonably be drawn from

it to support the verdict. *Id*. A conviction may be based upon circumstantial evidence alone. *Bockler v. State*, 908 N.E.2d 342, 346 (Ind. Ct. App. 2009).

Riker initially challenges the credibility of the State's witnesses, claiming that they did not testify truthfully at trial because their testimony differed from that given during a pretrial deposition. Inconsistencies between a witness's pretrial statement and her trial testimony do not make the testimony inherently contradictory such that the incredible dubiosity rule applies.[6] *Corbett v. State*, 764 N.E.2d 622, 626 (Ind. 2002). This court will not assess the credibility of witnesses. *Mork*, 912 N.E.2d at 411. Therefore, any inconsistencies in the witnesses' testimony were for the jury to weigh and consider. *See Beckham v. State*, 531 N.E.2d 475, 476 (Ind. 1988) (question of whether child victim's testimony, which was inconsistent at times, was to be believed was for the jury to determine).

Riker next contends that insufficient evidence was presented to support his convictions for sexual misconduct with a minor because no "supportive medical evidence" was presented at trial. *Appellant's Br*. at 11. He claims that such medial testimony is required to prove a "rape" case. Initially, we note that Riker was not charged with rape; his convictions were for sexual misconduct with a minor as Class B felonies, which did not require proof of force. *See* Ind. Code § 35-42-4-9(a)(1). Further, the State of Indiana does not require "mandatory medical evidence" to prove sexual misconduct with a minor, and a criminal conviction may be based upon circumstantial

[6] Under the incredible dubiosity rule, a defendant's conviction may be reversed where a sole witness presents improbable testimony that there is a total lack of circumstantial evidence. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002).

evidence alone. *Bockler*, 908 N.E.2d at 346. Here, L.S. testified that Riker inserted his penis into her vagina, attempted to insert his penis into her "butt," and placed his penis in her mouth. *Tr*. at 191, 192. We conclude that sufficient evidence was presented to support Riker's convictions.

Riker finally claims that insufficient evidence was presented to support a conviction for sexual misconduct with a minor as to P.H. because she was sixteen years old at the time of the incident. In order to convict someone of sexual misconduct with a minor, the State is required to prove that a person, at least eighteen years of age, performs sexual intercourse or deviate sexual conduct with a child, at least fourteen years of age but less than sixteen years of age. Ind. Code § 35-42-4-9(a). Therefore, Riker is correct that he could not be convicted of sexual misconduct with a minor as to P.H. However, the State did not charge him with, nor was he convicted of, such offense. The State charged and convicted Riker of sexual battery with regards to his conduct with P.H. In order to convict him of that offense, the State was required to prove that Riker, with intent to arouse or satisfy his own sexual desires or the sexual desires of another person, touched P.H. when she was compelled to submit to that touching by force or the threat of force. Ind. Code § 35-42-4-8(a). Therefore, P.H's age at the time of the incident did not matter, and sufficient evidence was presented to support Riker's conviction for sexual battery.

V. Jury Instruction

Riker seems to argue that the trial court abused its discretion when it refused to give his proposed jury instruction. As previously stated, pursuant to Indiana Appellate

Rule 46(A)(8)(a), "[t]he argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." Here, Riker fails to include any citations to authority or to the record to support his argument regarding the trial court abused its discretion in denying his proposed jury instruction. Therefore, this argument is waived.[7]

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.

[7] We note that Riker's appendix and the majority of his brief do not follow the Indiana Rules of Appellate Procedure. We caution his counsel that the appellate rules must be complied with in order to have an appeal determined on the merits. This failure to follow the rules of appellate procedure has impeded our review of his claims.