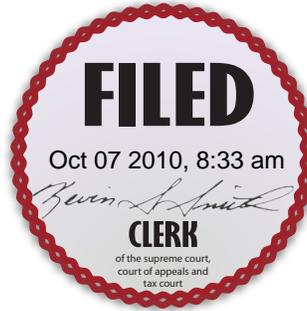


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LOUIS JENKINS,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 49A02-1003-CR-253

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0908-FC-74496

October 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Louis Jenkins appeals his conviction, following a jury trial, of child molesting, a Class C felony. Jenkins raises two issues on appeal, which we restate as 1) whether the trial court abused its discretion by excluding evidence regarding an alleged prior sexual incident involving the victim, and 2) whether sufficient evidence supports Jenkins's conviction. Concluding the trial court did not abuse its discretion, and the evidence is sufficient, we affirm.

Facts and Procedural History

In 2009, six-year-old A.D. was living in the custody of her father ("Father") and from time to time had overnight visitation with her mother ("Mother"). On June 4, 2009, Father dropped A.D. off at Mother's house, as he and Mother had agreed A.D. would spend the entire summer with Mother. A.D. testified that one evening, Jenkins, Mother's boyfriend, was also present at Mother's house. Jenkins "took [A.D.] upstairs" to the bathroom, pushed A.D. down, and locked the bathroom door. Transcript at 88-89. While A.D. was still "laying down a little," Jenkins touched A.D.'s "private part," meaning her vagina, with his finger on the outside of her clothing. Id. at 90. A.D. saw Jenkins was touching her "[b]etween [her] legs" and testified she "felt something a little bit." Id. at 90-91. A.D. asked Jenkins to stop and he stopped. Jenkins eventually opened the bathroom door, and A.D. went to Mother and asked to "go home with my daddy." Id. at 92.

On June 12, 2009, Father talked with A.D. on the phone, and the next day, Mother returned A.D. to Father's home. Father was worried about why A.D. had returned home

abruptly. The child custody order as between Mother and Father provided that Mother was not allowed to have Jenkins around when Mother was exercising her parenting time with A.D. Father asked A.D. if Jenkins had been at Mother's house, and A.D. initially said no. The next day, Father again asked A.D. if Jenkins had been there, and A.D. "kind of shrugged and put her shoulders in and went uh, uh." Id. at 117. After being asked the same question two or three more times, A.D. told Father that Jenkins had been at Mother's house. Father then called Mother and contacted the police.

The State charged Jenkins with child molesting, a Class C felony. The State filed a motion in limine seeking to exclude, under Indiana Rule of Evidence 412, any evidence that A.D. was previously touched in a sexual way "by another child or anyone else except [Jenkins]." Appellant's Appendix at 66. The State's motion was objected to by Jenkins and discussed at a pretrial hearing, where Jenkins's counsel and the deputy prosecutor informed the trial court that when A.D. was three or four years old, Mother walked in on A.D. and a male child with their pants down and the male child was rubbing A.D.'s vagina. Jenkins's counsel argued the prior incident would shed light on A.D.'s "experience and knowledge" of sexual activity, and the State argued such evidence was excluded by Indiana Rule of Evidence 412 and not within any of the Rule's exceptions. Tr. at 29-30. On the morning of trial, and following further argument by both counsel, the trial court granted the State's motion.

At Jenkins's jury trial, A.D. and Father testified for the State, and Mother testified on behalf of Jenkins that during June 2009, Jenkins was never at Mother's house when A.D. was there. The jury found Jenkins guilty as charged, and the trial court sentenced

him to six years with three years executed and three years suspended. Jenkins now appeals.

Discussion and Decision

I. Exclusion of Evidence

A. Standard of Review

The trial court's decision to admit or exclude evidence rests within its sound discretion and is reviewed for an abuse of discretion. Hinds v. State, 906 N.E.2d 877, 879 (Ind. Ct. App. 2009). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

B. Waiver of Issue

The State argues Jenkins waived any error in the trial court's exclusion of evidence by (1) not filing a pretrial motion requesting to offer the specific evidence under Indiana Rule of Evidence 412, and (2) not offering the evidence at trial following the trial court's adverse ruling in limine. Regarding the State's first argument, there is a split in the decisions of this court concerning whether the requirement of a pretrial motion applies whenever the proffered evidence is of prior sexual conduct by a victim or witness, or only when the evidence is sought to be admitted as one of Rule 412's enumerated exceptions.¹ Compare Graham v. State, 736 N.E.2d 822, 826 (Ind. Ct. App. 2000), trans. denied, with Sallee v. State, 777 N.E.2d 1204, 1211 n.6 (Ind. Ct. App. 2002), trans.

¹ Rule 412(b) provides:

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.

denied. Jenkins did not argue to the trial court that an exception to Rule 412 applied, but instead invoked his right of confrontation and cross-examination.

Regarding the State's second argument, our supreme court has applied to exclusions of evidence under Rule 412 the doctrine that any error in a trial court's ruling in limine is not preserved for appellate review unless the party offers the evidence at trial. Miller v. State, 716 N.E.2d 367, 370 (Ind. 1999). In another case, however, our supreme court held a pretrial offer of proof was sufficient when the issue was fully addressed at the pretrial hearing and immediately before the evidence would have been offered, the trial court "made its position plain" that it was not reconsidering its adverse order in limine. Baker v. State, 750 N.E.2d 781, 787 (Ind. 2001). Here, although no offer of proof was made at trial, the trial court addressed the issue immediately before the start of trial, and at the previous hearing Jenkins made clear what testimony he wanted to elicit. We need not decide whether Jenkins waived his claim of error because, in any event, we conclude the trial court did not abuse its discretion in excluding the evidence.

C. Prior Sexual Incident

Indiana Rule of Evidence 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.

Jenkins does not argue that any of the exceptions to Rule 412 apply, and they plainly do not. The trial court was correct to rule that evidence regarding the alleged prior sexual incident between A.D. and a male child was inadmissible under Rule 412.

However, Jenkins argues the trial court's exclusion of this evidence violated his right to confrontation and cross-examination under the Sixth Amendment to the United States Constitution and Article 1, section 13 of the Indiana Constitution. The constitutionality of Rule 412 as applied to exclude particular evidence offered by a defendant "remains subject to examination on a case by case basis." Sallee v. State, 785 N.E.2d 645, 651 (Ind. Ct. App. 2003) (quotation omitted), trans. denied. Jenkins directs us to Oatts v. State, 899 N.E.2d 714 (Ind. Ct. App. 2009), where this court held Rule 412 may be overridden by a defendant's Sixth Amendment rights where, in a prosecution for child molestation, the defendant shows a prior sexual incident involving the victim occurred and the prior incident was "sufficiently similar to the present sexual act to give the victim the knowledge to imagine the molestation charge." Id. at 725. In Oatts, however, the defendant failed to show a close resemblance between the prior acts and the present molestation; although the prior and the present acts both involved alleged sexual touching of the victim while in bed, no other specific similarities were adduced, and as a result, the prior acts were properly excluded from evidence. Id.

The prior incident alleged by Jenkins is similar to the present molestation only in the respect of being an alleged genital touching of A.D. The prior incident involved a male child who allegedly touched A.D. with her pants down, whereas in the present case, A.D. testified that Jenkins, an adult, touched her over her clothes. There is no indication

the prior incident led to A.D. or the boy getting in trouble for the touching, and hence, no indication the prior incident gave A.D. the knowledge that what she said Jenkins did was wrong and would cause trouble for Jenkins. Because Jenkins failed to show this prior incident was closely similar to the present molestation, the trial court did not abuse its discretion by excluding the evidence.

II. Sufficiency of Evidence

Jenkins argues the evidence is insufficient to support his conviction. When reviewing sufficiency of the evidence claims, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We neither reweigh the evidence nor judge witnesses' credibility. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). We will affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

A.D.'s testimony that Jenkins touched her vaginal area is sufficient to prove all elements of Class C felony child molesting. See Ind. Code § 35-42-4-3(b); Lockhart v. State, 671 N.E.2d 893, 903 (Ind. Ct. App. 1996). A.D.'s testimony on this point was unequivocal, and was maintained on cross-examination. Jenkins argues that other parts of A.D.'s testimony were contradicted by each other and by the testimony of other witnesses. However, the effect of such inconsistencies on A.D.'s credibility was a matter to be decided by the jury and does not implicate the incredible dubiousity exception to our standard of review. See Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). Despite

Mother's testimony that Jenkins was not at Mother's house and thus could not have molested A.D. during the time in question, the jury was free to disbelieve Mother on this point. The evidence is therefore sufficient to support Jenkins's conviction.

Conclusion

The trial court did not abuse its discretion by excluding evidence of an alleged prior sexual incident involving the victim, and sufficient evidence supports Jenkins's conviction of child molesting.

Affirmed.

MAY, J., and VAIDIK, J., concur.