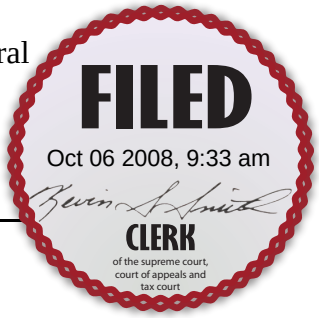
ATTORNEY FOR APPELLANT:

THOMAS J. O'BRIEN
O'Brien & Dekker
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

JAROD CHAFIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0801-CR-15
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0702-FB-10

October 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jarod Chafin appeals his convictions for five counts of class B felony child molesting and one count of class C felony child molesting. We affirm.

Issues

I. Did the trial court commit reversible error in denying Chafin's motion for severance?

II. Did the trial court abuse its discretion in admitting Chafin's statement regarding prior uncharged misconduct?

Facts and Procedural History

In February 2007, the State charged Chafin with nine counts of molesting ten-year-old C.W. and one count of molesting C.W.'s five-year-old sister, K.W., both of whom lived next door to Chafin and his parents. The charges alleged that Chafin fondled and performed oral and anal intercourse with C.W. and digitally penetrated C.W's anus and K.W.'s anus. Chafin filed a motion to sever the counts relating to C.W. from the count relating to K.W. The trial court denied the motion. On October 12, 2007, a jury found Chafin guilty on six of the nine counts regarding C.W. and not guilty on the three remaining counts. The jury did not return a verdict on the count regarding K.W. Chafin now appeals.

Discussion and Decision

I. Denial of Motion for Severance

Indiana Code Section 35-34-1-11(a) states,

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines

> that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Chafin contends that the ten child molesting offenses were joined solely because they were of the same or similar character and that therefore he had a right to a severance of the nine counts relating to C.W. from the one count relating to K.W. Chafin asserts that the trial court committed reversible error in denying his motion for severance.

We disagree. Even assuming, without deciding, that he was entitled to severance as a matter of right, Chafin must show that in light of what actually occurred at trial, the denial of a separate trial on the count relating to K.W. subjected him to prejudice. *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. Ct. App. 1999). Given that the jury did not find him guilty on the count relating to K.W., Chafin cannot make such a showing. *See id*. at 410 ("[E]ven had the offenses been erroneously united, it has long been the law of this state that acquittal of charges from one joined offense makes the misjoinder unavailable for reversal of the judgment.") (citing *Myers v. State*, 92 Ind. 390, 395 (1883)). Accordingly, we find no grounds for reversal.

II. Admission of Chafin's Statement

Eighteen-year-old Chafin testified on his own behalf at trial. When Chafin's counsel asked whether he had engaged in "inappropriate sexual contact" with C.W., Chafin responded, "Absolutely not. I find the act of sexual abuse towards children to be a violent

lascivious act." Tr. at 271, 272. Chafin's counsel resumed his questioning and did not move to strike this statement as nonresponsive.

On cross-examination, the prosecutor addressed Chafin as follows: "Now [counsel] cut you off on your answer when you were talking about child molesting acts. Please finish that answer about child molesting acts and what you feel about them?" *Id*. at 275. After a brief interruption by Chafin's counsel, the trial court told Chafin, "[Y]ou may finish the answer you intended to give." *Id*. at 275-76. Chafin responded as follows:

> What I was going to finish the sentence for was I believe that any sexual act towards [a] child is a vile and lascivious act I do not condone to the least bit. I --- I have so many things wrong with abusing a child, an innocent child who is --- they have their whole life ahead of them. Why should I ruin a kid's life. It's not only irresponsible, it's --- it's --- it's just plain wrong. There's no other words to describe it. I mean. I can't --- I can't really finish this answer because there's so many different ways to say how wrong it is. I --- I personally have always been against it. The fact that I'm accused just --- it just saddened me that the world has come to this. That you can just point the finger at someone and automatically they're in the trial for their life. It's just --- it's not right.

Id. at 276.

The prosecutor replied, "Okay. Tell us who [S.M.] is then if that's how you feel?" *Id*. Chafin's counsel objected and during a sidebar conference asserted that the prosecutor was "attempting to [elicit] some allegation, some prior unsubstantiated acts that my client may or may not have committed and, you know, in my opinion they're the ones that are opening the door to this." *Id*. at 277. The trial court noted that Chafin himself had "volunteered this information" and that if his answer to his counsel's question "had been no the door would not be opened." *Id*. at 278. The prosecutor informed the court that when Chafin was thirteen years old, he asked five-year-old S.M. "if he could touch her private parts and she told him

no." *Id*. at 280. According to the prosecutor, S.M.'s parents contacted the police, but no charges were filed; instead, Chafin's parents took him to counseling and made him apologize for his actions. *Id*. at 280.

The trial court told the prosecutor, "[W]hat you can ask [Chafin] is did you ask this child if you could touch her private parts. And if he said no I think you're stuck with that answer. And if he did --- if he says yes than that's impeached him. And he did open that door." *Id*. at 281. Chafin's counsel insisted that Chafin did not open the door and that the admission of such testimony would violate Indiana Evidence Rule 404(b). The trial court overruled the objection, and Chafin subsequently admitted that he had asked S.M. if he "could touch her private parts[.]" *Id*. at 284.

On appeal, Chafin again insists that he did not open to the door to the admission of his statement to S.M. and that the admission of the statement violated Evidence Rule 404(b). We disagree on both counts.

Our standard of review is well settled:

> [T]he admission of evidence is within the sound discretion of the trial court and the decision will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court.

Book v. State, 880 N.E.2d 1240, 1250 (Ind. Ct. App. 2008) (citation omitted), *trans. denied*.

We addressed a similar issue in *Crafton v. State*, 821 N.E.2d 907 (Ind. Ct. App. 2005):

> Indiana Evidence Rule 404(b) provides, in pertinent part, that:
>
> Evidence 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[.]
>
> This rule is designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so-called "forbidden inference." Thus, in assessing the admissibility of evidence under Ind. Evidence Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. To determine whether the trial court abused its discretion, we employ the same test. In addition, otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence. However, the evidence relied upon to "open the door" must leave the trier of fact with a false or misleading impression of the facts related.

Id. at 910-11 (citations and some internal quotation marks omitted). Evidence Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

Here, Chafin's statement to S.M. was relevant to a matter at issue other than his propensity to commit the charged molestations: namely, to Chafin's credibility, both in general and in reference to his gratuitous and sanctimonious comments regarding child sexual abuse. Given that Chafin's credibility was a central issue in this case, we cannot conclude that the probative value of his statement to S.M. was substantially outweighed by the danger of unfair prejudice. As such, the statement was admissible pursuant to Evidence Rule 404(b). In any event, Chafin opened the door to its admission by leaving the jury with a misleading impression regarding his abhorrence of child sexual abuse. In sum, we find no abuse of discretion in the admission of Chafin's statement and affirm his convictions.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.