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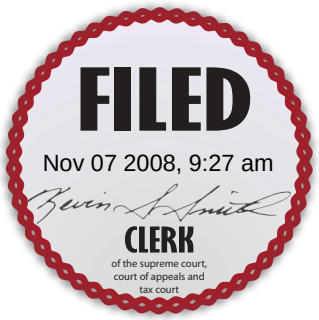


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# IN THE
# COURT OF APPEALS OF INDIANA

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| ERICK C. POLLOCK, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 17A03-0805-CR-229 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Kevin P. Wallace, Judge
Cause No. 17A03-0805-CR-229

**November 7, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Erick Pollock appeals his convictions for two counts of child molesting as class A felonies.[1] Pollock raises one issue, which we revise and restate as whether the trial court abused its discretion by allowing the admission of evidence regarding Pollock's past misconduct with the victim. We affirm.

The relevant facts follow. C.C. was born on January 4, 1990. When C.C. was three or four years old, Pollock married C.C.'s mother, Tara. In December 2003, while Pollock and C.C. were talking in the family room, Pollock told C.C. that he was afraid she was becoming sexually active and asked her if she was "thinking about having sex." Transcript at 231. Pollock then handed C.C. a glass of liquor, which she drank until she felt "a little woozy." Id. at 232. Pollock let her chase the liquor with a soft drink he was drinking, which was unusual because Pollock "doesn't let anyone drink after him." Id. Pollock then led C.C. to his and Tara's bedroom, closed the door, and began rummaging through a dresser in search of a vibrator. Pollock retrieved a vibrator and a dildo and, upon learning that the vibrator needed batteries, opened the bedroom door, gave some money to one of C.C.'s siblings, and sent him to a nearby gas station to buy batteries. When C.C.'s sibling returned to the bedroom, he "passed the batteries through[,] and the door shut." Id. at 236.

[1] Ind. Code § 35-42-4-3 (1998) (subsequently amended by Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

Pollock then played a pornographic video on a television in the room, turned the vibrator on, and inserted it into C.C.'s vagina. Pollock asked C.C. if the vibrator "felt nice." Id. at 239. Then, Pollock tried to insert his penis into C.C.'s vagina, but C.C. pulled away, telling Pollock to stop because it "hurt really bad." Id. at 240. Around two months later, C.C. told her cousin, aunt, and uncle about what Pollock had done to her. Shortly thereafter, Dr. William Gouldy examined C.C. and found a small tear in her hymen.

The State charged Pollock with two counts of child molesting as class A felonies. On the first day of trial, C.C. testified that, when she was around eleven years old, she had a vaginal rash, and, because her Mother was not home at the time, she asked Pollock about it. She testified that Pollock took her into his and Tara's bedroom, told her to lie on the bed, and applied lotion to C.C.'s vagina. C.C. also testified that, when C.C. began to develop breasts, Pollock would ask her to lift up her shirt so he could look at them or touch them and often made remarks about them and compared them to her mother's breasts.[2]

Pollock objected to C.C.'s testimony regarding his having rubbed lotion on her vagina as inadmissible evidence of other crimes, wrongs, or acts under Ind. Evid. Rule 404(b). The trial court took the objection under advisement but deferred ruling on it. The next day, after hearing arguments from both attorneys outside the presence of the

jury, the trial court overruled the objection. After closing arguments, however, the trial court instructed the jury as follows:

> There has been evidence that the Defendant rubbed lotion on [C.C.'s] vaginal area when she was about eleven years old and commented on the size of her boobs in relation to the size of her mother's boobs. The jury is not allowed to infer from this evidence that the Defendant's character is such that he was [sic] a propensity to engage in conduct of the sort charged and that he acted in conformity with the character on the occasion at issue in these charges.

Id. at 512-513. The jury found Pollock guilty as charged. The trial court sentenced Pollock to twenty-five years for each count and ordered that the sentences be served concurrently.

The issue is whether the trial court abused its discretion by allowing the admission of evidence regarding Pollock's past misconduct with C.C. Specifically, Pollock argues that "the evidence of Pollock putting lotion on [C.C.'s] vagina could only lead to the forbidden inference that Pollock acted badly in the past, and that Pollock's present, charged actions conform with those past bad acts." Appellant's Brief at 9. The State, on the other hand, argues that evidence of the misconduct was probative of Pollock's preconceived plan or, alternatively, of his grooming behavior.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. Ware v. State, 816 N.E.2d 1167, 1175 (Ind. Ct. App. 2004). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the

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[2] Pollock did not object to this testimony and does not raise the issue on appeal.

facts and circumstances before the court. Id. However, the improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction. Id.

Evid. R. 404(b) provides:

> 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Courts utilize the following two-part test in determining the admissibility of evidence under 404(b). Piercefield v. State, 877 N.E.2d 1213, 1216 (Ind. Ct. App. 2007). First, a trial court must 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." Id. (quoting Wilson v. State, 765 N.E.2d 1265, 1270 (Ind. 2002)). Then the trial court must determine "whether the probative value of the evidence outweighs the prejudicial effect under Indiana Evidence Rule 403." Id. To determine whether the trial court abused its discretion, we employ the same test. Ware, 816 N.E.2d at 1175.

In Ware, we found that evidence of defendant's sexual activity with a child molesting victim while on vacation and outside the jurisdiction should not have been

admitted because of its prejudicial effect. Id. at 1176. The evidence at issue included that the defendant slept naked in the same bed with the victim during one trip and performed oral sex on the victim during a cruise. Id. at 1175. The State argued that the evidence was relevant to show the defendant's knowledge of the victim's age, but we concluded these sexual acts showed only defendant's propensity to commit sexual misconduct. Id. The State also theorized that the evidence was relevant to show that defendant was grooming the victim by taking him on extravagant vacations, and we held that the evidence may have had some relevance for that purpose, but that, ultimately, the prejudicial effect outweighed any probative value. Id. Still, we did not reverse the conviction because we failed to see how that evidence contributed to the guilty verdict considering the trial court's limiting instruction and other cumulative evidence. Id.

Likewise, in the present case, we conclude that C.C.'s testimony that Pollock rubbed lotion on her vagina shows Pollock's propensity to commit sexual misconduct. The incident occurred two years before the charged offenses and thus is too remote in time to constitute evidence of Pollock's common plan or scheme. See, e.g., Lannan v. State, 600 N.E.2d 1334, 1341 (Ind. 1992) (holding that evidence that defendant in a molestation case had fondled the victim and another girl in a truck a year before the offense for which defendant had been charged was inadmissible under Evid. R. 404(b)). Moreover, we cannot agree with the State that the incident exemplifies grooming behavior, defined as "'the process of cultivating trust with a victim and *gradually*

*introducing sexual behaviors* until reaching the point' where it is possible to perpetrate a sex crime against the victim." Piercefield, 877 N.E.2d at 1216 n.1 (quoting U.S. v. Johnson, 132 F.3d 1279, 1283 n.2 (9th Cir. 1997)) (emphasis added). Rather, the incident itself constitutes sexual behavior. Accordingly, we hold that the trial court abused its discretion in admitting the evidence. See Ware, 816 N.E.2d at 1176 (holding that the trial court erred in admitting the evidence of extra-jurisdictional sexual acts).

Nevertheless, C.C. testified that, when she began to develop breasts, Pollock would ask her to lift up her shirt so he could look at them or touch them and often made remarks about them and compared them to her mother's breasts. C.C. also testified that, after telling her that he was afraid she was sexually active, Pollock gave her a glass of liquor and took her to the bedroom, where he molested her with a vibrator and then tried to insert his penis into her vagina until she stopped him. Pollock does not challenge this testimony. Furthermore, as in Ware, the trial court here gave a limiting instruction regarding C.C.'s testimony about the lotion incident. When a limiting instruction is given that certain evidence may be considered for only a particular purpose, the law will presume that the jury will follow the trial court's admonitions. Id. Given the limiting instruction in this case and the fact that the challenged testimony was cumulative of other substantial independent evidence of Pollock's guilt, we find that Pollock has failed to demonstrate a substantial likelihood that the improperly admitted evidence contributed to

his verdict. See id. (finding that the defendant failed to demonstrate a substantial likelihood that the improperly admitted evidence contributed to his verdict).

For the foregoing reasons, we affirm Pollock's convictions for two counts of child molesting as class A felonies.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur