ATTORNEY FOR APPELLANT:

MATTHEW JON McGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DANIEL RAY MOORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-0903-CR-135
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0809-FB-802

November 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Daniel Ray Moore ("Moore") was convicted in Vanderburgh Superior Court of Class B felony criminal deviate conduct. Moore appeals and presents two issues for our review, which we restate as: (1) whether the trial court erred in admitting evidence regarding Moore's past behavior toward the victim, and (2) whether the trial court erred in permitting the prosecuting attorney to claim during the State's closing argument that the uncorroborated testimony of the victim was sufficient to support a conviction. We affirm.

Facts and Procedural History

J.W., the victim in this case, had known Moore since she moved to Evansville, Indiana in 2002. J.W. was good friends with Moore's daughter, had previously dated Moore's son, and regarded Moore as a father figure. Moore, however, was interested in a romantic relationship with J.W. J.W.'s son lived in the Evansville area with his father, who would not let J.W. have visitation with their son unless she "had a place to stay." Tr. p. 132. Moore therefore let J.W. live at his apartment. J.W. had previously stayed at an apartment rented by Moore, but Moore moved out after J.W. rejected his sexual advances. Approximately one year before the incident that led to the current conviction, Moore again let J.W. move into another apartment with him. In this apartment, Moore slept in one bedroom, and J.W. slept in the other. Yet again, Moore made unwelcome sexual advances toward J.W, who responded by putting a hook-and-eye lock on her bedroom door to keep Moore out.

On September 2, 2008, J.W. had been sick for a few days and went to bed after having taken half of a sleeping pill. Moore and a friend were in the living room drinking

alcoholic beverages. The fact that Moore had company made J.W. feel that she did not need to lock her door. At approximately 1:30 a.m., J.W. awoke to find her shorts around her ankles and Moore with his head between her legs, licking her vaginal area. J.W. became angry, physically repelled Moore, and telephoned the police.

Evansville Police Officer Michelle Wilson ("Officer Wilson") was one of the responding officers. When Officer Wilson asked Moore what had happened, Moore stated, "I was wrong," and "it happened before." Tr. pp. 125, 115. Moore was arrested and taken to the police station, where he was interrogated by Detective Michael Jolly ("Detective Jolly"). After signing a waiver of his Miranda rights, Moore told Detective Jolly that he had gone into J.W.'s bedroom to check on her and found her "laying in bed, cover kicked back, everything exposed. I was wrong, I won't say I wasn't." Tr. p. 191. Moore also admitted that he "touched" and "licked" J.W. Id. at 193. Moore also explained that J.W. had told him that he had done similar things before, but claimed not to remember any such behavior. When pressed, Moore stated, "Well her – yes. She put a lock on her door." Id. at 195. Moore claimed that he went to check on J.W "[be]cause she's been sick . . . you know, but everything was expose[d] and – and I'd been drinking." Id. at 196.

On September 3, 2008, the State charged Moore with Class B felony criminal deviate conduct. Moore filed a motion in limine seeking to prohibit the State from admitting evidence regarding Moore's prior acts, specifically the references to the fact that Moore had previously engaged in unwanted sexual acts with J.W. The trial court denied this motion. During Moore's jury trial, the trial court overruled Moore's repeated

objections to evidence regarding his prior acts. During the State's closing argument, the prosecuting attorney told the jury that the J.W.'s uncorroborated testimony was sufficient by itself to support finding Moore guilty, but the prosecuting attorney argued that there was evidence other than J.W.'s testimony proving Moore's guilt, i.e. Moore's admissions. The jury subsequently found Moore guilty as charged, and the trial court sentenced him to the advisory sentence of ten years. Moore now appeals.

I. Evidence of Prior Misconduct

Moore first claims that the trial court erred when it permitted the State to introduce evidence regarding his prior sexual misconduct with the victim. In addressing this claim, we first note that the admission of evidence is within the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008), trans. denied. Indiana Evidence Rule 404(b) provides generally 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." Evidence Rule 404(b) was designed to assure that the State, relying upon evidence of uncharged misconduct, does not punish a person for his character. Rogers, 897 N.E.2d at 960. The effect of Rule 404(b) is that evidence is excluded only when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. Id.

In the present case, we need not go into a lengthy discussion of whether the trial court erred in admitting the evidence of Moore's prior misconduct. This is so because, contrary to Moore's argument, we conclude that any error in the admission of this

evidence was harmless. Errors in the admission of evidence are to be disregarded as harmless unless they affect the defendant's substantial rights. Rogers, 897 N.E.2d at 961. An error will be deemed harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Id.

Moore correctly notes that "'[w]e have often concluded pursuant to Ind. Evidence Rule 404(b) that the admission of evidence of prior acts of child molesting or sexual assault are so prejudicial as to be reversible.'" Camm v. State, 908 N.E.2d 215, 225 (Ind. 2009) (quoting Krumm v. State, 793 N.E.2d 1170, 1182-83 (Ind. Ct. App. 2003) (collecting cases)). However, such is not the case here.

Here, J.W. testified that Moore, whom she had known for years and with whom she had lived for approximately one year, licked and touched her vaginal area without her consent while she was asleep. She immediately telephoned the police, and when the police arrived, Moore admitted that he had done something "wrong." After waiving his Miranda rights, Moore admitted to Detective Jolly that he was sexually attracted to J.W., "touched" and "licked" her, and blamed his actions on the fact that J.W.'s private areas were exposed and that he was drunk. Thus, the evidence against Moore was rather strong, whereas the references to Moore's prior misconduct were vague and not terribly specific. Under these facts and circumstances, we conclude that that the references to Moore's prior behavior towards J.W. were harmless.

II. State's Closing Statement

Moore also claims that the trial court erred when it permitted the prosecuting attorney to make the following statement during the State's rebuttal argument: "the law in Indiana is [that] the uncorroborated testimony of the victim is sufficient for a conviction." Tr. p. 267. Moore immediately objected to this statement, arguing "there's no instruction as to that." Id. The trial court overruled Moore's objection, and the prosecuting attorney continued to argue that even though the uncorroborated testimony of J.W. would be sufficient to convict Moore, there was more evidence other than J.W.'s testimony, i.e., Moore's admission.

On appeal, Moore argues that the prosecuting attorney's statement was improper, citing Ludy v. State, 784 N.E.2d 459 (Ind. 2003) and Bayes v. State, 791 N.E.2d 263 (Ind. Ct. App. 2003), trans. denied.[1] In Ludy, the trial court had instructed the jury that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." 784 N.E.2d at 460. On appeal, our supreme court held that this instruction was "problematic for at least three reasons. First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder. Third, by using the technical term 'uncorroborated,' the instruction may mislead or confuse the

[1] The State claims that Moore failed to properly preserve this issue because his objection at trial was not based upon the same grounds as his appellate argument. See Grace v. State, 731 N.E.2d 442, 444 (Ind. 2000) (noting that grounds for objection must be specific and that any grounds not raised in the trial court are not available on appeal). While we are inclined to agree with the State, Moore's appellate argument is unavailing, notwithstanding any waiver.

jury." Id. at 461. But the Ludy court did not overturn the defendant's conviction because the victim's testimony in that case was not uncorroborated and there was substantial probative evidence establishing the elements of the charged offenses. Therefore, the court concluded that the improper instruction did not affect the defendant's substantial rights. Id.

In Bayes, the court cited Ludy in concluding that the jury instruction regarding the uncorroborated testimony of the victim was indeed improper. 791 N.E.2d at 265. However, the court in Bayes, unlike the court in Ludy, concluded that the improper instruction did affect the substantial rights of the defendant because the testimony of the victims was uncorroborated. Id. at 265. Based on these cases, Moore claims that the prosecutor's statements regarding the testimony of the victim constitute reversible error. We disagree.

We first observe that, unlike in Ludy or Bayes, the trial court here did not instruct the jury that the uncorroborated testimony of the victim was sufficient to support a conviction.[2] Even though a particular statement may not be suitable for a jury instruction, it "may, under the appropriate circumstances be . . . a proper subject for counsel's closing argument[.]" Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001). In other words, although it is improper for a trial court to specifically instruct the jury that the uncorroborated testimony of the victim is sufficient to support a conviction, it does not necessarily follow that a prosecuting attorney may not make mention of the issue during the State's closing argument. See Dill, 741 N.E.2d at 1232.

[2] Indeed, this was the specific basis for Moore's objection to the prosecuting attorney's argument.

Further, the instruction disapproved of in Ludy was improper because it impermissibly highlighted a single piece of evidence. 784 N.E.2d at 461. In contrast, here the prosecuting attorney's argument did not focus solely on J.W.'s statement. Instead, the prosecuting attorney emphasized that J.W.'s statement was not uncorroborated and that Moore himself admitted to inappropriately touching J.W.

Lastly, even if we assume for the sake of argument that the prosecuting attorney's statement here was improper, we must still determine whether such statement affected the substantial rights of the defendant. See Ludy, 784 N.E.2d at 462; Bayes, 791 N.E.2d at 265. In this respect, the present case is more similar to Ludy than to Bayes. As in Ludy, the victim's testimony here was not uncorroborated. In fact, J.W.'s testimony was corroborated by Moore's own admissions to the police. Under these facts and circumstances, we cannot conclude that the prosecuting attorney's statements during closing argument affected Moore's substantial rights. See Ludy, 784 N.E.2d at 463.

Conclusion

Any error in the admission of Moore's statements referring to his own prior misconduct was harmless in light of the substantial evidence of his guilt. The prosecuting attorney's statements during closing argument were not improper, and, even if they were improper, any error did not affect Moore's substantial rights.

Affirmed.

DARDEN, J., and ROBB, J., concur.