

**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.**

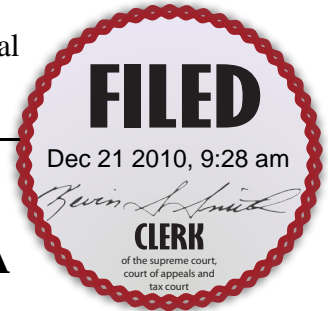
ATTORNEY FOR APPELLANT:

**DEBORAH MARKISOHN**  
Marion County Public Defender Agency  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**ANN L. GOODWIN**  
Deputy Attorney General  
Indianapolis, Indiana



---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

D.B., )  
 )  
Appellant-Respondent, )  
 )  
vs. ) No. 49A04-1004-JV-294  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Petitioner. )

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Marilyn A. Moores, Judge  
The Honorable Geoffrey A. Gaither, Magistrate  
Cause No. 49D09-0911-JD-003675

---

**December 21, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

D.B. appeals from his adjudication as a delinquent for having committed acts that would be, if committed by an adult, Child Molesting, as a Class C felony,<sup>1</sup> Resisting Law Enforcement, as a Class A misdemeanor,<sup>2</sup> and Criminal Mischief, as a Class B misdemeanor.<sup>3</sup>

We affirm.

### **Issues**

D.B. raises two issues for our review:

- I. Whether there was sufficient evidence to support the true finding for Child Molesting; and
- II. Whether the court erred in refusing to admit evidence related to D.B.'s victim's prior reports of molestation by other family members.

### **Facts and Procedural History**

S.B., the female victim, lived with her mother, her elder brothers D.B. and Do.B., and an older sister. At various points during the summer of 2009, D.B. fondled S.B.'s breasts underneath her bra, touched S.B.'s behind, attempted to insert his penis into S.B., and permitted S.B. to touch his penis. D.B. would often attempt to draw S.B. from her bedroom and into his for these purposes after S.B. had gone to bed.

On November 9, 2009, S.B. reported D.B.'s activities to her therapist, Jennifer Schaefer ("Schaefer"). Schaefer submitted a report to Marion County Child Protective Services ("CPS"), which conducted two interviews with S.B.

---

<sup>1</sup> Ind. Code § 35-42-4-3.

<sup>2</sup> I.C. § 35-44-3-3.

<sup>3</sup> I.C. § 35-43-1-2. We note that D.B. does not challenge the findings related to Resisting Law Enforcement and Criminal Mischief.

On November 18, 2009, the State alleged D.B. to be a delinquent child, seeking his adjudication as such for Child Molesting, Resisting Law Enforcement, and Criminal Mischief. D.B. admitted the allegations of Resisting Law Enforcement and Criminal Mischief.

A denial hearing was held on March 11, 2010, as to whether D.B. was delinquent for Child Molesting. At the end of the hearing, the juvenile court found the Child Molesting allegation to be true.

On April 8, 2010, a dispositional hearing was held. The court found D.B. to be in need of treatment. D.B. was placed in the wardship of the Indiana Department of Correction for housing in a correctional facility for children, with said commitment suspended to probation and placement with Gibault for treatment.

This appeal followed.

## **Discussion and Decision**

### **Sufficiency of the Evidence**

D.B. first challenges the sufficiency of the evidence for the true finding for Child Molesting. When reviewing a trial court's finding that a child is delinquent, our standard of review is well-settled.

The State must prove every element of that offense beyond a reasonable doubt. Upon review, we will not reweigh the evidence or judge the credibility of the witnesses. Rather, this court looks to the evidence and the reasonable inferences therefrom that support the verdict, and we will affirm a conviction if evidence of probative value exists from which the factfinder could find the defendant guilty beyond a reasonable doubt. Thus, we will affirm the finding

of delinquency unless it may be concluded that no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt.

J.V. v. State, 766 N.E.2d 412, 415 (Ind. Ct. App. 2002) (citations omitted), trans. denied.

In order to obtain a true finding of Child Molesting as alleged against D.B., the State was required to prove beyond a reasonable doubt that on or between June 1, 2009, and August 31, 2009, D.B. performed or submitted to fondling or touching with S.B., a child then twelve years old, with the intent to arouse or satisfy D.B.'s sexual desire. See I.C. § 35-42-4-3(b); App. 21.

Here, D.B. challenges only whether there was sufficient evidence that D.B. engaged in this behavior with the intent to arouse or satisfy his sexual desire.<sup>4</sup>

Mere touching alone is not sufficient to constitute the crime of child molesting. The State must also prove beyond a reasonable doubt that the act of touching was accompanied by specific intent to arouse or satisfy sexual desires. The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points.

Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000) (citations omitted).

Here, S.B. testified that D.B. touched her breast under her bra on numerous occasions, and that while some of these occurred when the two were "wrestling," other incidences of this conduct occurred at other times. She also testified that once, while she was lying on a mattress, D.B. touched her breast, then her "butt," then tried to "put stuff in [her]." (Tr. 41.) S.B. then indicated that she was referring to D.B.'s penis, which she touched during that

---

<sup>4</sup> D.B.'s brief argues that "the State failed to present evidence D.B.'s conduct was intended to arouse or satisfy either his own or S.B.'s sexual desires." (Appellant's Br. 6.) The Charging Information refers only to D.B.'s sexual desire, and we limit our inquiry to the offense as charged. (App. 21.)

incident. S.B. further testified that on another occasion she called another brother, Do.B., into the room when D.B. was touching her breast; when Do.B. arrived, D.B. “tried to hurry up and pull his pants up.” (Tr. 42.) Still another time, S.B. testified she was in her room at night when D.B. told her to come back to his room “and tried to put it in me that, that night.” (Tr. 43.)

In short, S.B. provided testimony as to a number of incidents involving D.B. that give rise to the reasonable inference that D.B. sought to satisfy his own sexual desires in molesting S.B. D.B.’s arguments invite us to reweigh the evidence, which we cannot do. J.V., 766 N.E.2d at 415. The court’s true finding is supported by sufficient evidence.

#### Admission of Reports of Other Alleged Abuse

D.B. also challenges his conviction on the ground that the trial court erred in refusing to permit him to introduce the testimony of S.B. and Do.B. regarding other incidents of alleged abuse that S.B. reported to Marion County CPS. We afford broad discretion to a trial court’s decisions on whether to admit or exclude evidence, and review such decisions for abuse of discretion. An abuse of discretion occurs when the trial court’s ruling is clearly against the logic of the facts and circumstances before it. Oatts v. State, 899 N.E.2d 714, 719 (Ind. Ct. App. 2009). Because the line of questioning D.B. pursued implicated prior sexual conduct, the trial court was required to apply Evidence Rule 412 in determining whether to permit such questions.

Rule 412 precludes introduction of evidence of any prior sexual conduct of an alleged victim of a sex crime or a witness in a sex crime prosecution unless that evidence would

establish evidence of prior sexual conduct with the defendant, would bring into question the identity of the defendant as the assailant, or would be admissible as a prior offense under Rule 609. Ind. Evidence Rule 412(a). A common-law exception exists for situations where the victim has admitted the falsity of a prior accusation of rape or where a prior accusation is demonstrably false. State v. Walton, 715 N.E.2d 824, 826-28 (Ind. 1999). Where a defendant seeks to offer evidence of past sexual conduct, whether or not that evidence is within the scope of the exceptions to Rule 412, he must submit a written motion that includes a description of the evidence at least ten days before trial. Sallee v. State, 785 N.E.2d 645, 651 (Ind. Ct. App. 2003), trans. denied.

Evidence Rule 412 “is intended to prevent the victim” of a sexual assault “from being put on trial ... and, importantly, to remove obstacles to reporting sex crimes.” Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997). It reflects the insight of Indiana’s Rape Shield Statute, see Ind. Code § 35-37-4-4, that “inquiry into a victim’s prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense.” Id.

In introducing this testimony, D.B. would have sought to attack S.B.’s credibility by questioning S.B. about accusations she had made during interviews with Marion County CPS. D.B.’s offer of proof set forth the substance of the testimony Do.B. and perhaps S.B. would have offered:

If [Do.B.] were allowed to testify he would testify that... And if I were allowed to ask [S.B.] about it, I mean she would have agreed that she had made some accusations about [Do.B.] touching her chest and butt as well. [Do.B.]—she made accusations. He felt her—get along now and that he never did anything intentionally to her. That there wasn’t any contact, it was

incidental as part of wrestling and that in [his] view, S.B. might of took something and represented it as something else happened.

(Tr. 61-62.)

An attempt to impeach a witness's credibility does not remove evidence that would be introduced to support that attempt from the scope of Rule 412. The existence of the common-law exception to the Rule for admittedly false or demonstrably false prior accusations of rape is just that—an exception to the Rule, not something that takes such accusations entirely outside the Rule. Because the testimony D.B. sought to elicit from S.B. and Do.B. applied to prior sexual conduct and reports regarding such conduct, Rule 412 applied.

Because Rule 412 applied, the procedural requirements outlined in 412(b) also applied, particularly the requirement that a party seeking to introduce such evidence file a written motion with the court at least ten days before trial. D.B. did not file such a motion, and thus failed to meet the requirements of Rule 412(b).

Even if D.B. had complied with Rule 412(b), he would have faced the requirement that the evidence he sought to introduce met one of the exceptions to Rule 412. The most likely exception here is the common-law exception for admittedly or demonstrably false prior claims of rape. Yet the nature of the testimony D.B. sought to introduce would not rise to the level required by the exception. S.B. maintained upon re-direct examination by the State that while a fight with D.B. had prompted her to make a report of abuse by D.B., she “wanted to get it” off her chest. (Tr. 58.) Do.B. would have testified that “in [his] view” S.B. had made

a false report because she had stated in a prior deposition that Do.B. had touched her chest, (Tr. 61.) but that S.B.'s statements at the deposition were unclear as to whether S.B. understood Do.B.'s conduct to be sexual in nature or not. This does not amount to S.B. admitting prior false allegations of rape or to Do.B. offering proof of prior false allegations.

Similarly, the allegations S.B. made about other individuals not living in S.B.'s home also do not constitute prior false allegations of rape. D.B. produced no evidence that these allegations were false, and thus the common-law exception would not function to bring answers to questions about these allegations within the scope of admissible evidence. Thus we cannot say that the trial court abused its discretion by refusing to permit S.B. or Do.B. to be examined on S.B.'s prior accusations of sexual abuse, even if D.B. had complied with Rule 412(b).

### **Conclusion**

There was sufficient evidence of intent to support the true finding. The trial court did not abuse its discretion in refusing to permit examination of Do.B. and S.B. on the matter of other allegations of sexual abuse by S.B.

Affirmed.

NAJAM, J., and DARDEN, J., concur.