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IN THE COURT OF APPEALS OF INDIANA

MICHAEL KIRK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0605-CR-240
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Magistrate
Cause No. 49G01-0505-FA-78294

April 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Michael Kirk appeals his convictions, following a jury trial, of three counts of child molestation, all Class A felonies, and one count of child solicitation, a Class D felony. On appeal, Kirk argues that certain testimony concerning uncharged acts of child molestation was inadmissible under Indiana Evidence Rule 404(b). Although we conclude that the testimony was inadmissible, we affirm, as we also conclude that its admission was harmless.

Facts and Procedural History

On May 11, 2005, Kirk was charged with three counts of child molestation and two counts of child solicitation stemming from abuse of his two stepdaughters, Ti.P. and Ta.P.[1] At the start of the trial, Kirk asked that all mention of other uncharged bad acts not be admitted. This oral motion in limine was granted as to acts concerning drug abuse, physical abuse, and molestation of another girl, but was denied as to other acts dealing with the abuse of Ti.P. The court noted that the charges spanned a three-year period and that it is common in such cases of recurring abuse for a victim to speak in general terms about the abuse occurring during the time period, rather than limiting testimony to specific instances.

At trial, Ti.P. testified about four specific instances of molestation. Ti.P. testified in detail concerning each incident, but also made some statements concerning other, uncharged, molestation. Ta.P. testified concerning child solicitation and also testified that she witnessed one of the instances of molestation described by Ti.P.

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[1] Kirk was found guilty of three counts of child molestation and one count of child solicitation, each involving his stepdaughter Ti.P. He was found not guilty of one count of child solicitation involving his other stepdaughter, Ta.P.

Ti.P. testified that Kirk first molested her when she was eleven years old. She testified that Kirk came into her room when her mother was at work and her sister was not home and forced her to undress and engage in intercourse with him. Kirk told Ti.P. not to tell anyone because he had a gun and was not afraid to use it.

Ti.P. testified that on a different occasion, when she was still eleven years old, Kirk made her undress, put on a t-shirt, and come into his room. He then inserted his fingers and a hotdog into her vagina. During her testimony regarding this incident, she mentioned that this behavior occurred more than once, so it was difficult for her to remember the circumstances surrounding the first time that it happened. She mentioned that it happened at least three times, and believed that on this occasion, he also performed oral sex on her and had intercourse with her.

Ti.P. testified that on another occasion, Kirk had intercourse with her when they were lying in the living room. He made her wear shorts and get under a blanket with him. Ta.P. was also in the room at the time, and testified at trial about this incident. Ta.P. testified that when she was in third or fourth grade, she saw Ti.P. lying under a blanket with Kirk lying behind her and that Kirk had his leg over Ti.P. She said that they were "too close, and it didn't look right." Transcript at 64.

Ti.P. also testified that on another occasion Kirk had intercourse with her in a bathroom. She said they had difficulty finding a position, and ended up lying on the floor. She said she took a shower afterwards and that Kirk pretended he was just using the bathroom while she was in the shower.

Ti.P. made several comments during the trial that indicated that these specific four

instances were not the only times Kirk molested her. She stated that such instances happened "like every other day." Id. at 123. She also testified that Kirk would make her sister and her sister's friend leave the house so that he could be alone with her. He would then make her undress, put on a t-shirt and come into his room. She said that she was used to this and she knew what she was supposed to do. When asked about some specific instances, she could not remember details, because "it was just the same usual thing." Id. at 133.

At trial, the jury found Kirk guilty of each count of child molestation, guilty of one count of child solicitation, and not guilty of one count of child solicitation. The trial court then held a sentencing hearing.[2] Kirk now appeals.

Discussion and Decision[3]

"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." Ind. Evidence Rule 404(b). Evidence may still be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id. "[S]uch evidence may be admissible despite its tendency to show bad character or criminal propensity, if it makes the existence of an element of the crime charged more probable than it

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[2] The trial court's sentencing order states that Kirk entered into a plea agreement and pled guilty to the crimes. It is apparent from the transcript and other parts of the record that Kirk did not plead guilty, and that a jury trial was held. We urge the trial court to take care to ensure that its orders accurately reflect the nature of the proceedings.

[3] We note that the State argues that Kirk has waived this issue by failing to raise a proper objection at trial. We choose to address Kirk's argument on the merits. We have a preference for deciding issues on the merits rather than invoking waiver. State v. Hancock, 530 N.E.2d 106, 107 (Ind. Ct. App. 1988), trans. denied. Because we do not address the issue of whether Kirk properly objected at trial and thus preserved this issue for appeal, we do not frame the issue on appeal as whether the trial court abused its discretion in

would be without such evidence." Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992) (quoting Bedgood v. State, 477 N.E.2d 869, 872-73 (Ind. 1985)).

> The standard for assessing the admissibility of 404(b) evidence is: (1) the court must determine that 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) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evid. Rule 403.

Udarbe v. State, 749 N.E.2d 562, 564 (Ind. Ct. App. 2001).

Kirk argues that the testimony offered at trial that did not refer to specific, charged conduct should not have been admitted. He argues that this testimony was unfairly prejudicial and that he was therefore unable to receive a fair trial.

We agree that the evidence admitted at trial that did not concern Kirk's specific charges should not have been admitted. The State does not argue that this evidence was offered for any permissible purpose, and it seems evident that it was offered to show Kirk's bad character and conformity therewith. In a situation involving ongoing child molestation by a parental figure, we have held that testimony concerning uncharged acts of child molestation should not be admitted. Greenboam v. State, 766 N.E.2d 1247, 1255 (Ind. Ct. App. 2002), trans. denied; see also Sloan v. State, 654 N.E.2d 797 (Ind. Ct. App. 1995), trans. denied (decided under four-part test requiring that prior bad acts must be similar and close in time to be admissible; our supreme court has disapproved this test in Hicks v. State, 690 N.E.2d 215, 219 (Ind. 1997)). In these cases, the defendants argued successfully that evidence of prior molestation should not be admitted under the proof of plan exception to

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admitting the evidence. Instead, we examine only whether the evidence was in fact inadmissible pursuant to

Rule 404(b). Greenboam, 766 N.E.2d at 1254; Sloan, 654 N.E.2d at 801. We have held that the plan exception is not so broad that it will encompass acts of molestation that are similar only because they occurred between the same people or in the same house, without further evidence of a preconceived plan. Greenboam, 766 N.E.2d at 1254. Here, the State has not presented any argument that evidence relating to the uncharged acts tends to show some sort of plan by Kirk to molest Ti.P., nor has the State suggested any other permissible purpose for the evidence. We conclude that the evidence is inadmissible under Indiana Evidence Rule 404(b).[4]

Although this evidence is inadmissible under Rule 404(b), any error in its admission was harmless and did not affect Kirk's ability to receive a fair trial. "The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." Wickizer v. State, 626 N.E.2d 795, 800 (Ind. 1993). "To decide if the erroneous admission of prejudicial evidence of extrinsic offenses is harmless, we . . . evaluate whether the jury's verdict was substantially swayed." Id. at 800.

Ti.P. testified in detail concerning each count of molestation or solicitation. She discussed what she wore, whether Kirk used a condom, whether anyone else was in the house at the time, where the events occurred, and in some cases, what Kirk said to her. In contrast

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Indiana Evidence Rule 404(b).

[4] Because we conclude that this evidence is not relevant except for its tendency to show Kirk's propensities, we need not conduct the second part of the test and balance the evidence's probative value against its prejudicial effect.

to the detailed and graphic testimony Ti.P. offered to support each charge of child molestation, the remarks she made concerning uncharged acts of child molestation were vague and were not inflammatory. See Greenboam, 766 N.E.2d at 1256 (noting that limited testimony regarding prior molestations was unlikely to have affected the jury where the victim gave detailed testimony of charged molestations). It is unlikely that this additional testimony could have swayed the jury.

Also, Ta.P. witnessed one of the instances and testified concerning what she saw. Our supreme court has found that admissible evidence was overwhelming in other cases that involved eyewitness testimony. See Martin v. State, 622 N.E.2d 185, 188 (Ind. 1993) (a sister and brother testified that they each witnessed molestation of the other by defendant); Lannan, 600 N.E.2d at 1341 (one person testified that she witnessed the molestation and another testified that he witnessed defendant drive to the home where the molestation occurred and announce his intent to molest the victim again). We conclude that any error in admitting the testimony was harmless.

Conclusion

The testimony offered at trial that concerned other uncharged acts of child molestation is inadmissible under Indiana Evidence Rule 404(b). This testimony, however, is unlikely to have swayed the jury, and its admission was therefore harmless. We affirm Kirk's convictions.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.