

Appellant-defendant Randall McKinney appeals his convictions for Child Molesting,¹ a class A felony, and Child Molesting,² a class C felony. Specifically, McKinney contends that the trial court erred in admitting (1) evidence that McKinney possessed a pornographic videotape when one of the offenses was committed, and (2) testimony regarding the victim's mental handicaps. Concluding that the admission of this evidence did not constitute reversible error, we affirm the judgment of the trial court.

FACTS

John and Christy Murry (collectively, the Murrys) are the parents of K.M., born September 29, 1994, and M.M., born October 31, 1989. K.M. is mildly mentally handicapped, undergoes therapy, and attends special education classes at school. While living in Evansville, the Murrys became friends with Tina Merrifield and McKinney, Merrifield's boyfriend. McKinney's son, Cody, also lived with the couple.

Merrifield, McKinney, and Cody eventually moved to a Days Inn in Evansville where the Murrys were employed. While John tended bar at the Days Inn, Christy brought K.M. and M.M. to the hotel and the children played together and swam in the hotel pool. Occasionally, the children remained in the Days Inn suite alone with McKinney.

In January 2004, John was hospitalized with pneumonia. During that time, McKinney met K.M. at the school bus stop and took her home on days when Christy was working. M.M. typically arrived home from school one hour later. Between January

¹ Ind. Code § 35-42-4-3(A)(1).

² I.C. § 35-42-4-3(B).

2004 and June 2004, McKinney molested K.M. in her mother's bedroom on multiple occasions. Specifically, McKinney directed K.M. to spread her legs and he placed his "bladder" inside her "bladder."³ McKinney also licked K.M.'s vagina and told her that she should "do it more" in order for the sex to stop hurting. Tr. p. 120.

In April or May 2004, K.M. told M.M. about the incidents. However, M.M. had also begun to molest K.M. Although M.M. stated that he never penetrated K.M., he admitted fondling and placing his tongue on K.M.'s vagina. On July 11, 2004, after M.M. attempted to molest K.M., she told her father what had occurred and informed him that she had also been having sex with McKinney. K.M. revealed that McKinney had molested her at her home in January and also in the Days Inn suite. K.M. stated that a number of these incidents had occurred while her brother and Cody were playing videogames in another room.

K.M. told her father that during one of the episodes at the Days Inn, she and McKinney watched a movie of a man and a woman engaged in sex. K.M. then stated that McKinney had sex with her. On that occasion, McKinney allegedly fondled K.M.'s vagina and had sexual intercourse with her. K.M. also stated that McKinney made her swear not to tell anyone about the incidents because he would go to jail.

On July 11, 2004, John took K.M. to the hospital and reported the molestations to the local Child Protection Agency. Thereafter, McKinney was arrested at his sister's residence and charged with the above offenses and with being a habitual offender.

³ K.M. referred to both male and female sex organs as "bladders" throughout her testimony. Tr. p. 105-08.

At a jury trial that commenced on January 23, 2006, K.M. testified that she had viewed the pornographic videotape with McKinney during at least one of the instances of molestation. McKinney and Merrifield both admitted that they had possessed a pornographic video at the suite. Merrifield testified that she had borrowed a pornographic video of adult, heterosexual sex for McKinney's birthday and that the film was in the Days Inn suite from June 16, 2004, until June 19, 2004. Evidence was also presented establishing that K.M. attended special education classes at school and was receiving therapy.

McKinney was found guilty as charged, and he pleaded guilty to being a habitual offender. Following a sentencing hearing on February 16, 2006, McKinney was sentenced to an aggregate term of incarceration of seventy years. He now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Before proceeding to the merits of McKinney's claims, we first note that the admission or exclusion of evidence is a matter that lies within the trial court's discretion. Timberlake v. State, 690 N.E.2d 243, 255 (Ind. 1997). Thus, we review the admission of evidence under an abuse of discretion standard which occurs when the admission of evidence is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997).

Additionally, Indiana Evidence Rule 402 allows for the admission of relevant evidence, which is defined as evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence. Ind. Evidence Rule 401. However, relevant evidence may be excluded if its possible prejudicial effect outweighs any evidentiary value. Evid. R. 403.

II. McKinney's Claims

A. Admission of the Videotape

McKinney claims that the trial court improperly admitted evidence regarding the pornographic videotape that Merrifield had rented. Specifically, McKinney contends that his convictions must be reversed because the admission of that evidence was irrelevant and unduly prejudicial to him.

In support of his argument that his convictions must be reversed, McKinney directs us to Rafferty v. State, 610 N.E.2d 880 (Ind. Ct. App. 1993). In Rafferty, the defendant was convicted of two counts of child molesting. Id. at 883. At trial, the State presented evidence that the defendant possessed sexually explicit material and paraphernalia. In reversing the convictions, this court noted that the victim never alleged that those items were used in the commission of the offenses and, therefore, the State failed to link the evidence to the crime. Id. We noted that before physical evidence may be admitted at trial, the State must satisfy the following two-part test: (1) the witness who observed the particular instrumentality must be able to state at the least that the item shown is like the one associated with the crime, and (2) the item was connected to the defendant and the commission of the crime. Id. We also observed that the State is only required to show a small but legitimate link in the chain of evidence connecting the defendant to the crime. Id.

We noted in Rafferty that the victim did not allege that the defendant used any of the seized paraphernalia during the sexual encounters that formed the basis of the charges. Id. at 883. Indeed, the victim admitted that the defendant never showed him the sexually explicit materials, and it was established that the defendant's son owned those materials. The victim further testified that he had discovered the materials accidentally and that the defendant kept the materials hidden. Thus, we concluded that the challenged exhibits were neither like the instrumentality associated with the crime nor connected to the defendant's commission of the offense. As a result, we determined that the exhibits were irrelevant and improperly admitted. Id.

Unlike the circumstances in Rafferty, the evidence in this case demonstrated that McKinney showed the pornographic videotape to K.M. prior to at least one instance of molestation. Tr. p. 112-13. Because of the legitimate nature of the State's inquiry into the circumstances of the possession of the videotape and the nature of the acts it depicted, it is apparent that the requirements for the admission of evidence regarding the contents of the videotape and McKinney's connection to the tape were satisfied. As a result, McKinney's claim of error fails.

We also reject McKinney's assertion that the admission of this evidence amounted to an "impermissible character assassination under [Evidence] Rule 404." Appellant's Br. p. 15. In accordance with this rule, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of providing action in conformity therewith on a particular occasion." Evid. R. 404(a). Additionally, Indiana Evidence Rule 404(b) provides in 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.” Evidence Rule 404 is “designed to prevent the jury from assessing a defendant’s present guilt on the basis of his past propensities.” Hicks v. State, 690 N.E.2d 215, 218-19 (Ind. 1997). In determining whether to admit evidence under 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. Id. at 221.

When considering the above, it is apparent that McKinney has failed to demonstrate that the evidence was elicited to merely establish the forbidden inference that McKinney was of bad character. However, even if it could be said—solely for argument’s sake—that the evidence regarding the videotape was improperly admitted for this reason, our Supreme Court has determined that not all errors in admitting evidence under Evidence Rule 404(b) require reversal. Such errors are deemed harmless “if [their] probable impact on the jury in the light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.” Berry v. State, 715 N.E.2d 864, 867 (Ind. 1999).

As noted above, the jury heard K.M.’s testimony describing the circumstances and details of the offenses. Hence, any improper admission of evidence regarding the videotape was harmless and merely cumulative of the other evidence that was properly

admitted. See Morrison v. State, 824 N.E.2d 734, 743 n.6 (Ind. Ct. App. 2005), trans. denied (holding that the uncorroborated testimony of the victim is sufficient to sustain a criminal conviction).

B. K.M.'s Mental Handicap

McKinney next claims that the trial court's admission of evidence relating to K.M.'s "mental impairment was irrelevant and unfairly prejudicial." Appellant's Br. p. 18. Specifically, McKinney argues that he is entitled to a reversal because this evidence was not material to any issue in dispute and it served only to invoke the jury's sympathy.

It is well settled that a defendant may open the door to questions otherwise inadmissible under the rules of evidence. Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000). Moreover, a party may not invite error and then request relief on appeal based upon that ground. Mitchell v. State, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000). Finally, a party's failure to object at trial generally waives the issue for purposes of appeal. Nasser v. State, 646 N.E.2d 673, 676 (Ind. Ct. App. 1995).

In addressing McKinney's arguments that evidence of K.C.'s mental handicap was improperly admitted at trial, we initially observe that during the cross-examination of John Murry, McKinney's counsel acknowledged to the jury that K.M. was in "special education." Tr. p. 58-59. On re-direct examination from the State, and without any objection from McKinney, John testified that K.M. attends speech therapy and other counseling at a rehabilitation center. Id. at 59. Additionally, Christy Murry testified on direct examination—also absent any objection from McKinney—that K.M. had been in "special classes" since she was three years old and was still undergoing speech therapy.

Id. at 134-35. When considering the above, it is apparent that McKinney opened the door to the evidence regarding K.M.'s handicap and failed to make any objection to the State's questioning of the Murrays. Thus, McKinney may not now complain that the admission of this evidence was error, inasmuch as he has waived the issue.

Waiver notwithstanding, it is apparent that this evidence assisted the jury in assessing K.M.'s credibility when she used unusual words to describe sexual organs and their function when testifying. Furthermore, K.M.'s mild mental handicap demonstrated to the jury that she might have been vulnerable and improperly influenced. Thus, McKinney has failed to demonstrate that such evidence merely served to invoke the jury's sympathy toward K.M. As a result, the admission of this evidence was not reversible error.

The judgment of the trial court is affirmed.

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