MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Matthew Todosijevic,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 30, 2023

Court of Appeals Case No. 22A-CR-1965

Appeal from the Porter Superior Court

The Honorable Michael A. Fish, Judge

Trial Court Cause No. 64D01-1801-F1-280

Memorandum Decision by Judge Brown
Judges Bailey and Weissmann concur.

Brown, Judge.

[1] Matthew Todosijevic appeals his conviction for child molesting as a level 4 felony and argues the trial court erred in granting the State's motion to strike Juror 29 and admitting evidence related to a prior allegation of nonconsensual sex. We affirm.

Facts and Procedural History

[2] Todosijevic, who was born in 1980, and Sheena Ewing are the parents of I.T., who was born in August 2009. Sheena and Todosijevic separated when I.T. was about two years old, and I.T. visited Todosijevic on the weekends. In October 2014, Todosijevic married Aisha Sandberg, they separated in February 2016, but I.T. remained close with Sandberg.

[3] On Friday, October 13, 2017, I.T. was at Todosijevic's duplex with seven or eight of Todosijevic's friends including I.T.'s uncle and cousin. Todosijevic and his friends played poker and were "drinking a lot." Transcript Volume III at 72. When it was I.T.'s bedtime, Todosijevic started a movie in his bedroom. I.T. changed into her nightgown in her room, returned to Todosijevic's bedroom to finish the movie, and fell asleep. At some point, she awakened, and Todosijevic touched her with his fingers and penis and licked her ear. The next morning, I.T. went to the home of Sandberg's mother and spent Saturday night there. On Sunday, she returned to Todosijevic's residence. At around noon on Monday, Todosijevic transported I.T. to Ewing's house. Ewing asked I.T. if she had a good time and if anyone tickled her in places they should not, which she typically asked. I.T. said she had fun, mentioned some of the things she had done, and then started to cry. After I.T. told her what happened,

Ewing went to the garage and called Todosijevic who said he would "never do anything like that" and indicated he believed she was dreaming. *Id.* at 111. After speaking with I.T., Ewing called the Department of Child Services. On October 18, 2017, Angela Marsh, a forensic interviewer employed by the Dunebrook Child Advocacy Center, interviewed I.T.

[4] On January 9, 2018, the State charged Todosijevic with Count I, child molesting as a level 1 felony, and Count II, child molesting as a level 4 felony.[1] On May 20, 2022, Todosijevic filed a Motion in Limine requesting that the court prohibit the State from introducing any information relative to any other pending criminal charges.

[5] On June 21, 22, and 23, 2022, the court held a jury trial. During voir dire, the following exchange occurred:

> [Prosecutor]: Ms. [C.], how about you, what are your thoughts about beyond a reasonable doubt, is that a fair burden for the State.
>
> PROSPECTIVE JUROR: Yes.

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[1] Count I alleged that Todosijevic "did on or between the dates of the 13th day of October, 2017 and the 14th day of October, 2017, with a child under fourteen (14) years of age, knowingly or intentionally perform or submit to any sexual intercourse or other sexual conduct, to-wit: engaged in other sexual conduct and intercourse with I.T. . . . and while doing so was at least 21 years of age . . . ." Appellant's Appendix Volume II at 20. Count II alleged that he "did on or between the dates of the 13th day of October, 2017 and the 14th day of October, 2017, with a child under fourteen (14) years of age, knowingly or intentionally perform or submit to any fondling or touching, of either the child or the older person, with the intent to arouse or satisfy the sexual desires of either the child or the older person, to-wit: engaged in fondling and touching with I.T. . . . with the intent to arouse the sexual desires of himself . . . ." *Id.* at 21-22.

[Prosecutor]: Do you think the State should be held to a higher burden of beyond all doubt?

PROSPECTIVE JUROR: No.

[Prosecutor]: You seem a little bit hesitant?

PROSPECTIVE JUROR: Yeah.

[Prosecutor]: That's okay. There's no wrong answer here. This is about your thoughts and your feelings.

PROSPECTIVE JUROR: I'm not sure.

[Prosecutor]: All right. It's a serious matter; right? So the State should have a burden; right? Do you feel like the State would be able to prove something to you beyond all doubt if you didn't see it for yourself?

PROSPECTIVE JUROR: Yeah.

[Prosecutor]: Okay. How do you think that the State might accomplish something like that?

PROSPECTIVE JUROR: Just providing the evidence, that would be about it.

[Prosecutor]: Okay. Okay. So you think that, you know, hearing the testimony and things like that could get you to beyond all doubt even if you didn't see it for yourself?

PROSPECTIVE JUROR: Yes.

[Prosecutor]: Okay. All right. Well, let me ask you this, Ms. [C.] then, do you think if you heard the victim come in and tell you what happened to her and who did it, and you listened to that, that story made sense to you, you believed her, do you believe you could convict based on her testimony?

PROSPECTIVE JUROR: Yes.

[Prosecutor]: It's a hard question.

PROSPECTIVE JUROR: Yeah.

[Prosecutor]: So what do you think?

PROSPECTIVE JUROR: Yes.

[Prosecutor]: Do you think you could?

PROSPECTIVE JUROR: (Nod of head.)

[Prosecutor]: Okay. You understand that some crimes like this happen in private and so there may not be a whole list of witnesses that see what happened or know about it. Does that make sense?

PROSPECTIVE JUROR: Yes.

Transcript Volume II at 177-179.

[6] The following exchange later occurred:

THE COURT: 29 for cause? State has asked for 29?

[Prosecutor]: Oh. She indicated that she would hold the State to a higher burden if tend to do that, I asked her would you hold the State to a burden beyond all doubt and she said, yes, she thought testimony of evidence will get her beyond all doubt, they indicated the burden of proof and she would hold the State to –

[Defense Counsel]: She said she could convict on the victim's testimony.

[Prosecutor]: But –

THE COURT: 29, you want to make a motion for cause on that?

[Defense Counsel]: No.

> THE COURT: I didn't make any notes on her, she didn't raise any cause for concerns for me but I'll grant a motion for cause on that.
>
> [Prosecutor]: Okay.
>
> [Defense Counsel]: That's over my objection?
>
> THE COURT: Yeah. That's fairly compelling, I just didn't catch all that.
>
> [Prosecutor]: She was kind of quiet-ish and she did say that.

Id. at 196-197.

[7] I.T. testified that she woke up feeling "a sharp pain in [her] vagina," "laid there . . . very confused," and did not "really know what to do so [she] just didn't move." Transcript Volume III at 77. She felt Todosijevic's fingers were causing her the pain in her vagina and that he reached his hand between her legs and stuck his finger in her vagina more than once. Todosijevic put his fingers in his mouth and continued to stick his fingers in her vagina which "hurt a lot" and "felt like a sharp pain." *Id.* at 78. At some point while he was touching her with his fingers, he "took a break," stood up, and removed his boxers. *Id.* at 81. Todosijevic then pushed his penis against her and "[i]t wasn't in [her] vagina but he was pushing it up against it." *Id.* at 79. He moaned when he was touching her with his penis. When asked if she ever felt his penis enter her vagina, she answered: "A little bit, yes." *Id.* She testified that Todosijevic licked her ear and was "putting [her] ear in his mouth." *Id.* at 80. She stated that "[a]fter he was pushing, he . . . just stopped," she rolled over

after making it obvious she was awake, and he "rolled over and pretended to be asleep." *Id.* at 79-80. "After a couple seconds, [she] woke him up and said [she] wanted to go to [her] room with the cold pillows," and he replied "yes." *Id.* at 81-82. Todosijevic stood up, put on a robe, and asked her if she wanted to go to the bathroom. She could see his penis when he stood up and described it as "pointing down" and looking red. *Id.* at 82. I.T. stood up and started walking to the bathroom, and he followed her. She urinated, wiped, went to her room, and fell asleep. When asked if she had ever heard adults talking about these kinds of acts or seen these acts happening between adults prior to that weekend, she answered in the negative.

[8] The State also presented the testimony of Marsh, Ewing, and Sandberg. After the State rested, Todosijevic's counsel moved for a "directed finding" and asserted that, "without medical evidence, there's no way to shift the burden to the Defendant to even go forward in the case, especially when that is available." *Id.* at 161. The court denied the motion.

[9] Todosijevic testified that he retired at about 3:30 a.m., slept in his own room, and I.T. slept in her bed. When asked if he touched I.T.'s vagina, he answered: "Absolutely not. I would never, ever. Not only would I never, if someone ever did that to my daughter, I would kill them." *Id.* at 198-199. When asked if he held his penis and inserted it in her vagina, he answered: "Never. No. Never." *Id.* at 199.

[10] During redirect examination of Todosijevic, the following exchange occurred:

> Q. Did you molest your daughter?
>
> A. No, I did not. I would never molest anyone, especially my daughter.
>
> Q. In any way, did you do anything improper with your daughter?
>
> A. I never did anything inappropriate, improper to my daughter ever, nor would I to anyone's daughter.

Id. at 212.

[11] Outside the presence of the jury, the prosecutor argued that Todosijevic's counsel brought up pending charges in his pretrial motions including a level 3 rape alleged to have occurred three months prior to the allegations in the present case, the State did not intend to introduce that evidence unless a door was opened, and defense counsel had opened the door based on Todosijevic's response that he would never molest anyone. She asserted Todosijevic's testimony constituted character evidence that left the jury with "only part of the story" and Evidence Rules 404 and 608 allowed the State to inquire into the other allegation. *Id.* at 213. Defense counsel argued the testimony would be highly prejudicial and unfair. The prosecutor indicated what it would ask Todosijevic, argued that the victim in the rape allegation was someone's daughter, and Todosijevic put forth evidence that he would never engage in sexual acts that were nonconsensual. Defense counsel argued that "[m]olest is defined in Indiana law as under age" and "[t]he other case has nothing to do with under age." *Id.* at 219. The court allowed the prosecutor to make a limited inquiry.

[12] On recross-examination in the presence of the jury, Todosijevic testified that he spent some time with a female named K. on July 21, 2017. The following exchange then occurred:

> Q. And on that day, you had been out drinking with [K.]; is that correct?
>
> A. That was like our second date or whatever I think it was.
>
> Q. And on that day, you had a sexual encounter with [K.]; is that correct?
>
> A. That is correct.
>
> Q. And you're aware that she has indicated that that was a non-consensual sexual encounter; right?
>
> A. That is incorrect.
>
> Q. You're not aware that she has indicated that that was a non-consensual sexual encounter?
>
> A. That's not what she said to me.
>
> Q. You're aware that she's indicated that; correct?
>
> A. Yes.

Id. at 222.

[13] Todosijevic's twin brother, Milan Jared Todosijevic ("Jared"), testified that he put I.T. in her bed, and I.T. was asleep when he left the residence that evening at approximately 11:00 p.m. Brandon Todosijevic, Jared's son, testified that he, Jared, and Todosijevic put I.T. to bed in her room.

[14] The jury found Todosijevic not guilty of Count I, child molesting as a level 1 felony, and guilty of Count II, child molesting as a level 4 felony. The court sentenced Todosijevic to ten years with three years suspended to probation.

Discussion

I.

[15] Todosijevic argues that, "[b]ecause Juror 29 provided no answers that rose to the level of a cause challenge, the trial court should not have granted the cause challenge." Appellant's Brief at 24. We review a trial court's decision on for-cause challenges for an abuse of discretion. *Oswalt v. State*, 19 N.E.3d 241, 245 (Ind. 2014), *reh'g denied*. "The trial court has the unique position to observe and 'assess the demeanor of prospective jurors as they answer the questions posed by counsel.'" *Id.* (quoting *Smith v. State*, 730 N.E.2d 705, 708 (Ind. 2000), *reh'g denied*). "[O]n appeal, we afford substantial deference to the trial judge's decision . . . and will find error only if the decision is illogical or arbitrary." *Id.* (quoting *Whiting v. State*, 969 N.E.2d 24, 29 (Ind. 2012)). "Reversible error occurs only when the error has prejudiced defendant." *Id.* at 249 (quoting *Woolston v. State*, 453 N.E.2d 965, 968 (Ind. 1983)).

[16] "For-cause motions . . . are available to exclude any prospective juror whose 'views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath . . . ."'" *Id.* at 246 (quoting *Wainwright v. Witt*, 469 U.S. 412, 423-424, 105 S. Ct. 844 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521 (1980))). Ind. Code §

35-37-1-5 and Ind. Jury Rule 17 "list many additional bases for removing a prospective juror for cause." *Id.*

[17] While Todosijevic argues that the trial court's decision "could very well have had a prejudicial impact on the outcome of this case," Todosijevic shows no prejudicial impact. Appellant's Brief at 26. Even assuming that the trial court abused its discretion in granting the State's motion to strike Juror 29 for cause, we cannot say reversal is warranted. *See Woolston*, 453 N.E.2d at 968 ("Reversible error occurs only when the error has prejudiced defendant. Defendant has not shown how the error prejudiced him. Only one other juror was sworn after [the excused juror]. Defendant did not challenge that juror for cause and does not now argue that he would have used a peremptory challenge on the juror. Furthermore, a review of the voir dire reveals no attempt on defendant's part to discover any grounds for cause with respect to the last juror. Thus there was no reversible error.") (Citations omitted).

II.

[18] Todosijevic argues the trial court erred when it permitted the State to offer evidence of an unrelated rape allegation. He asserts that, even if defense counsel did not properly preserve an objection, the trial court's admission of the unrelated rape allegation constituted fundamental error. He contends his defense was that the molestations never occurred and that none of the exceptions in Rule 404(b) applied. He also argues that he did not open the door to evidence of the unrelated rape because his testimony did not touch upon

whether he had committed rape of an adult and did not leave the jury with a false or misleading impression. He further contends that, even if the evidence was admissible pursuant to Rule 404(b), its prejudicial effect substantially outweighed its probative value.

[19] Ind. Evidence Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 404(b)(2) provides: "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(a) provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Ind. Evidence Rule 404(a)(2) provides: "The following exceptions apply in a criminal case: (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it . . . ."

[20] The standard for assessing the admissibility of Rule 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. Evidence Rule 403.[2] *Boone v. State*, 728 N.E.2d 135, 137-138 (Ind. 2000), *reh'g denied*. The purpose of the rule is to prevent the jury from making the "forbidden inference" that a defendant is guilty of the charged offense on the basis of other misconduct. *Hicks v. State*, 690 N.E.2d 215, 218-219 (Ind. 1997). The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. *Crain v. State*, 736 N.E.2d 1223, 1235 (Ind. 2000). If evidence has some purpose besides behavior in conformity with a character trait and the balancing test is favorable, the trial court can elect to admit the evidence. *Boone*, 728 N.E.2d at 138. For instance, evidence which shows the defendant's motive or plan may be admissible. *See* Ind. Evidence Rule 404(b)(2). Errors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996); Ind. Trial Rule 61. In determining whether error in the introduction of evidence affected the defendant's substantial rights, we assess the probable impact of the evidence upon the jury. *McClain*, 675 N.E.2d at 331. Additionally, otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence. *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000). However, "the evidence relied upon to

[2] Ind. Evidence Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

'open the door' must leave the trier of fact with a false or misleading impression of the facts related." *Id.*

[21] Todosijevic testified that he "would never molest anyone." Transcript Volume III at 212. Moreover, when asked if he did "anything improper" with his daughter, he answered: "I never did anything inappropriate, improper to my daughter ever, nor would I to anyone's daughter." *Id.* This testimony offered evidence of a pertinent trait of Todosijevic and left the trier of fact with a false or misleading impression of the facts related and the prosecutor was allowed to offer evidence to rebut the testimony. We also note that Todosijevic does not assert that the prosecutor mentioned the prior allegation during the closing argument. We cannot say the trial court abused its discretion in admitting the limited inquiry regarding an allegation of a nonconsensual sexual encounter or that the probative value was substantially outweighed by the danger of unfair prejudice.[3] Fundamental error did not occur.

[22] For the foregoing reasons, we affirm Todosijevic's conviction.

[23] Affirmed.

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[3] To the extent Todosijevic relies upon *Werne v. State*, 750 N.E.2d 420 (Ind. Ct. App. 2001), *trans. denied*, and *Oldham v. State*, 779 N.E.2d 1162 (Ind. Ct. App. 2002), *trans. denied*, we find those cases distinguishable. Unlike in *Werne* where the evidence of another alleged molestation was offered under the intent exception to Rule 404(b) and where the trial court improperly relied upon the defense counsel's opening statement, 750 N.E.2d at 422, and unlike in *Oldham* where the defendant "made no effort to affirmatively rebut the State's assertion that he had a bad and dangerous character," 779 N.E.2d at 1173, Todosijevic specifically testified that he "would never molest anyone" and would never do anything inappropriate to anyone's daughter. Transcript Volume III at 212.

Bailey, J., and Weissmann, J., concur.