MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Tyson Taylor,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 12, 2022

Court of Appeals Case No. 22A-CR-831

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-2004-F1-2336

Bailey, Judge.

Case Summary

[1] Robert Tyson Taylor ("Taylor") appeals his conviction of Child Molesting, as a Level 1 felony,[1] with a Repeat Sexual Offender Enhancement.[2]

[2] We affirm.

Issues

[3] Taylor raises the following two restated issues:

I. Whether the trial court abused its discretion when it excluded evidence of the child victim's alleged past behavioral issues.

II. Whether the trial court abused its discretion when it admitted into evidence the video recording of the child victim's forensic interview.

Facts and Procedural History

[4] In April of 2020, twelve-year-old H.H. ("Child"), her mother ("Mother"), her mother's boyfriend, Cory Carmickle ("Carmickle"), and her two younger sisters were living with Child's grandmother ("Grandmother") and Taylor, who was

[1] Ind. Code § 35-35-42-4-3(a)(1).

[2] I.C. § 35-50-2-14.

Grandmother's boyfriend. Child had come to live with Grandmother first, and the rest of the family came a few weeks later.

[5] On or about the night of April 3, 2020, Child was in the living room watching television while everyone else was in bed. She went onto the back porch to let the dog out. Taylor came out onto the porch and started talking to her while she was sitting on a chair. Taylor took off her shorts and the maroon underwear she was wearing. He grabbed her legs on her thighs and, with her legs positioned "upwards," he started licking her vagina with his tongue, which felt "weird" and scared her. Tr. v. II at 127-29. He stopped when he heard someone coming, and he told her to go back inside. Child went inside the house and threw her shorts and underwear into her "dirty laundry." *Id*. at 130.

[6] At approximately 1:00 a.m. on April 5, 2020, Carmickle and Mother were in bed when Carmickle heard a loud thud against the wall that their room shared with Child's bedroom; the sound had come from Child's bedroom. When Carmickle opened his bedroom door to check on what was happening, he saw Taylor coming out of Child's bedroom. Taylor was closing up the bathrobe he was wearing. Carmickle asked Taylor what he was doing, and Taylor said that he went in to tell Child to quiet down. Carmickle felt "uneasy" about what he had seen, and the next morning he called the police. *Id*. at 57. While Carmickle was talking to the police, Mother asked Child if Taylor "had touched her down there." *Id*. at 87. Child started crying and told Mother what had happened.

[7] A forensic interview of Child was conducted that day at the Cherish Child Advocacy Center. During that interview, Child disclosed the incident on the porch where Tylor had performed oral sex upon her. Later that same day, the police retrieved Child's maroon underwear and shorts from her "dirty clothes basket." Tr. v. II at 63. During subsequent testing, Taylor's DNA was found on the inside crotch of Child's underwear. The DNA profile was from the non-sperm fraction of the sample, meaning that it was from cells other than sperm cells.

[8] The State charged Taylor with Level 1 felony child molesting and Level 6 felony performing sexual conduct in the presence of a minor[3] and alleged that he was a repeat sexual offender. During his opening statement, Taylor told the jury that Child had given several statements and that in those statements she had given many different accounts as to what had occurred and her story had "changed considerably." *Id*. at 33. During his cross-examination of Child, Taylor did not question Child about any alleged inconsistent statements she had made previously. After Child testified, the State sought to admit the video of her forensic interview as a prior consistent statement, noting that Taylor had put the consistency of her account at issue in his opening statement. The trial court found that Taylor had opened the door to the issue of Child's credibility and allowed the video of the interview to be played for the jury.

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[3] I.C. § 35-42-4-5.

[9] During his cross-examination of Mother, who testified before Child did, Taylor sought permission to question her about Child's history of behavioral problems; namely, that Child was violent, disruptive, defiant, previously sent to a special behavior school, and had made a previous allegation to Child Protective Services ("CPS") against her parents, which was not sexual in nature and was unsubstantiated. Taylor argued this went to Child's credibility, to impeach Child, and to show why Child's accusation against him might be fabricated. The trial court stated that Taylor could not impeach a witness who had not yet testified and that the type of conduct Taylor had described was not relevant to Child's credibility. The court ruled, "[s]o at this time I will not permit the introduction of this evidence through this witness" and suggested that Taylor should keep Mother on standby in case it was later determined that some or all of the proffered evidence would be allowed as impeachment. *Id*. at 100.

[10] Taylor then made an offer of proof in which Mother testified that, when she and Child lived in Illinois, Child: had behavioral issues since she was five years old; was defiant and would scream, kick, yell, and throw things; had ADHD and was taking an ADHD medication; received counseling and went to a behavioral school in the second grade; and, a few years ago, had made a false complaint that Mother and Carmickle had struck her, but no court proceedings ever arose from that accusation, and Child was not put into foster care as a result of that accusation. Mother could not remember any such behavioral problems with Child since the time Child moved to Indiana.

[11] The jury found Taylor guilty of child molesting but "reached an impasse" and could not reach a verdict on Count II, Performing Sexual Conduct. Tr. v. III at 56. Count II was subsequently dismissed per the State's request. The trial court found Taylor to be a Repeat Sexual Offender based on a prior child molesting conviction. The court imposed a sentence of thirty years on Count I and enhanced the sentence by ten years as a Repeat Sexual Offender Enhancement. This appeal ensued.

Discussion and Decision

[12] Taylor challenges two of the trial court's rulings on the admission of evidence. A trial court's decision to admit or exclude evidence is within its sound discretion, and we will reverse only for an abuse of that discretion. *E.g.*, *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). A court abuses its discretion when its ruling is clearly against the logic and effect of the facts and circumstances before it and the error affects a party's substantial rights. *Id*.

Evidence of Child's Character for Truthfulness

[13] Taylor first challenges the trial court's denial of his request to introduce evidence of Child's alleged past "behavioral issues," specifically, defiance toward parents, "oppositional behaviors," and "lying" to CPS in the past about "having been struck by [Mother] and her boyfriend." Appellant's Br. at 7, 8.

Taylor asserts that such issues were "evidence [of] a pertinent character trait" of Child, namely, dishonesty.[4] *Id*.

[14] Under Indiana's Rules of Evidence, evidence must be relevant in order to be admissible. Ind. Evidence Rule 402. To be relevant, the evidence must have "any tendency to make a fact more or less probable than it would be without the evidence," and the fact must be "of consequence in determining the action." Evid. R. 401. However, even relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Evid. R. 403.

[15] Evidence of a victim's character trait is admissible only if the character trait is "pertinent" to a criminal case. Evid. R. 404(a)(1), (2)(B). However, evidence of prior bad acts 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," Evid. R. 404(b)(1), but may be admissible for another purpose, such as proving motive, Evid. R. 404(b)(2). *If* character evidence is admissible, it may be proved by testimony about the person's reputation or by opinion testimony. Evid. R. 405(a). *If* a person's character is "an essential element of a

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[4] Taylor sought to introduce such evidence through Mother's testimony and before Child had testified. The court prohibited the admission of such evidence on the grounds that Taylor could not "impeach" a witness (i.e., Child) who had not yet testified, and, in any case, such evidence was not relevant to Child's credibility about the allegations of sexual abuse. Tr. v. II at 100. On appeal, the State asserts that Taylor has waived the issue of the admissibility of the evidence because "[p]art of the basis for the ruling … was the court's view that the evidence was being offered prematurely," and Taylor never sought to introduce it again at any later point in the trial. Appellee's Br. at 11. However, the State cites no legal authority for its waiver claim; therefore, the waiver claim is itself waived for failure to provide supporting legal authority as required by the Appellate Rules. *See* Ind. Appellate Rule 46(A)(8)(a), (B).

… defense," the character may "be proved by *relevant* specific instances of the person's conduct." Evid. R. 405(b) (emphasis added).

[16] A party may impeach a witness by attacking his or her credibility with relevant, admissible evidence. Evid. R. 607. A witness's credibility may be attacked by testimony about his or her reputation for having a character for untruthfulness. Evid. R. 608(a). However, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Evid. R. 608(b).

[17] Here, the trial court ruled in pertinent part that the evidence of Child's alleged past behavioral issues was inadmissible because it was not relevant. *See* Evid. R. 404(a)(2)(B) (requiring that evidence of a character trait must be "pertinent"); Evid. R. 607 (requiring that admissible evidence used to impeach a witness's credibility must be relevant). We agree. Specifically, alleged childhood defiance and temper tantrums have no relevance at all to Child's reputation for truthfulness or whether Child's sexual abuse allegations in this case are truthful. And, as the trial court noted, Child's alleged past false claim of physical abuse by her Mother and Mother's boyfriend[5] "has nothing to do with a sexual allegation" against Taylor in this criminal case. Tr. v. II at 100.

[5] In addition, as the trial court also noted, Taylor had not laid a proper foundation for the alleged prior false reporting to CPS. *See* Tr. v. II at 100 (noting "unsubstantiation by CPS [of the alleged false allegation] doesn't come in through this witness," i.e., Mother).

[18] Similarly, to the extent Child's past behavioral issues are evidence of prior bad acts as addressed in Evidence Rule 404(b), Taylor has not shown that they had any relevance to Child's motive or intent to falsely testify against Taylor—or to any other permitted use. And, even assuming Child's character was an "essential element" of Taylor's defense, the evidence of her specific instances of past conduct were irrelevant to her sexual abuse allegation against Taylor and therefore inadmissible under Evidence Rule 405(b). Moreover, Child's alleged past false reporting of physical abuse[6] is extrinsic evidence of a "specific instance of conduct" that is not admissible to prove her character for truthfulness. Evid. R. 608(b); *see also Jacobs v. State*, 22 N.E.3d 1286, 1289 (Ind. 2015) (holding evidence of certain alleged instances in which child victim lied to his mother were inadmissible extrinsic evidence of specific instances of conduct used to attack child's character for truthfulness); *Nunley v. State*, 916 N.E.2d 712, 720 (Ind. Ct. App. 2009) (holding evidence that child molesting victim had previously made a false accusation to police was inadmissible under Evidence Rule 608(b) to impeach child's credibility because it was a specific instance of misconduct that did not result in a conviction), *trans. denied*.

[19] The trial court did not abuse its discretion when it denied Taylor's request to introduce evidence of Child's past behaviors because the evidence was not relevant and, in any case, it was extrinsic evidence of specific instances of

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[6] There was no evidence or even an allegation that Child's supposed prior false reporting resulted in a criminal conviction such that it would be admissible under Rule of Evidence 609.

conduct that is not admissible to prove Child's character for truthfulness. *See* Evid. R. 608(b).[7]

Admission of Video of Forensic Interview

[20] Next, Taylor challenges the trial court's admission, over Taylor's objection, of the video recording of Child's forensic interview. Taylor maintains that the video was inadmissible hearsay. The State asserts that the video was "not hearsay" as defined under Evidence Rule 801(d)(1)(B), which provides in relevant part that a witness's prior statement is not hearsay if the witness is subject to cross-examination and the prior statement "is consistent with the declarant's testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated" the statement. The trial court agreed with the State and admitted the video into evidence.

[21] Child testified that Taylor molested her by performing oral sex upon her. In her forensic interview, Child made the same allegation. Thus, the video of the interview was a statement that was "consistent" with Child's testimony per Evidence Rule 801(d)(1)(B) and was admissible under that rule if it was "offered to rebut an express or implied charge" that Child had "recently fabricated" the molestation allegation.

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[7] Taylor asserts that Evidence Rule 608(b) must yield to his Sixth Amendment right of confrontation and right to present a full defense. In support, he cites *State v. Walton*, 715 N.E.2d 824, 827 (Ind.1999). However, as our Supreme Court has noted, the exception discussed in *Walton* was limited to the "very narrow circumstances" of "prior false accusations of rape." *Jacobs*, 22 N.E.3d at 1290. There are no rape accusations at issue in this case.

[22] Taylor asserts that he did not charge that Child had recently fabricated the allegation of molestation because the trial court prohibited the admission of the evidence of Child's prior behavior issues. However, in his opening statement, Taylor did make an implied charge that Child fabricated the claims against Taylor. Taylor's lawyer stated:

> There are a number of inconsistencies, however, in what [Child] has stated because [Child] has not given one statement, she gave several. She did give a statement to the police officers or to the investigators very shortly after this report was made. She gave a further statement again about a year later and then was subjected to or submitted to a deposition where I asked her questions a few months after that.
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> The story changed. The story changed considerably. Now, I'm not sure exactly what she's going to say today. I'm not going to give you a preview of what I believe her testimony will be given that she's made different accounts and different statements as to what happened, when it happened, where it happened, how many times it happened, as to what she said happen. I don't know what version we're going to hear today. Just to [sic] know that I don't believe she can give a statement today that's consistent with what she's said in the past, and that story has changed.

Tr. v. II at 33. Because Taylor's counsel implied that Child recently fabricated her claim that Taylor had molested her, the trial court did not err in allowing the State to rebut that implication with Child's prior consistent statement contained in the video of her forensic interview per Evidence Rule 801(d)(1)(B).

[23] Moreover, even if Taylor had not implied in his opening statement that Child "recently fabricated" the claim of molestation, his opening statement at the very least "opened the door" to evidence of Child's prior consistent statements by raising Child's alleged inconsistent statements. "[W]hen a defendant interjects an issue in a trial, he opens the door to otherwise inadmissible evidence." *Beauchamp v. State*, 788 N.E.2d 881, 896 (Ind. Ct. App. 2003) (citation omitted); *see also Clark v. State*, 915 N.E.2d 126, 130 (Ind. 2006) (same). "The door may be opened when the trier of fact has been left with a false or misleading impression of the facts." *Clark*, 915 N.E.2d at 130. Here, Taylor's opening statement left the impression that Child had made inconsistent statements about the molestation. That impression opened the door to Child's prior consistent statement in the video of the forensic interview.

Conclusion

[24] The trial court did not abuse its discretion when it denied Taylor's request to introduce evidence of Child's past behaviors, nor did it abuse its discretion when it allowed the State to introduce into evidence Child's prior consistent statement.

[25] Affirmed.

Bradford, C.J., and Tavitas, J., concur.