MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joe Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 2, 2022

Court of Appeals Case No. 21A-CR-2303

Appeal from the Marion Superior Court

The Honorable Angela D. Davis, Judge

Trial Court Cause No. 49D27-1909-F1-37289

Molter, Judge.

[1] A jury convicted Joe Johnson of two counts of child molesting after his stepdaughter, T.P., testified he repeatedly molested her a few years earlier. Before trial, Johnson notified the court he intended to admit evidence that T.P.'s family discovered she was in a sexual relationship with a man she recently met in Florida, which he thought supported his defense theory that T.P. falsely accused him of child molesting to deflect attention from that relationship. But the trial court excluded this evidence pursuant to Indiana Evidence Rule 412, commonly known as the Rape Shield Rule. Because we conclude the trial court did not abuse its discretion in excluding the evidence under Evidence Rule 412, we affirm.

Facts and Procedural History

[2] In 2017, T.P. was eleven years old and lived with her mother and stepfather, Johnson. One night, Johnson entered T.P.'s bedroom and shined a flashlight to see if she was awake. Believing she was asleep, Johnson pulled up her shirt, "played" with her breasts, and "sucked on" her breasts. Tr. Vol. 2 at 197, 199. Johnson then removed T.P.'s pants so that he could "suck on [only her] vagina." *Id.* at 199. All the while, T.P. was pretending to be asleep because she was scared by what was happening and did not know what to do. Later, T.P. told her mother what had happened, but her mother did not believe her, and Johnson remained in the home.

[3] A couple of years later, when T.P. was thirteen years old, she visited Florida with relatives. When she returned home, her mother noticed a change in her behavior, decided to check her cell phone, and learned that T.P. had begun an

intimate relationship with a nineteen-year-old man while in Florida. T.P.'s text messages also revealed that she and the man were making plans to get married and have children. T.P.'s mother was so upset by the text messages that after confronting T.P. about them she invited multiple relatives to their home to scold T.P. for her behavior. T.P.'s mother reported the man to the police, and there was a "big family blowup." Tr. Vol. 3 at 144; Tr. Vol. 2 at 245.

[4] To defuse the situation at home, T.P. decided to stay with her maternal aunt for a few days. While together, T.P.'s aunt "press[ed]" T.P. to explain what had happened in Florida. Tr. Vol. 2 at 245. T.P.'s aunt gave T.P. an ultimatum, telling T.P. that she could either explain what took place in Florida or be taken to a doctor who, upon medical examination, would reveal whether T.P. and the man had engaged in sexual intercourse. Because T.P. believed she was in "big trouble," *id.*, she wrote a "lengthy" letter to her aunt "about all sorts of things." Tr. Vol. 3 at 169. One paragraph in the letter explained what had happened with Johnson when she was eleven years old.

[5] T.P.'s aunt texted T.P.'s mother conveying T.P.'s allegations against Johnson. But T.P.'s mother responded that T.P. had made similar allegations in the past and she did not believe T.P. because she thought T.P. would make the allegations when in trouble for her behavior. T.P.'s aunt then reported Johnson to the police, and T.P. was taken to a child advocacy center to provide a statement.

[6] As relevant here, the State charged Johnson with child molesting as a Level 1 felony and child molesting as a Level 4 felony. On the morning of his jury trial, Johnson filed a motion proposing to offer evidence pursuant to Indiana Evidence Rule 412. Particularly, Johnson intended to offer the following evidence:

> (1) That in July 2019, approximately one week prior to th[e] investigation beginning, [T.P.'s mother] discovered text messages in her daughter, [T.P.'s], cell phone indicating communication with an adult male that was not the defendant.
>
> (2) This relationship resulted from a family trip to Florida two weeks prior where the adult male was present.
>
> (3) The text messages revealed that [T.P.] and the adult male had engaged in sexual conduct on the Florida trip.
>
> (4) The text messages revealed that [T.P.] and the adult male were making plans for their future, to include being married and having children.
>
> (5) That in July 2019, [T.P.'s mother] reported these findings to the Indianapolis Metropolitan Police Department as she believed, based on the text messages, that her daughter had engaged in an appropriate [sic] sexual relationship with the adult male and could be in danger.
>
> (6) That as a result of the text messages, [T.P.'s aunt] threatened [T.P.] with juvenile prosecution.

(7) That as a result of the text messages, [T.P.'s aunt] told [T.P.] that she could either disclose what happened between her and the adult male or be taken to a doctor and examined to determine whether she had engaged in sexual conduct with the adult male.

(8) That within a few hours of being threatened with medical examination, [T.P.] disclosed the allegations that lead to criminal charges against [Johnson] in this matter.

Appellant's Conf. App. Vol. 2 at 113–14. Johnson asserted that the purpose for the proposed evidence was to demonstrate that T.P. had a motive to fabricate the allegations in this case.

[7] The trial court denied Johnson's motion, ruling that Rule 412 prevented him from offering the proposed evidence. However, it agreed to allow Johnson to elicit testimony from T.P. that: (1) she began communicating with a man in Florida; and (2) she believed she was going to be in trouble, and was threatened with prosecution, based on those communications. Tr. Vol. 2 at 37–40. Ultimately, the jury found Johnson guilty of both counts of child molesting. Johnson now appeals.

Discussion and Decision

[8] Johnson contends the trial court abused its discretion by excluding evidence relating to T.P.'s relationship with the man she met in Florida. On appeal, "[w]e afford broad discretion to a trial court's decisions on whether to admit or exclude evidence, and [we] review such decisions for [an] abuse of discretion." *Conrad v. State*, 938 N.E.2d 852, 855 (Ind. Ct. App. 2010). "An abuse of

discretion occurs when the trial court's ruling is clearly against the logic of the facts and circumstances before it." *Id.* Because we conclude the trial court properly applied Evidence Rule 412, we find no such abuse of discretion.[1]

II. Indiana Evidence Rule 412

[9] Evidence Rule 412 provides that "evidence offered to prove that a victim or witness engaged in other sexual behavior" and "evidence offered to prove a victim's or witness's sexual predisposition" is inadmissible in criminal and civil proceedings involving alleged sexual misconduct. Ind. Evidence Rule 412. There are three exceptions in criminal cases:

> (A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

[1] The State argues Johnson waived the issues he raises on appeal by failing to timely alert the trial court to his intention to introduce the disputed evidence. While Rule 412, among other things, requires a party to submit a written motion describing the evidence it wishes to introduce at least ten days before trial, the trial court may set a different deadline if the party shows good cause. Ind. Evid. Rule 412(c)(1)(B). Here, Johnson argued he had good cause for failing to meet the ten-day period and filing his motion on the morning of the trial because both sides agreed there was confusion among them as to whether or not they had previously agreed Johnson could introduce the evidence at issue. See Tr. Vol. 2 at 28–29. The State did not argue Johnson waived this issue by not filing his motion sooner, and the trial court ruled on the merits after briefing and argument. We therefore conclude there is no waiver.

(C) evidence whose exclusion would violate the defendant's constitutional rights.

Ind. Evidence Rule 412(b)(1).[2] The objective of Rule 412 is to prevent victims of sexual assault from "being put on trial" and "to remove obstacles to reporting sex crimes," *Conrad*, 938 N.E.2d at 855 (quotation marks omitted), which reflects the principles of Indiana's Rape Shield Statute. Ind. Code § 35-37-4-4 (stating that "inquiry into a victim's prior sexual activity is sufficiently problematic" and "should not be permitted to become a focus of the defense").

[10] Johnson argues the evidence he wished to introduce at trial does not fall under Rule 412 because it "was not evidence of prior sexual conduct" and was instead merely "evidence that a relationship existed, that communication occurred, and that T.P. had a motive to fabricate the allegations against Johnson." Appellant's Br. at 12. This argument fails because the trial court did not preclude that evidence. The trial court ruled Johnson *could* introduce evidence that T.P. was communicating with a man in Florida and that she believed she might face juvenile prosecution as a result of those communications. The court also allowed Johnson to introduce testimony supporting his defense theory that T.P. was in serious trouble with her family after they discovered her

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[2] Also, evidence of prior false accusations of rape made by a complaining witness does not constitute prior sexual conduct for rape shield purposes because that evidence is more properly understood as verbal conduct. *Blair v. State*, 877 N.E.2d 1225, 1233 (Ind. Ct. App. 2007), *trans. denied*. Indiana common law thus permits evidence of prior false accusations of sexual misconduct. *Id.* Evidence of prior false accusations may only be admitted if the complaining witness admits that she had made a prior accusation of sexual misconduct or the accusation is demonstrably false. *Id.* at 1234. "Prior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved." *Id.* (quotation marks omitted).

relationship with the man she met in Florida, so she fabricated her allegations against Johnson to deflect that family tension.

[11] The State called T.P. as its first witness, and T.P. confirmed in her direct testimony that when she came back from Florida she "got in trouble for things that happened in Florida," *id.* at 208:7–11, and then she wrote "a letter about what had happened with . . . Johnson." *Id.* at 208:19–20. Through cross-examination, Johnson's counsel elicited more testimony from T.P. emphasizing the severity of the trouble she was in with her family and how that related to the timing of her allegations against Johnson:

> Q: Okay. Now, when you returned from Florida and this situation happened – when you returned from Florida, the situation happened where you were in trouble; is that correct?
>
> A: Yes.
>
> Q: Okay. And when I say that you were in trouble, your mom went through your phone, found text messages, and was very upset; is that correct?
>
> A: Yes.
>
> Q: Okay. And when I say very upset, you told the interviewer that she physically jumped on you; is that right?
>
> A: Yes.
>
> Q: And you were very upset about that?

A: Yes.

Q: And is it also correct that she called your [aunt] over to your house?

A Yes.

Q: And she called your [aunt]'s boyfriend . . . over to your house?

A: Yes.

Q: Okay. And [Johnson] was there also; is that right?

A: Yes.

Q: Okay. And it was a really big family blowup; is that right?

A: Yes.

Q: And you were under the impression that you were in really big trouble; is that correct?

A: Yes.

Q: Oh, I'm sorry, did you say yes?

A: Yes.

Q: Okay. And during – to defuse this blowup, you went to your [aunt]'s house for the week of (inaudible); is that correct?

A: Yes.

Q: And your phone was taken away?

A: Yes.

Q: And while you were at your [aunt]'s house, your aunt continued to press you and press you and press you about this incident with – following the text messages; is that right?

A: Yes.

Q: And based on the things she was saying to you, you believed you were in big trouble; is that right?

A: Yes.

Q: Okay. And after that, that is when you wrote that letter that included, among other things, the allegation that . . . Johnson touched you inappropriately, correct?

A: Yes.

Id. at 244:10–246:1.

[12] Johnson's counsel also elicited testimony through cross-examination of T.P.'s grandmother that she was aware that when T.P. returned from Florida text messages were discovered on her phone which led to "a big blowup in the family," Tr. Vol. 3 at 51:15–17, and that it was only after that blowup that she learned of T.P.'s allegations. *Id.* at 52:15–20. Johnson's counsel then

repeatedly highlighted these points in closing argument, further developing the defense theme that T.P. fabricated allegations against Johnson in response to being in trouble with her family.

> All of this comes about as it relates to T.P. because T.P. was in trouble. Everybody was upset, and not just made [sic], . . . her aunt, her best friend . . . that she can talk to about anything, she could talk to about everything, was hurt and crying because something happened on her watch. And she goes to her, and she tells her, you need to tell me what's going on or you're going to be in more trouble, and this goes on for a week, and she's in her mother's home, being confronted by her [aunt] that she loves, her uncle, her mother, her stepfather, people are making claims to go to Chicago, it is chaotic, and this continues for a week. And what makes it stop? This letter. There's no question. We talked in jury selection, do kids sometimes lie? Yes. Why do they lie? Sometimes they're trying to keep themselves from getting in trouble. Everybody here agrees, this was big trouble, this was serious trouble, this was trouble, to Chicago, trouble, and she writes this letter in response, and the State makes so much of this letter.
>
> . . . .
>
> And ladies and gentlemen, that's why we're here. We're here because T.P. needed a break. T.P. was in serious trouble. Big, serious trouble. Her aunt is upset and crying. Her mom is upset and getting physical with her. Somebody's reco[r]ding this whole thing to find out her responses. Another lack of evidence because the State's witness knew it was recorded and never gave it to the detective. Her aunt is pressing, and pressing, and pressing her. And [Johnson] is headed to Chicago. And this disclosure comes out. She's in big trouble.

. . . .

> 15-year-old doesn't know she's not still in trouble today. She has every interest to blame this man. She had every interest to get out that house.
>
> . . . .
>
> And then your knowledge, commonsense, and life experiences. So let's talk about that. T.P.'s credibility, shot based on commonsense. When kids want to get out of trouble, they lie about things.
>
> . . . .
>
> Are you firmly convinced that T.P.'s telling the truth or was T.P. in big, serious trouble that she was trying to get out of?

Id. at 242:17–243:5, 247:20–248:1, 248:15–17, 249:1–3, 250:2–4.

[13] What the trial court did not permit was testimony that the reason T.P. was in trouble was because her relationship with the man she recently met in Florida included sexual conduct. For example, as part of Johnson's offer of proof, counsel elicited T.P.'s confirmation that her aunt "told [T.P.] she was going to take [her] to a doctor to determine if [she] had sex with this man." Tr. Vol. 2 at 230:7–10; *see also* Tr. Vol. 3 at 211:2–4 ("Q: And did those text messages reveal that T.P. was having sexual conduct with the adult male? A: Yes."). Counsel's written submission represented to the court that Johnson wished to prove that T.P. and the man she met in Florida "had engaged in sexual

conduct," that they were planning to have children together, that T.P.'s mother believed T.P. "had engaged in an [in]appropriate sexual relationship with the adult male," and that T.P.'s aunt told her "she could either disclose what happened between her and the adult male or be taken to a doctor and examined to determine whether she had engaged in sexual conduct with the adult male." Appellant's Conf. App. Vol. 2 at 113–14. At oral argument on the motion, Johnson's counsel argued T.P. "had a motivation to accuse [her] client because she was going to be taken in for, or at least she thought, she was going to be taken in for a medical examination that would reveal sexual conduct, consensual or otherwise, with this adult male that she was trying to protect." Tr. Vol. 2 at 31.

[14] That is evidence of T.P.'s prior sexual conduct, which falls squarely within the Rape Shield Rule. The trial court therefore did not abuse its discretion when it concluded that the excluded evidence Johnson sought to introduce fell within the parameters of Rule 412.

II. Constitutional Claim

[15] Johnson argues that even if the evidence fell within Evidence Rule 412, it was admissible under Rule 412(b)(1)(C), which provides an exception for the admission of "evidence whose exclusion would violate the defendant's constitutional rights." He contends the trial court's exclusion of his proposed evidence violated his constitutional right to cross-examine witnesses and present a defense.

[16] As our court noted in *Oatts*, the right to cross-examination is not absolute. *Oatts v. State*, 899 N.E.2d 714, 722 (Ind. Ct. App. 2009). "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (alteration adopted and quotation marks omitted). Also, the right to confront witnesses "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* (quotation marks omitted). Our Supreme Court has "consistently held that Indiana's rape shield statute does not violate a defendant's Sixth Amendment right to confront witnesses absent a showing of actual impingement on cross-examination." *Thomas v. State*, 471 N.E.2d 677, 679 (Ind. 1984).

[17] Here, Johnson's defense theory was that T.P. fabricated her child molestation claim because she wanted to divert any unwanted attention or punishment from her intimate relationship with the man she met in Florida. As explained above, Johnson was permitted to develop this theory through an extensive cross-examination of T.P. and T.P.'s relatives—particularly her mother, aunt, and grandmother. As to T.P.'s mother, aunt, and grandmother, trial counsel questioned each relative about the subsequent big family blowup and how T.P. made her allegations against Johnson after believing she was in serious trouble. Tr. Vol. 3 at 51–52, 164–66. He even elicited testimony from T.P.'s mother that T.P. had made similar allegations in the past when she was in trouble for her behavior. *Id.* at 206. And the trial court allowed Johnson to present evidence to the jury that, before alleging that Johnson inappropriately touched her, T.P.

began communicating with a man in Florida and that she believed she was going to face juvenile prosecution for communicating with the man. Tr. Vol. 2 at 37–40.[3]

[18] Thus, Johnson had a sufficient opportunity to develop his own account of the events at issue. He was only prevented from presenting the jury with evidence of T.P.'s other sexual behavior, which allegedly occurred after the offenses and had nothing to do with the events that formed grounds for the charges against him. As such, we conclude that Johnson's proposed evidence does not fall within the exception provided by Rule 412(b)(1)(C), and in ruling that Johnson could not present this evidence, the trial court did not violate Johnson's constitutional right to cross-examine witnesses and present a defense.

[19] Affirmed.

Mathias, J., and Brown, J., concur.

[3] In addition to questioning T.P. about being in trouble with her family, Johnson's trial counsel also questioned her about alleged inconsistencies in her statements.