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IN THE
COURT OF APPEALS OF INDIANA

Robert A. Cutshall, II,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff,

March 25, 2021

Court of Appeals Case No. 20A-CR-1866

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-1905-F1-115

Robb, Judge.

Case Summary and Issues

[1] Following a jury trial, Robert Cutshall II was found guilty of child molesting. The trial court sentenced Cutshall to thirty-five years in the Indiana Department of Correction ("DOC"), with two years suspended to probation. Cutshall now appeals, raising two issues, which we restate as: (1) whether there was sufficient evidence of penetration to support his child molesting conviction; and (2) whether the trial court erred in admitting certain evidence. Concluding that the State presented sufficient evidence to support his conviction and that the trial court's admission of certain evidence was harmless error, we affirm.

Facts and Procedural History

[2] Cutshall and his wife Michelle Cutshall had been married for twenty-one years and lived with their fourteen-year-old child, V.C., and their four grandchildren, including three-year-old Z.S. The family lived in a one-bedroom home. V.C. slept in the formal bedroom while the rest of the family slept in the living room. Two mattresses were on the floor of the living room – Cutshall and Michelle slept on one, Z.S. shared the other mattress with another grandchild, and the two youngest grandchildren slept in a portable crib.

[3] On April 26, 2019, Michelle left the home to attend a concert with her two oldest daughters. Cutshall and V.C. were placed in charge of watching the grandchildren. After Michelle left, Cutshall began taking shots of whiskey. Around 10:00 p.m., V.C. and the grandchildren laid down to go to sleep. Later

that night, V.C. entered the living room and saw Cutshall in his bed with Z.S. V.C. testified that Cutshall and Z.S. were under the covers but she saw their bodies perpendicular to each other with their "crotch areas " closest together. Transcript, Volume III at 41. Further, Z.S.'s legs were in the air while Cutshall moved back and forth. *See id.* V.C. also testified that Z.S. was crying and Cutshall was telling her to be quiet. V.C. got Z.S. to get out of the bed and come over to her but then Cutshall called Z.S. back. When Cutshall called Z.S. back to bed, his penis was out, erect, and he "was swinging [it] around." *Id.* at 44.

[4] When Michelle returned, V.C. told her what she had witnessed, and they packed their things and left the home with the grandchildren. While sitting on the outside step of a friend's home later that night, Michelle saw Officer Evan Rhoades of the Huntington City Police drive by and waved him down. Officer Rhoades then contacted Department of Child Services and Detective Shane Blair who was on call that night.

[5] V.C. and Z.S. were taken to a child advocacy center for a child forensic interview. Detective Blair attempted to conduct an interview with Z.S.; however, Z.S. had a very limited verbal capacity. Ultimately, he only interviewed V.C. Afterward, Z.S. was transported to a sexual assault treatment center in Fort Wayne and examined by sexual assault nurse Sara Coburn. Coburn documented that Z.S. had swelling of the bilateral labia majora, or the outer lips of the genitalia, and abrasions to the fascia navicularis, where the inner lips join together. *See id.* at 131. Coburn also testified that the abrasion

was likely caused by blunt force trauma and was not a common physical injury to a child Z.S.'s age. *See id.* at 131-32. DNA swabs were taken which revealed Cutshall's DNA on Z.S.'s hands and inner thigh. *See id.* at 158-59.

[6] The State charged Cutshall with Count I, child molesting as a Level 1 felony for sexual intercourse; Count II, child molesting as a Level 1 felony for other sexual conduct; and Count III, possession of child pornography, a Level 6 felony. Following a jury trial, Cutshall was found guilty of possession of child pornography and not guilty of Count II of child molesting. However, the jury could not reach a verdict on Count I of child molesting and the trial court declared a mistrial as to that count.

[7] On September 9, 2020, a second jury trial was held for Count I of child molesting. During the State's case in chief, Detective Blair testified that forensic analysis had been conducted on Cutshall's cellphone. Cutshall's internet web history on the day in question revealed that Cutshall accessed "a large amount of adult pornographic material" between 6:22 p.m. and 7:05 p.m. *Id.* at 108. This testimony was admitted over Cutshall's objection. *Id.* at 107.[1] The jury found Cutshall guilty of child molesting. The trial court sentenced Cutshall to

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[1] Cutshall also filed a motion in limine regarding the evidence of pornography which was granted in part. *See* Appellant's Appendix, Volume 2 at 65-67. The trial court barred any reference to or evidence of Cutshall's possession of *child* pornography; however, the State was allowed to introduce evidence regarding adult pornography viewed "roughly around the time of the allegations occurring." Tr., Vol. III at 12.

thirty-five years in the DOC with two years suspended to probation.[2] Cutshall now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

[8] When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id*. (quotation omitted). We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id*.

B. Evidence of Penetration

[9] To convict Cutshall of child molesting by sexual intercourse as a Level 1 felony, the State was required to prove beyond a reasonable doubt that Cutshall, being at least twenty-one years old, knowingly or intentionally performed or submitted to sexual intercourse with a child under fourteen years of age. Ind.

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[2] Cutshall was sentenced to two years and 183 days, with 180 days suspended, for possession of child pornography following his first trial. *See* Appellant's App., Vol. 2 at 17. Cutshall's child molesting sentence was ordered to be served consecutively with his child pornography sentence. *Id.* at 110.

Code § 35-42-4-3(a)(1). "Sexual intercourse" means an act that includes "*any* penetration of the female sex organ by the male sex organ." Ind. Code § 35-31.5-2-302 (emphasis added).

[10] We have held that the slightest penetration of the female sex organ, including external genitalia, constitutes child molesting. *Seal v. State*, 105 N.E.3d 201, 211 (Ind. Ct. App. 2018), *trans. denied*; *see also Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002) (stating that "our statute defining sexual intercourse does not require that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated"), *trans. denied*. Thus, full penetration resulting in genital trauma is not required to prove child molesting.

[11] Here, due to her young age and inability to put full sentences together, Z.S. did not testify or submit to a child forensic interview. Therefore, there is no direct testimony regarding penetration. Similarly, in *Spurlock v. State*, 675 N.E.2d 312 (Ind. 1996), there was no direct testimony of penetration. The twelve-year-old victim testified that the accused's penis touched her vagina; however, she never said that it penetrated or went inside, and explicitly said that she did not know whether that occurred. *Id.* at 315. Noting that "a detailed anatomical description of penetration is unnecessary," our supreme court nevertheless found that because "the State did not present any external evidence of a bruised hymen or other proof of penetration of even external genitalia[,] . . . the jury had no evidence from which it could find [defendant] guilty beyond a reasonable doubt[.]" *Id.* The court distinguished its decision in *Spurlock* from *Short v. State*, 564 N.E.2d 553, 558 (Ind. Ct. App. 1991), stating:

> *Short* involved a five-year-old victim, who was incapable of clearly describing the events. The evidence of penetration was, *inter alia,* a bruised hymen, demonstrating sufficient penetration. Here, we are confronted with a situation where the victim herself, who was of an age to understand and respond to the questions, did not state that penetration occurred and there was no medical or physical evidence of penetration.

675 N.E.2d at 315.

[12] Here, there is evidence of damage to Z.S.'s external genitalia distinguishing this case from *Spurlock.* Even without Z.S.'s testimony, there is sufficient evidence to show penetration because penetration can be inferred from circumstantial evidence, *Mastin v. State*, 966 N.E.2d 197, 202 (Ind. Ct. App. 2012), *trans. denied*, such as the physical condition of the victim soon after the incident, *Pasco v. State*, 563 N.E.2d 587, 590 (Ind. 1990); *see also Dinger v. State*, 540 N.E.2d 39, 40 (Ind. 1989) (finding sufficient evidence of penetration when a pediatrician found "small pinpoint bruises on, around [the victim's] hymen and a small, superficial laceration on the side of her vagina") (internal quotations omitted).

[13] V.C. testified that Cutshall and Z.S. were in bed under the covers but that their crotches were close together and Cutshall had Z.S.'s legs in the air while he moved back and forth. *See* Tr., Vol. III at 41. V.C. also testified that Z.S. was crying and Cutshall was telling her to be quiet. Z.S. briefly left the bed when V.C. beckoned her but then Cutshall called Z.S. back to the bed. When Cutshall called Z.S. back to bed, his penis was out, erect, and he was swinging it around. *See id.* at 44.

[14] That same night, Z.S. was examined by Coburn who documented that Z.S.'s bilateral labia majora, or the outer lips of her vagina, were swollen and there were abrasions to the fascia navicularis, where the inner lips of the vagina join together. *See id.* at 135. Coburn further testified that the abrasion was likely caused by blunt force trauma and that it was not a common physical injury to a child Z.S.'s age. *See id.* at 132.[3]

[15] We cannot reweigh the evidence. *Bailey*, 907 N.E.2d at 1005. From the evidence presented at trial, the trier of fact could have inferred Cutshall committed child molesting by penetrating Z.S.'s sex organ.

II. Admission of Evidence

A. Standard of Review

[16] Cutshall contends that the trial court abused its discretion when it admitted over his objection Detective Blair's testimony that Cutshall viewed pornography on his phone the night of the incident. The trial court has broad discretion in ruling on the admissibility of evidence. *Small v. State*, 632 N.E.2d 779, 782 (Ind. Ct. App. 1994), *trans. denied*. We will disturb its ruling only upon a showing of abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Baxter*

[3] Cutshall's DNA found on Z.S.'s thigh is additional circumstantial evidence. *See* Tr., Vol. III at 159.

v. State, 734 N.E.2d 642, 645 (Ind. Ct. App. 2000). But even if a trial court abuses its discretion by admitting challenged evidence, we will not reverse the judgment if the admission of evidence constituted harmless error. *Sugg v. State*, 991 N.E.2d 601, 607 (Ind. Ct. App. 2013), *trans. denied*.

[17] Error in the admission of evidence is harmless if it does not affect the substantial rights of the defendant. *See McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied*. In determining whether an evidentiary ruling has affected a defendant's substantial rights, we assess the probable impact of the evidence on the factfinder. *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007).

B. Admission of Testimony About Pornography

[18] Cutshall contends that the evidence regarding his internet search history was inadmissible under Indiana Evidence Rule 404(b). "Evidence 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."[4] Ind. Evidence R. 404(b)(1). However, such evidence may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of

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[2] The State argues that Indiana Evidence Rule 404(b) applies only to a defendant's prior illegal acts, and thus, the evidence that Cutshall viewed pornography the night of the incident falls outside of Rule 404(b)'s scope because possession of adult pornography "is not a bad act or misconduct for the purposes of [Indiana Evidence Rule 404(b)]." Brief of Appellee at 16 (internal quotations omitted). Because we conclude that the admission of this evidence was not relevant but constituted harmless error, we do not address this argument. However, we note that Rule 404(b) plainly states that it applies to "a crime, wrong, or *other* act[.]" Evid. R. 404(b) (emphasis added).

mistake, or lack of accident."[5] Evid. R. 404(b)(2). The rule is "designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so called 'forbidden inference.'" *Hicks v. State,* 690 N.E.2d 215, 218-19 (Ind. 1997). A court faced with a challenge to evidence under Rule 404(b) must: (1) decide if 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 Rule 403. *Id.* at 221.

[19] This court has found that evidence of pornography in an defendant's internet search history is admissible under the "plan" exception of Rule 404(b)(2) when the searches are "close in time" to when a defendant commits the acts and when the internet search history is "very similar" to a defendant's actions. *Laird v. State*, 103 N.E.3d 1171, 1178 (Ind. Ct. App. 2018), *trans. denied; see also Remy v. State*, 17 N.E.3d 396, 401 (Ind. Ct. App. 2014), *trans. denied*. In *Remy*, we concluded that the trial court did not abuse its discretion by admitting evidence of pornographic materials found in the defendant's home involving saran wrap and oral sex because on one occasion the defendant wrapped the victim's body in saran wrap, cut holes for his eyes, mouth, nose, and penis, and then performed oral sex on him. 17 N.E.3d at 401.

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[5] The State claims that the pornography was not offered to show intent but to show Cutshall's state of mind. *See* Br. of Appellee at 17-18. However, the State provides no case law that a defendant's "state of mind" is an exception under Indiana Evidence Rule 404(b) or how it would otherwise make the pornography relevant.

[20] The testimony about pornography admitted in the case at hand does not have the "strong parallel to one of the charged acts" that the pornography in *Remy* did. *Id.* Here, the trial court admitted evidence that Cutshall's browsing history indicated he accessed adult pornography from 6:22 p.m. to 7:05 p.m. the night of the incident. However, there is nothing in the record detailing the type of pornography other than it was adult.[6] Therefore, the pornography admitted in this case was not similar enough to Cutshall's alleged actions to be considered relevant. *See Remy*, 17 N.E.3d at 400 (stating that pornographic images not similar to activities the victim was subjected to were admitted "for no perceivable reason other than to inflame the jury and encourage the forbidden inference") (quotation omitted). We conclude that the pornography at issue was irrelevant and the trial court erred in admitting Detective Blair's testimony.

[21] However, despite finding error in the trial court's admission of this evidence, we hold that the admission was harmless error. In determining whether a party's substantial rights have been affected by erroneous admission of evidence, we consider the evidence's probable impact on the factfinder. *Hoglund v. State,* 962 N.E.2d 1230, 1238 (Ind. 2012). Improper admission of evidence is harmless error "if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction." *Id.*

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[6] The trial court deemed any evidence of child pornography inadmissible. *See* Tr., Vol. III at 12; Appellant's App., Vol. 2 at 42.

[22] Here, substantial independent evidence of Cutshall's guilt was presented at trial. V.C. saw Cutshall and Z.S. in a compromising position in bed, V.C. saw Cutshall's uncovered erect penis as he called Z.S. back to the bed, and a medical examiner found injuries to Z.S.'s genitalia.

[23] Although a danger of prejudice and the possibility of the forbidden inference existed after the admission of Detective Blair's testimony, given the substantial independent evidence of Cutshall's guilt we do not believe that the erroneous admission of that evidence requires a new trial here. In this case, there is no substantial likelihood that the admission of testimony about pornography contributed to the conviction. Therefore, the trial court's error in this case was harmless error.

Conclusion

[24] We conclude that the State presented sufficient evidence of penetration to support Cutshall's child molesting conviction and that the trial court's admission of evidence that Cutshall viewed adult pornography was harmless error. Accordingly, we affirm.

[25] Affirmed.

Bailey, J., and Tavitas, J., concur.