

STATEMENT OF THE CASE

Richard D. Martin appeals from his six convictions for Child Molesting, each as a Class A felony. Martin raises three issues for our review, which we restate as follows:

1. Whether the trial court committed fundamental error when it permitted the State to present evidence of uncharged acts of alleged molestation involving the victim.
2. Whether the trial court committed fundamental error when it permitted the State to introduce into evidence Martin's statement regarding the victim's propensity to tell the truth.
3. Whether the trial court committed fundamental error when it instructed the jury that the uncorroborated testimony of the victim could support a guilty verdict.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2004, Martin began living with C.C. and her three children, which included eight-year-old S.G. Over the next three years,¹ Martin repeatedly molested S.G. Two or three times per month, Martin would enter S.G.'s bedroom late at night and kiss S.G.'s breasts or vagina and rub his penis on her face, neck, shoulders, and vagina. Each molestation lasted about ten to fifteen minutes.

Martin and C.C. ended their relationship in November of 2006, and in February of 2007, S.G. told her mother about the molestations. C.C. informed the Clark County Sheriff's Department, which, in turn, informed the Indiana Department of Child Services ("DCS"). The DCS sent investigator Chris Yarbrough to interview C.C., S.G., and Martin. Yarbrough informed Martin of S.G.'s allegations, and Martin's response "was

¹ Martin and C.C. were not together for a period of six to seven months in 2005, and no molestations of S.G. occurred in that time period.

very firm that [S.G.] doesn't lie." Transcript at 46-47. While Martin did not admit the allegations to Yarbrough, Martin did acknowledge to Yarbrough that S.G. had "hunched" on Martin's penis one night when he was in bed with her, and that that "activity went on for approximately one minute and he noted . . . that he probably could have stopped that activity sooner than he did." Id. at 53. Yarbrough made a report based on those interviews and submitted that report to the Clark County prosecutor.

The State charged Martin with six counts of Class A child molesting. The State alleged that Martin had molested S.G. in the fall of 2004, in the winter of 2004, in the winter of 2005, in March of 2006, in the summer of 2006, and in November of 2006. On August 14, 2008, Martin filed a motion to suppress "any and all statements made by the Defendant to Chris Yarbrough" on the grounds that those statements were "taken from him in violation of his state and federal constitutional and due process rights, including . . . Miranda warnings." Appellant's App. 187. The trial court denied Martin's request.

At the ensuing jury trial on August 19, the State introduced into evidence Yarbrough's and S.G.'s testimony, as well as the testimony of the arresting officer. Yarbrough testified that S.G. had detailed to him numerous molestations by Martin and that those molestations had occurred "three times per month over the entire period they lived together." Transcript at 38. Martin objected to that testimony on hearsay grounds, but the trial court overruled the objection. Yarbrough also testified as to Martin's comments during their interview, which Yarbrough stated he "consider[ed] to be a partial admission of guilt to the allegations." Id. at 53. Martin objected "pursuant to the motion that we had filed," but, again, the trial court overruled Martin's objection. Id. at 46. And

S.G. likewise testified about the various times Martin had molested her. Martin objected to her testimony “on . . . 404(b)” grounds, which the trial court overruled. Id. at 162.

At the close of trial, the court reviewed the final jury instructions with the parties and gave each side the express opportunity to object to any of the instructions. Martin did not object to any of the final instructions. Id. at 366. The court then instructed the jury “that the defendant may be convicted of Child Molesting solely on the uncorroborated testimony of the victim [and that the State] is not required to present evidence to corroborate the testimony of the victim.” Id. at 414. The jurors were then sent to deliberate, but about ten minutes later the jury requested to hear S.G.’s testimony. S.G.’s testimony was about an hour and ten minutes in length. After hearing the testimony, the jury returned to deliberations. “Within minutes,” the jury found Martin guilty as charged. Appellant’s App. at 371. The trial court entered its judgment of conviction accordingly.

On September 24, after the sentencing hearing, Martin filed a motion to correct error. In that motion, Martin asked the court to set aside his convictions and declare a mistrial because:

2. An instruction was apparently given to the jury that it could convict the Accused based solely on the uncorroborated testimony of the alleged victim.
3. This instruction has been found to be improper by the Indiana Supreme Court. Ludy v. State, 784 N.E.2d 459, 460 [(Ind. 2003)].
4. The victim’s testimony was uncorroborated.
5. The giving of this instruction was not harmless error when . . . the jury later disclosed that it had considered only the testimony of the victim[] (see attached Affidavit[]).

Id. at 369. In the attached Affidavit, which was also dated September 24, Martin’s trial counsel stated “[t]hat at the end of the trial I heard jurors state that their guilty verdict was based solely on the testimony of the victim, to the exclusion of the other evidence presented.” Id. at 373. No other grounds for error were alleged in Martin’s motion. The trial court denied the motion, and this appeal ensued.

DISCUSSION AND DECISION

Issue One: Admission of “other crimes” into Evidence

Martin first appeals the trial court’s admission of Yarbrough’s and S.G.’s testimonies regarding Martin’s numerous molestations of S.G. Normally, our standard of review of a trial court’s findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Martin argues on appeal that, insofar as those testimonies alleged crimes for which the State did not charge Martin, their admission was contrary to Indiana Evidence Rule 404(b). Cognizant of the fact that he did not lodge Rule 404(b) objections to Yarbrough’s testimony, Martin asserts that the admission of Yarbrough’s testimony was fundamental error. But Martin also did not raise this issue in his motion to correct error. Accordingly, even if he had properly objected to the testimonies, the alleged error has not been preserved. See, e.g., Meeks v. Shettle, 514 N.E.2d 1272, 1276 (Ind. Ct. App. 1987).

Thus, to prevail Martin must demonstrate fundamental error as to the admission of both testimonies. See, e.g., Robinson v. State, 525 N.E.2d 605, 606 (Ind. 1988). To

constitute fundamental error, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Brown v. State, 799 N.E.2d 1064, 1067 (Ind. 2003) (quotation omitted). It must be so prejudicial to the rights of a defendant as to make a fair trial impossible. Id. (quotation omitted).

Indiana Evidence Rule 404(b) limits the admission of prior bad acts into evidence and reads in relevant part: “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 is excluded under Rule 404(b) only when it is introduced to prove the “forbidden inference” of demonstrating the defendant’s propensity to commit the charged crime. Pavey v. State, 764 N.E.2d 692, 704 (Ind. Ct. App. 2002) (citing Sanders v. State, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000)), trans. denied. However, “[a]s a general rule, the erroneous admission of evidence of extrinsic acts is not fundamental error.” Williams v. State, 634 N.E.2d 849, 854 (Ind. Ct. App. 1994). “In determining whether error in the introduction of evidence affected an appellant’s substantial rights, we assess the probable impact of the evidence on the jury.” Oldham v. State, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002), trans. denied.

The admission of neither Yarbrough’s nor of S.G.’s statements of uncharged criminal conduct constitutes fundamental error. Assuming arguendo that the testimony regarding Martin’s uncharged criminal molestation of S.G. was erroneously introduced to

demonstrate Martin's propensity to commit the crimes for which he was charged, that alone does not constitute fundamental error. Rather, for the error to be fundamental, it must be "blatant." Brown, 799 N.E.2d at 1067.

Here, the references made by the witnesses to uncharged acts of criminal conduct by Martin were, at most, harmless to Martin. Indeed, there were only three possible references to uncharged conduct. First was the testimony of Yarbrough and S.G. in which they each stated that Martin had molested S.G. two or three times per month since 2004, which, when compared with the charging information, leads to the inference that the State did not charge Martin with every possible act of molestation. Second was Yarbrough's testimony that half of the molestations occurred in other jurisdictions, which, again, implies that Martin was not charged by the Clark County prosecutor with each act of molestation. And third was Yarbrough's testimony of Martin's "admission" during their interview. Transcript at 53. But neither of the first two references was expanded upon by the witnesses or the State. And the third reference, Martin's "admission" to Yarbrough, is fairly innocuous when compared to S.G.'s testimony as to what Martin did to her. Thus, we must conclude that the admission of the testimony regarding uncharged conduct had a minimal impact on the jury, did not deny Martin fundamental due process, and, therefore, was not fundamental error. See Manuel v. State, 793 N.E.2d 1215, 1219 (Ind. Ct. App. 2003), trans. denied.

Issue Two: Martin's Statement that S.G. "doesn't lie"

Martin next contends that the trial court erroneously permitted Yarbrough to testify that Martin firmly told him "that [S.G.] doesn't lie." Transcript at 46-47.

Specifically, Martin contends that Yarbrough’s testimony violated Indiana Evidence Rule 704(b), which prohibits witnesses from testifying to opinions on the truthfulness of allegations or other witnesses’ testimony. Noting in his Reply Brief that he did not preserve a Rule 704(b) objection at trial—in addition to the fact that he did not raise this purported error in his motion to correct error—Martin again seeks relief under the fundamental error doctrine.

We agree with Martin that Rule 704(b) generally prohibits one witness from vouching for the credibility of another. But that rule is more relaxed in child molestation trials:

Indiana Evidence Rule 704(b) provides in relevant part that a witness may not offer an opinion concerning the truth or falsity of allegations or whether a witness has testified truthfully. (Emphasis added). Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness’s testimony. See Head v. State, 519 N.E.2d 151, 153 (Ind.1988). In the context of child molesting, however, our supreme court has recognized that where children are called upon to describe sexual conduct, a special problem exists in assessing credibility since children often use unusual words to describe sexual organs and their function and since they may be more susceptible to influence. Stewart [v. State], 555 N.E.2d [121,125 (Ind. 1990)]. Therefore, testimony is allowed which permits

some accrediting of the child witness in the form of opinions from parents, teachers, and others having adequate experience with the child, that the child is not prone to exaggerate or fantasize about sexual matters. Such opinions . . . facilitate an original credibility assessment of the child by the trier of fact

....

Id. (quoting Lawrence v. State, 464 N.E.2d 923, 925 (Ind.1984), abrogated on other grounds by Lannan [v. State], 600 N.E.2d [1334, 1338-39 (Ind. 1992)]). Thus, adult witnesses are allowed to state an opinion as to the child’s general competence and ability to understand the subject, but are prohibited from making direct assertions as to their belief in the child’s testimony. Id. (citations omitted).

Rose v. State, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006). Here, Yarbrough’s testimony regarding Martin’s statement amounted only to “some accrediting of the child witness in the form of [an] opinion[] from . . . [one] having adequate experience with the child.” Id. It was not, as Martin alleges on appeal, a “direct assertion[] as to . . . the [credibility of the] child’s testimony.” Id. Thus, Rule 704(b) is not available to Martin.

Further, we note that Martin’s claim of fundamental error on this issue must fail for another reason. Namely, Yarbrough did not testify that he thought S.G. never lied; Yarbrough testified that Martin told Yarbrough that S.G. never lied. That is a statement by a party-opponent and, as such, it is admissible evidence. See Ind. Evidence Rule 801(d)(2)(A); Dorsey v. State, 802 N.E.2d 991, 994-95 (Ind. Ct. App. 2004). It would strain reason to permit a defendant to make an admission and then use that admission as the basis for error on appeal. We therefore cannot agree with Martin’s assertions that Yarbrough’s testimony violated Evidence Rule 704(b), let alone to the point of constituting fundamental error.

Issue Three: Jury Instruction

Finally, Martin asserts that the trial court erred in instructing the jury. Our review is well established:

The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury. Still, errors in the giving or refusing of instructions are

harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.

Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008) (quotations and citations omitted). Martin concedes that he did not object to the jury instructions during trial, and, therefore, he argues that the purportedly erroneous instruction amounts to fundamental error.

In Ludy, our Supreme Court held that the giving of the following instruction is, when properly preserved through a timely objection, reversible error: “A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt.” 784 N.E.2d at 460. The tendered instruction in Martin’s case is substantially similar to the instruction in Ludy. Accordingly, it was error for the trial court to issue that instruction.

Nonetheless, the erroneous instruction does not amount to fundamental error. Although Martin asserts that S.G.’s testimony was the only evidence actually relied upon by the jury, there is no decisive evidence to support that suggestion. Further, as discussed above, the trial court did not err when it permitted the State to introduce Martin’s statements to Yarbrough, which, in turn, provided at least some degree of corroboration of S.G.’s testimony. See id. at 463 (holding that the giving of the erroneous instruction was harmless when evidence in the record corroborated the witness’s testimony). And our review of the totality of the jury instructions, as well as the record, demonstrates that the trial court instructed the jury on all elements of the charged offenses, the State’s burden of proof, and the jury’s role is assessing witness credibility. See Manuel, 793

N.E.2d at 1218. Thus, we must conclude that the giving of the now contested jury instruction was not fundamental error.

Conclusion

In sum, none of the purported errors raised by Martin in this appeal amounts to fundamental error. Thus, we must affirm his convictions.

Affirmed.

KIRSCH, J., and BARNES, J., concur.