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**IN THE
COURT OF APPEALS OF INDIANA**

KEITH GOBER,)

Appellant-Defendant,)

vs.)

No. 78A01-0808-CR-387

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE SWITZERLAND SUPERIOR COURT
The Honorable John Mitchell, Judge
Cause No. 78D01-0608-FB-447

April 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Keith Gober appeals his conviction for Class B felony sexual misconduct with a minor. We affirm.

Issue

The sole issue is whether the trial court properly admitted evidence that both Gober and the victim had received medical treatment for a sexually transmitted disease.

Facts

The evidence most favorable to the conviction is that sometime in April 2006, twenty-eight year old Gober had sexual intercourse with fifteen year old H.W. H.W. did not tell anyone about this incident until August 2006. On August 28, 2006, the State charged Gober with one count of Class B felony sexual misconduct with a minor.

During Gober's jury trial held on May 28-30, 2008, the State elicited evidence that on April 11, 2006, Gober went to a medical clinic and told a nurse practitioner that a girlfriend of his recently had been diagnosed with chlamydia.¹ Gober himself was not tested for chlamydia, but was given an antibiotic prescription. Gober did not fill the prescription until September 16, 2006, while he was in jail awaiting trial for the present offense.

Additionally, H.W. testified that in July 2006, H.W. went to a doctor complaining of cramping and bleeding. After the doctor performed a pelvic examination he diagnosed H.W. as having an infection and prescribed antibiotics for her. Precisely what disease

¹ The transcript uses the word "climitia" or "clamitia." Tr. p. 127. We assume the word actually used was chlamydia.

H.W. had was not specified; H.W. started to testify on that point, but Gober objected on hearsay grounds to what the doctor had told her, and the trial court sustained the objection. H.W. required two rounds of antibiotics to cure her infection. She also testified that she had not had intercourse with anyone other than Gober between March and when she began having problems. H.W. also testified that the only other time she had ever had intercourse with someone was when she was twelve. Gober made objections to the evidence regarding his and H.W.'s medical treatment, but they were overruled.

The jury found Gober guilty as charged. He now appeals.

Analysis

The thrust of Gober's argument is that the evidence regarding his exposure to chlamydia and H.W.'s pelvic infection was inadmissible pursuant to Indiana Evidence Rule 403. That Rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Evidence otherwise admissible is inadmissible if the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence. Spires v. State, 670 N.E.2d 1313, 1316 (Ind. Ct. App. 1996). "Unfair prejudice" refers to the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis. Ingram v. State, 715 N.E.2d 405, 407 (Ind. 1999) (quoting 12 ROBERT LOWELL MILLER,

INDIANA PRACTICE § 403.102 at 284 (1995)). Trial courts have wide latitude in weighing probative value against the danger of unfair prejudice. Id. at 408. We review a trial court's determination of admissibility under Rule 403 for an abuse of discretion. Id.

Evidence that a defendant gave a sex crime victim a sexually transmitted disease is relevant and probative of whether the defendant committed the crime. See Love v. State, 761 N.E.2d 806, 811 (Ind. 2002) (holding that evidence defendant could have taken antibiotics to avoid testing positive for sexually transmitted disease molestation victim had contracted was relevant). The evidence here reveals that in April 2006, the same month in which Gober allegedly had sex with H.W., he told a nurse practitioner that he had been exposed to chlamydia. Although whether Gober himself contracted the disease was not verified, he was given an antibiotic prescription. Three months after April 2006, H.W. was diagnosed with a pelvic infection that also required antibiotic treatment.

Certainly, this evidence would have been more probative of whether Gober had sex with H.W. if there had been definitive testimony that both he and she had been diagnosed with chlamydia. In other words, with respect to the Rule 403 balancing test, this evidence had less probative value than it could have had. But it is not completely lacking, particularly since there is no other physical evidence that could prove Gober had sex with H.W. The prejudice from this evidence derives from the inference that Gober may have infected H.W. with a disease. That is primarily legitimate, not illegitimate, prejudice. We understand there are negative connotations associated with transmitting a sexually transmitted disease that may go beyond the commission of a sex crime without

transmitting one. Nevertheless, the trial court here had broad discretion in determining whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See Ingram, 715 N.E.2d at 408. We cannot say the trial court abused that discretion.

Conclusion

The trial court did not abuse its discretion in admitting the evidence related to Gober's and H.W.'s medical treatment. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.