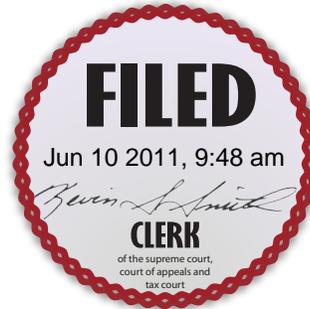


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HAROLD LEROY TICE, JR.,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 15A01-1010-CR-518

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Jonathan N. Cleary, Judge
Cause No. 15D01-0902-FC-6

June 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Harold Leroy Tice, Jr., appeals his convictions for sexual misconduct with a minor as a Class C felony and contributing to the delinquency of a minor as a Class A misdemeanor. We affirm.

Issues

Tice raises three issues, which we restate as:

- I. whether the trial court properly denied Tice's motion for a continuance;
- II. whether the trial court properly denied Tice's challenge to a prospective juror for cause; and
- III. whether the trial court properly denied Tice's motion to strike a witness's reference to "rape."

Facts

B.R. and her family were friends with Tice and his wife, Jennifer. B.R. and Tice are also cousins. B.R.'s daughter, J.G., who was born in November 1991, often spent weekend nights at the Tices' residence in Moores Hill. When J.G. spent the night with the Tices, they would often give her alcohol.

On September 30, 2006, Tice, Jennifer, and J.G. were drinking wine coolers and Jagermeister shots. At some point, Tice carried J.G. to their bedroom, and J.G. passed out on their bed between Tice and Jennifer. J.G. woke later to Jennifer removing her tampon, and J.G. fell asleep again. Jennifer woke J.G. again, and J.G. remembered Jennifer "nudging" her and putting her on top of Tice. Tr. p. 349. Tice was on his back, and J.G. was sitting on his "crotch region." *Id.* J.G. heard Jennifer say "something like

be careful with her,” and J.G. passed out again. Id. When J.G. woke in the morning, she was between Tice and Jennifer on the bed, and she was not wearing her pants. In April 2007, J.G. told B.R. about the incident with the Tices, and B.R. called the police.

The State charged Tice and Jennifer with sexual misconduct with a minor as a Class C felony and contributing to the delinquency of a minor as a Class A misdemeanor. Jennifer pled guilty. During the weekend immediately prior to Tice’s trial, his counsel apparently requested a continuance because counsel’s father had been hospitalized. Although the discussion was not recorded for the record, the trial court denied the motion for a continuance.

During voir dire, a prospective juror, Ms. Martini, noted that she was friends with the judge’s mother and that she had known the judge since he was a child. After some questioning, Tice requested that Ms. Martini be dismissed for cause. The trial court asked Ms. Martini if she could “be fair and impartial to both sides.” Id. at 52. Ms. Martini said, “I think I can,” and the trial court denied Tice’s motion to dismiss Ms. Martini for cause. Id. Ms. Martini was later excused due to a peremptory challenge.

During the trial, B.R. testified that, in April 2007, J.G. was in trouble for a fight at school and was getting a monitoring ankle bracelet. J.G. told B.R. that “[s]he couldn’t believe that she was in trouble and being punished and the people who raped her were still walking the streets.” Id. at 207. J.G. then told B.R. about the incident with the Tices. Tice objected and moved to strike “on the rape part.” Id. The trial court overruled the objection. On cross examination, B.R. clarified that J.G. actually used the term “molested” instead of the term “rape.” Id. at 214.

Tice's statement to the police was entered into evidence at the trial. In Tice's statement, he said that Jennifer showed her breasts to J.G., that J.G. had touched his penis, and that Jennifer had "freaked out." State's Exhibit 3. Jennifer testified at the trial that J.G. initiated the touching and that she did not remove J.G.'s tampon, but Jennifer also testified that she showed her breasts to J.G., that J.G. touched her breasts, that they kissed, and that J.G. put her hand on Tice's erect penis. Jennifer claimed that Tice was asleep during the incident though.

The jury found Tice guilty as charged, and the trial court sentenced him to five years in the Department of Correction with one year suspended to probation. Tice now appeals.

Analysis

As an initial matter, we note that the State did not file an appellee's brief. "The obligation of controverting arguments presented by the appellant properly remains with the State." Mateyko v. State, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), trans. denied. When the appellee does not submit a brief, the appellant may prevail by making a prima facie case of error—an error at first sight or appearance. Id. "We are nevertheless obligated to correctly apply the law to the facts of the record to determine if reversal is required." Id.

I. Motion for Continuance

Tice argues that the trial court abused its discretion by denying his motion for a continuance of the trial as a result of the illness of his counsel's father. Indiana Code section 35-36-7-1 provides for a continuance upon a proper showing of an absence of

evidence or the illness or absence of the defendant or a witness. Rulings on non-statutory motions for continuance, such as Tice's, lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice. Maxey v. State, 730 N.E.2d 158, 160 (Ind. 2000).

Tice concedes that whether the denial of his motion for a continuance "prejudiced the trial is unknown." Appellant's Br. p. 3. Tice fails to direct our attention to any portion of the record where he was prejudiced by the denial. Moreover, our review of the record fails to uncover any evidence that defense counsel was not prepared for trial. As a result, Tice fails to demonstrate that he was prejudiced by the denial of his motion for continuance. We conclude that the trial court did not abuse its discretion by denying Tice's motion for a continuance. See Maxey, 730 N.E.2d at 161; see also Schumann v. State, 172 Ind. App. 383, 386, 360 N.E.2d 277, 279 (1977) (holding that the trial court did not abuse its discretion by denying the defendant's motion for a continuance based on his counsel's illness where the defendant failed to demonstrate that he was prejudiced by the denial).

II. Challenge to Juror

Tice next argues that the trial court abused its discretion by denying his challenge to a prospective juror for cause. The trial court has discretion to grant or deny challenges for cause. Merritt v. Evansville-Vanderburgh Sch. Corp., 765 N.E.2d 1232, 1235 (Ind. 2002). We will sustain the decision on appeal unless it is illogical or arbitrary. Id. When a juror serves who should have been removed for cause, the complaining party is entitled to a new trial, absent waiver. Id.

Our supreme court noted in Merritt that “a claim of error arising from denial of a challenge for cause is waived unless the appellant used any remaining peremptory challenges to remove the challenged juror or jurors.” Id. Further, the court held “you must use any available peremptories to correct erroneous denials of challenges for cause. If on appeal you then prove both the erroneous denial and that you were unable to strike another objectionable juror because you exhausted your peremptories, you are entitled to a new trial, full stop.” Id. at 1237. “For example, a claim is preserved where a party uses her last peremptory challenge to cure a trial court’s erroneous denial of a challenge for cause and establishes for the record that she would have used that peremptory to strike another juror.” Id. at 1237 n.8.

Here, Tice challenged Ms. Martini for cause, and the trial court denied his motion. Ms. Martini was later excused due to a peremptory challenge, and she did not serve on the jury. However, the record is not clear whether the peremptory challenge was from the State or Tice. Further, there is no indication in the record that Tice was unable to strike another objectionable juror because he later exhausted his peremptory strikes. Tice failed to preserve his claim that the trial court should have excused Ms. Martini for cause, and the issue is waived. See id. at 1238.

III. Witness’s Reference to Rape

The final issue is whether the trial court abused its discretion by denying Tice’s motion to strike B.R.’s reference to “rape.” A claim of error in the exclusion or admission of evidence will not prevail on appeal unless the error affects the substantial rights of the moving party. McCarthy v. State, 749 N.E.2d 528, 536 (Ind. 2001); Ind.

Evidence Rule 103(a)). When reviewing such claims, we determine whether the trial court abused its discretion when it ruled upon the evidence. McCarthy, 749 N.E.2d at 536. “To determine whether an error in the introduction of evidence affected the appellant’s substantial rights, this Court must assess the probable impact of that evidence upon the jury.” Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

During the trial, B.R. testified that, in April 2007, J.G. was in trouble for a fight at school and was getting a monitoring ankle bracelet. J.G. told B.R. that “[s]he couldn’t believe that she was in trouble and being punished and the people who raped her were still walking the streets.” Tr. p. 207. J.G. then told B.R. about the incident with the Tices. Tice objected and moved to strike “on the rape part.” Id. The trial court overruled the objection. On cross examination, B.R. clarified that J.G. actually used the term “molested” instead of the term “rape.” Id. at 214.

Even if the trial court abused its discretion by denying Tice’s motion to strike the reference to a rape, given the evidence presented, we cannot say that the testimony affected Tice’s substantial rights. Tice was charged with sexual misconduct with a minor as a Class C felony, which is defined as performing or submitting to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person. Ind. Code § 35-42-4-9.

J.G. testified that, after an evening of drinking with Tice and his wife, Jennifer, she passed out between them on their bed. J.G. woke later to Jennifer removing her tampon, and J.G. fell asleep again. Jennifer woke J.G. again, and J.G. remembered Jennifer “nudging” her and putting her on top of Tice. Tr. p. 349. Tice was on his back,

and J.G. was sitting on his “crotch region.” Id. J.G. heard Jennifer say “something like be careful with her,” and J.G. passed out again. Id. When J.G. woke in the morning, she was between Tice and Jennifer on the bed, and she was not wearing her pants. Tice’s statement to the police was admitted at the trial. In his statement, Tice admitted that J.G. had touched his penis. Jennifer also testified J.G. put her hand on Tice’s erect penis.

Given Tice’s statement, Jennifer’s testimony, J.G.’s testimony, and B.R.’s clarification of her testimony, we conclude that the probable impact of B.R.’s reference to “rape” was sufficiently minor so as not to affect Tice’s substantial rights. Any error in the denial of Tice’s motion to strike the testimony was harmless.

Conclusion

The trial court did not abuse its discretion when it denied Tice’s motion for a continuance due to the illness of his counsel’s father. Tice waived his argument that the trial court abused its discretion by denying Tice’s motion to strike a prospective juror for cause. Finally, any error in the trial court’s denial of Tice’s motion to strike a portion of B.R.’s testimony was harmless. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.