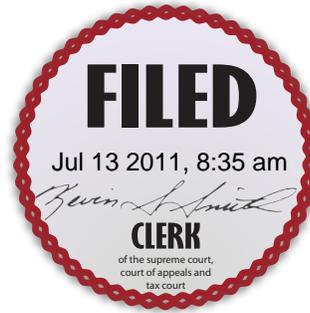


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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM MILLER,)
)
Appellant- Defendant,)
)
vs.) No. 29A04-1010-CR-602
)
STATE OF INDIANA,)
)
Appellee- Plaintiff,)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pflieger, Judge
Cause No. 29D02-0706-FA-59

July 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a bench trial, William Miller appeals his conviction for child molesting as a Class A felony. He raises two issues for our review, which we reorder and restate as: whether the trial court abused its discretion in restricting his cross-examination of a witness, and whether sufficient evidence was presented to support his conviction. We conclude that the trial court abused its discretion in overly restricting Miller's cross-examination of a witness, which, however, amounts to harmless error in this case. Further, we conclude that sufficient evidence was presented to sustain Miller's conviction, and we therefore affirm.

Facts and Procedural History

Beginning in about January 2007, Miller frequently hosted at his home his six-year-old nephew, N.T. In mid-2007, N.T. told his mother that Miller touched him inappropriately, leading N.T.'s mother to put a stop to visits with Miller. N.T.'s mother disclosed N.T.'s allegations to family members, one of whom contacted Officer David Hildebrand. Officer Hildebrand met with N.T.'s mother, contacted the Department of Child Services ("DCS"), and arranged for an interview at Chaucie's Place, an organization that investigates reports of child abuse and neglect. Rita Ann Johnson, a forensic child interviewer at Chaucie's Place, interviewed N.T. wherein N.T. revealed that someone, in fact, touched his penis and rear-end. His explanation was meandering and his description of the incident was convoluted and lacked essential details. He repeated several times that he was touched on his penis and rear-end, but continued to be distracted when asked who touched him. Over forty minutes into the interview, N.T. indicated that a specific person at his daycare was the perpetrator. The record,

particularly the video-taped interview vaguely suggests that the perpetrator was another child at N.T.'s daycare. Regardless, the first interview ended without N.T. identifying Miller as the one who touched him inappropriately.

A few days later, Officer Hildebrand was contacted again regarding new information and additional concerns, which led Officer Hildebrand to contact DCS again and arrange another interview of N.T. at Chaucie's Place. At this second interview, N.T. told Johnson that Miller touched N.T.'s rear-end and penis, and licked N.T.'s penis.

Miller was arrested and charged with child molesting as a Class A felony. Following a bench trial, the trial court found Miller guilty as charged and sentenced him to twenty-five years in prison. Miller now appeals his conviction.

Discussion and Decision

I. Cross-Examination

A. Rape Shield

Miller argues the trial court erred in restricting his cross-examination of Johnson as to statements by N.T. in the first interview regarding who molested N.T. "The purpose of cross-examination is to expose possible biases, prejudices, or ulterior motives related to the case." Morrison v. State, 613 N.E.2d 865, 867 (Ind. Ct. App. 1993), trans. denied. But, as with the admission or exclusion of all evidence, a trial court's limitation on the scope of cross-examination is reviewable only for an abuse of discretion. See id.; Zemco Mfg., Inc. v. Pecoraro, 703 N.E.2d 1064, 1069 (Ind. Ct. App. 1998), trans. denied. A trial court abuses its discretion when it takes action that is clearly erroneous or against the logic and effect of the facts and circumstances before it. Zemco, 703 N.E.2d at 1069.

Miller is correct that he has the right to confront the State's witnesses against him in the form of an opportunity to conduct effective cross-examination to test the witness's believability and motivation for testifying. McQuay v. State, 566 N.E.2d 542, 543 (Ind. 1991); see Davis v. Alaska, 415 U.S. 308, 316 (1974). This right is subject to reasonable limitations by the trial court, "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." McQuay, 566 N.E.2d at 543 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

At trial, Miller cross-examined Johnson, posing the following question: "[I]sn't it true that [N.T.] talked about being improperly touched by someone else?" Transcript at 25. The State objected based on the "Rape Shield Statute," id. at 26, and presumably the closely related Rape Shield Rule. Miller contended that the question was intended to undercut N.T.'s credibility, but the trial court sustained the objection.¹

Our supreme court has explained that Indiana Evidence Rule 412, which is commonly-referred to as the Rape Shield Rule, embodies the following basic principles of Indiana's Rape Shield Statute, Indiana Code section 35-37-4-4:

¹ Below is the pertinent portion of the transcript:

[Defense counsel]: Judge, this is the State's witness and the Rape Shield Statute is not meant to shield these situations where the child talks about other instances of being touched. We're not talking about the child's reputation here. We are talking about whether the child is touched by my client or touched by someone else if anything happened and I believe that is not, does not come under the Rape Shield Statute.

[State]: Your Honor, it most precisely does. The Rape Shield Statute specifically addresses the victim and any potential sexual contact between them and anyone other than the defendant unless the alibi defense has been interposed and any discussion of any sexual contact by any person other than the defendant with [N.T.] is improper.

[Defense counsel]: Judge, in essence, the State wants to quash any exculpatory evidence that there is and we believe that here is a situation, is not the reputation of the child but the fact that if the child has been touched, it had not been by Mr. Miller but by someone else and as such as that does not fall into the Rape Shields [sic] Statute, in fact that is strictly Brady versus Marilyn [sic] [373 U.S. 83 (1963)] situation where there is exculpatory evidence and that's what we're trying to draw out.

Tr. at 25-26.

[I]nquiry into a victim’s prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense. Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes. Consequently, “[t]he Rule does not permit the trial to stray from the central issue of guilt or innocence of the defendant into a full-scale investigation of charges made by the prosecutrix against other persons.”

State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) (alteration in original, citations omitted). To the extent the Statute differs from the Rule, Evidence Rule 412 controls. Graham v. State, 736 N.E.2d 822, 825 (Ind. Ct. App. 2000), trans. denied.

More specifically, Evidence Rule 412 prohibits the introduction of evidence of the past sexual conduct of a victim or witness in prosecution for a sex crime, with certain enumerated exceptions. Ind. Evidence Rule 412(a). One of these exceptions allows “evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded.” Evid. R. 412(a)(2); cf. Oatts v. State, 899 N.E.2d 714, 722 (Ind. Ct. App. 2009) (explaining that the Rape Shield Rule must yield to a defendant’s Sixth Amendment right to conduct a full, adequate, and effective cross-examination to the extent the Rule would otherwise limit “evidence . . . offered not to show the victim’s consent but to establish some other point such as that an injury could have been inflicted by someone other than the defendant”).

By the phrasing of Miller’s question alone, it is not completely clear whether Miller’s question refers to prior molestation or sexual activity, which would be an improper inquiry under the Rape Shield Rule. However, the colloquy that followed the State’s objection, among Miller’s attorney, the prosecutor, and the trial court, makes clear

that Miller's question was intended to clarify whether N.T. identified another as the molester instead of Miller.²

Miller's attorney seems to have been attempting to undercut N.T.'s testimony regarding Miller by highlighting N.T.'s statement in the first interview in which he identified the one who touched him as a particular person at his daycare. In advocating the trial court for permission to pose this question to Johnson, Miller argued: "We're not talking about the child's reputation here. We are talking about whether the child is touched by my client or touched by someone else if anything happened." Tr. at 26. Miller's attorney added that the question concerns "not the reputation of the child but the fact that if the child has been touched, it had not been by Mr. Miller but by someone else." Id.

Miller's attorney was correct: the question was permissible within the exception to the Rape Shield Rule noted above, because the question might show that some person other than Miller committed the act upon which the prosecution is founded. See Evid. R. 412(a)(2). Thus, we conclude the trial court abused its discretion in overly limiting Miller's right to conduct an effective cross-examination.

B. Chapman Harmless Error

The next question is whether the State can show that the trial court's abuse of discretion in limiting Miller's cross-examination of Johnson did not contribute to the finding of guilt, because if it did not, then Miller's conviction need not be reversed.

² Miller's attorney also referred the trial court to Brady v. Maryland, 373 U.S. 83 (1963), which is oft-cited authority for an argument that the prosecution has violated the defendant's right to due process (under the Fourteenth Amendment to the United States Constitution) by withholding exculpatory evidence which is material to guilt or punishment. This reference to Brady is not quite on point because even if the Chaucie's Place interviews were considered "exculpatory," the State certainly disclosed those interviews to Miller prior to trial. So no Brady violation occurred. This misspeak does not invalidate Miller's other rationale for overruling the State's objection – that the question fits an exception to the Rape Shield Rule.

Koenig v. State, 933 N.E.2d 1271, 1273 (Ind. 2010); id. (“[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.”) (citing Chapman v. California, 386 U.S. 18 (1967)); see Oatts, 899 N.E.2d at 722-23 (discussing whether an improper exclusion of evidence violated a defendant’s right to confrontation). To answer that question, appellate courts determine whether, “in the context of a particular case, certain constitutional errors, no less than other errors, may have been ‘harmless’ in terms of their effect on the fact-finding process at trial.” Koenig, 933 N.E.2d at 1273.

The so-called Chapman harmless error analysis turns on a number of factors:

[T]he importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution’s case.

Id. (citation omitted). In other words, convictions will not be set aside for “small errors or defects that have little, if any, likelihood of having changed the result of the trial.” Chapman, 386 U.S. at 22 (explaining the federal harmless error analysis).

Here, in addition to the restricted testimony from Johnson regarding Johnson’s educated opinion of N.T.’s mannerisms and conduct, and the rough contours of their interviews, the trial court heard testimony from Officer Hildebrand regarding his legwork that led to N.T.’s interviews at Chaucie’s Place, N.T.’s mother regarding her view of N.T., and by N.T. himself. The State also introduced into evidence – without objection by Miller – audio-visual recordings of both interviews of N.T. While the testimony of Johnson, Officer Hildebrand, and N.T.’s mother created the context for testimony by

N.T., details necessary to satisfy each element of the offense were revealed exclusively by N.T.'s testimony.

At the time of trial, N.T. was eight years old. For over thirty-five pages of the trial transcript, N.T.'s testimony meandered but did not clearly provide the details of his being touched, until he finally responded "I think [Miller], yeah it was [Miller]" that touched him. Tr. at 114. In the next thirty pages of the transcript of N.T.'s testimony, N.T. repeated this assertion several more times and with greater detail. He testified Miller touched him "on my butt and pee pee." Id. at 116. N.T. stated that Miller touched him with a glove, id. at 121, "[t]hat [Miller] did lick" his penis, id. at 139, 142, N.T. confirmed that he "remember[s] it actually happening," id. at 125, and that it occurred in Miller's home, room nine of a hotel. N.T. explained that he was afraid during the first interview at Chaucie's Place. Id. at 129. Finally, N.T. acknowledged that although he is not afraid of Miller, the touching "felt a little gross," id. at 142, and he would not choose to go to Miller's house in the future because, in N.T.'s opinion, Miller's touching "could happen again." Id. at 133.

Relative to the testimony of N.T., the testimony of Johnson was unimportant to the State's case. Although Johnson's testimony was not wholly cumulative, its purpose was merely to provide background and context for N.T.'s allegations. Johnson's interviews with N.T., which the State entered into evidence as audio-visual exhibits without objection by Miller, in some respects corroborate and in other respects contradict N.T.'s trial testimony. The question Miller posed to Johnson was directed at undercutting the credibility of N.T., but Miller was given and took full advantage of his opportunity to cross-examine N.T. concerning the apparently contradictory statements in his interviews.

In light of the limited impact of Johnson’s testimony on the ultimate finding of guilt by the trial court and Miller’s full opportunity to cross-examine N.T., we consider the trial court’s improper limitation of Miller’s cross-examination of Johnson to be harmless. Consequently, this trial court error does not warrant reversal of Miller’s conviction.

II. Sufficiency of the Evidence

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or weigh the evidence, and “we consider only the evidence that is favorable to the judgment along with the reasonable inferences to be drawn therefrom to determine whether there was sufficient evidence of probative value to support a conviction.” Staten v. State, 844 N.E.2d 186, 187 (Ind. Ct. App. 2006), trans. denied. “We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt.” Id.

Miller argues the State failed to present sufficient evidence to sustain his conviction. To convict Miller of child molesting as a Class A felony, the State was required to prove that Miller performed deviate sexual conduct with N.T., and that N.T. was less than fourteen years old. Ind. Code § 35-42-4-3(a). Deviate sexual conduct means an act involving the sex organ of one person and the mouth or anus of another person. Ind. Code § 35-41-1-9. As relevant here, N.T. testified at least twice that when he was about six-and-one-half years old, Miller licked N.T.’s penis. Tr. at 139, 142.

Miller asks us to reweigh the evidence and reassess the credibility of witnesses – N.T. in particular – to conclude that insufficient evidence was presented. Generally, our standard of review prohibits us from doing so. Miller argues that this case fits a narrow

exception that allows appellate courts to impinge on a fact-finder's function to assess the credibility of a witness when that witness's testimony is "incredibly dubious." Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007). Our supreme court has explained the rule as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Love v. State, 761 N.E.2d 806, 810 (Ind. 2002) (citations omitted).

While N.T.'s testimony was often shaky and seemed uncertain, he described Miller's molestation with sufficient particularity by the end of the trial. N.T.'s testimony was not inherently improbable, as N.T. spent many overnights at Miller's home, and (unfortunately) many incidents of child molestation occur in a home. The manner in which N.T. described Miller's molestation is not inherently improbable either. In sum, the testimony of N.T. is not so inherently improbable that no reasonable person could believe it, and we therefore decline to apply the rule of "incredible dubiousity" to override the fact-finder's assessment of credibility and weighing of evidence. Sufficient evidence was thus presented to sustain Miller's conviction.

Conclusion

The trial court's error in overly restricting Miller's cross-examination of a witness

was harmless error, and does not warrant reversal of Miller's conviction. Sufficient evidence was presented to sustain Miller's conviction, which we therefore affirm.

Affirmed.

NAJAM, J., and CRONE, J., concur.