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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY McALEXANDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0903-CR-140
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause No. 71D08-0711-FA-43

MEMORANDUM DECISION – NOT FOR PUBLICATION

July 17, 2009

BAKER, Chief Judge

Appellant-defendant Timothy McAlexander appeals his conviction for Child Molesting,[1] a class C felony. Specifically, McAlexander argues that his conviction must be reversed because the trial court improperly admitted his confession into evidence. McAlexander argues that the confession was not voluntary and the State failed to offer any independent evidence establishing the corpus delicti of the charged offenses. Finding that the admission of the confession did not result in undue prejudice to McAlexander and that the State established the corpus delicti of the offense for which McAlexander was ultimately convicted, we affirm the judgment of the trial court.

FACTS

On November 9, 2007, Detectives Ken Kahlenbeck and Galien Pellitier of the South Bend Police Department interviewed McAlexander following a report that he had inappropriately touched his six-year-old minor daughter (Daughter). The report indicated that McAlexander had inappropriately touched Daughter on numerous occasions while his wife (Wife) was at work. Tr. p. 16-17, 27-28, 86.

McAlexander and Wife had separated in March 2007, and McAlexander moved in with his sister. Pursuant to a visitation schedule, Daughter visited McAlexander at his sister's residence. During those visits, McAlexander continued touching Daughter under her clothing on numerous occasions. Wife learned of the incidents when Daughter refused to stay with McAlexander and told her about the touching. Thereafter, Wife took Daughter to the hospital. However, Daughter refused to be examined by a physician.

[1] Ind. Code § 35-42-4-3.

After the detectives issued the Miranda[2] warnings to McAlexander, he admitted that he had touched Daughter on several occasions while he was living with his sister. McAlexander told the detectives that "[h]e missed the companionship of a female" and that he saw "his wife in [Daughter] and that's why he was touching her." Tr. p. 60, 82. Although McAlexander initially told the detectives that he had only touched Daughter on the outside of her clothing, he eventually admitted to touching Daughter "under her clothing inside her pants." Id. at 62-63. When the detectives did not believe that McAlexander was being completely truthful, they informed him that there was DNA evidence taken from Daughter's vagina and that "[McAlexander] would be screwed" if [the] DNA "came back and matched." Id. at 63, 74, 82, 88. Although there was no such DNA evidence, McAlexander confessed to penetrating Daughter, stating that he "was not very far in and that it was quick and she stopped it." Id. at 63, 83.

On November 13, 2007, the State charged McAlexander with one count of child molesting, a class A felony, and one count of child molesting, a class C felony. Thereafter, McAlexander filed a motion to suppress "all statements . . . regarding digital penetration," on the grounds that the statements had not been voluntarily made in light of the detectives' misrepresentations about the DNA evidence. Appellant's App. p. 48-49.

Following a hearing, the trial court denied the motion to suppress, and at a jury trial that commenced on November 18, 2008, Daughter testified that McAlexander touched the outside of her vagina. However, Daughter also claimed that McAlexander

[2] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

did not touch the inside of it. Wife testified that the only information she had was that the touching had occurred "on top of [Daughter's] clothing." Tr. p. 33-34.

In the jury's absence, McAlexander objected to the anticipated testimony of the two detectives regarding his confession to the alleged penetration, arguing that the statements he made during questioning were inadmissible because there was no corpus delicti for the act. Although the trial court noted the objection, it determined that Daughter's testimony was sufficient to satisfy the corpus delicti requirement. As a result, the two detectives were permitted to testify that McAlexander confessed that he had touched Daughter's vagina and had penetrated her on at least one occasion.

Following the presentation of the evidence, McAlexander was found guilty of class C felony child molesting, which requires a showing of "fondling or touching,"[3] and not guilty of class A felony child molesting, which requires a showing of either sexual intercourse or deviate sexual conduct.[4] The trial court subsequently sentenced McAlexander to six years in the Indiana Department of Correction with four years suspended. McAlexander now appeals.

DISCUSSION AND DECISION

I. Admissibility of Confession

McAlexander argues that his conviction must be reversed because the trial court improperly admitted the detectives' testimony about his confession into evidence.

[3] I.C. § 35-42-4-3(b).

[4] I.C. § 35-42-4-3(a).

McAlexander maintains that his confession should have been suppressed because the detectives lied to him about the existence of DNA evidence.

In resolving this issue, we initially observe that the admissibility of evidence is within the sound discretion of the trial court, whose decision is afforded great deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). We will reverse a trial court's decision regarding the admission or exclusion of evidence only for an abuse of discretion that results in a denial of a fair trial. Flake v. State, 767 N.E.2d 1004, 1009 (Ind. Ct. App. 2002). An abuse of discretion occurs only when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

We also note that evidence that is erroneously admitted at trial may not require reversal if the error is found to be harmless. Overstreet v. State, 783 N.E.2d 1140, 1156 (Ind. 2003). An erroneous admission of evidence is harmless where its probable impact, in light of all the evidence in the case, "is sufficiently minor so as not to affect the substantial rights of the party." Ind. Appellate Rule 66(A). Even more compelling, we note that when evidence is erroneously admitted for a crime of which the defendant is found not guilty, the error is harmless. Kelley v. State, 825 N.E.2d 420, 429 (Ind. Ct. App. 2005). As we observed in Kelley:

> Kelley was charged with Possession of Methamphetamine with Intent to Deliver, as a Class A felony. The State relied upon his statement in which he admitted that he had been involved in drug dealing with Smith to prove his intent to sell the methamphetamine which was in the safe. However, the trial court concluded that the evidence did not support the inference that Kelley was going to sell the drugs, only that he was going to "get rid of it" as ordered by Smith should something happen to him. Appendix at 142.

> Consequently, the trial court found Kelley not guilty of the Class A felony and instead found him guilty of Possession of Methamphetamine, a Class C felony, which requires no intent to deliver. See I.C. § 35-48-4-6. Thus, the statement in which Kelley implicated himself in dealing drugs in no way contributed to his conviction. Therefore, the admission of that information was harmless.

Id.

Under the rationale espoused in Kelley, even assuming for the sake of argument that McAlexander's statement regarding the penetration of Daughter should not have been admitted at trial, McAlexander was ultimately acquitted of the class A felony charge. Hence, McAlexander has failed to show that the admission of the confession unduly prejudiced him and reversal is not warranted. Id.

II. Corpus Delicti

In a related issue, McAlexander argues that reversal is warranted because the State failed to establish the corpus delicti of the charged offenses through independent evidence. McAlexander asserts that his confession was the sole evidence presented to prove the offense and, therefore, his conviction must be set aside because "the jury was considering [his] statement while deliberating on the Class C molest [charge]." Appellant's Br. p. 5.

In Willoughby v. State, 552 N.E.2d 462, 466 (Ind. 1990), our Supreme Court held that to admit a confession into evidence, the State must demonstrate the corpus delicti of the crime by independent evidence of the occurrence of the specific kind of injury and someone's criminal act as the cause of the injury. In other words, there must be "some

evidence of probative value aside from the confession" that tends to prove the commission of the crime. Parker v. State, 228 Ind. 1,7, 88 N.E.2d 556, 558 (1949).

Contrary to McAlexander's claim, Daughter testified at trial that McAlexander touched her vagina on multiple occasions. Tr. p. 17-18, 20. Wife also testified that Daughter informed her of the touchings. Id. at 17-18, 20, 32. Thus, even though Daughter testified that no penetration had occurred, McAlexander admitted to committing the principal crime of child molesting, and that admission was corroborated by Wife and Daughter. As a result, the State established the corpus delicti of the crime, and McAlexander's challenge to the admissibility of his confession also fails on this basis.

The judgment of the trial court is affirmed.

MAY, J., and BARNES, J., concur.