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IN THE
COURT OF APPEALS OF INDIANA

EDWARD A. GRADY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-0903-CR-104
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0710-FA-10

August 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Edward A. Grady appeals his convictions for four counts of Child Molesting,[1] a class A felony, and two counts of Child Molesting,[2] a class C felony. Grady argues that the trial court erred by denying his motion to sever the charges and that he was denied a fair trial because of alleged prosecutorial misconduct. Finding no error, we affirm.

FACTS

In 1987, Grady married the mother of then-two-year-old twin girls D.H. and D.Z. Grady adopted the twins in 1988 and the girls grew up believing that he was their biological father.

Between March 1997 and March 1999, Grady sexually abused the then-twelve- and thirteen-year-old twin girls. Grady would approach one of the girls from behind, comment that he wanted to check how she was "developing," tr. p. 466, 623-25, lift her shirt, fondle her breasts, and comment on how well she was developing. He fondled each girl's breasts on a weekly basis.

During the same period of time, Grady would ask the girls for "kisses" or "special kisses," id. at 474, 632, which the girls understood to mean oral sex. Grady then placed his penis in the girl's mouth and would either ejaculate into a Tupperware cup or into the girl's mouth, directing her to spit it out into the cup. He subjected D.H. to oral sex approximately twenty times and D.Z. approximately fifty times.

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[1] Ind. Code § 35-42-4-3(a)(1).

[2] I.C. § 35-42-4-3(b).

Also during the same period of time, Grady would ask the girls for "special hugs," id. at 477, 625, which they understood to mean sexual intercourse. Grady would position the girl such that he was lying on his back and she was lying on her back on top of him with the back of her head resting on his shoulder. He would then insert his penis into the girl's vagina. Towards the end of intercourse, he withdrew his penis and ejaculated into a Tupperware cup. He subjected D.H. to intercourse in this manner on more than five occasions. He performed intercourse on D.Z. on approximately 250 occasions, up to three times per week. Although he subjected D.Z. to additional sexual positions, he also performed intercourse on her in the same way he did on D.H. He also ejaculated into a Tupperware cup following intercourse with D.Z.

To procure sex from the girls, Grady withheld privileges until they engaged in sex acts with him. He gave them money in exchange for sex acts and told them that engaging in sex with him was acceptable because God would not have made it feel so good if he did not want them to do it.

All of the sexual molestations occurred with one girl or the other—Grady never molested them at the same time,[3] and the sisters never discussed it with each other. Grady and the twins' mother divorced in 2004. Shortly before her wedding, twenty-one-year-old D.H. revealed to her mother for the first time what Grady had done to her. After

[3] There may have been one occasion in which he engaged in sex with one girl while the other watched, but only one of them remembered it and they never discussed it later.

D.H. and her mother confronted D.Z., she also admitted that the molestations had occurred.

D.H. and D.Z. reported the molestations to the police, and on October 5, 2007, the State charged Grady with four counts of class A felony child molesting and two counts of class C felony child molesting. On December 17, 2007, Grady moved to sever the charges concerning D.H. from the charges concerning D.Z. Following a hearing, the trial court denied the motion on January 10, 2008. Following a three-day jury trial that began on October 7, 2008, the jury found Grady guilty as charged. On November 24, 2008, the trial court sentenced Grady to thirty-year terms for each of the four class A felony convictions, to be served consecutively, and to four-year terms for each of the two class C felony convictions, to be served concurrently with the other sentences, for an aggregate sentence of 120 years imprisonment. Grady now appeals.

DISCUSSION AND DECISION

I. Motion to Sever

Grady first argues that the trial court erred by denying his motion to sever the charges relating to D.H. from the charges relating to D.Z. Two or more offenses may be joined in the same information when the offenses "(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." Ind. Code § 35-34-1-9(a).

If two or more offenses have been joined for trial solely on the same ground that they are of the same or similar character, the defendant has a right to a severance of the offenses. Ind. Code § 35-34-1-11(a). In all other cases, it is within the trial court's discretion to grant severance when it is "appropriate to promote a fair determination of the defendant's guilt or innocence of each offense . . . ." Id. In conducting its analysis, the trial court should consider the number of offenses charged, the complexity of the evidence to be offered, and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Id. If the defendant is not entitled to severance as a matter of right, we review the trial court's ruling on a motion to sever charges for an abuse of discretion. Craig v. State, 730 N.E.2d 1262, 1265 (Ind. 2000).

To be sufficiently connected as a single scheme or plan such that the trial court may disallow severance at its discretion, the State must establish that "[the charges] are connected by a distinctive nature; a common modus operandi linked the crimes; and that the same motive induced the criminal behavior." Wilkerson v. State, 728 N.E.2d 239, 246 (Ind. Ct. App. 2000). A modus operandi is "'a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.'" Craig, 730 N.E.2d at 1265 n.1 (quoting Penley v. State, 506 N.E.2d 806, 810 (Ind. 1987)).

Here, Grady's crimes were linked in timeframe (1997-99), location (his house), and victims (his adopted twin daughters). When he wanted to fondle one of the girls, he

approached them from behind, made a comment about checking to see how she was developing, lifted her shirt, and fondled her breasts. When he wanted oral sex, he said he wanted "kisses" or "special kisses," tr. p. 474-632, and when he was finished, he either ejaculated into a Tupperware cup or into the girl's mouth, asking her to spit the semen into the Tupperware cup. When Grady wanted to have sexual intercourse, he said he wanted a "special hug," id. at 477, 625, and laid down on the bed on his back, asking that the girl lay on top of him on her back with the back of her head resting on his shoulder. He ejaculated into a Tupperware cup at the end of most episodes of sexual intercourse. He used the withholding of privileges and the giving of money to procure sex and told the girls that his abuse was sanctioned by God.

We find that these episodes are sufficiently unique, connected, and distinctive to conclude that they were part of a single scheme or plan. Therefore, Grady was not entitled to severance as a matter of right. See Philson v. State, 899 N.E.2d 14, 17 (Ind. Ct. App. 2008) (finding that denial of severance was appropriate when the defendant had committed sexual offenses against two of his siblings in the same home over the same time period), trans. denied; Piercefield v. State, 877 N.E.2d 1213, 1217-118 (Ind. Ct. App. 2007) (finding that a "unique set of circumstances" supported the denial of severance when the defendant had a history of showering with his stepchildren before committing sex offenses against them), trans. denied; Blanchard v. State, 802 N.E.2d 14, 25-26 (Ind. Ct. App. 2004) (finding that denial of severance was appropriate when the defendant had abused and neglected his twin sons living in the same household).

Therefore, it was within the trial court's discretion to rule on Grady's motion for severance. In making its ruling, the trial court was to consider the number of offenses charged, the complexity of the evidence, and the ability of the jury to distinguish the evidence and apply the law intelligently. I.C. § 35-34-1-11(a). Grady faced six charges, three per victim. The evidence consisted of the testimony of the victims, their mother, and Grady. We cannot conclude that anything about this trial was particularly complex or that it was difficult for the jury to distinguish the evidence or apply the law intelligently. Therefore, we do not find that the trial court abused its discretion in denying Grady's motion to sever.[4]

II. Prosecutorial Misconduct

Grady also argues that he was denied a fair trial because of alleged prosecutorial misconduct. When reviewing a claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct and, if so, whether the misconduct placed the defendant in a position of grave danger or peril to which he would not have otherwise been subjected. Coleman v. State, 750 N.E.2d 370, 374 (Ind. 2001). The gravity of peril

[4] On appeal, Grady directs our attention to Indiana Rule of Evidence 404(b) and authority interpreting that rule in arguing that the motion to sever should have been granted. The statute governing motions to sever is the relevant authority for this issue, however. We also note, briefly, that Rule 404(b) is an evidentiary rule that seeks to prevent the forbidden inference that, based upon evidence of other bad acts, the defendant has a propensity for committing crime and, therefore, committed the charged offense. The severance statute, on the other hand, addresses whether charged offenses may be tried together and does not address bad acts that are not contained in the charging information. Therefore, the subject matter addressed by Rule 404(b) and the severance statute are different, notwithstanding some common phraseology. Under these circumstances, we will not address Grady's argument made under Rule 404(b).

turns on the probable persuasive effect of the misconduct on the jury, not on the degree of impropriety of the conduct. Wisehart v. State, 693 N.E.2d 23, 67 (Ind. 1998).

Grady's first claim of prosecutorial misconduct is based on D.H.'s testimony. When Grady deposed D.H., she remembered few details of the molestations. Before trial, however, she began counseling and began to keep a journal. When she testified at trial, she remembered Grady's molestations in significantly greater detail than she had at the deposition. Grady argues that the prosecutor, with whom D.H. had been having pretrial preparation meetings, committed misconduct because the prosecutor did not inform Grady of D.H.'s regained memories or produce her journal before she testified at trial.

Based on these facts, we cannot conclude that there was a discovery violation or prosecutorial misconduct. Grady deposed D.H., not the State. Furthermore, nothing in the trial court's pretrial discovery order required the prosecutor to share his trial preparation with the defense. Nor is there evidence proving that D.H. provided the prosecutor with any exculpatory information during trial preparation or that her journal, which D.H. never supplied to the prosecutor, contained any exculpatory information.

Furthermore, Grady cross-examined D.H. at great length about her recovered memories and the discrepancies between her deposition and trial testimony. As a result, Grady presented a solid defense that D.H. had fabricated details to supplement her story, which he argued extensively during closing argument. It was for the jury to sift through all of the conflicting testimony, and it did so, though the outcome was not what Grady had been hoping for. Under these circumstances, we cannot say that the prosecutor

committed misconduct by failing to apprise Grady of the substance of D.H.'s testimony before she testified. Cf. Hill v. State, 531 N.E.2d 1382, 1384 (Ind. 1989) (finding that when an officer surprised the defendant by testifying at trial in a way that materially contradicted his deposition testimony, the proper remedy was to impeach the officer during cross-examination rather than grant the defendant a continuance to investigate).

Additionally, Grady argues that the prosecutor committed misconduct during voir dire. During voir dire, Grady's attorney asked several potential jurors if, to convict someone of an offense, they would require evidence in addition to someone's testimony indicating guilt. Thereafter, the prosecutor expressed concern that the potential jurors had been left with the impression that they could not convict Grady based solely on the victim's testimony, which was not an accurate statement of the law. Over Grady's objection, the trial court ruled that the prosecutor could inform the jury that they could convict based solely upon witness testimony.

Grady directs our attention to Ludy v. State, in which our Supreme Court held that a trial court may not instruct the jurors that they may convict based solely on the uncorroborated testimony of a victim. 784 N.E.2d 459, 461 (Ind. 2003). The rationale for that rule is that such an instruction would make it seem as though the trial court was emphasizing the testimony of one witness. Id. No case has extended Ludy to a

prosecutor's remarks during voir dire, however, and we do not believe that it makes sense to do so.[5] As aptly put by the State,

> [a]lthough a trial court may not emphasize any piece of evidence or any particular witness in its instructions, that is precisely the aim of a prosecutor in presenting his case. Furthermore, a prosecutor's remarks during voir dire are not invested with the same onus or authority as jury instructions issued from the trial court.

Appellee's Br. p. 16. We agree. Inasmuch as the prosecutor made an accurate statement of the law to the potential jurors, we see no error on this basis. See Ware v. State, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004) (holding that a molestation victim's uncorroborated testimony is sufficient to sustain a conviction).

The judgment of the trial court is affirmed.

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

[5] Grady does not argue that the jury instructions were in any way improper.