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ATTORNEY FOR APPELLANT:

KEVIN McSHANE
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

THEODORE EBEYER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A05-0911-CR-674
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 41C01-0906-FC-28

September 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Theodore Ebeyer appeals his conviction for Possession of Cocaine, as a Class C felony.[1] We affirm.

Issue

Ebeyer presents a single issue for review: whether the trial court abused its discretion by excluding Ebeyer's proffered evidence that a State's witness, one of the detectives involved in investigating Ebeyer, had engaged in coercive sexual activity with Ebeyer's daughter.

Facts and Procedural History

On August 16, 2006, Ebeyer's sixteen-year-old daughter B.E. was with her boyfriend, Ryan Huffman, at a Greenwood, Indiana church parking lot when Huffman was arrested for possession of marijuana. One of the arresting officers, Detective Joseph Rodriguez, had been conducting surveillance of B.E.'s family residence in connection with suspected drug activity. He was familiar with B.E. both because he had responded to B.E.'s report of a possible rape and because B.E. had been implicated during Detective Rodriguez's investigation of drug activity in the Greenwood area.

B.E. was not arrested along with Huffman. Detective Rodriguez drove B.E. to a convenience store, to the Greenwood Police Station, and finally to her residence. During that time, Detective Rodriguez informed B.E. that he had received information that B.E. purchased and used drugs and was reportedly about to make a drug purchase at Ebeyer's

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[1] Ind. Code § 35-48-4-6(a).

behest. B.E. agreed to act as a confidential informant and cooperate with obtaining evidence against Ebeyer.

On August 17, 2006, B.E. met with Detective Rodriguez and another officer at a Greenwood department store parking lot. The officers outfitted B.E. with a recording device and took photographs of bills that B.E. already had in her possession (in the aggregate amount of $1,000). The officers followed B.E. to an apartment complex in south Greenwood, where she purchased an ounce of cocaine from someone known to her as "Scootie." (Tr. 388.)

The officers continued to conduct surveillance of B.E. as she returned to a hair salon to pick up Ebeyer. After Ebeyer entered the vehicle, the recording captured Ebeyer questioning B.E., "where's that shit at" and "it is a full onion, no scamming, no bullshit." (State's Ex. 5, pg. 13.) Ebeyer subsequently assured B.E. that it was the last time she would be expected to "get it" for her mother. (State's Ex. 5, pg. 13.) B.E. informed Ebeyer that there were "cops following" and Ebeyer responded with shouts to B.E. to "take the shit out" and "stuff it down your f----- pants." (State's Ex. 5, pg. 14.)

Ebeyer was arrested and charged with possession of cocaine. At Ebeyer's trial, B.E. testified and confirmed the authenticity of the recording. However, she testified that her father had not instigated the cocaine purchase; rather, he had believed that B.E. was cooperating in a plan to incriminate Huffman. As part of an offer of proof, B.E. testified that Detective Rodriguez had "made [her] perform oral sex" by threatening to take her to jail if she did not comply. (Tr. 366.) She also stated that Detective Rodriguez had "placed his

firearm on his lap" during the incident. (Tr. 368.)

Ebeyer was convicted and sentenced to four years imprisonment, with three years suspended. He now appeals.

Discussion and Decision

Ebeyer argues that evidence of Detective Rodriguez's "sexual predatory conduct" was admissible to "show the detective's prejudice and bias against Ebeyer" and its exclusion denied him a fair trial. Appellant's Brief at 21, 26. The State responds that the trial court properly excluded such evidence, as it is highly prejudicial and lacking in probative value.

Pursuant to Indiana Evidence Rule 401, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Evidence Rule 403, even relevant evidence may be excluded if its probative value is substantially out-weighed by the danger of unfair prejudice, confusion of the issues, or the potential to mislead the jury. Pelley v. State, 901 N.E.2d 494, 505 (Ind. 2009), reh'g denied.

Indiana Evidence Rule 404(b) in particular governs the admissibility of prior bad act evidence and provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Traditionally, the Rule has protected a defendant from being convicted based upon unrelated prior bad acts. Garland v. State, 788 N.E.2d 425, 428 (Ind. 2003). However, it governs evidence about acts by non-defendants as well, and operates as an appropriate restraint on admissibility of evidence about events or acts that are largely extraneous to those for which a defendant is on trial. Id. at 429. In what has become known as "reverse 404(b)," a defendant can introduce evidence of someone else's conduct if one of the exceptions of the Rule (motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) applies and the evidence tends to negate the defendant's guilt. See id.

To decide whether character evidence is admissible under Rule 404(b), the trial court must (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. We review admissibility determinations by the trial court for an abuse of discretion, and reversal is appropriate only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997).

Ebeyer does not explain how evidence of Detective Rodriguez's alleged victimization of B.E. satisfies one of the exceptions in 404(b). Too, whether or not Detective Rodriguez coerced B.E. into performing a sex act has no tendency to prove or disprove Ebeyer's guilt as to the charge of possession of cocaine. The proffered evidence is extraneous as it is not probative of an issue in the case. The trial court did not abuse its discretion in excluding such.

Affirmed.

RILEY, J., and KIRSCH, J., concur.