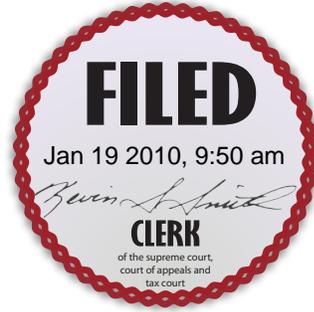


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**IN THE
COURT OF APPEALS OF INDIANA**

NICHOLAS HAIR,)

Appellant-Defendant,)

vs.)

No. 49A04-0905-CR-266)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Stanley Kroh, Commissioner
Cause No. 49G04-0802-FC-48888

January 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Nicholas Hair was charged with two counts of molesting four-year-old R.H., and he was convicted on each count. Hair argues there was insufficient evidence he was the perpetrator and he should have been granted a mistrial when a question asked by the prosecutor suggested he had been in jail on an unrelated matter. We affirm.

FACTS AND PROCEDURAL HISTORY

R.H. lives with her mother, Misti H. R.H. spends every other weekend with her father, Daniel H. Daniel lived with his girlfriend, Angie, and a roommate, Brian Hair. Brian and Nicholas Hair are cousins and close friends. Nicholas often visited Brian and was also friends with Daniel.

The weekend of February 15 to February 17, 2008, R.H. was staying with her father. The evening of the 15th, Nicholas and his brother, Micah Hair, came to visit Brian; however, Brian was not home. Micah left, but Nicholas stayed. He and Daniel began drinking rum and playing video games. R.H. fell asleep on the couch, and after a while, Daniel carried her to her bed.

Hair, who had drunk approximately a pint of rum, went to the bathroom and threw up. He was not in any condition to drive, so he lay down in Brian's room, which is next to R.H.'s. Daniel went to sleep in his bedroom downstairs.

During the night, R.H. awoke to the sound of her door opening. A man came in the room, and at first, R.H. thought it was her father checking on her. However, her nightlight was on, and she realized the person was Hair. Hair sat down on her bed and asked her, "Do you want to play a game?" (Tr. at 31.) Hair took off her shorts and panties and touched her vagina. Hair then had her touch him under the covers. At first,

she thought she was touching his thumb, but she then realized it was his penis because it was bigger than a thumb.

R.H. wanted to tell her mother about the incident instead of her father, so she waited until Misti brought her home on Sunday. R.H. told Misti someone had taken her pants off while she was at her father's house. Misti asked who had done it, and R.H. said, "Nick." (*Id.* at 66.) R.H. then told her someone had come into her room at night, and at first she thought it was her father, so she sat up and said, "Gotcha!" (*Id.* at 67.) However, she then realized it was Hair. Hair took her pants and panties off and said they were going to play a game. At that time, R.H. did not tell Misti that Hair had touched her or that she had touched Hair.

Misti called the police, and the police arranged for a forensic interview with Jill Carr at the Child Advocacy Center. After establishing that R.H. uses the term "bunny" for vagina, Carr asked, "Has anybody ever touched your bunny before?" (Ex. 5 at 12.) R.H. responded, "Um, well, Brian has a friend names [sic] Nick and he went to my bedroom and he took my panties and pants off." (*Id.*) She then said "Nick" pulled her panties and pants down and touched her "bunny." (*Id.* at 13-14.) At first, she thought it was her father coming into the room, but then she realized it was "Nick" because she "saw the, the head shape." (*Id.* at 20.) Carr then asked whether Nick asked her to touch him:

Q: . . . Did Nick ask you to touch him anywhere on his body?

A: Well . . . yes.

Q: What'd he say?

A: I thought I saw his thumb got [sic] bigger, but . . .

* * * * *

Q: You saw it get bigger?
A: No, I thought it got bigger, I didn't *see* it!
Q: Oh, you didn't see it. Did, did Nick want you to touch him anywhere on his body?
A: (movement sounds)
Q: Where are you pointing at? Can you point with your hand, please?
(pause) Okay, he wanted you to touch his pee-pee?
A: Yeah huh.
* * * * *
Q: . . . Did you touch his pee-pee?
A: Yes.

(*Id.* at 21-22) (emphasis in original). R.H. said that the next morning, “Nick” told her “he didn’t mean to” and that “it was a secret.” (*Id.* at 17.) At the conclusion of the interview, Carr showed R.H. a photographic array, and she immediately identified Hair as the person she was calling “Nick.”

After the interview, R.H. told Misti that Hair had touched her “bunny” and that she had touched “his thumb and that his thumb got bigger.” (Tr. at 69.) R.H. said Hair had told her to keep it a secret.

Detective Steven Buchanan, the lead detective on the case, interviewed Hair at the jail. At the conclusion of the interview, he arrested Hair. Hair was charged with two counts of Class C felony child molesting.¹

Hair was tried to a jury on March 19, 2009. R.H., Misti, Carr, and Detective Buchanan testified to the facts mentioned above, and the tape of R.H.’s interview was played for the jury. Daniel testified he woke early on the Saturday after the molestation: “I’d say like six or seven ‘cause [R.H.] wakes me up in the morning really early.” (*Id.* at

¹ Ind. Code § 35-42-4-3(b).

97.) Hair was already gone when he woke up. Daniel did not know when or how Hair left.

Micah testified in Hair's defense. Micah stated he left Daniel's house around 11:30 p.m. and returned to pick up Hair around 2:30 a.m. Everyone was asleep and the front door was unlocked, so Micah let himself in and went to Brian's room, where he found Hair "passed out, drunk." (*Id.* at 197.) Hair had all his clothes on. Micah shook Hair and yelled at him to wake him up. He then took Hair to their grandparents' house.

Hair testified he was drinking and playing video games with Daniel until about 1:30 a.m. Then he went to the bathroom and threw up a couple times. He went to Brian's room and passed out on the bed until Micah woke him up. He denied seeing R.H. that morning.

The jury found Hair guilty as charged. Hair was sentenced to concurrent terms of eight years, with two years suspended.

DISCUSSION AND DECISION

1. Sufficiency of Evidence

In reviewing the sufficiency of evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

Hair argues there is insufficient evidence he was the perpetrator. First, he notes R.H. said she initially thought her father was the person who came into the room.

However, R.H. testified her nightlight was on and she could see Hair's face. Nevertheless, Hair argues R.H.'s confusion was not merely temporary. R.H. testified she felt nervous about telling her father about the incident and felt more comfortable telling her mother. On cross-examination, Hair asked her whether she felt nervous "because you weren't sure if it was your dad or Nick that night?" (Tr. at 60.) R.H. responded, "Yeah." (*Id.*) On redirect, R.H. testified "Nick" touched her "bunny" and made her put her hand on his "weenie." (*Id.* at 60-61) She testified her father did not do those things and did not come into her room that night. To the extent R.H.'s response on cross-examination contradicted other statements she made, it was the province of the jury to determine which statements should be believed.

Next, Hair notes Micah had an opportunity to commit the offense because he was in the house when everyone else was asleep. In addition, Hair argues R.H. confused Hair and Micah during her interview with Carr. Carr began the interview by asking R.H. who lived in her home. R.H. informed her that Angie and Brian live with her father. Carr drew pictures of these people and listed their names underneath. When R.H. later mentioned "Nick," Carr tried to clarify who he was:

- Q: He took your panties and pants off? Who . . . what was this guy's name?
A: Nick.
Q: Nick? I don't see Nick up here, let's put Nick. And who is he?
A: Um, he's a grown-up.
Q: He's a grown-up.
A: He has a brother but I don't know his name.
Q: He's a grown-up named Nick?
A: Um, no, I . . .
Q: No?
A: . . . just don't know his name.

Q: You don't know his name?
A: No.
Q: Should I not put Nick up here?
A: Well . . .
Q: If you don't know his name, that's okay.
A: Well, you can call him Nick if you want to.

(Ex. 5 at 12-13.)

A reasonable interpretation of this exchange is that Carr was trying to inquire about "Nick," while R.H. thought she was asking about Nick's brother. Although Carr equivocated when asked whether she might have misunderstood R.H. during this part of the interview, she affirmed that R.H. later clarified "Nick" was the perpetrator. (Tr. at 135.) Even assuming R.H. was unsure of the perpetrator's name, she had no difficulty picking Hair out of a line-up, and she also identified him in court as the man who had come into her room.

Hair further notes he had been drinking heavily and threw up, but R.H. testified the man in her room did not smell bad. However, R.H. said she did not know what vomit smells like, and Daniel testified Hair did not smell bad.

Finally, Hair argues R.H. must have been confused about the identity of the perpetrator because she said in her interview that she spoke to him in the morning. He notes his and Micah's testimony that they left around 2:30 a.m. and Daniel's testimony that Hair was gone when he woke up around 6:00 or 7:00 a.m. However, Daniel testified R.H. usually woke up before he did, and the jury did not have to credit Hair's evidence that he left at 2:30 a.m. and did not see R.H. before he left. There was sufficient evidence from which a reasonable jury could conclude Hair was the perpetrator.

2. Mistrial

Hair argues the trial court abused its discretion by denying his motion for a mistrial after a question by the prosecutor suggested he had been in jail on an unrelated matter.

Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. We will reverse the trial court's ruling only upon an abuse of that discretion. We afford the trial court this deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct.

A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings, because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement.

Lehman v. State, 777 N.E.2d 69, 72 (Ind. Ct. App. 2002) (citations omitted).

When cross-examining Detective Buchanan, Hair elicited the fact that the detective had interviewed him in jail. Hair also inquired about some of Detective Buchanan's statements to him during the interview. Later, in a conversation outside the presence of the jury, the prosecutor indicated she believed Hair had opened the door to her asking why he had been in jail.² The court determined Hair had not opened the door to his criminal history, but the prosecutor could ask whether Hair was already in jail when he was interviewed.

² According to the prosecutor, Hair had been arrested on a probation violation in a separate case.

On cross-examination of Hair, the prosecutor asked, “And when Detective Buchanan came to talk to you on February 27th of 2008, you were already in the Marion County Jail *on another matter*, right?” (Tr. at 222) (emphasis added). Defense counsel objected, and the trial court sustained the objection. The prosecutor then requested a sidebar, and the following discussion took place:

THE COURT: What we talked about in the hearing was he was already in jail, . . . and it is those last three words that I have to sustain the objection on. So, you need to move on from this. . . .

MR. LIDY [defense counsel]: . . . I’m going to ask for a mistrial . . .

THE COURT: Right and I think that mistrial is an extreme remedy here . . . and I’m denying that request. I didn’t hear a Motion to Strike or anything so

* * * * *

MR. LIDY: Well, I want . . . an ordering instruction that this jury shall . . . disregard that statement from the deputy prosecutor, striking that question

* * * * *

THE COURT: . . . I’m going to grant the last three words be stricken from the record so what’s going to stay in the record is that he was already in jail.

MS. DEPREZ [for the State]: Strike the whole thing and I’ll ask the question (unintelligible.)

MR. LIDY: We’re just calling attention to it now.

* * * * *

THE COURT: Okay, I sustain the objection, I’m going to grant the Motion to Strike the question. . . . [Y]ou can ask the question but not with those last three words and we’ll go from there and move on.

(Tr. at 224-27.) The court then told the jury, “Ladies and gentlemen, the Court did sustain the last objection and is striking that question from the record that was asked and Ms. Deprez, if you’ll continue.” (*Id.* at 228.)

Hair argues the reference to another criminal matter was highly prejudicial because of the public perception that sex offenders have a high rate of recidivism.³ Hair also argues the question of his guilt was close and the prosecutor intentionally introduced the issue. *See Mack v. State*, 736 N.E.2d 801, 803 n.5 (Ind. Ct. App. 2000) (listing thirteen factors bearing on the necessity of a mistrial, including whether there was deliberate action on the part of the prosecution to present the matter to the jury and whether the question of guilt is close), *trans. denied*.

The jury already knew Hair was interviewed in jail and was not arrested on the child molesting charges until after the interview. Thus, the jury might have inferred anyway that Hair was in jail on an unrelated matter. However, the court struck the prosecutor's question, and the jury did not hear the answer to it.⁴ In addition, the sidebar conversation suggests defense counsel did not want the trial court to give a detailed admonition because that would call attention to the issue. We cannot say the improper question was probably persuasive to the jury; therefore, the trial court did not abuse its discretion by denying Hair's motion for mistrial.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.

³ In support, Hair directs us to http://www.livescience.com/strangenews/060516_predator_panic.html.

⁴ Hair argues the "jury was never instructed about what having a question stricken from the record meant for their deliberations and should have been explicitly told they were not to consider that information." (Appellant's Br. at 13.) On the contrary, preliminary instruction 10 stated, "Occasionally, the court may strike evidence from the record after you have already seen or heard it. You must not consider such evidence in making your decision." (Appellant's App. at 72.)