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IN THE COURT OF APPEALS OF INDIANA

BRIAN LEE JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 68A01-0702-CR-102
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Jay L. Toney, Judge
Cause No. 68C01-0505-FB-29

August 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brian Lee Johnson appeals his conviction for class B felony rape. We affirm.

Issues

We restate the issues as follows:

I. Whether the State presented sufficient evidence to convict Johnson of class B felony rape;

II. Whether the trial court abused its discretion in allowing the prosecutor to ask R.D. leading questions;

III. Whether the trial court erred in allowing R.D. to testify at trial after she admitted that she discussed her testimony with her parents prior to trial; and

IV. Whether the trial court abused its discretion in allowing the State to treat R.D. as mentally disabled or deficient.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that R.D. is a mentally challenged girl, who was sixteen years old and living with her parents in Randolph County. R.D. was a special programs student at New Castle Middle School. Tr. at 55. Johnson is R.D.'s cousin and a youth minister at the church where both families attend. R.D. occasionally stayed overnight with Johnson and his wife. On March 31, 2005, Johnson picked up R.D for church. After church, R.D. was going to Johnson's house to stay all night with him and his wife, Marsha. On this date, Marsha was not feeling well, so Johnson was alone when he picked R.D. up from her parents' house. As they drove to church, Johnson touched R.D. between her legs outside of her clothes when the vehicle stopped. *Id*. at 64. R.D. told Johnson to stop touching her, but he did not. After church, Johnson and R.D. drove

to Johnson's residence. R.D. slept on the couch in the living room, while Johnson slept in his bedroom with his wife.

The following morning, Marsha left for work early, leaving Johnson and R.D. home alone. R.D. was watching television when Johnson came into the living room, sat on the couch behind her, and began playing with her hair and touching her between her legs. Johnson took off R.D.'s pajama pants and underwear, and then he removed his own clothes. Johnson inserted his finger inside of R.D. and told her to go into his bedroom and lie down on the bed. *Id*. at 70. Johnson sat on top of R.D., stuck his "thing" inside her, and began kissing her on the neck. *Id*. at 73-74, 78. R.D. was afraid and in pain, and she told Johnson to stop, but he did not do so. Johnson finally stopped and went into the kitchen. When R.D. got up, she saw her blood on the sheet. R.D. returned to the living room, got dressed, and watched television. Johnson then drove R.D. home. Before she got out of the vehicle, Johnson told her not to tell. *Id*. at 83.

When R.D. entered her home, she went straight to her bedroom and slammed the door. By R.D.'s attitude and actions, her mother knew something was wrong. After a few minutes, R.D. called her mother into her bedroom and told her what happened. R.D.'s parents took her to the hospital. A medical examination revealed that R.D. had a lot of bruises on her insides. *Id*. at 86-87. The doctor concluded from R.D.'s exam that there was "notable injury" present, that she was bleeding, and that there were signs of nonconsensual sex. *Id*. at 163. A DNA analysis was conducted on the samples recovered from R.D.'s clothing and person. The results showed that extra pieces of DNA were present in these

samples that did not match R.D.'s. *Id*. at 227-28. The results could not rule Johnson out as a contributor of that DNA. *Id*. at 229.

The State charged Johnson with class B felony rape. On November 16, 2006, the jury found Johnson guilty as charged. Johnson now appeals his conviction.

Discussion and Decision

I. Sufficiency of Evidence

Johnson asserts that the State failed to provide sufficient evidence to support his conviction for class B felony rape. When reviewing sufficiency of the evidence claims, "a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects the jury's exclusive province to weigh conflicting evidence." *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). The appellate court must consider only the probative evidence and reasonable inferences supporting the verdict. *Id*. We will affirm "if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." *Id*.

Class B felony rape is committed when "a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given." Ind. Code § 35-42-4-1. Specifically, Johnson asserts that the State did not prove that R.D. was incapable of giving consent. The question of mental deficiency is a question to be decided by the trier of fact, who is in the best position to observe and hear the victim testify. *Hall v. State*, 504 N.E.2d 298, 300 (Ind. Ct. App. 1987).

Kristy Davenport, R.D.'s mother, and Karen Marcum, director of the New Castle Area Special Education Services, provided evidence about R.D.'s mental capacity. Davenport testified that R.D. was diagnosed as being mentally handicapped when she was four years old. Tr. at 30. Davenport also explained that R.D. has been in special education programs at school since she was four, and at age sixteen she acts more like a five- or eight-year-old child. *Id*. at 31. Davenport stated that she had not discussed sex education with R.D. because R.D. would not understand and it would be like talking to a five-year-old about sex. *Id*. at 32. Marcum testified that R.D.'s test scores indicated that she was in the severely handicapped range and that her IQ scores were extremely low. *Id*. at 137. This evidence is sufficient to support a finding that R.D. was so mentally disabled or deficient as to be incapable of giving consent.

II. Leading Questions

Johnson asserts that the trial court abused its discretion by allowing the prosecutor to ask R.D. leading questions.

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Ind. Evidence Rule 611(c). Our case law has allowed leading questions on direct examination to develop the testimony of certain kinds of witnesses such as young, inexperienced, frightened, and special education student witnesses. *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000). "The use of leading questions on direct examination generally rests within the trial court's discretion." *Id*. An abuse of discretion occurs when the trial

court's decision is against the logic and effect of the facts and circumstances before it. *Weis v. State*, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005). The prosecutor asked R.D. questions that were necessary to help her answer the questions and develop her testimony. R.D. was young, inexperienced, frightened, and a special education student; therefore, the trial court did not abuse its discretion in allowing the prosecutor to ask R.D. leading questions.

III. R.D.'s Testimony

Johnson asserts that the trial court erred in allowing R.D. to testify after she admitted that she discussed her testimony with her parents. Johnson did not raise this issue at trial. The appellate review of a claim of error requires a timely and precise trial objection, which is clear and specific to inform the trial court of the claimed error, to afford an opportunity for timely correction and thus prevention of inadvertent error, and to facilitate appellate review. *McGregor v. State*, 725 N.E.2d 840, 842 (Ind. 2000). "Grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal." *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 1996). As such, Johnson has waived any error in the admission of R.D.'s testimony.

IV. Treating R.D. as Mentally Disabled or Deficient

Lastly, Johnson asserts that the trial court abused its discretion in allowing the State to treat R.D. as mentally disabled or deficient. Specifically, Johnson notes that "the State of Indiana had the burden to prove that R.D. was mentally deficient. The Court by its actions gave the impression to the jury that R.D. was mentally deficient without the State having to prove it." Appellant's Br. at 14. We have already determined that the trial court did not abuse its discretion in allowing the State to ask R.D. leading questions. Johnson cites no

other specific examples of improper conduct and makes no attempt to establish prejudice. We therefore affirm Johnson's convictions.

Affirmed.

DARDEN, J., and MAY, J., concur.