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**IN THE
COURT OF APPEALS OF INDIANA**

JAMESON MALBROUGH,)

Appellant-Defendant,)

vs.)

No. 49A02-1009-CR-958

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0908-FB-70414

May 12, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Jameson Malbrough appeals his convictions of two counts of child molesting, class B felonies,¹ as well as one count each of child molesting, a class C felony,² vicarious sexual gratification,³ a class D felony, and intimidation,⁴ a class D felony. Specifically, Malbrough argues that the trial court erred in excluding evidence that the victim had a familiarity with sexual acts because he had previously molested his own brother. Because Malbrough failed to make a written motion describing the evidence he proposed to offer at least ten days before trial, he has waived appellate review of this issue. Thus, we affirm the judgment of the trial court.

FACTS

In the summer of 2009, twenty-year-old Malbrough, a mildly mentally handicapped young adult who suffers from cerebral palsy and an active seizure disorder, lived with his grandmother, Eva Thomas. Thomas provided respite care to foster children to allow their foster parents to take a break. In July 2009, case manager Holly McFadden asked Thomas to keep ten-year-old foster child J.B. for the weekend. McFadden explained to Thomas that J.B. had sexually abused his younger brother and was a risk to young children. McFadden asked Thomas not to let J.B. sleep in the same room with young boys. Instead, McFadden placed J.B. in a bedroom with Malbrough.

¹ Ind. Code § 35-42-4-3.

² Id.

³ I.C. §35-42-4-5.

⁴ I.C. § 35-42-2-1.

J.B. subsequently claimed that during the course of the weekend, Malbrough performed several sexual acts on him, and then threatened to kill him if he told anyone what had happened. J.B. was examined a few days later by a pediatrician, who found no physical trauma or injury.

The State charged Malbrough with four counts of child molesting, one count of vicarious sexual gratification, and one count of intimidation. At trial, the trial court excluded Malbrough's police statement from evidence after finding it was coerced and given by a person who had difficulty with abstract concepts and complex words.

Also at trial, the State argued that J.B. would not have such a detailed knowledge of sexual activity had he not been molested by Malbrough. Malbrough sought to admit evidence that J.B. had molested his younger brother to rebut the State's argument and to challenge J.B.'s credibility. The trial court excluded the evidence. The jury convicted Malbrough of five of the six counts, and the trial court sentenced him to an aggregate sentence of eight years of incarceration with two years suspended. Malbrough now appeals.

DISCUSSION AND DECISION

Malbrough's sole argument is that the trial court erred in excluding evidence that J.B. had previously molested his younger brother. However, where a defendant offers evidence of a victim's past sexual conduct at trial, the defendant must first file a written motion describing the proposed evidence at least ten days before trial. Ind. Evid. Rule

412(b)(1). The motion may be made less than ten days before trial if good cause is shown. Id.

Malbrough did not make a timely written motion and has not shown good cause for allowing such evidence absent the proper notice. His failure to comply with Evidence Rule 412(b) precluded him from presenting evidence of J.B.'s past sexual history and results in waiver of the issue on appeal. See Sallee v. State, 785 N.E.2d 645, 651 (Ind. Ct. App. 2003) (holding that failure to comply with Evid.R. 412(b) precludes presentation of evidence and results in waiver of issue on appeal); see also Graham v. State, 736 N.E.2d 822, 826 (Ind. Ct. App. 2000) (holding that the "procedural error is fatal to [defendant's] attempt to introduce evidence of prior false rape allegations. To hold otherwise would allow circumvention of the rule itself."). But see Sallee v. State, 777 N.E.2d 1204, 1211, n.6 (Ind. Ct. App. 2002) (interpreting Evid.R. 412(b) by reference to the language of Ind. Code § 35-37-4-4(c), which requires special procedures only when the defendant proposes to offer evidence pertaining to the exceptions listed in a prior subsection.). Consequently, this argument fails and we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.