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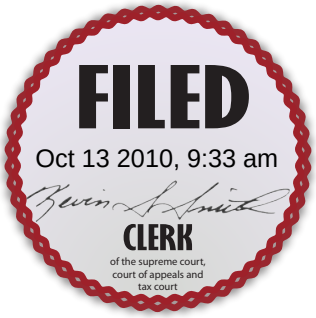

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IN THE
COURT OF APPEALS OF INDIANA

KEVIN ANDREW KOHLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-1002-CR-175
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0906-FA-25

October 13, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kevin Andrew Kohler ("Kohler") was convicted in Huntington Circuit Court of one count of Class A felony child molesting and two counts of Class C felony child molesting. Kohler appeals and argues that the trial court's admission of certain witness testimony was fundamental error.

We affirm.

Facts and Procedural History

The facts relevant to our discussion of this appeal are that in 2005, M.V. and E.W. were thirteen years old and lived in the same neighborhood as Kohler, who was twenty-six years old. Between the months of August and December of 2005, M.V. performed oral sex on Kohler multiple times. M.V. alleged that during one of these incidents, Kohler put his hand down the back of her pants and inserted his finger into her vagina. On another occasion, Kohler dared both M.V. and E.W. to touch his penis, and they complied.

These incidents of molestation were not reported to the police until May 2009, when M.V. disclosed them to her therapist. On June 4, 2010, the State charged Kohler with two counts of Class A felony child molesting and two counts of Class C felony child molesting. At trial, the State called as its first witness Nichole Allen ("Allen"), the Department of Child Services caseworker who interviewed M.V. and E.W. Allen testified regarding the interview process and the steps that were taken following the interviews. Next, M.V. testified and detailed Kohler's multiple acts of molestation against her. M.V. also testified that she witnessed E.W. touch Kohler's penis. After M.V. testified, the State called D.G., M.V.'s close friend, who testified that in 2005 or

2006, he had a conversation with M.V. about Kohler. D.G. also testified that he did not tell anyone about what M.V. had told him because it was "personal" and M.V. was "scared." Tr. p. 330. Next, E.W. testified that she touched Kohler's penis and witnessed M.V. do the same.

On January 15, 2010, the jury found Kohler guilty of one count of Class A felony child molesting and both counts of Class C felony child molesting. Kohler now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Kohler argues that M.V.'s and E.W.'s out-of-court statements were admitted through the testimony of Allen and D.G., and that the admission of these statements was erroneous because they met none of the requirements for admissibility under Modesitt v. State, 578 N.E.2d 649 (Ind. 1991), and amounted to a drumbeat repetition of the victims' allegations. However, because Kohler failed to object on this basis at trial, he has waived appellate review of this issue unless the admission of the testimony constitutes fundamental error. Cutter v. State, 725 N.E.2d 401, 406 (Ind. 2000).

The fundamental error doctrine is extremely narrow. Rowe v. State, 867 N.E.2d 262, 266 (Ind. Ct. App. 2007). "To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Id. The error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Id.

A. *Admission of Out-of-Court Statements*

Kohler first claims that the admission of the victims' prior out-of-court statements was erroneous because they met none of the requirements for admissibility under Modesitt. In Modesitt, our supreme court adopted Federal Rule of Evidence 801(d)(1) governing the admissibility of prior statements as substantive evidence, holding that:

> a prior statement is admissible as substantive evidence only if the declarant testifies at trial and is subject to cross examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person made after perceiving the person.

Id. at 653-54. This holding is now codified as Indiana Rule of Evidence 801(d)(1). See Humphrey v. State, 680 N.E.2d 836, 838 (Ind. 1997) (noting that the Indiana Rules of Evidence now "accomplish by Rule what Modesitt did by decision").

However, both this court and our supreme court have held that in some fact situations, the erroneous admission of evidence in violation of Modesitt is harmless. Willis v. State, 776 N.E.2d 965, 968 (Ind. Ct. App. 2002); Craig v. State, 630 N.E.2d 207, 211-12 (Ind. 1994). "An error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Gall v. State, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004), trans. denied. The erroneous admission of evidence may be harmless if it is merely cumulative of other evidence in the record. Pavey v. State, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), trans. denied.

Kohler first argues Allen's testimony consisted entirely of the victims' out-of-court statements and was inadmissible under Modesitt. In support of this argument, Kohler first directs our attention to portions of Allen's testimony in which she states that both M.V. and E.W. were forthcoming with information and described the incidents in detail. Tr. pp. 204-206, 220-221. Kohler argues that Allen's testimony of M.V.'s and E.W.'s "willingness to speak freely during the interview process constituted the kind of abuse the Indiana Supreme Court sought to correct with Modesitt." Appellant's Br. at 9.

Kohler's reliance on Modesitt is misplaced. Modesitt and Indiana Rule of Evidence 801(d)(1) apply only to prior out-of-court *statements*, and Allen's testimony regarding M.V.'s and E.W.'s candor during their interviews did not relay the content of any out-of-court statements made during their interviews to the jury. There was no error in the admission of this portion of Allen's testimony. See Craig, 630 N.E.2d at 209 (Modesitt did not apply where victim's mother did not give the content of out-of-court statements that she made to the investigating officer or that the victim made to her).

Next, Kohler argues that Allen's testimony included M.V.'s out-of-court statements identifying E.W. as an additional victim, and that this statement was inadmissible under Modesitt. At trial, Allen testified as follows:

> Q: Okay. When you interview[ed] [M.V.] that day, . . . did you get a disclosure from her?
> A: Yes sir.
> Q: And based on that disclosure . . . , was there . . . anyone else who was named that needed to be interviewed following that disclosure?
> A: Yes.
> Q: And who was that?
> A: [E.W.].

Tr. p. 205.

Kohler presumably argues Allen's testimony showed that M.V. was the person who "named" E.W. as another person who should be interviewed regarding the case, although Allen's testimony is by no means clear on that point. To the extent that Allen's testimony reflected M.V.'s inadmissible out-of-court statements, the error was harmless. Both M.V. and E.W. testified that E.W. touched Kohler's penis. Assuming that Allen's testimony included M.V.'s inadmissible out-of-court statement naming E.W. as an additional victim, the statement was clearly cumulative of M.V.'s and E.W.'s testimony. The statement did not affect Kohler's substantial rights because, in light of M.V.'s and E.W.'s testimony, its probable impact on the jury was negligible.

Kohler also argues that Allen testified that M.V. identified Kohler as a "potential perpetrator." Appellant's Br. at 8. In support of this argument, Kohler cites the following relevant portion of Allen's testimony:

> Q: Did [M.V.] also provide you with the name of anyone who had engaged in sexual abuse against her?
> A: Yes.
>
> . . .
>
> Q: As a result of the two interviews was it determined that there was an individual . . . , potential perpetrator that needed to be interviewed as a result?
> A: Yes sir.
> Q: And who was arranged to be interviewed after that?
> A: Kevin Kohler.

Tr. pp. 205, 206-07.

Again, the complained-of testimony does not include any out-of-court statements of the victims. Although Allen stated that M.V. provided the name of her abuser, Allen

did not testify as to what M.V. said. Rather, Allen testified that as a result of the interviews with M.V. and E.W, an interview of Kohler was arranged because it was determined that he was a potential perpetrator. Modesitt and Indiana Rule of Evidence 801(d)(1) are inapposite in this regard.

Next, Kohler argues that the following portion of Allen's testimony was inadmissible under Modesitt:

> Q: One last question. Following the interview . . . , was an appointment made for [M.V.] at the Fort Wayne Sexual Assault Treatment Center?
> A: Yes.
> Q: Okay . . . , in what situations is it . . . advised that you should contact the Sexual Assault Treatment Center?
> A: Anytime there is penetration of any sort we are asked to call the Fort Wayne Sexual Assault Treatment Center.
>
> . . .
>
> Q: How about for [E.W.], was there [an] appointment made for her?
> A: No.

Tr. pp. 207-08.

Here again, Allen's testimony did not include any of M.V.'s or E.W.'s out-of-court statements. Although a juror could infer from Allen's testimony that M.V. alleged that she had been penetrated by Kohler and that E.W. did not so allege, Allen never repeated any of M.V.'s or E.W.'s statements to that effect. Modesitt and Indiana Rule of Evidence 801(d)(1) govern only the admissibility of prior out-of-court statements, and are therefore unavailing to Kohler regarding this testimony. And to the extent that this portion of Allen's testimony could be construed as containing inadmissible out-of-court statements, it was cumulative of the detailed accounts of Kohler's acts of molestation

given by M.V. and E.W. during their testimony, and therefore harmless. For all of these reasons, the admission of Allen's testimony was not fundamental error.

Kohler also argues that D.G.'s testimony was inadmissible under Modesitt. Specifically, Kohler points to the following relevant testimony:

> Q: Okay. [D]id you share things with one another as far as . . . relationships that each of you had?
> A: Yeah.
>
> . . .
>
> Q: Did you ever . . . , during 2005 or 2006 have a conversation with [M.V.] about . . . her and Kevin?
> A: Yeah.
>
> . . .
>
> Q: Okay. Did you ever tell anybody about the conversation you had with her . . .
> A: [N]o.
> Q: [] Okay. Can I ask you why? Why did you never tell anybody?
> A: [I]t was just for her to tell, I mean it was personal, not something I would really tell, you know.
> Q: Was it, during that time did you feel it was something she told you in confidence?
> A: [S]he was pretty much scared and she was pretty much the only, she felt like I was the only person she could tell because she didn't know, you know, who else to tell[.]

Tr. pp. 328-30.

Again, Kohler's reliance on Modesitt is misplaced. D.G. testified that he had a conversation with M.V. about Kohler, that the subject matter of the conversation was "personal," and that M.V. was "scared" and "didn't know . . . who else to tell." Tr. pp. 328-30. None of these statements relayed the content M.V.'s out-of-court statements to the jury. Modesitt is therefore inapplicable. There was no error, much less fundamental error, in the trial court's admission of D.G.'s testimony.

B. *Drumbeat Repetition*

Finally, Kohler argues that Allen's and D.G.'s testimony, combined with the testimony of two other witnesses, resulted in an impermissible "drumbeat repetition" of M.V.'s allegations against Kohler. Appellant's Br. at 11. In Stone v. State, this court reversed a child molesting conviction because, after the victim had already testified, six other witnesses were permitted to testify as to what the victim had told them about the molestation. 536 N.E.2d 534, 539-40 (Ind. Ct. App. 1989), trans. denied. We held that the probative value of the testimony of the six successive witnesses was outweighed by the prejudicial effect of the repetition of the inflammatory aspects of the State's case. Id. at 540.

Later, in Modesitt, our supreme court reversed a child molesting conviction where the victim's mother, caseworker, and psychologist all testified, over objection and prior to the victim taking the stand, as to the victim's statements to them about the details of the molestation. 578 N.E.2d at 650. The court reasoned that putting into evidence the victim's allegations through the testimony of three separate and repetitive witnesses prior to the victim testifying effectively precluded the defendant from cross-examining the victim regarding the truthfulness of the statements, and resulted in the victim's veracity being vouchsafed prior to taking the witness stand. Id. at 651. The court held "as did the Court of Appeals in [Stone], that we could not say that the drumbeat repetition of the victim's original story prior to calling the victim to testify did not unduly prejudice the jury[.]". Id. at 651-52.

Kohler argues that Allen's and D.G.'s testimony, combined with the testimony of E.W. and Ron Hochstetler, the latter an investigator employed by the Huntington County Prosecutor's Office, resulted in the drumbeat repetition of M.V.'s allegations and "constitutes a clear and blatant violation of Kohler's right to cross-examine his accusers and resulted in the victims' credibility being erroneously vouchsafed." Appellant's Br. at 11. We disagree.

Here, unlike in Stone and Modesitt, there was no parade of repetitive witnesses, each recounting the inflammatory details of the defendant's crimes as reported to them by the victim. The jury only heard M.V.'s account of Kohler's multiple acts of molestation against her one time, from M.V. herself.[1] There is simply no drumbeat repetition here.

For all of these reasons, the trial court did not commit fundamental error by admitting the complained-of testimony.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.

[1] Kohler claims that E.W. testified that M.V. "reported to her that Kohler had engaged in oral sex with [M.V.] when [E.W.] and [M.V.] went for a ride in the truck together." Appellant's Br. at 11. E.W. did not so testify. Rather, E.W. simply responded affirmatively when asked whether she had ever discussed what happened that evening with M.V. Tr. p. 355.