



Appellant-defendant James T. Bagby, Jr., appeals his convictions for two counts of Sexual Misconduct With a Minor,<sup>1</sup> a class B felony. Bagby argues that the trial court erred by refusing to admit testimony regarding another sexual partner of the victim and that the prosecutor committed fundamentally erroneous misconduct. Additionally, Bagby argues that the aggregate thirty-year sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character. Finding no error and finding that the sentence is not inappropriate, we affirm.

### FACTS

Bagby, who is over the age of eighteen, has a stepdaughter, A.R., who was fifteen years old during the relevant period of time. Between November and December 2008, Bagby went into A.R.'s bedroom around 5:30 a.m. and had sexual intercourse with her on at least two occasions. He threatened A.R. not to tell anyone. On January 2, 2009, A.R. reported the incident to a family member, and the police were contacted. In the course of the investigation, A.R.'s bed sheets were seized, and laboratory results later revealed that Bagby's sperm was on the sheets.

On January 6, 2009, Bagby was charged with class D felony criminal confinement, on January 14, 2009, the State added two counts of class B felony sexual misconduct with a minor, and on January 23, 2009, the State added a fourth count alleging class D felony sexual battery.

---

<sup>1</sup> Ind. Code § 35-42-4-9(a)(1).

Bagby's jury trial took place on September 22 and 23, 2009. At the close of the first day of trial, Bagby sought to introduce a statement purportedly made by A.R. to the father of a former sexual partner that the partner was her "one and only." Tr. p. 115. Bagby sought to present this statement through the testimony of A.R.'s mother, who claimed to have overheard the conversation. The trial court denied admission of the evidence based on the Rape Shield Rule.

At the conclusion of the State's evidence, the State dismissed the criminal confinement charge. The jury found Bagby not guilty of sexual battery and guilty of two counts of sexual misconduct with a minor. Following the December 16, 2009, sentencing hearing, the trial court imposed fifteen-year sentences on each of the two convictions, to run consecutively. Bagby now appeals.

## DISCUSSION AND DECISION

### I. Admission of Testimony Regarding A.R.'s Other Sexual Partner

Bagby first contends that the trial court erred by refusing to admit the testimony of A.R.'s mother regarding a conversation she purportedly overheard between A.R. and another sexual partner's father. Admission of evidence is within the trial court's discretion, and we will reverse only upon an abuse of that discretion. Allen v. State, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004).

A.R.'s alleged statement that the other sexual partner was her "one and only," tr. p. 115, constitutes evidence of her past sexual conduct that is inadmissible except under certain limited circumstances. Ind. Evid. Rule 412. Bagby contends that the evidence is

admissible pursuant to the exception for “evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded[.]” Evid. R. 412(a)(2).

We cannot agree, inasmuch as the content of the evidence in no way tends to show that a person other than Bagby committed the act upon which the prosecution is founded. Specifically, A.R.’s alleged statement in no way shows that a person other than Bagby was the person who repeatedly entered A.R.’s bedroom at 5:30 in the morning, especially given the evidence that Bagby’s sperm was found on A.R.’s sheets. Bagby contends that the evidence goes to A.R.’s credibility, but that is not an exception set forth by Rule 412.

Additionally, Bagby sought to present this evidence by way of testimony from A.R.’s mother, who overheard A.R. allegedly making the statement to the father of a sexual partner. This testimony would have constituted inadmissible hearsay, regardless of its substantive content, so even if it had passed the Rule 412 test, it would still not have been admissible. Ind. Evid. Rule 802. Consequently, the trial court did not err by refusing to permit A.R.’s mother to testify in this regard.

## II. Prosecutorial Misconduct

Next, Bagby argues that the prosecutor committed misconduct by making certain statements during closing arguments. Bagby did not object at the time the statements were made, so he must establish that the statements constituted fundamental error. To constitute fundamental error, the alleged misconduct must have made a fair trial impossible or been a clearly blatant violation of basic and elementary principles of due

process that presents an undeniable and substantial potential for harm. Carter v. State, 932 N.E.2d 1284, 1288 (Ind. Ct. App. 2010).

After the State presented its evidence, the defense immediately rested without presenting any witnesses or evidence of its own. In closing argument, the prosecutor emphasized the fact that its case was uncontradicted by stating that “there’s no evidence to show that he’s not guilty and the true test is whether or not you’ve got something you can put in your hands” to show he’s not guilty and that “[h]e doesn’t try to explain how this man’s DNA and semen got all over that bed sheet, no explanation for that except what we’ve told you, intercourse.” Tr. p. 224. Bagby argues that these statements impermissibly shifted the burden to him to prove his innocence.

During closing argument, the prosecutor repeatedly emphasized the fact that the State bears the burden of prosecution. The statements highlighted by Bagby were merely made to emphasize the uncontradicted nature of the State’s case, which is permissible. Martinez v. State, 549 N.E.2d 1026, 1028 (Ind. 1990).

To the extent that the statements arguably shift the burden to Bagby, we note that in addition to the prosecutor’s statements that the State bore the burden of prosecution, the jury was instructed, both preliminarily and in final instructions, that the burden rested with the State to prove guilt beyond a reasonable doubt. Indeed, the jury was explicitly instructed that “the burden never shifts from the State to the Defendant. The Defendant is not bound to explain anything, and his failure to explain anything connected with this

case cannot be considered by you as a circumstance tending to prove his guilt.” Appellant’s App. p. 117.

Inasmuch as jury instructions are presumed to cure any improper statements made during trial, Guy v. State, 755 N.E.2d 248, 258 (Ind. Ct. App. 2001), we find that even if the prosecutor’s statements during closing argument were improper, the error was cured by the jury instructions. Consequently, Bagby is not entitled to relief on this basis.

### III. Sentencing

Finally, Bagby argues that the aggregate thirty-year sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Bagby was convicted of two class B felonies, which were eligible for consecutive sentences because they were committed a month apart from each other and, consequently, are not considered a single episode of criminal conduct. Ind. Code § 35-50-1-2. Class B felonies carry a sentencing range of six to twenty years, with ten years being the advisory term. I.C. § 35-50-2-5. Thus, Bagby’s aggregate thirty-year sentence is ten years less than the forty-year maximum term he faced.

As for the nature of Bagby’s offense, he was in a position of trust over his fifteen-year-old stepdaughter, A.R. He violated that trust by repeatedly entering her bedroom

early in the morning and having sexual intercourse with her. He then threatened her not to tell anyone about the incidents.

As for Bagby's character, he has a long and substantial criminal history. He has seven prior felony convictions, including theft, operating while intoxicated, and battery by means of a deadly weapon. Additionally, Bagby has twelve prior misdemeanor convictions and had two cases pending at the time he committed the instant offenses, including charges of class C felony operating a motor vehicle after lifetime forfeiture, class D felony auto theft, class D felony theft, and class C felony non-support of a dependent child. Bagby has violated in-home detention and had suspended sentences revoked on multiple occasions. It is evident that despite at least twenty-seven instances of being charged with crimes as an adult, and being given multiple opportunities to reform his behavior, Bagby continues to refuse to respect the rule of law and his fellow citizens. Under these circumstances, we do not find the aggregate thirty-year sentence to be inappropriate in light of the nature of the offenses and his character.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.