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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY WATSON, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A04-0904-CR-221
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0412-FA-167

February 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jeffrey Watson appeals his convictions of two counts of Class A felony child molesting,[1] one count of Class D felony child solicitation,[2] and one count Class D felony conducting a performance harmful to minors.[3] He argues: (1) there was insufficient evidence to support his convictions; (2) the trial court erred by excluding the testimony of three intended defense witnesses; (3) the admission of pornographic materials found in his residence was fundamental error; and (4) the trial court erred by finding him to be a credit-restricted felon. The State concedes the statute restricting credit time for certain felons would be an *ex post facto* law if applied to Watson. Therefore, we remand for the trial court to recalculate Watson's credit time in accordance with the statute in effect at the time of his offenses. We affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

Watson and his wife, Ju., have two daughters, Vi. and Va., and two sons, A. and J. When Va. was nine years old, she had a nightmare and went to sleep with her parents in their bed. She later awoke and found Watson had his fingers in her vagina. Watson took Va. back to her bedroom and again inserted his fingers in her vagina. Then Watson asked Va. to touch his penis, but she refused.

The next night, when Va. was asleep in her room, she again woke to find Watson had his fingers in her vagina. Va. held still because she felt like she could not move, and she acted as though she were still asleep.

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[1] Ind. Code § 35-42-4-3(a)(1).
[2] Ind. Code § 35-42-4-6(b).
[3] Ind. Code § 35-49-3-3.

On another occasion while Va. was nine years old, she was riding with Watson in his truck. Watson showed her a magazine[4] that had pictures of naked women who were "[t]ouching the[m]selves and touching other girls." (Tr. at 239.) Watson asked Va. to touch herself while looking at them. Va. refused.

On several occasions, the children had lice in their hair. Watson would have the girls stand in the shower while he combed the lice out of their hair. Watson touched Va.'s breasts while she was in the shower.

Watson also frequently asked Va. if he could touch her butt. In December 2004, when Va. was 13, she tired of Watson's comments about her butt and decided to tell Ju. everything that had happened. Ju. took Va., Vi., and A. out of the home and made a report to the police.[5] J. was picked up from school, and all the children were interviewed at Chaucie's Place. Ju. and the children moved out of the family home.

That day, Watson went to the police station looking for his family.[6] Watson was informed of the allegations against him, and he made a voluntary statement to the police. Watson denied the allegations and also denied that there was pornography in the home. Police obtained consent to search the home from Ju., and they found the red crate filled with pornographic magazines under the desk where Va. said it was. The police also found four pornographic VHS tapes and a DVD. Over 3,300 pornographic images were found on the

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[4] According to Va., the magazine had come from a red crate under a computer desk in their home.

[5] At this time, Va., Vi., and A. were "homeschooled," although Va. testified the children did not actually do any school work and were sometimes left at home unsupervised. J. was attending a public school, and he was at school when Va. told Ju. what Watson had done.

[6] Evidently, on several prior occasions, Ju. had left the home for months at a time, and she sometimes took the children with her.

family's computer.

Ultimately, Watson was charged with four counts of Class A felony child molesting, one count of Class D felony child solicitation, and one count of Class D felony conducting a performance harmful to minors.[7]

After Va.'s allegations came to light, Ju. and the children lived in several different places, including stays with Va.'s aunt Lisa and aunt Heather. Eventually, Ju. and the children went to live with Watson's mother. At that time, Watson was living in a trailer on his mother's property, and Va. saw him every day.[8]

During the time Va. was living at her grandmother's house, her parents took her to meet with Watson's counsel. At trial, Va. admitted she told defense counsel "that it was all misunderstood and someone else did it." (*Id*. at 283.) However, she explained her parents told her to tell defense counsel that nothing had happened. She said she felt scared around her father and felt like she would "rather live on the streets" than with her grandmother. (*Id*. at 318.) After the meeting with defense counsel, Va. asked her aunt Heather whether she would get in trouble if she changed her story.

Watson's mother and her partner, Joyce, testified on behalf of Watson. Watson's mother testified Va. would "lie when the truth came easier." (*Id*. at 418.) Joyce testified she

[7] Originally, Watson was also charged with several offenses that alleged Vi. was the victim. However, as the time for trial approached, the State was unable to locate Vi., so the State dismissed those charges. Va. initially alleged the offenses occurred a few months before her disclosure; however, upon further reflection, she realized the offenses had occurred when she was nine. Therefore, the remaining charges were amended to reflect the appropriate timeframe.

[8] Police later became aware of this arrangement, and Va. was removed from the home and placed in foster care. Watson had been ordered not to have contact with Va., and he was arrested for invasion of privacy, but that charge was later dismissed.

believed Va. made her allegations because she "wanted to party and to [party] she had to get rid of her father." (*Id*. at 425.)

Watson also testified. He admitted he once had a pornography collection, but said he thought he had gotten rid of it. He acknowledged he would comb lice out of the children's hair in the shower. Watson denied ever touching Va. inappropriately.

Watson apparently had intended to call Ju., A., and J. as witnesses. However, prior to trial and in violation of a court order, Watson allowed them to view the videotape of Va.'s interview at Chaucie's Place. The State discovered this violation when deposing the boys. The State moved to exclude the witnesses as a discovery sanction. The court ruled:

> . . . Watson shall be precluded from presenting, at trial, any and all testimony of [J., A., and Ju.] that has been tainted by the violation of the Protective Order. Watson may voir dire [J., A., and Ju.] outside the presence of the jury to determine if they have any relevant testimony that has not been tainted by the violation of the Protective Order.

(Appellant's App. at 202.) Watson did not conduct *voir dire* of Ju., A., or J., and none of them testified at trial.

The jury found Watson guilty of two counts of Class A felony child molesting, one count of Class D felony child solicitation, and one count of Class D felony conducting a performance harmful to minors.[9] The trial court sentenced him to thirty years on each Class A felony and three years on each Class D felony, with all sentences to be served concurrently. The court gave Watson 138 days credit for sixty-nine days served. Subsequently, the court issued an order finding Watson to be a credit restricted felon. *See* Ind. Code § 35-41-1-5.5.

[9] After the close of evidence, the State dismissed the other two counts of child molesting.

DISCUSSION AND DECISION

1. Sufficiency of Evidence

In reviewing the sufficiency of the 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*.

In order to convict Watson of child molestation as a Class A felony, the State had to prove Watson was at least twenty-one years old at the time of the offense. Ind. Code § 35-42-4-3(a)(1). To convict Watson of child solicitation, the State had to prove Watson was at least eighteen years old at the time of the offense. Ind. Code § 35-42-4-6(b). Watson argues the State did not prove his age.

When the defendant's age is an element of the offense, the State must prove the defendant's age beyond a reasonable doubt, just as any element of the offense. *Staton v. State*, 853 N.E.2d 470, 473 (Ind. 2006). Age may be proven by circumstantial evidence. *Id*. at 474. In *Staton*, the Court discussed two cases in which there was sufficient circumstantial evidence of the defendant's age:

> In *Altmeyer v. State*, 519 N.E.2d 138, 141 (Ind. 1988), where age was an element of the charged crime, and the defendant argued that the State failed to prove that he was at least sixteen years old at the time of his alleged offense, we held that the defendant's testimony that he was married and had an eleven-year-old son at the time of the offense was sufficient to establish that he was over sixteen. Also, in *Marshall v. State*, 643 N.E.2d 957, 963 (Ind. Ct. App. 1994), the Court of Appeals affirmed a conviction where the State relied on evidence that the defendant was a deputy marshal, was married, had two

> children over the age of six, and had attended high school several years earlier to prove that the defendant was over sixteen.

Id. at 474-75.

Similar circumstantial evidence exists in Watson's case. Joyce testified she had moved in with Watson's mother over thirty years ago, and Watson was nine at the time. The trial was held in 2009; therefore, according to Joyce's testimony, Watson was around nine years old in 1979. That would make him twenty-nine or thirty in 2000, when Va. turned nine.

In addition, Watson testified he married Ju. in 1988. At the time of trial, Vi. was twenty, A. was nineteen, Va. was seventeen, and J. was sixteen. Watson testified he was in third grade when his parents divorced. Watson's mother testified she got divorced in 1976. Assuming Watson began kindergarten at five years old and was eight years old in third grade, then he was born in 1968 and would have been around thirty-two years of age in 2000 when Va. turned nine. Therefore, the testimony of these witnesses establishes Watson was over twenty-one at the time of the offenses.[10]

Watson next argues Va.'s testimony must be disregarded because it was incredibly dubious. The "incredible dubiosity" rule applies when "a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence." *Love*, 761 N.E.2d at 810. The rule is rarely applied and is appropriate only when the testimony is so inherently improbable or equivocal that no reasonable person could believe it. *Id*.

Watson argues Va.'s testimony is incredibly dubious because she recanted her allegations in a meeting with defense counsel. However, Va. explained that she was living in close proximity to Watson at the time, that she was not comfortable with that living arrangement, and that her parents drove her to the meeting and told her to tell the attorney that nothing happened. A jury could reasonably believe Va. felt pressured to recant her allegations when she was with defense counsel.

Watson also notes Va. asked her aunt Heather whether she would get in trouble for changing her story. This conversation occurred after Va.'s meeting with the defense attorney. Thus, a jury could reasonably conclude Va. was simply wondering about the implications of recanting her allegations to Watson's counsel.

Watson notes Va. initially said the offenses occurred a few months before her first disclosure, but she later indicated they happened when she was nine. Va. testified, "As I got older, more things came to me," and she also indicated that a specific event in her life had triggered her memory. (Tr. at 328.) A jury reasonably could credit Va.'s testimony.

Watson also identifies inconsistencies between Va.'s testimony and that of Detective Greg Marlow, the lead detective on the case. Va. testified that, on the day she was interviewed at Chaucie's Place, she, her mother, and her siblings picked up J. from school and then went to stay with Va.'s aunt Lisa. Detective Marlow testified he picked up J. from school, and Ju. and the children went to a hotel room. Even assuming Va.'s version was

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[10] Watson argues we cannot rely on the testimony of the defense witnesses to find support for his age, because the evidence must be elicited during the State's case. However, in *Altmeyer*, our Supreme Court relied on Altmeyer's own testimony to find sufficient proof of his age. 519 N.E.2d at 141.

incorrect, these minor inconsistencies do not render her testimony incredibly dubious. That she might be confused about where she spent one particular night is hardly surprising given that Va. has lived in numerous locations since she made her disclosure.[11]

Finally, Watson notes his mother's testimony that Va. would "lie when the truth came easier." (*Id*. at 418.) Va. testified it would not surprise her if a family member said she had lied because "my whole family has gone against me." (*Id*. at 315.) It was the province of the jury to determine which witnesses to credit, and we will not reweigh the witness's credibility.

2. Sanctions

Watson argues the exclusion of witness testimony as a sanction for his violation of the court's order was unduly punitive. Both parties offer *Wisehart v. State*, 491 N.E.2d 985 (Ind. 1986), as a framework for analyzing this issue.

On the morning of his trial, Wisehart requested permission to call four witnesses that had not been disclosed during discovery. The State objected on the ground that this violated the court's pretrial discovery order. The trial court excluded the witnesses, but our Supreme Court reversed. The Court held: "While sanctions for failure to comply with discovery are within the trial court's discretion, the primary factors which a trial court should examine are whether the breach was intentional or in bad faith and whether substantial prejudice has resulted." *Id*. at 988. The trial court must "determine more than the existence of a violations," especially because the defendant's request to present witness testimony "is

[11] Va. testified she had lived in multiple hotels, in an apartment, with her aunt Lisa, with her aunt Heather, at her grandmother's house, at Guardian's Home, and with two different foster families.

buttressed by his Sixth Amendment right to present witnesses on his behalf." *Id*. at 988-89.

In determining whether the "most extreme sanction of witness exclusion" should be employed, a court should consider:

> (1) Whether the nature of defendant's violation was trivial or substantial. . . .
> (2) How vital the potential witness' testimony is to the defendant's case. The trial court should determine the significance of the proffered testimony to the defense. Is the testimony relevant and material to the defense or merely cumulative?
> (3) The nature of the prejudice to the State. Does the violation have a deleterious impact on the case prepared by the State?
> (4) Whether less stringent sanctions are appropriate and effective to protect the interest of both the defendant and the State.
> (5) Whether the State will be unduly surprised and prejudiced by the inclusion of the witness' testimony despite the available and reasonable alternative sanctions (e.g., a recess or a continuance) which can mitigate prejudice to the State by permitting the State to interview the witnesses and conduct further investigation, if necessary.

Id. at 991. "It may well be that other factors will be relevant in a given case or that some of the foregoing will be inapplicable to a certain set of facts." *Id*.

A defendant must make an offer of proof to preserve the issue of the exclusion of witness testimony. *Id*. "This offer to prove is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded." *Id*.

The trial court did not exclude entirely the testimony of Ju., A., and J. The order provided Watson the option of conducting *voir dire* to determine whether the witnesses had any relevant testimony that had not been tainted by viewing the videotape. For instance, Ju., A., and J. still might have been able to testify about Va.'s reputation for truthfulness or

possible motivations to lie. However, Watson did not make an offer of proof. Therefore, he has waived this issue. *Id.*

Waiver notwithstanding, we cannot say the trial court abused its discretion. Before viewing the tape, A. and J. had been unaware of the details of Va.'s allegations. However, during their depositions, the boys acknowledged that they had viewed the videotape and had discussed aspects of Va.'s allegations that they thought were inaccurate. Thus, viewing the tape gave A. and J. the opportunity to tailor their testimony to refute the details of Va.'s allegations. For example, A. claimed his parents had never slept in a bed, but had slept on the couch. Watson suggests a less severe sanction would have been appropriate, but he does not suggest what other sanction would have remedied the tainted testimony. As the harm to the State was not merely "surprise," a continuance could not remedy the violation. Finally, we note Watson was able to elicit testimony about Va.'s reputation for truthfulness and motive to lie through his mother and Joyce. Therefore, we cannot say the trial court abused its discretion.

3. Admission of Pornography

The magazines from the red crate, the pornographic videos, and testimony concerning the pornographic images on the computer were admitted into evidence without objection from Watson. Watson now argues this evidence should have been excluded pursuant to Ind. Evidence Rule 404(b). Acknowledging he did not object at trial, Watson argues the error was fundamental. *See State v. Eubanks*, 729 N.E.2d 201, 205 (Ind. Ct. App. 2000) (when no objection is made, defendant must show fundamental error), *reh'g denied*, *trans. denied*.

Fundamental error is error so prejudicial it deprives a defendant of an opportunity for a fair trial. *Id*.

Evid. R. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

When determining whether to admit evidence of other crimes, wrongs, or acts, the court must make three findings:

> First, the court must "determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act." Second, the court must determine that the proponent has sufficient proof that the person who allegedly committed the act did, in fact, commit the act. And third, the court must "balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403."

Camm v. State, 908 N.E.2d 215, 223 (Ind. 2009) (citations omitted), *reh'g denied*.

Watson cites *Buchanan v. State*, 767 N.E.2d 967 (Ind. 2002), for the proposition that pornographic evidence is inadmissible under Evid. R. 404(b). Buchanan was charged with child molesting, and at trial, drawings and photographs of naked girls that were found in his home were admitted into evidence. We reversed his conviction, holding the evidence was inadmissible under Evid. R. 404(b). On transfer, our Supreme Court, without addressing whether the evidence was inadmissible, held any error would be harmless because of the "substantial quantity of incriminating evidence presented." *Buchanan*, 767 N.E.2d at 970.

The pornography at issue in *Buchanan* was child pornography, which is illegal to possess. *See* Ind. Code § 35-42-4-4(c). The pornography Watson possessed, on the other

hand, apparently depicted only adults. The State asserts it has found no decision addressing whether lawful possession of pornography is a "bad act" for purposes of Evid. R. 404(b) analysis, and neither have we found one.

Even assuming *arguendo* possession of pornography is a "bad act," we cannot say fundamental error resulted in Watson's trial because the evidence was relevant to issues other than Watson's propensity to commit the offenses. Va. told police Watson had shown her a pornographic magazine that came from a red crate under the computer desk, and she testified to the same at trial. The fact that the police found the crate where Va. said it would be tends to make Va.'s allegations more probable. In addition, the pornographic evidence tends to show Watson was being dishonest when he told police there was no pornography in his home and, specifically, that there was no pornography on the computer. Watson has not demonstrated this evidence was so prejudicial as to deprive him of a fair trial.

4. Credit Restricted Felon

In 2008, the General Assembly restricted the amount of credit time that could be earned by defendants who had committed certain offenses, including child molesting, if the defendant was at least twenty-one years old and the victim was less than twelve years old. Ind. Code § 35-41-1-5.5 (defining "Credit restricted felon"). While awaiting trial or sentencing, a credit restricted felon is initially assigned to credit Class IV. Ind. Code § 35-50-6-4(b). A person assigned to Class IV earns one day of credit for every six days served. Ind. Code § 35-50-6-3(d). A credit restricted felon may not be reassigned to Class I or II. Ind. Code § 35-50-6-4(b). A person in Class I earns one day of credit for each day served,

and a person in Class II earns one day of credit for every two days served. Ind. Code § 35-50-6-3(a), (b).

The original sentencing order found Watson had served sixty-nine days and gave him credit for 138 days. Thereafter, on May 13, 2009, the court entered an order finding Watson was a credit restricted felon.

Watson argues, and the State concedes, that he cannot be found a credit restricted felon because that classification did not exist when he committed his offenses. *See Upton v. State*, 904 N.E.2d 700, 704-05 (Ind. Ct. App. 2009) (application of the credit restricted felon statute was an *ex post facto* law as applied to defendant who had committed his offenses before the statute was enacted), *trans. denied*. Therefore, we reverse the trial court's order of May 13, 2009, and remand for the trial court to recalculate Watson's credit time in accordance with the statute in effect at the time of his offenses.

CONCLUSION

There was sufficient evidence to support Watson's convictions. The trial court did not abuse its discretion in imposing sanctions on Watson, and the admission of pornographic evidence was not fundamental error. The trial court erred by finding Watson to be a credit restricted felon; therefore we reverse that order and remand for a new determination of Watson's credit time.

Affirmed in part, reversed in part, and remanded.

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