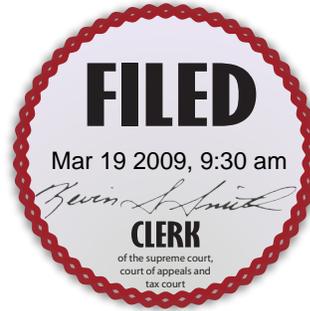


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KURT C. HOBBS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0805-CR-312

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0702-FD-019999

March 19, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kurt C. Hobbs was convicted in Marion Superior Court of Class D felony obscene performance. He was sentenced to a term of three years with 185 days executed and the balance suspended to probation. Hobbs appeals and argues three issues which we consolidate and restate as follows:

- I. Whether the evidence was sufficient to convict Hobbs of Class D felony obscene performance, and
- II. Whether the trial court abused its discretion in considering inappropriate aggravators.

We affirm.

Facts and Procedural History

In August, 2006, Hobbs's daughter, M.H. invited her friends, A.W. and E.O., for a sleepover at her house. Both A.W. and E.O. were ten-years-old. That evening the girls played games, watched television, and ate dinner. They also watched a movie. After the movie ended, they asked Hobbs for permission to go swimming in the family's pool. He agreed and the girls went swimming.

Around 1:00 a.m. the girls got tired of swimming and reentered the Hobbs's living room where they changed into their pajamas. They decided to play "Truth or Dare." During the course of the game, Hobbs entered the room. While Hobbs was in the room, A.W. received a "dare" to run around the room naked. After coaxing by Hobbs, A.W. removed her clothes and ran once around the room. Hobbs watched while A.W. did this. As a result of watching the girls, Hobbs's penis became semi-erect.

The next morning E.O. and A.W. left. A.W. eventually told a classmate and her parents about the events of that evening. The matter was investigated including an

interview with Hobbs during which he waived his Miranda rights. On February 5, 2007, the State charged Hobbs with one count of Class D felony dissemination of matter harmful to minors, three counts of Class D felony obscene performance, and one count of Class D felony attempted obscene performance.

After a two-day jury trial, Hobbs was found guilty of one count of Class D felony obscene performance and found not guilty on all other counts. On April 25, 2007, the trial court sentenced Hobbs to three years, 185 days executed and the balance suspended to probation. Hobbs appeals.

I. Sufficiency of Evidence

Hobbs argues that the evidence was insufficient to support his conviction for Class D felony obscene performance. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Hobbs claims that the conflicting testimonies of E.O, A.W., and M.H. cannot support his conviction for Class D felony obscene performance. The Class D felony alleged by the State at trial was that Hobbs knowingly and intentionally participated in an obscene performance depicting the genitals of A.W., a person under sixteen years of age. During trial, A.W. testified that Hobbs participated in the game of “Truth or Dare” that

culminated in A.W. running around the living room nude. Tr. p. 232. Hobbs's statement to police acknowledged that there was a "possibility" that he had become sexually aroused during the game of "Truth or Dare." Tr. p. 462.

Hobbs's argument is merely an invitation for our court to judge the credibility of the witnesses and reweigh the evidence, and this we will not do. The evidence is sufficient to support his conviction for Class D felony obscene performance.

II. Aggravating Circumstances

Hobbs argues that the trial court abused its discretion by improperly finding aggravators. Sentencing decisions rest within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Id. at 491 (citations omitted). A trial court can abuse its sentencing discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that explains reasons for imposing a sentence where the record does not support the reasons; (3) entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration; and (4) entering a sentencing statement in which the reasons given are improper as a matter of law. Id. at 490-91. If the trial court abuses its discretion in one of these or any other way, remand for resentencing may be the appropriate remedy "if we cannot say with confidence that the trial court would have

imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491.

Hobbs argues that the use of his criminal history as an aggravator is inappropriate. He is wrong. As noted in Indiana Code section 35-38-1-1.7 (2004), a person’s criminal history may be considered an aggravating circumstance. Hobbs then argues that his criminal history should not be considered a “significant” aggravator. However, the trial court noted that the criminal history was minor and old. This would likely mean that the trial court did not attach great significance to this aggravator. Regardless, we no longer address the weight given by the trial court to the aggravating and mitigating circumstances. Id. at 491 (“Because the trial court no longer has any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-Blakely statutory regime, a trial court can not now be said to have abused its discretion in failing to ‘properly weigh’ such factors.”)

Hobbs also argues that the trial court abused its discretion when it determined that the age of Hobbs’s victim was an aggravator. “When the age of a victim constitutes a material element of the crime, then the victim’s age may not also constitute an aggravating circumstance to support an enhanced sentence.” McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). However, the trial court may consider the particularized circumstance of the factual elements as aggravating factors. Id.

In this case, the age of the victim, ten years old, was a material element of Class D felony obscene performance. The State argues that the trial court did set forth a particularized circumstance that would justify relying on the victim’s age as an

aggravator when it spoke of the consequences for the victim that flowed from the crime. However, the trial court did not specifically state the reasons for finding that the victim's age should be used as an aggravator.

Finally, Hobbs argues that the trial court abused its discretion when it used Hobbs's belief in his innocence as an aggravator. A review of the record does not support this claim. The trial court specifically mentioned the aggravators and mitigators it considered and Hobbs's claim of innocence was not on that list. The trial court's statement at sentencing merely referred to the trial court's desire that Hobbs come to terms with the actions that led him to be convicted.

Although the trial court abused its discretion when it determined that A.W.'s age of ten was an aggravating circumstance, the remaining aggravators, Hobbs's criminal history and his position of care, custody, and control of the victim, are valid and support the trial court's decision to sentence Hobbs to three years with 185 days executed and the balance suspended to probation.

Conclusion

The trial court did not abuse its discretion in sentencing Hobbs because the trial court properly found aggravators that were sufficient to support the sentence imposed. The evidence is sufficient to support Hobbs's conviction for Class D felony obscene performance.

Affirmed.

BAILEY, J., and BARNES, J., concur.