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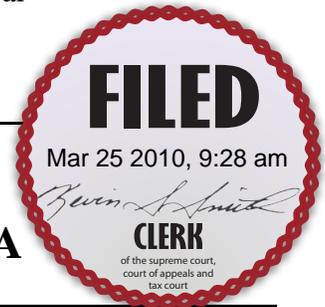
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**IN THE
COURT OF APPEALS OF INDIANA**

RICK DELKS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 84A04-0907-CR-368

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0802-FA-535

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Rick Delks appeals his conviction and sentence for class A felony child molesting. We affirm his conviction and sentence and remand with instructions to recalculate his good time credit.

Issues

Delks raises the following issues for review:

- I. Did the trial court abuse its discretion in finding the victim competent to testify?
- II. Did the trial court abuse its discretion in admitting the victim's videotaped statement?
- III. Did the State present sufficient evidence to sustain his conviction?
- IV. Did the trial court properly sentence him?
- V. Did the trial court err in calculating his good time credit?

Facts and Procedural History

K.B. was born on November 24, 2002. Her mother, Jennifer Brandenburg, took K.B. and her younger brother to Delks's residence for babysitting at various times during December 2007 and January 2008.¹ When Delks babysat the children, he would show "bad movies" with naked people in them. Tr. at 74-75. He also put his finger inside K.B.'s "pee-pee" while he sat on the couch with her. *Id.* at 79-81. In January 2008, Brandenburg's close

¹ Delks was the brother-in-law of Brandenburg's mother's ex-husband, and Brandenburg had known him for twelve years.

friend, Shelly Green, observed K.B.'s aversion to being around Delks and asked K.B. about it. K.B. told Green about Delks touching her.

On January 25, 2008, Green and Brandenburg reported the incidents to police. On January 29, 2008, Terre Haute Police Detective Jonathan VanDeventer interviewed K.B. K.B. told Detective VanDeventer that Delks had put his finger inside her "pee-pee" every night when he babysat her. *Id.* at 92-94, 107, 144. She also reported that Delks had sucked on her "boobies" and made her touch his "pee-pee." *Id.* at 100, 102-03, 106, 126, 131. She also told the detective that she and Delks had watched "dirty" movies about "boys putting their pee pees in girls' pee pees." *Id.* at 103, 128-29. She said that Delks told her about his sex life with his deceased wife and that he had a drawer in his bedroom containing dirty movies and drawings of "girls sucking on a man's pee pee." *Id.* at 103, 105, 129-30. On January 30, 2008, the police obtained a search warrant, and the ensuing search produced ninety-two drawings of nude people in various sex positions. *Id.* at 138, 149.²

On February 12, 2008, Delks was arrested and charged with class A felony child molesting. On May 6, 2009, a jury found him guilty as charged. On June 8, 2009, the trial court sentenced him to the thirty-year advisory term, with twenty-five years executed and five years suspended to community corrections. This appeal ensued. Additional facts will be provided as necessary.

² The search also produced hundreds of DVDs and videotapes, but police opted not to review them due to time constraints. Tr. at 147-48.

Discussion and Decision

I. Competency to Testify

Delks contends that the trial court abused its discretion by finding K.B. competent to testify. The determination of a witness's competency to testify lies within the trial court's sound discretion. *Aldridge v. State*, 779 N.E.2d 607, 609 (Ind. Ct. App. 2002), *trans. denied* (2003). As such, we review it for an abuse of discretion. *Id.* Indiana Evidence Rule 601 states that “[e]very person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly.” Evidence Rule 601 assumes competency unless otherwise demonstrated by the party opposing the testimony. *Aldridge*, 779 N.E.2d at 609. A child's competency is determined by the trial court based on its observation of the child's demeanor and responses to questions posed by counsel and the court. *Agilera v. State*, 862 N.E.2d 298, 303 (Ind. Ct. App. 2007), *trans. denied*. Such competency is established by demonstrating that the child (1) understands the difference between telling a lie and telling the truth; (2) knows that she is under compulsion to tell the truth; and (3) knows what a true statement actually is. *Id.* at 303-04.

At the outset, we note that Delks did not object to K.B.'s competency to testify at the time of trial. As such, the issue is waived. *See Camm v. State*, 908 N.E.2d 215, 221-22 (Ind. 2009) (finding failure to state specific objection at time evidence is offered results in waiver). Waiver notwithstanding, on direct examination, the prosecutor asked six-year-old K.B. several preliminary questions about her home in the country and various farm animals. He then asked her if she remembered the judge having her raise her hand and promise to tell the

truth. She responded affirmatively. Tr. at 72. The following questioning ensued:

Q: And when [the judge] did that he asked you to tell the truth and not a lie. Do you know what a lie is?

A: Yes.

Q: What's a lie?

A: When you don't tell the truth.

Q: Okay. And if I told you that a pig made a sound like "meow", would that be the truth or a lie?

A: Lie.

Q: Okay. Why?

A: Because it don't make that sound.

Q: Okay, it doesn't, it's not true is it?

A: Nope.

Q: Okay, alright. And if I said you were a boy, would that be true?

A: No.

Q: Because you're not a boy, are you?

A: No.

Q: You're a little girl, right?

A: Yes.

Q: Okay. So do you know the difference between telling the truth and not telling the truth?

A: Yes.

Q: Now, what you're telling these people here has got to be the truth, do

you remember that? That's what the Judge told you to do?

A: Yes.

Q: So, you're [sic] answers here are not to be lies and not to be false, they're to be the truth, okay? You understand that okay?

A: Yes.

Id. at 72-74.

The record indicates that K.B. understood the difference between the truth and a lie and could recognize what a true statement is. Moreover, both the State and the trial court repeatedly asked questions aimed at reminding her that she was under a compulsion to tell the truth. To the extent Delks points to K.B.'s misidentification of her school as evidence of her incompetency, we note that "[t]o be qualified to testify, a child need not be a model witness, have an infallible memory, or refrain from making inconsistent statements." *Kien v. State*, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007) (citation and quotation marks omitted), *trans. denied*. Based on the foregoing, we conclude that the trial court acted within its discretion in determining that K.B. was competent to testify.

II. Videotaped Testimony

Delks asserts that the trial court abused its discretion by admitting K.B.'s videotaped testimony under the Indiana Protected Person Statute, Indiana Code Section 35-37-4-6. The decision to admit a statement or videotape under the Protected Person Statute lies within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. *Mishler v. State*, 894 N.E.2d 1095, 1099 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is clearly

erroneous and against the logic and effect of the facts and circumstances before it. *Id.*

Regarding the use of videotaped statements, the statute provides in pertinent part:

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness

Ind. Code § 35-37-4-6(e). The parties agree that K.B. is a protected person as defined by the statute. Ind. Code § 35-37-4-6(c). A protected person's videotaped statement concerning "an act constituting a material element of a charged offense is admissible if the trial court finds that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability and the protected person either testifies at trial or is unavailable." *Mishler*, 894 N.E.2d at 1100. Factors used in determining reliability include: "(1) the time and circumstances of the statement, considering whether there was significant opportunity for coaching; (2) the nature of the questioning; (3) whether there was a motive to fabricate; (4) use of age-appropriate terminology; and (5) spontaneity and repetition." *Id.*

Here, Delks claims that the trial court failed to make a specific finding of reliability before admitting K.B.'s videotaped statement. At the hearing outside the jury's presence, the trial court previewed the videotape, heard arguments from counsel, and stated as follows:

Okay, I'm going to make the following finding: I find that the victim, K.B.,

has no apparent motive to lie in this matter, her general character in this matter is the same as it was on the videotape as it was in the Courtroom today. The um, Officer or Detective VanDeventer heard this statement and it was given to her, the statements were spontaneous at times and I agree with [the State] that the matter, whether she was hurt, was offered spontaneously. And this was made January 28th, '08, which is a lot closer to the time than now. I'm going to allow the videotape to be played to the jury, but I do under Indiana Codes 35-37-4-6, I do want the, K.B., to be made available for any cross-examination once this tape is played to the jury. If [defense counsel] so chooses to bring her back to the stand.

Tr. at 113-14.

Although the trial court did not specifically state that it found K.B.'s videotaped statement to "contain sufficient indications of reliability," it satisfactorily addressed the considerations mentioned above. The trial court specifically referenced the time of the statement and K.B.'s lack of a motivation to fabricate. Moreover, it repeatedly referenced her spontaneity, thus indicating a lack of both suggestiveness and coaching. Finally, the court found that her general character was the same on the videotape as in the courtroom, indicating its consideration of the appropriateness of terms she used and her competency to convey the circumstances surrounding the molestation. Thus, we conclude that the trial court's failure to utter the specific term "reliability" was not fatal to the admissibility of the videotape. Finally, the record shows that the videotape was made within five days after K.B. first told her mother and Green about the molestation and that neither K.B.'s mother nor Green indicated any hostility toward Delks that would motivate them to lie or to coach K.B. to lie.³ Thus, the trial court acted within its discretion in admitting K.B.'s videotaped

³ K.B.'s mother testified that she had known Delks for twelve years and had no reason to get even with him or to get him in trouble. Tr. at 51, 58.

statement.

III. Sufficiency of Evidence

Delks challenges the sufficiency of evidence to support his class A felony child molesting conviction. When reviewing a sufficiency of evidence claim, we neither reweigh evidence nor judge witness credibility; rather, we look only to the probative evidence and reasonable inferences supporting the verdict to determine whether a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. *Riehle v. State*, 823 N.E.2d 287, 292 (Ind. Ct. App. 2005), *trans. denied*. We will affirm if substantial evidence of probative value exists to support the verdict. *Id.* The testimony of the victim, even if uncorroborated, is sufficient to sustain a conviction. *Mishler*, 894 N.E.2d at 1102.

To obtain a conviction for class A felony child molesting, the State was required to prove that Delks, who was at least twenty-one years of age, knowingly performed or submitted to deviate sexual conduct with K.B., who was under fourteen years of age. Ind. Code § 35-42-4-3(a)(1). Deviate sexual conduct is an act involving “(1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-41-1-9.

Here, the evidence most favorable to the verdict indicates that in December 2007 through January 2008, Delks repeatedly inserted his finger into five-year-old K.B.’s “pee-pee” while babysitting her at his house. Tr. at 79-81. Also, Green testified that in January 2008, she noticed that K.B. showed a sudden aversion to being around Delks. *Id.* at 27-28. To the extent Delks relies on the fact that K.B. showed no medical evidence of molestation

and that she continued to perform well in school after the molestation, he merely asks that we reweigh evidence and judge witness credibility, which we may not do. The evidence most favorable to the verdict is sufficient to support Delks's conviction.

IV. Appropriateness of Sentence

Delks challenges the appropriateness of his sentence. We “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). We do not look to see whether the defendant’s sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is “inappropriate.” *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

First, we note that although Delks frames his argument in terms of Appellate Rule 7(B), he also challenges the validity of the aggravating and mitigating circumstances found by the trial court. As such, we review the challenge thereto under an abuse of discretion standard. *Anglemyer*, 868 N.E.2d at 490. At sentencing, the trial court stated,

This is a heinous crime Your [sic] put in a position of trust with this child and violated that position of trust. You’ve shown nothing but a lack of remorse sense [sic] found guilty and sense [sic] the trial. I will take into consideration you’re not a health[y] individual and I’ll take into ... consideration your lack of criminal history.

Sent. Tr. at 40. To the extent Delks challenges the trial court’s finding of his lack of remorse

as an aggravator, we note that there is no general prohibition against using lack of remorse as a sentencing factor. *Dinger v. State*, 540 N.E.2d 39, 40 (Ind. 1989). Nevertheless, we agree with Delks that lack of remorse generally is not applicable in situations where the defendant consistently maintains his innocence and the only evidence is the victim's uncorroborated testimony. *Id.* However, even when an aggravating factor is misapplied, it does not constitute grounds for reversal where the record supports other aggravators. *Edrington v. State*, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), *trans. denied*. A violation of position of trust is one such proper aggravator. *Id.* Delks does not challenge the trial court's finding that he violated his position of trust. To the extent he complains that the trial court failed to give proper weight to various mitigators and aggravators, we note that these claims are not subject to review. *Anglemyer*, 868 N.E.2d at 493-94.

We now address the appropriateness of Delks's sentence pursuant to Appellate Rule 7(B). In considering the nature of a defendant's offense, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Id.* at 494. Here, Delks was convicted of class A felony child molesting and received the thirty-year advisory sentence. *See* Ind. Code § 35-50-2-4 (setting sentencing range for class A felony at twenty to fifty years, with advisory sentence of thirty years). The record indicates that fifty-three-year-old Delks molested five-year-old K.B. while she was in his care in violation of his position of trust. These circumstances are more than sufficient to support an advisory sentence.

Likewise, Delks's violation of this position of trust does not reflect well on his character. He was not merely K.B.'s babysitter; he was a long-time friend of her mother.

Poor health and lack of criminal record notwithstanding, we find that Delks has failed to meet his burden of establishing that his sentence is inappropriate.

V. Good Time Credit

Finally, Delks contends that the trial court incorrectly calculated his good time credit for his pretrial confinement at 116 days. He was incarcerated in February 2008. As of that time, he was entitled to one day's good time credit for each day served. Ind. Code § 35-50-6-4 (2007). In 2008, the Indiana General Assembly enacted the "credit restricted felon statute," which defined and reclassified certain convicted felons and limited the amount of credit time earned. *See* Ind. Code § 35-41-1-5.5 (including as credit-restricted felons perpetrators over age twenty-one who are convicted of child molesting involving deviate sexual conduct with a child under age twelve). The new statute applies to persons convicted after June 30, 2008. Thus, Delks was convicted of an offense for which he may be defined as a credit-restricted felon. Under the new statute, credit-restricted felons receive one day of good time credit for every six days that they are imprisoned or confined awaiting trial or sentencing. Ind. Code § 35-50-6-3(d). Because Delks was convicted of class A felony child molesting on May 6, 2009, the new statute applies to his conviction. He does not challenge the application of the new statute to days he was confined *after* July 1, 2008. Rather, he raises a constitutional challenge to the retroactive application of the new statute's credit restriction to days he served between the date of his incarceration in February 2008, and July 1, 2008.

In *Upton v. State*, 904 N.E.2d 700, 704 (Ind. Ct. App. 2009), *trans. denied*, we held that the retroactive application of the credit-restricted felon statute to days served prior to

July 1, 2008, was a violation of the defendant's constitutional protection against ex post facto laws. The State concedes that remand is appropriate because the record is unclear both as to exactly how the trial court applied the old and new statutes and as to the exact dates of Delks's incarceration. Thus, to the extent the trial court's calculation of good time credit amounted to retroactive application of the new statute, we remand for a recalculation of Delks's good time credit. In all other respects, we affirm.

Affirmed and remanded.

RILEY, J., and VAIDIK, J., concur.