

STATEMENT OF THE CASE

Appellant-Defendant, James John Johnson (Johnson), appeals his conviction and sentence for sexual misconduct with a minor, a Class B felony, Ind. Code § 35-42-4-9(a).

We affirm.

ISSUES

Johnson presents two issues for our review, which we restate as:

- (1) Whether the trial court committed reversible error by not admitting as evidence a video recording of an interview of Johnson's victim; and
- (2) Whether his sentence is inappropriate when the nature of his offense and character are considered.

FACTS AND PROCEDURAL HISTORY

During the summer of 2008, Johnson began providing transportation for his co-worker's family because they did not own a car. He became more acquainted with the family and began interacting with his co-worker's fifteen-year-old sister, C.W., who is mildly mentally retarded. From July 2008 until January 2009, Johnson, who was over fifty years old, had sex with C.W. approximately thirty times. Sometime between July 20, and July 30, 2008, C.W. became pregnant. C.W.'s family did not recognize that she was pregnant for a couple of months, but eventually noticed signs and gave her a pregnancy test. C.W.'s family did not know who the father was, and Johnson was still a regular visitor at their home. Johnson kept having sexual encounters with C.W., and was eventually caught by C.W.'s father at approximately 2:00 a.m. in C.W.'s room hiding under her bed with his shirt off.

C.W.'s father kicked Johnson repeatedly and yelled at him. Johnson stated that he had a problem and needed help. At some point C.W.'s step-mother confronted Johnson, and he did not deny that C.W.'s child could be his, but rather stated "if it's mine . . . I'll take the responsibility and . . . take care." (Transcript p. 129).

On January 7, 2009, Officer William Meyerrose (Officer Meyerrose) of the Greensburg Police Department received a report from the Family and Social Services Department that C.W. was pregnant. Officer Meyerrose interviewed C.W. who told him that she had had sex with Johnson, Johnson's son, and three other men. After C.W.'s child was born, DNA tests were administered. According to the tests, there is a 99.999% certainty that Johnson is the father as opposed to an unrelated male, and it is fifty-two times more likely that Johnson is the father of the child compared to his son.

On February 6, 2009, the State filed an Information charging Johnson with sexual misconduct with a minor, a Class B felony, I.C. § 35-42-4-9(a), and the State sought a sentence enhancement due to Johnson's status as a repeat sex offender, I.C. § 35-50-2-14. On August 4 and 5, 2009, the trial court conducted a bifurcated jury trial. During the trial, Johnson requested that recordings of the interview with Officer Meyerrose be admitted as evidence to impeach C.W., but the trial court excluded those recordings. However, the trial court permitted Johnson to ask specific questions about what C.W. had said during her interviews with Officer Meyerrose, and C.W. acknowledged that she had made statements to Officer Meyerrose that were inconsistent with her testimony at trial.

The jury found Johnson guilty as charged. On September 5, 2009, the trial court sentenced Johnson to fifteen years for his sexual misconduct with a minor, and enhanced Johnson's sentence by ten years for being a repeat sexual offender.

Johnson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Exclusion of the Recordings

Johnson first contends that the exclusion of the recordings of C.W.'s interviews with Officer Mererrose was error because they impeached C.W.'s trial testimony. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In re S.W.*, 920 N.E.2d 783, 788 (Ind. Ct. App. 2010). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* Any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted. *Id.*

At trial, C.W. testified that on one occasion Johnson put a pill in her drink that he said would relax her, and she does not remember what happened after that. However, she remembers that the next morning Johnson was lying on her floor when she awoke, and he told her that he had had sex with her. She further testified with specific details about a few other sexual encounters with Johnson and stated that over a five or six-month period they had had sex approximately thirty times. Johnson cross-examined C.W. in regards to these facts. She acknowledged that she had told Officer Meyerrose that she and Johnson had sex only

five or six times. She also acknowledged that she did not tell Officer Meyerrose about Johnson placing a pill in her drink, stating that she had forgotten about it at the time.

Pursuant to Indiana Evidence Rule 613(B), a party may impeach a witness with prior inconsistent statements. However, if a party wishes to use extrinsic evidence of the prior inconsistent statement “a proper foundation must be laid to warn the witness and enable him to admit, explain, or deny the prior statement.” *Roberts v. State*, 712 N.E.2d 23, 32 (Ind. Ct. App. 1999), *trans. denied*. “If the witness explains or admits to making the prior inconsistent statement, impeachment has occurred, and the extrinsic evidence of the inconsistent statement is inadmissible.” *Id.* Here, C.W. readily admitted to having made the prior inconsistent statements, and, therefore, the trial court did not err by refusing to admit the recordings of her interviews with Officer Meyerrose.

II. *Appropriateness of Johnson’s Sentence*

Johnson contends that his sentence is inappropriate considering the nature of his offense and character. Specifically, Johnson contends that because of his good character, his sentence is inappropriate.

Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court’s decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified*

on reh'g, 875 N.E.2d 218 (Ind. 2007). “Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). “The principle role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” *Id.* at 1225. The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Johnson was convicted of a Class B felony, for which the minimum sentence is six years, the maximum sentence is twenty years, and the advisory sentence is ten years. I.C. § 35-50-2-5. The trial court decided to sentence Johnson to fifteen years for his sexual misconduct, five years less than the maximum sentence for his offense. In addition, the trial court enhanced Johnson’s sentence by ten years pursuant to Indiana Code section 35-50-2-14, which provides in pertinent part: “The court may sentence a person found to be a repeat sexual offender to an additional fixed term that is the advisory sentence for the underlying offense. However, the additional sentence may not exceed ten (10) years.”

Addressing the nature of Johnson’s offense first, we note that it is particularly appalling. Johnson repeatedly had sex with a mildly mentally retarded girl in her parent’s home after having developed a relationship of trust with the family. C.W. testified that this happened multiple times, and that Johnson had her orally pleasure him, as well as having both vaginal and anal sex with her. To facilitate his prurient quests with C.W., he groomed her by giving her gifts and telling her that she owed him in return, gave her beer, and

according to C.W.'s trial testimony, drugged her on one occasion. This alone would make the nature of Johnson's offense appalling. However, Johnson not only did these abhorrent acts, but he also impregnated C.W. while doing so.

Moving on to Johnson's character, he contends that his limited criminal history and service in the armed forces demonstrates his good character. We disagree. Johnson's repeated actions with C.W. are a clear reflection of his character. Furthermore, his criminal history consisting of counterfeiting, endangering the welfare of a child, and a sex crime in Pennsylvania referred to as "Aggravated Indecent Assault," also speak for Johnson's poor character. (Appellant's App. Vol. II, p. 129). Altogether, Johnson has failed to persuade us that his aggregate twenty-five year sentence for sexual misconduct with a minor, and being a repeat sexual offender, was inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err when it refused to admit recordings of C.W.'s interviews to impeach her trial testimony, and Johnson's sentence is not inappropriate when the nature of his offense and character are considered.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.