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**IN THE
COURT OF APPEALS OF INDIANA**

W.L., II,)
)
Appellant-Defendant,)
)
vs.) No. 02A03-0901-CR-11
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0710-FA-75

April 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, W.L. was convicted of three counts of Child Molesting,¹ one as a class A felony and two as class C felonies, and two counts of Sexual Misconduct with a Minor,² one as a class B felony and one as a class C felony. W.L. was subsequently sentenced to an aggregate term of forty years. On appeal, W.L. presents two issues for our review, which we restate as:

1. Did the trial court abuse its discretion in excluding personal opinion testimony of defense witnesses concerning the character of the victim?
2. Is W.L.'s sentence excessive?

We affirm.

The facts underlying the convictions follow. W.L. began molesting his biological daughter (the victim) when she was ten or eleven years old and in the fifth grade.³ The victim testified that the first time something happened, W.L. entered her bedroom at night, laid on his back on her bed, had her lie on top of his body, and then he moved her body up and down over his own. This happened on a couple of other occasions. On other occasions, both before and after her fourteenth birthday, W.L. touched the victim's bare breasts with his hand. W.L. also forced the victim to touch his penis with her hand and had her move her hand "up and down." *Transcript* at 211. This occurred more than once. On a separate occasion when the victim was older, but before her fourteenth birthday, W.L. entered the victim's bedroom at night, pulled down her underwear, and placed his finger inside her

¹ Ind. Code Ann. § 35-42-4-3 (West, Premise through 2008 2nd Regular Sess.).

² I.C. § 35-42-4-9 (West, Premise through 2008 2nd Regular Sess.).

³ The victim was born in April 1992.

vagina. After the victim turned fourteen years old, W.L. entered her bedroom one night and again placed his finger in her vagina. When the victim started to cry because it hurt, W.L. angrily told her that she was “asking for it.” *Id.* at 212. The victim said she smelled alcohol on W.L. during each of these incidents.

During her freshman year of high school, the victim confided in her good friend K.L. about W.L.’s molestations. K.L. testified that the victim became emotional and seemed scared and was crying when she talked about W.L. violating her. K.L. kept the victim’s confidence, but in January 2007, the victim thought that K.L. had disclosed her secret. The victim confronted K.L. and the two had a falling out. Approximately two weeks later, K.L. tried to make amends with the victim, but the victim threw pop on her and the two fought. As a result of the altercation, both the victim and K.L. disclosed W.L.’s molestations to school administrators as the reason for their fight. An investigation into the victim’s allegations began.

School Resource Officer Robert Elmer⁴ was working at the high school when the victim made her allegations. In speaking with the victim, Officer Elmer noted that she was “very upset, very emotional” in that she was “crying, nervous, angry, kind of all at the same time.” *Id.* at 269. Officer Elmer then contacted Child Protective Services (CPS). Melissa Sarrazine, a supervisor with CPS, arrived at the school to interview the victim, who informed her that her father had been sexually molesting her. Based on her initial investigation, Sarrazine removed the victim from her home and placed her in foster care.

⁴ Officer Elmer was also employed as a police officer with the City of Fort Wayne Police Department.

Detective John Gerardot of the Allen County Sheriff's Department also investigated the victim's allegations. Detective Gerardot interviewed the victim on two separate occasions and she described for him the incidents set forth above. Detective Gerardot testified that the victim's statements in the two interviews were consistent.

On October 30, 2007, the State charged W.L. with one count of class A felony child molesting, two counts of class C felony child molesting, one count of class B felony sexual misconduct with a minor, and one count of class C felony sexual misconduct with a minor. A two-day jury trial commenced on September 3, 2008. Prior to the start of trial, the State filed its second motion in limine seeking to exclude certain testimony concerning the victim's character for dishonesty. After extensive argument, the trial court granted the State's motion in limine. At the conclusion of the evidence, the jury found W.L. guilty as charged. On October 6, 2008, the trial court sentenced W.L. to thirty years for the class A felony conviction and to concurrent four-year sentences for the two class C felony child molesting convictions. The trial court further sentenced W.L. to ten years for the class B felony sexual misconduct with a minor conviction and to a concurrent four-year term for the corresponding class C felony conviction. The trial court ordered the sentences for the sexual misconduct convictions to run consecutive to the sentences on the child molesting convictions, for a total aggregate sentence of forty years. W.L. now appeals.

1.

W.L. argues that the trial court abused its discretion in excluding testimony from defense witnesses concerning the victim's character. Specifically, the defense sought to elicit

testimony from Michelle Ruiz and her daughter Aubrey that, when the victim was twelve years old, Michelle and Aubrey personally believed the victim had a dishonest character. Michelle and Aubrey's personal opinions were based on two prior incidents: one in which the victim denied having taken CDs from Aubrey, but the CDs were later found in the victim's bedroom, and a second incident in which the victim told Michelle and Aubrey that W.L. was divorced, which was untrue, in an attempt to "fix [W.L.] up" with Michelle. *Id.* at 14. Defense counsel argued that this evidence showed that the victim had a dishonest character and "was known to make things up all the time." *Id.* at 19.

Initially, we observe that a trial court has broad discretion in ruling on the admissibility of evidence. *Turner v. State*, 878 N.E.2d 286 (Ind. Ct. App. 2007), *trans. denied*. We will reverse a trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* A claim of error in the admission or exclusion of evidence will not prevail on appeal "unless a substantial right of the party is affected." Ind. Evidence Rule 103(a). That is, this court will not reverse even if the trial court's decision was an abuse of discretion, if the admission or exclusion of evidence constitutes harmless error. *See Combs v. State*, 895 N.E.2d 1252 (Ind. Ct. App. 2008), *trans. denied*. "Harmlessness is ultimately a question of the likely impact of the evidence on the jury." *Id.* at 1258 (quoting *Littler v. State*, 871 N.E.2d 276, 278 (Ind. 2007)).

Here, the parties dispute the interpretation of Indiana Evidence Rules 404 and 405 in light of Evid. R. 608. We need not delve into the parties' competing interpretations of these rules, however, because W.L. has waived the issue for review. A pre-trial ruling on a motion in limine is a preliminary ruling and alone is insufficient to preserve error for an incorrect ruling on the motion. *Swaynie v. State*, 762 N.E.2d 112 (Ind. 2002). Absent a ruling excluding the evidence accompanied by a proper offer of proof, there is no basis for a claim of error. *See Hollowell v. State*, 753 N.E.2d 612 (Ind. 2001) (citing Ind. Evidence Rule 103(a)). The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial court with an opportunity to consider its evidentiary ruling. *State v. Wilson*, 836 N.E.2d 407 (Ind. 2005). From our review of the record, it does not appear that W.L. sought to introduce the challenged testimony during the trial. Further, other than arguments made in objection to the State's second motion in limine, prior to voir dire, W.L. made no offer to prove during the trial itself. W.L. therefore waived the issue for review.

Moreover, even if we assume that exclusion of the evidence was error, W.L. has not even attempted to demonstrate how his substantial rights were affected. The fact that the victim may have lied on two prior occasions when she was twelve years old about matters wholly unrelated to the matter at hand would likely have had minimal to no impact on the jury's assessment of the victim's credibility at the age of sixteen when testifying at trial about

being molested by her father over a three- to four-year period.⁵ We therefore conclude that any error in the trial court's exclusion of the defendant's proffered evidence was harmless.

2.

W.L. argues that his sentence is excessive. In so arguing, W.L. cites Ind. Appellate Rule 7(B), which provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” In support of his argument, however, W.L. simply notes that he has been consistently employed and that he has a limited criminal history consisting of several misdemeanor offenses and one felony offense, all occurring between 1990 and 1995. While W.L. offers a cursory discussion of his character, he does not address the nature of the offense. W.L. has therefore waived this issue by failing to present a cognizable argument regarding the inappropriateness of his sentence. *See Williams v. State*, 891 N.E.2d 621 (Ind. Ct. App. 2008) (noting that revision of a sentence under App. R. 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of *both* the nature of his offenses and his character and waiver results if appellant fails to demonstrate both factors).

Waiver notwithstanding, the nature of the offense and W.L.'s character do not warrant a reduction of his sentence. W.L. repeatedly molested his biological daughter over a three- to four-year time period, violating the sacred trust between a father and daughter. W.L. had been drinking prior to each of the incidents, which is directly related to W.L.'s criminal

⁵ We agree with the trial court that “two (2) instances five (5) years ago do not a reputation for dishonesty

history consisting of alcohol-related offenses: criminal recklessness (1990); false informing and driving while suspended (1990); operating a vehicle while intoxicated (1990); habitual traffic violator (1992); public intoxication (1994); and operating a vehicle while intoxicated (felony) (1995). W.L. also violated his probation on one occasion and was unsatisfactorily discharged from probation on another occasion. In light of the nature of the offense and the character of the offender, we cannot say that the sentence imposed is inappropriate.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

make.” *Transcript* at 15.