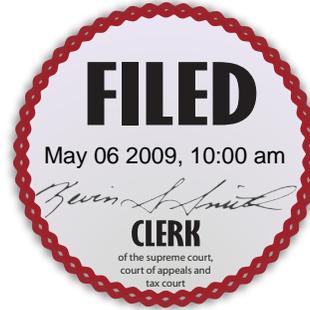


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY MILLER,)
)
Appellant-Defendant,)
)
vs.) No. 06A01-0810-CR-487
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable Rebecca McClure, Special Judge
Cause No. 06C01-0708-FA-157

May 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Timothy Miller (“Miller”) appeals his convictions after a jury trial for child molesting¹ as a Class A felony and sexual misconduct with a minor² as a Class B felony. Miller presents the following restated issues for our review:

- I. Whether the evidence was sufficient to support Miller’s conviction of Class A felony child molesting;
- II. Whether the trial court erred by allowing the prosecutor to use a timeline as a demonstrative exhibit;
- III. Whether Miller was entitled to relief based upon an allegation of prosecutorial misconduct for a discovery violation and drum-beat repetition of certain evidence;
- IV. Whether Miller was entitled to relief based upon an allegation of juror misconduct in allowing the participation of alternate jurors; and
- V. Whether Miller’s sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

In early 2007, Detective Mike Beard of the Boone County Sheriff’s Department received a report that Miller had been molesting his step-daughter, H.G., who was born on November 15, 1989. Ultimately, H.G. told Detective Beard that her step-father, Miller, had been molesting her for years and was the father of her child, who was born on May 4, 2006. H.G. told Detective Beard that Miller had threatened her with violence if she said anything about the abuse. Detective Beard obtained DNA samples from H.G., her child, and Miller.

¹ See Ind. Code § 35-42-4-3.

² See Ind. Code § 35-42-4-9.

The child's DNA revealed that she inherited DNA from both H.G. and Miller, and tests determined that there was a 99.99% chance that Miller was the child's father.

At trial, H.G. testified that the first time Miller had sex with her was when she was twelve years old and detailed what she was wearing and the circumstances of the first molestation. H.G. stated that Miller continued to molest her for several years, first in Miller's apartment, later at her mother's house, and sometimes in the sleeper cab of his truck.

H.G. testified that when she told Miller she was pregnant, he told her to get an abortion, but H.G. objected. Miller later told H.G. that she should tell people that a recently deceased friend was the father of her child. H.G. did initially tell her mother that story, and H.G.'s mother repeated that story to H.G.'s siblings. Miller continued to attempt to have intercourse with H.G. while she was pregnant.

Dr. Robert McCarty was the obstetrician/gynecologist who treated H.G. Dr. Ted Winkler, Dr. McCarty's partner, saw H.G. on February 27, 2006, and Dr. McCarty saw her on April 13, 2006. The doctors determined on H.G.'s first visit that the baby was likely conceived in September 2005 and was due in June 2006. However, a March 2006 ultrasound revealed that the baby was due in May 2006. Based upon ultrasound measurements, Dr. McCarty estimated that the baby was conceived approximately on August 14, 2005, with a range of error from late July to early September. H.G.'s baby was born on May 4, 2006. In Dr. McCarty's opinion, H.G. was fifteen years old when the baby was conceived.

At the conclusion of Miller's jury trial, he was found guilty of child molesting as a Class A felony and sexual misconduct with a minor as a Class B felony. The trial court

sentenced Miller to forty years for the Class A felony and fifteen years for the Class B felony.

The trial court ordered the sentences to be served concurrently. Miller now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Miller challenges the sufficiency of the evidence supporting his child molesting conviction. He claims that H.G.'s testimony "was not unequivocal and could not meet the beyond a reasonable doubt standard." *Appellant's Br.* at 7. The State was required to prove that Miller, who was more than twenty-one years old at the time, had sexual intercourse with H.G., who was under the age of fourteen at the time. Ind. Code § 35-42-4-3(a)(1).

Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). "To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it 'most favorable to the trial court's ruling.'" *Id.* (quoting *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005)). Appellate courts will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Drane*, 867 N.E.2d at 146. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* at 147. The evidence is sufficient if

an inference may be reasonably drawn from it in support of the verdict. *Id.* The jury is free to believe or disbelieve witnesses as it sees fit. *McClendon v. State*, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996). Finally, a “molested child’s uncorroborated testimony is sufficient to sustain a conviction.” *Carter v. State* 754 N.E.2d 877, 879 (Ind. 2001).

The record reveals that H.G. testified that Miller first had sexual intercourse with her when she was twelve years old. H.G. testified that she and her mother got into an argument, and that H.G.’s mother called Miller and asked him to pick up H.G. Miller took H.G. to his apartment where they watched some television. H.G. remembered the clothes she was wearing on that first occasion and remembered what she did after Miller had intercourse with her. H.G. testified that the next morning she rode the bus to school and that Miller molested her in his apartment a few nights later. H.G. further testified that when she moved back in with her mother, Miller did not molest her. The molestations resumed when Miller moved into H.G.’s mother’s house with them. After a year or more, the molestations were occurring almost every other night. H.G. would sleep on a sofa-bed in the living room and Miller would join her. H.G. testified that she did not tell anyone about the molestations because Miller threatened her, and she was scared of him. H.G.’s testimony alone makes the evidence sufficient to support Miller’s conviction for child molesting as a Class A felony. Furthermore, DNA tests showed that Miller is the father of H.G.’s baby and that the baby was conceived before the victim became sixteen years old. The evidence and inferences that may be drawn therefrom are sufficient to support the conviction.

II. Demonstrative Exhibit

Miller argues that the trial court abused its discretion by allowing the prosecution to use a timeline as a demonstrative exhibit at trial. Miller argues that the exhibit was prepared for use by Dr. McCarty “to explain the three-week gestational margin of error for pregnancy.” *Appellant’s Br.* at 12. Miller also argues that the timeline was inappropriately used to assist H.G. in her testimony, and that the prosecution’s failure to allow Miller to inspect the demonstrative exhibit prior to trial violated Indiana Evidence Rule 612.

A trial court has broad discretion in ruling on the admissibility of evidence. *Scott v. State*, 855 N.E.2d 1068, 1071 (Ind. Ct. App. 2006). “Because we are considering the issue after a completed trial, we review the admission of evidence for an abuse of discretion.” *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied, cert. denied* (2009). We will consider the conflicting evidence most favorable to the trial court’s ruling and any uncontested evidence favorable to the defendant. *Id.* An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.*

Demonstrative evidence is evidence offered for purposes of illustration and clarification. *Wise v. State*, 719 N.E.2d 1192, 1196 (Ind. 1999). “To be admissible, the evidence need only be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact.” *Myers v. State*, 887 N.E.2d 170, 184 (Ind. Ct. App. 2008). “The admissibility of demonstrative evidence, like all evidence, is also subject to the balancing of probative value against the danger of unfair prejudice.” *Id.*

The timeline at issue spanned from 2001 to 2006 and denoted H.G.'s birthdate each year. The years 2005 through July 2006 were broken down by month to further aid the trier of fact in understanding conception dates in relation to H.G.'s age and the period of gestation, with the corresponding margin of error. *State's Ex. 5*. Dr. McCarty used the exhibit to testify about his estimate of the date of conception and the duration of H.G.'s pregnancy and did so with no objection from Miller.

Miller first claims that it was unfair and prejudicial for H.G. to use the exhibit to illustrate the dates Miller had sexual intercourse with her. We disagree. H.G. testified that she had difficulty remembering a lot of the dates in the case in relationship to her age, that she had helped to create the exhibit, and that the exhibit would help her to explain where she was living at certain times relevant to the case. Moreover, Miller's cross-examination of H.G. on the dates of certain events included the use of the timeline at issue here. The timeline encompassed the entire period of Miller's molestation of H.G. Miller's argument that: 1) the exhibit was to be used by Dr. McCarty only; and 2) the exhibit, although not objected to, was overly broad for Dr. McCarty's testimony fails. The exhibit clearly was intended for use by more than one witness. The trial court was well within its discretion to allow Dr. McCarty and H.G. to use the exhibit.

Second, Miller contends that the use of the timeline violated Indiana Evidence Rule 612 because the State did not allow him "to inspect the demonstrative aid before trial as it pertained to recollecting [H.G.'s] memory and any testimony based on the aid should have been struck." *Appellant's Br.* at 16. However, Miller did not raise this objection below, and

the record does not indicate that the exhibit was not disclosed to Miller. Miller's argument that he "had no access to the timeline before [H.G.] testified" fails in light of the fact that Dr. McCarty had used the exhibit earlier in the trial during his testimony. *Id.* The trial court did not abuse its discretion. Furthermore, there was no violation of Indiana Rule of Evidence Rule 612.

III. Prosecutorial Misconduct

Next, Miller argues that the State engaged in prosecutorial misconduct by: 1) failing to produce in discovery the handwritten notes of Detective Beard; and 2) engaging in drum-beat repetition of the fact that DNA evidence established that Miller was the father of H.G.'s child. Miller argues that these instances of alleged prosecutorial misconduct constituted fundamental error.

In this situation, the defendant must establish not only the grounds for prosecutorial misconduct, but also the additional grounds for fundamental error. *McKinney v. State*, 873 N.E.2d 630, 642 (Ind. Ct. App. 2007). "In reviewing a properly preserved claim of prosecutorial misconduct, we would 'determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected.'" *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002) (quoting *Coleman v. State*, 750 N.E.2d 370, 374 (Ind. 2001)). "But for prosecutorial misconduct to constitute fundamental error, it must also 'make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for

harm.”” *McKinney*, 873 N.E.2d at 642 (quoting *Booher*, 773 N.E.2d at 817). Stated differently, to prove fundamental error, “the prosecutor’s conduct must have subjected the defendant to grave peril and had a probable persuasive effect o[n] the decision.” *Rodriguez v. State*, 795 N.E.2d 1054, 1059 (Ind. Ct. App. 2003).

First, Miller claims that the State engaged in prosecutorial misconduct by failing to produce in discovery the handwritten notes of Detective Beard from his interview with Miller. The record reveals that the State believed that it had provided Miller with a copy of those notes, but, in fact, had really provided the handwritten notes from another detective. Miller moved to strike the testimony of Detective Beard concerning his interview with Miller and requested that the testimony about the interview be stricken. Miller specifically stated, “I’m not moving for a mistrial.” *Tr.* at 169. The trial court agreed with Miller and admonished the jury to disregard that testimony.

Miller now claims that the discovery violation prevented him from examining Detective Beard’s notes and preparing impeachment evidence. However, trial courts are given wide discretionary latitude in discovery matters and their rulings will be given deference on appeal. *Williams v. State*, 749 N.E.2d 1139, 1144 (Ind. 2001). Absent clear error and resulting prejudice, the trial court’s determination of violations and sanctions will be affirmed. *Id.* Moreover, a timely admonition is presumed to cure any error in the admission of evidence. *Banks v. State*, 761 N.E.2d 403, 405 (Ind. 2002). Miller received the relief he sought. Consequently, the trial court did not abuse its discretion.

Second, Miller claims that the State committed prosecutorial misconduct by engaging in drum-beat repetition of the fact that DNA evidence established that Miller was the father of H.G.'s child. Miller notes that "Indiana courts have attempted to restrain the practice of calling numerous persons to testify about the same statement given by a particular witness." *Appellant's Br.* at 24.

In the present case, Miller failed to object to the testimony or allege drum-beat repetition of the DNA evidence. The record reflects that the State introduced evidence in its case-in-chief to show that DNA testing established a 99.99% certainty that Miller was the father of H.G.'s child. On cross-examination of two of Miller's witnesses, the State asked about their knowledge of the DNA evidence, and whether Miller's paternity of H.G.'s child could be excluded. Those questions were appropriate for cross-examination of the witnesses, and did not amount to drum-beat repetition. Miller has failed to establish prosecutorial misconduct here.

To the extent that Miller argues that the use of the demonstrative exhibit amounted to prosecutorial misconduct, his argument fails. We have determined that the trial court did not abuse its discretion in allowing the State's witnesses to use the demonstrative exhibit.

IV. Juror Misconduct

Miller notes that the trial court instructed the alternate jurors that they would be present in the jury room during discussion of the evidence and could participate in those discussions during the course of the trial, but would not be allowed to participate once deliberations began. Miller claims that "[t]he alternate jurors improperly participated during

Mr. Miller's trial proceedings and their participation amounts to a fundamental error." *Appellant's Br.* at 27. However, Miller later claims in his brief, "Though the alternate jurors might not have participated in the final verdict, and there is no evidence that they did, it is fundamentally unfair to Mr. Miller to assume they played no role in influencing the other jurors in the finding of his guilt." *Id.* at 28. His argument continues, "Because the alternate jurors could have participated in the weighing of evidence before the tendering of the final instructions, the alternate jurors were an impermissible outside influence." *Id.* at 28-29.

There is no evidence in the record before us to support Miller's claim. As such, we find his contention of juror misconduct to be mere speculation. Further, the trial court's preliminary instruction models that of Indiana Jury Rule 20(a)(8): "that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence." Absent a showing that the jury was unable to render a fair verdict because of the instructions or procedures of the court, Miller is not entitled to relief. *See Fuller v. State*, 852 N.E.2d 22, 25 (Ind. Ct. App. 2006).

V. Inappropriate Sentence

Miller asserts that his forty-year sentence without the possibility for probation is inappropriate in light of the nature of the offense and the character of the offender. He argues that the sentence is unreasonable given "his lack of criminal history, his age, and the uncertain nature of the offense." *Appellant's Br.* at 30.

Indiana Appellate Rule 7(B) provides that the court may 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. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The sentencing range for a Class A felony is a fixed term of between twenty and fifty years with the advisory sentence being thirty years. Ind. Code § 35-50-2-4. The sentencing range for a Class B felony is a fixed term of between six and twenty years with the advisory sentence being ten years. Ind. Code § 35-50-2-5. Miller was sentenced to forty years for the Class A felony conviction and a concurrent term of fifteen years for the Class B felony conviction.

While Miller does not have a prior criminal history, he repeatedly engaged in a pattern of behavior whereby he violated his position of trust with H.G. for a period of years resulting in her pregnancy. The trial court took into consideration Miller's age and lack of criminal history by imposing concurrent sentences. We find that in light of the nature of the offense and the character of the offender, the sentence was not inappropriate. *See Padgett v. State*, 875 N.E.2d 310, 315-17 (Ind. Ct. App. 2007) (affirming forty-year sentence for child molesting and sexual misconduct with a minor).

Affirmed.

RILEY, J., and MATHIAS, J., concur.