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**IN THE
COURT OF APPEALS OF INDIANA**

PHILIP R. MILLER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 58A01-0806-CR-250

APPEAL FROM THE OHIO SUPERIOR COURT
The Honorable John D. Mitchell, Judge
Cause No. 58D01-0611-FB-35

May 12, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Phillip R. Miller (Miller), appeals his convictions for two counts of incest, as Class C felonies, Ind. Code § 35-46-1-3, contributing to the delinquency of a minor, as a Class A misdemeanor, I.C. § 35-46-1-8, and furnishing alcohol to a minor, as a Class C misdemeanor, I.C. § 7.1-5-7-8.

We affirm in part and reverse in part.

ISSUES

Miller raises three issues, which we restate as:

- (1) Whether the trial court violated his right to present a defense;
- (2) Whether his convictions for both contributing to the delinquency of a minor and furnishing alcohol to a minor violate the prohibition against double jeopardy; and
- (3) Whether his sentence is inappropriate when the nature of his offenses and character are considered.

FACTS AND PROCEDURAL HISTORY

During the weekend of January 13 and 14, 2006, Miller's sixteen-year-old granddaughter, J.S., came to stay with him, as she frequently did. Miller's wife, J.S.'s grandmother, had recently passed away. On the evening of Friday, January 13, Miller and J.S. talked for a while. At some point Miller left and bought some vodka. He came back and gave it to J.S. to drink. She drank "a lot" of vodka mixed with orange juice and eventually became sick. (Transcript p. 204). Miller took her upstairs to the bathroom that was connected to his bedroom. At some point, Miller grabbed J.S. around the waist so she would

not fall over, and walked her over to his bed. He had her lie down and brought a trash can for her. While J.S. was lying on the bed, Miller rubbed her stomach. He progressively moved his hand lower until his hand was down her pants. He then pulled off her pants and underwear, rubbed her vaginal area, and stuck his fingers inside her. Miller pulled his own pants off, exposing his penis to J.S., and had her touch it. J.S. fell asleep shortly thereafter.

J.S. woke up early in the morning, and Miller was lying next to her on his bed. She tried to climb out of bed without waking him, but he woke up, grabbed her around her waist, and asked where she was going. J.S. told Miller she wanted to get up, and he let her go. She went into the kitchen and sat there smoking cigarettes, upset about what had happened. After a couple of hours, Miller came into the kitchen, asked J.S. if she got anything out of it, and told her it made him feel better. J.S. asked him how God would feel about it, and Miller responded that he would go to hell for the both of them.

J.S. stayed there that day and worked on a project for school. Later, she took a shower and Miller asked if he could watch her shave her legs, but J.S. refused his request. Miller let her drink more alcohol and kept bothering her about going to bed with him. She told him she did not want to, but “eventually [c]aved in . . . for him to leave [her] alone after that.” (Tr. p. 209). Miller “did the same thing” he had done the prior day. (Tr. p. 209).

J.S. went back home and, later that week, told her younger brother that Miller had been inappropriate and done some bad things, but did not explain what had happened. At one point, J.S. was going to try to tell her mother what had happened, but her mother was at work and did not return J.S.’s phone call until after J.S. had gone to bed. J.S. later told an

older friend at school about what had happened. She also told her older brother Daniel after he approached her because he could tell that something was bothering her. Daniel told their father about what had happened, and their father called the police.

On November 9, 2006, the State filed an Information charging Miller with Count I, criminal deviate conduct, a Class B felony, I.C. § 35-42-4-2; Count II, criminal deviate conduct, a Class B felony, I.C. § 35-42-4-2; Count III, incest, a Class C felony, I.C. § 35-46-1-3; Count IV, incest, a Class C felony, I.C. § 35-46-1-3; Count V, contributing to the delinquency of a minor, a Class A misdemeanor, I.C. 35-46-1-8; Count VI, furnishing alcohol to a minor, a Class C misdemeanor, I.C. § 7.1-5-7-8. On December 18, 2007, the trial court began a jury trial. At the close of the State's presentation of evidence, Miller moved for a judgment on the evidence, which the trial court granted with respect to Counts I and II, and acquitted Miller of those charges. On December 21, 2007, the jury returned a verdict of guilty on all remaining counts.

On February 14, 2008, the trial court held a sentencing hearing, and on February 25, 2008, the trial court issued its sentencing order. In that order, the trial court stated that it found one aggravating factor, that Miller violated his position of trust, and one mitigating factor, that Miller had no criminal history. The trial court concluded that the "mitigating and aggravating records balance each other." (Appellant's App. p. 176). The trial court sentenced Miller to four years for Count III, four years for Count IV, one year for Count V, and sixty days for Count VI, all sentences to run concurrent and served in the Department of Correction.

On March 24, 2008, Miller filed a motion to correct error, which the trial court denied on April 28, 2008. On May 22, 2008, Miller filed his notice of appeal, but on August 14, 2008, Miller filed a motion to modify sentence temporarily staying his appeal. On December 1, 2008, the trial court denied Miller's motion to modify his sentence.

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

DISCUSSION AND DECISION

I. Miller's Right to Put on a Defense

Miller argues that the trial court erred by denying him his right to present a defense. Specifically, Miller contends that the trial court erred when it excluded documents which support the testimony of his daughter Robin Miller Dodd (Robin) and her husband John Dodd (John) that they were at his house the weekend that J.S. claims the incest occurred.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* However, if the trial court abused its discretion by admitting challenged evidence, we will only reverse for that error, if the error is inconsistent with substantial justice or if a substantial right of a party is affected. *Id.* Where the wrongfully excluded evidence is merely cumulative of other evidence presented, its exclusion is harmless error. *Sylvester v. State*, 698 N.E.2d 1126, 1130 (Ind. 1998).

Miller cites to *Hubbard v. State*, 742 N.E.2d 919 (Ind. 2001), *cert. denied*, 534 U.S. 869 (2001), for support. Hubbard argued that the trial court had committed reversible error by excluding polygraph results from another individual that Hubbard alleged had committed the murders which he was charged with. *Id.* at 921. Hubbard’s argument was based, in part, on the contention that the exclusion of the results violated his federal constitutional right to put on a defense. *Id.*¹

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The *Hubbard* court acknowledged that the Sixth Amendment does not provide an unlimited right to present exculpatory evidence, but rather, a defendant’s rights must be balanced against legitimate interests in the criminal trial process. 742 N.E.2d at 922.

When the defendant’s Sixth Amendment right to present a defense collides with the State’s interest in promulgating rules of evidence to govern the conduct of its trials, the merits of the respective positions must be weighed, [and] the State’s interest must give way to the defendant’s rights if its rules are “mechanistically” applied to deprive the defendant of a fair trial.

Id. (quoting *Huffman v. State*, 543 N.E.2d 360, 375 (Ind. 1989)).

¹ In his brief, Miller writes out the text of Article 1, section 13 of the Indiana Constitution as well, but does not cite any case law, or develop any specific argument regarding his right to present a defense pursuant to that provision. Therefore, we will consider the argument he has developed based on the Sixth Amendment.

Applying this balanced approach here, we first note that Robin and John testified that they stayed at Miller's home the weekend that J.S. claimed she had been victimized by Miller. Miller based his defense, in part, on the contention that he could not have gotten J.S. intoxicated and then performed sex acts upon her without the two other adults who were in his small house knowing about it, and, therefore J.S. was lying. The evidence which Miller contends the trial court improperly excluded was his bank statement. Miller wanted to use the bank statement as a form of evidence that Robin had to have been at Miller's house the weekend J.S. says the incest occurred, because Robin did Miller's banking for him. The trial court excluded the bank statements because it had not been shared with the State until the first day of trial, after the trial had begun, despite an appropriate discovery request by the State requesting such evidence earlier.

Miller made an offer to prove when the trial court ruled that the bank statements would be excluded. He elicited testimony that the proffered exhibit was a bank statement, and his counsel informed the trial court "it's showing that she wrote checks for him and the date it was authenticated." (Tr. p. 284). We will assume this means, for the sake of argument, that Miller's bank statement shows that the transactions were dated either January 13 or 14, 2006. Since there was testimony that Robin performed Miller's banking activities for him after his wife died, transactions occurring on January 13th or 14th could make it more probable that Robin had been with Miller at some point on those dates; therefore the evidence is relevant. *See* Ind. Evidence Rule 401. However, the probative value of the bank statement is low because the checks could have been issued days earlier and only processed

on January 13th or 14th. Nevertheless, to the extent that the bank statement was evidence that Robin and John had stayed at Miller's home the weekend J.S. claimed she was violated, it was merely cumulative of Robin and John's testimony on that point.

As a general rule, even if the trial court has erred by excluding certain evidence, that error is harmless if the evidence is cumulative of other evidence presented to the jury. *Sylvester*, 698 N.E.2d at 1130. This general rule has recently been applied to a claim that the trial court violated a defendant's right to present a defense. In *Bassett v. State*, 895 N.E.2d 1201 (Ind. 2008), Bassett contended that the trial court violated his right to present a defense when it did not permit two of his witnesses to testify. *Id.* at 1214. Bassett was on trial for the murders of Jamie Engleking and her two children, J.B. (age two) and B.E. (less than one year old). *Id.* at 1204. Our supreme court noted that during the course of the trial, there was some suggestion that Engleking suspected that J.B. had been molested. *Id.* at 1214. Bassett contended that the inference was that he was the perpetrator of such molestation, and, therefore, had motive to commit the murders. *Id.* As such, Bassett claimed that the trial court violated his right to present a defense by not permitting his witnesses to testify that he had not molested J.B. *Id.* However, our supreme court took notice that "the evidence presented at trial clearly showed that Engleking suspected [someone other than Bassett] of molesting J.B." *Id.* Therefore, the *Bassett* court concluded the testimony which Bassett sought to present was simply cumulative of evidence already before the jury, and "the trial court was, therefore, well within the discretion that it enjoys with respect to the admission of evidence when it excluded the testimony." *Id.* at 1214-1215.

Furthermore, it is undisputed that Miller's counsel did not provide a copy of the bank statement to the State until the first day of trial, after the trial had already begun. This was in spite of a discovery request by the State. The purpose of pretrial discovery is to promote justice and to prevent surprise. *Lloyd v. State*, 448 N.E.2d 1062, 1067 (Ind. 1983). The choice of the remedy upon showing of a discovery violation lies within the discretion of the trial court. *Id.* Altogether, because the bank statement was cumulative of Robin and John's testimony, and because Miller failed to share the bank statement with the State until after the trial had begun, we conclude that the trial court did not abuse its discretion by refusing to admit the bank statement, and even if it had, the error would have been harmless. For these same reasons, we conclude that the trial court did not violate Miller's constitutional right to present a defense.

II. *Double Jeopardy*

Miller next contends that his convictions for both furnishing alcohol to a minor and contributing to the delinquency of a minor violate double jeopardy, and the State concedes by acknowledging that the same evidence was used to prove each of these convictions. *See Richardson v. State*, 717 N.E.2d 32, 52-53 (Ind. 1999) (acknowledging that two offenses constitute the same offense when an appellant can demonstrate "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second offense"). Therefore, we reverse Miller's conviction for furnishing alcohol to a minor.

III. *Appropriateness of Miller's Sentence*

Finally, Miller argues that his sentence is inappropriate when the nature of his offense and character are considered. Specifically, Miller contends that the fact that he violated a position of trust should not impact his sentence because a violation of a position of trust is the typical result of the crime of incest, and his lack of criminal history at the age of seventy-two demonstrates that only the minimum sentence was appropriate.

Regardless of whether the trial court has sentenced the defendant within its discretion, we also 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. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Where a defendant asks us to exercise our appropriateness review, the burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "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). Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other considerations that come to light in a given case. *Id.*

Miller was sentenced to four years on Count III, incest, a Class C felony, four years on Count IV, incest, a Class C felony, and one year on Count V, contributing to the delinquency of a minor, a Class A misdemeanor, with all sentences to be served concurrently. Four years is the advisory sentence for a Class C felony, with two years being the minimum and eight years being the maximum. I.C. § 35-50-2-6.

Addressing Miller's contention that incest typically involves violation of a position of trust, we look first to the language of the incest statute:

A person eighteen [] years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest, a Class C felony. However, the offense is a Class B felony if the other person is less than sixteen [] years of age.

I.C. § 35-46-1-3. From the plain language of the statute, a position of trust will not necessarily be violated by the commission of incest. We first note that the crime of incest requires only that the defendant have knowledge of the familial relationship, and the other party to the sexual act could be ignorant of the relationship. Moreover, several of the relationships described by the statute would not likely create a position of trust by the defendant. For example, an eighteen-year-old niece who has sex with her older uncle would be guilty of incest, but would not likely be characterized as being in a position of trust with the uncle. This would be likewise true for adult siblings. Rather, the violation of a position of trust is an aggravator that is often cited by sentencing courts when there is at least an

inference that an adult defendant has authority over a minor who is victimized. *Rodriguez v. State*, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007).

Here, J.S. visited Miller often and they had an established relationship as grandfather to granddaughter. J.S. was sixteen at the time of the incest, which is the age of sexual consent for purposes of other criminal statutes, but still can be an impressionable age. *See, e.g.*, I.C. § 35-42-4-9. From our review of the record, J.S. clearly did not want to engage in the incest, and her actions were submissive. Such submission was likely due in large part to the position of trust that Miller held. This violation of his position of trust is part of the heinous nature of his crime. As such, Miller has not persuaded us that his four year sentence is inappropriate because it was based in part upon his violation of his position of trust with J.S.

Moving on to address his contention that his sentence is inappropriate because he has never before been convicted of a crime in his seventy-two years of life, his long, crime-free life speaks well for his character. However, he committed the incestuous acts not once, but twice over the period of two days, which demonstrates his poor character. We therefore conclude that his sentence is not inappropriate when his character is considered.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not violate Miller's right to put on a defense by refusing to admit certain evidence, and his sentences for his crimes of incest are not inappropriate. However, Miller's convictions for both contributing to the

delinquency of a minor and furnishing alcohol to a minor were based on the same evidence, and therefore violate the prohibition against double jeopardy.

Affirmed in part and reversed in part.

KIRSCH, J., and MATHIAS, J., concur.