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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY ROBINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-1007-CR-848
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard A. Maughmer, Judge
Cause No. 09D02-0806-FA-7

May 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Timothy Robinson appeals his sentences for three counts of child molesting as class A felonies and two counts of child molesting as class C felonies. Robinson raises two issues which we revise and restate as:

I. Whether the court erred in allowing the State to amend the charging information two days prior to trial; and

II. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm in part, reverse in part, and remand.[1]

The relevant facts follow. Between September 2007 and March 2008, eight-year-old J.B. and her mother lived in Logansport, Indiana. J.B.'s mother was dating Robinson, who was born in 1976, and at some point the relationship became "serious" when she introduced Robinson to J.B. as her boyfriend. Trial Transcript at 97. Initially, J.B. liked Robinson and they "would go swimming at [Robinson's] house, walk the trail, come over and watch movies . . . ." Id. at 98. There were times when Robinson spent time alone with J.B., including picking her up from daycare.

During this time period, on one occasion at J.B.'s house, Robinson and J.B. were in the living room and "sitting on the couch . . . . watching TV and [Robinson] was

[1] Robinson also appears to raise the issue of whether the trial court abused its discretion in sentencing him. In the section of his brief raising the issue of whether his sentence is inappropriate, Robinson argues that the court improperly recognized as aggravating circumstances that he "was not in a constructive relationship with [J.B.] prior to the crimes in question," that he "had violated J.B. on multiple occasions," and that "Counts 4 and 5, while only Class C Felonies, were supported by evidence that would have justified a finding of guilt had [Robinson] been charged with Class A Felonies." Appellant's Brief at 6-7, 9. However, because we find Robinson's sentence to be inappropriate, we need not address whether the court abused its discretion in sentencing him. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding that where we find that a court abused its discretion in sentencing the defendant, we may either remand for resentencing or exercise the authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), reh'g denied.

cooking dinner." Id. at 229. Robinson picked J.B. up, pulled her over the side of the couch he was occupying, and began to touch her in her "private" which she used "[t]o go pee." Id. at 230. Robinson placed his hand underneath J.B.'s jeans and underwear and, using his finger, touched both the "outside" and the "inside" of her vagina. Id. at 232. Robinson moved his finger around while he touched J.B. At one point, Robinson went to the kitchen to take their dinner out of the stove and he told J.B. to "hold on." Id. J.B. remained lying down because she "didn't know if he was going to do anything," or "try to hurt [her]." Id. at 233-234.

On another occasion, while only J.B. and Robinson were home, J.B. was in her mother's bedroom watching television and Robinson entered the room. J.B. left her mother's bed and sat in her mother's computer chair in the room because she "didn't know if [Robinson] was going to touch [her] again." Id. at 237. Robinson left the room to watch his own television show, but he returned and "scootched up and [] just started touching [J.B.] . . . ." Id. at 238. Robinson again used his hand, placed it underneath her clothing and underwear, and touched both the outside and inside of her vagina. When J.B.'s mother returned Robinson "just got up and went out there like he didn't do anything . . . ." Id. at 240.

Another time, J.B. and Robinson were in the living room sitting on a couch at Robinson's house, and Robinson touched J.B. "[i]n [her] private." Id. at 247. Robinson placed his hand on the inside of her clothing and touched both the outside and inside of her vagina.

On another occasion, J.B. and Robinson were in Robinson's basement sitting in a recliner chair, and J.B. asked Robinson if she could use his "laptop to [] play on" a website. Id. at 250. Robinson told J.B.: "[W]hy don't you come and sit on my lap," and J.B. complied. Id. at 252. While J.B. used the laptop, Robinson "reached his hand [] over around . . . [her] and just started touching [her]." Id. at 254. Robinson placed his hands inside of her clothing and, using his finger, touched both the inside and outside of J.B.'s vagina. Robinson moved his hand "in circles and . . . . in a line straight [sic], back and forth." Id. at 255. At this time, Robinson's two children were also in the house.

On one more occasion at Robinson's house in the morning, J.B. went into Robinson's bedroom because she "didn't like being downstairs by [herself] . . . ." Id. at 267. J.B. lay on the bed "where [she] was like partially off," and Robinson, who had been "all the way over onto one side" began to move towards the middle of the bed. Id. Robinson reached his hand underneath J.B.'s clothing and began touching the inside and outside of her vagina.

On March 1, 2008, J.B. informed her mother that she had been molested by Robinson. On June 26, 2008, the State filed a six-count information charging Robinson with three counts of child molesting as class A felonies (Counts I-III) and three counts of child molesting as class C felonies (Counts IV-VI). On April 26, 2010, the State filed an amended charging information which charged Robinson with three counts of child molesting as class A felonies (Counts I-III) and two counts of child molesting as class C felonies (Counts IV-V). The charges contained in the amended charging information

contained wording which differed from the original charging information and were renumbered.

On April 28, 2010, a jury trial began. At the outset of trial, Robinson and the State discussed the State's amended charging information. After noting that the original Count II had been dismissed and Count III had been renumbered as amended Count II, Robinson objected, arguing that the addition of the word "anus" to amended Count II "prejudices the substantial rights of [Robinson] significantly . . . because it simply gives the State another avenue that they have not previously disclosed" to prove Count II. Id. at 29-30. Robinson also objected to another change it termed "substantive" where original Count VI was re-filed as amended Count III and "which is elevated from a C felony to an A felony." Id. at 30. Robinson argued that "[i]t changes the language, touched her vagina to the [] new language, placed his finger in her vagina," and that it "goes on and also changes, while sitting in his lap in the basement recliner with other children present[,] to the new language, while she was in [Robinson's] basement sitting in a recliner chair." Id. at 30-31. Robinson argued that the "substantive change [] going from a mere touch to an actual penetration . . . prejudices our client's (inaudible) rights. It is a substantive change [] we have not prepared to defend . . . ." Id. at 31. The prosecutor explained that "I did change the charging information and the reason of course . . . is that . . . the court wanted me to be a little clearer on each Count . . . to clear up any possible [] overlap between the Counts." Id. at 33. The prosecutor argued that she did not "believe that the changes . . . prejudice the substantial rights" of Robinson because his

defense "under the original information . . . would be equally available [] after the amendment" in that the changes "comport[] with the evidence that . . . will be presented in this case and [] that has been part of discovery . . . ." Id. at 34-35. The court ruled to allow the State to proceed with the five-count amended charging information.

On April 30, 2010, the jury found Robinson guilty as charged. On June 29, 2010, the court held a sentencing hearing.[2] In imposing its sentence, the court identified Robinson's history of steady employment, the hardship imposed on his children as a result of his incarceration, and his lack of criminal history as mitigators. The court listed as aggravators that: (1) Robinson did not "have a relationship . . . with [J.B.] prior to the time the [] allegations occurred;[3] (2) Robinson was in a position of trust; (3) Counts IV and V "were supported by evidence that would have [] justified a finding of guilty had [he] been charged with a Class A felony;" and (4) the multiple violations of the same crime on the same victim. Sentencing Transcript at 28-29. The court sentenced Robinson to fifty years each on Counts I-III to be served concurrently, and to eight years each on Counts IV-V to be served consecutively to Counts I-III and consecutively to each other. Thus, the court imposed an aggregate sentence of sixty-six years in the Department of Correction.

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[2] In advance of sentencing, the court ordered a presentence investigation report which is contained in the record as part of the appellant's appendix. We remind Robinson's counsel that presentence investigation reports shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential." Ind. Trial Rule 5(G)(1).

[3] The court noted that this aggravator was found "based upon the argument that the State made today . . . ." Sentencing Transcript at 28. At the sentencing hearing, the State argued that, based upon Rivers v. State, 915 N.E.2d 141, 143 (Ind. 2009), "the lack of a constructive relationship should be considered as an aggravator . . . ." Id. at 20.

I.

The first issue is whether the court erred in allowing the State to amend the charging information two days prior to trial. Robinson argues that "[t]he Trial Court's order granting the State's request to amend the Charging Information on the morning of trial" violated his due process rights because "[t]he amendments were substantive in nature . . . ." Appellant's Brief at 4. Robinson acknowledges that his counsel "did not request a continuance of the trial date based on the State's Amended Information," but he "believes that his fundamental right to be informed of the allegations against him and raise a defense supercedes [sic] any waiver argument." Id. at 13.

This court recently examined this issue in Wilson v. State, 931 N.E.2d 914 (Ind. Ct. App. 2010), trans. denied. In Wilson, the State was allowed, over defendant's objection, to amend the charging information the day before trial was scheduled to begin. Wilson, 931 N.E.2d at 917-918. We acknowledged that the General Assembly amended Ind. Code § 35-34-1-5 in response to the Indiana Supreme Court's opinion in Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). Ind. Code § 35-34-1-5, as amended, permits "amendments of substance at any time before the commencement of trial so long as the amendment does not prejudice the substantial rights of the defendant." Id. at 918. This amendment went into effect on May 8, 2007, and it is undisputed that the amended version applies to the instant matter. We held in Wilson that, under amended Ind. Code § 35-34-1-5, "a defendant's failure to request a continuance after a trial court allows a pre-trial substantive amendment to the charging information over defendant's objection

results in waiver." Id.; see also Riley v. State, 506 N.E.2d 476, 478 (Ind. 1987) (holding that the defendant waived his right to appellate review of the trial court's order by failing to "avail himself of the statutory continuance available to allow 'adequate opportunity to prepare his defense'").

The State amended its charging information two days before trial was set to commence. Although Robinson objected, he did not request a continuance as required. Consequently, we conclude that Robinson has waived the issue.[4]

II.

The second issue is whether Robinson's sentence of sixty-six years is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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).

[4] To the extent that Robinson argues that "his fundamental right to be informed of the allegations against him . . . supercedes [sic] any waiver argument," we note that he cites Kellems v. State, 849 N.E.2d 1110, 1112 (Ind. 2006), for the proposition. Appellant's Brief at 13. In Kellems, the issue was whether the defendant was denied his constitutional right to be tried by jury. Kellems, 849 N.E.2d at 1112. Robinson, appearing to quote Kellems, argues that "[a] fundamental aspect of our system of criminal justice is the right to a trial by jury. Although this right may be waived, we have concluded that the statutory requirement that a consent to a waiver of his right to jury trial means that an assent by the Defendant be personally reflected in the record before the trial begins either in writing or in open Court." Appellant's Brief at 13-14. Robinson argues that "[t]here is no reason why [his] right to raise a proper defense should be treated any differently in that there should be an obligation on the Trial Court to question [him] as to whether or not he wished to move forward after the amendments were granted." Id. at 14. Under the circumstances, we do not find Robinson's argument persuasive.

Robinson argues that "the facts and circumstances surrounding the acts with respect to all charged counts are not extraordinary in any way, shape, or form," and that the court did not properly evaluate his character. Appellant's Brief at 10.

Our review of the nature of the offenses reveals that Robinson committed multiple, similar acts of molestation consisting of digital penetration against eight-year-old J.B. over a six month period. J.B. has "been through counseling ever since this has taken place." Sentencing Transcript at 11.

Our review of the character of the offender reveals that Robinson's criminal history consists of only a theft conviction in Illinois while he was attending college in 1996, for which he received one year of probation. As identified by the court at sentencing, Robinson has a history of steady employment, working for a company for twelve years until he lost his job following the jury trial. Robinson has been an involved father in the lives of his two children. He served in the Indiana Army National Guard for six years and was honorably discharged.

Based upon the facts and circumstances we believe that Robinson's sentence of sixty-six years is inappropriate. Although the court ordered Robinson's three class A felony convictions to be served concurrently, we note that Robinson received maximum sentences on all five counts. While Robinson's crimes are despicable, we note that the nature of his offenses, as well as his character, notably his minimal criminal history, his employment history, and his military service, demonstrate that he is far from the worst of offenders. See Buchanan v. State, 767 N.E.2d 967, 974 (Ind. 2002) (holding that in

general, the maximum possible sentences should be reserved for the worst offenders and offenses). Accordingly, we conclude that Robinson's sentences for each count of child molesting as a class A felony (Counts I-III) should be reduced to the advisory term of thirty years, and we maintain that those sentences be served concurrently. We also modify Robinson's sentences on Counts IV and V for child molesting as class C felonies to the advisory term of four years each and we order that those sentences be served concurrent with each other and consecutive to Counts I-III. We also order that the final four years of Robinson's sentence be suspended to probation. Thus, Robinson's aggregate sentence shall be thirty-four years with thirty years executed and four years suspended to probation.

For the foregoing reasons, we affirm the trial court's ruling allowing the State to amend its charging information and reverse the court's aggregate sentence of sixty-six years and remand for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

RILEY, J., concurs.

ROBB, C.J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY ROBINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-1007-CR-848
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

ROBB, Chief Judge, dissenting

I respectfully dissent from the majority's decision to revise Robinson's sentence downward by effectively half. His commission of child molesting offenses on five separate occasions over a period of six months makes enhanced sentences fully appropriate. Yet the majority's decision reduces his executed time to thirty years, the advisory sentence for a single offense of Class A felony child molesting. That being said, I agree with the majority's implicit premise that Robinson, because he has no significant criminal history and will likely return to society regardless of whether his sentence is reduced, should have a portion of his sentence suspended to supervised probation.

I would let stand the trial court's sentencing of Robinson to fifty years on each Class A felony and eight years on each Class C felony. However, I would revise and remand for the Class C felony sentences to be served concurrently with each other, although consecutively to the Class A felony sentences, for a total sentence of fifty-eight years. In addition, I would suspend the final eight years of Robinson's sentence to supervised probation.