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ATTORNEY FOR APPELLANT:

**JOHN S. ANTALIS**
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana
Indianapolis, Indiana

**MONIKA PREKOPA TALBOT**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| J.S. | | |
| Appellant-Defendant, | ) | |
| vs. | ) | No. 79A02-0805-CR-465 |
| STATE OF INDIANA, | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0703-FC-00015

**JUNE 29, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant J.S. appeals his convictions of and sentence for two counts of child molesting, Class C felonies. (Ind. Code § 35-42-4-3(b)). We affirm.

## ISSUES

J.S. raises four issues for our review, which we restate as:

I. Whether the trial court abused its discretion in admitting into evidence a videotape of the victim.

II. Whether D.H.'s testimony was "incredibly dubious."

III. Whether the trial court abused its discretion in sentencing J.S.

IV. Whether the sentence imposed by the trial court was inappropriate.

D.H., who was born in 1998, lived in Florida with her mother ("A.H.") until 2003, when she moved to Indiana with A.H. so that A.H. could be around A.H.'s father, J.S. Approximately twice a month, D.H. would spend the night at J.S.'s house, and she would occasionally stay with relatives when J.S. was present. During this time, J.S. became upset with A.H. because she was pregnant with "another fatherless black child." (Tr. 230). After January of 2006, when A.H.'s son was born, A.H. had no contact with J.S.

On August 16, 2006, D.H. told her mother and grandmother that J.S. had molested her. Although the molestations had happened some months prior to D.H.'s revelation, she had not told anyone because she was afraid of getting in trouble. On the same day, A.H. met with Tippecanoe County Deputy Sheriff John Ricks and made a complaint

against J.S. Shalon Perez, the director of Heartford House, where abused children are interviewed, talked to D.H. on August 22, 2006.

D.H. told Perez that one night before Thanksgiving of 2005, she was in the bathroom at J.S.'s house, and he told her to come out. When D.H. came out of the bathroom, she saw J.S. naked on the bed. Defendant grabbed D.H.'s arm, squeezed some white stuff out of his private part, and made D.H. eat it. The white stuff tasted nasty. D.H. tried to scream, but J.S. told her to "shut up."

On Christmas Eve of the same year, when D.H. was at an aunt's house sleeping on the couch, she awakened to find her hand on J.S.'s private part, which was hard and outside the zipper of J.S.'s pants.

J.S. denied the allegations saying, "those girls have concocted this." (Tr. 259). The State charged J.S. with two counts of Class C felony child molesting, and a jury found him guilty of both counts. He now appeals.

## DISCUSSION AND DECISION

### I. ADMISSION OF VIDEOTAPE

J.S. contends that the trial court abused its discretion in admitting D.H.'s videotaped statement. Specifically, he argues that the videotaped message was not sufficiently reliable under Indiana's Protected Person Act (Ind. Code § 35-37-4-6). The Act provides that an otherwise inadmissible statement or videotape made by a child under fourteen years of age is admissible in a criminal action involving sex crimes defined in Indiana's code (Ind. Code § 35-42-4-1 et al.).

A trial court's decision to admit statements under the Act will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. *M.T. v. State*, 787 N.E.2d 509, 511 (Ind. Ct. App. 2003). An abuse of discretion occurs only when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id*.

Under the Act, a statement or videotape that is made by someone who at the time of trial is a protected person, concerns an act that is a material element of the charged offense, and is not otherwise admissible, becomes admissible if the court finds that the "time, content, and circumstances of the statement or videotape provide sufficient indications of reliability, and the 'protected person' either testifies at trial or is found to be unavailable." *Id*. at 512. Considerations in making the reliability determination under the Act include "the time and circumstances of the statement, whether there was significant opportunity for coaching, the nature of questioning, whether there was a motive to fabricate, use of age appropriate terminology, and spontaneity and repetition." *Id.* (quoting *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997)).

In the present case, J.S. argues that the trial court abused its discretion because D.H.'s videotaped statement (1) was recorded more than seven months after the events giving rise to the child molesting charges; (2) revealed a motive to fabricate; and (3) exhibited inconsistencies affecting reliability.

It does not appear that the trial court's admission of the videotaped statement was an abuse of discretion. First, while it is true that a substantial period of time passed

between the touchings and the statement, this is just one factor to be considered and is not necessarily dispositive. *See Trujillo v. State*, 806 N.E.2d 317, 328 (Ind. Ct. App. 2004). Furthermore, D.H. did not share her story with anyone until several months after the molestation because she was scared she would be in trouble. On the day that D.H. told about the events, her mother reported the statements to the police. There is no evidence of coaching during the time leading up to the initial or the videotaped statements.

Second, although there was a strained relationship between A.H. and J.S. because of J.S.'s determination not to accept her son as his grandchild, the trial court was within its discretion to determine that there was no evidence A.H. encouraged D.H. to concoct a story to cause J.S. any trouble. Although D.H. noted in the videotaped statement that J.S. "talks mean to my mom," the trial court was within its discretion to determine that there was no evidence that the "mean talk" caused D.H. to create a story about the molestations.

Third, the alleged inconsistencies in the videotaped statement pertained to D.H.'s confusion about her age at the time of the molestations, her supposed confusion as to whether J.S. molested her two or three times, and her description of J.S.'s sperm as "thin like water." We do not find that the trial court abused its discretion in allowing the tape in evidence with these alleged inconsistencies. It is not damning that D.H., a young and traumatized child, would forget whether she was six- or seven-years old when she was molested or that she would not be able to testify as to the exact consistency of the sperm that J.S. forced into her mouth. Additionally, she did testify on tape about the

Thanksgiving and Christmas incidents, as well as an attempt when J.S. took her "to the floor" in an apparent attempt at molestation. Thus, there is no inconsistency as to the number of "molestations."

Finally, the videotaped statement was the product of an interview by an experienced forensic child interviewer. Taking all the factors into consideration, we cannot say that the trial court abused its discretion in deeming the videotaped statement reliable. Thus, the trial court did not abuse its discretion in admitting the statement.

## II. INCREDIBLE DUBIOSITY

J.S. contends that the State failed to present sufficient evidence to support his convictions. Specifically, he argues that D.H.'s testimony was "incredibly dubious."

In reviewing sufficiency claims, this court does not reweigh the evidence or judge the credibility of witnesses. We consider only the evidence most favorable to the verdict, together with all reasonable and logical inferences to be drawn therefrom. The verdict will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Vega v. State*, 656 N.E.2d 497, 504 (Ind. Ct. App. 1995), *trans. denied*. The testimony of the victim, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molestation. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

On rare occasions, this court may overturn a conviction because the evidence is "incredibly dubious." The "incredible dubiosity" rule applies where a sole witness presents testimony that is inherently improbable or coerced, equivocal, or wholly

uncorroborated. *Carter v. State*, 754 N.E.2d 877, 880 (Ind. 2001), *cert. denied*, 537 U.S. 831, 123 S.Ct. 135, 154 L.Ed.2d 47 (2002). Incredibly dubious or inherently improbable testimony is that which runs counter to human experience and which no reasonable person could believe. *Campbell v. State*, 732 N.E.2d 197, 207 (Ind. Ct. App. 2000).

Here, D.H. unequivocally and consistently told the interviewer that around Thanksgiving, when she was six- or seven-years old, J.S. grabbed her arm, squeezed some white stuff out of his private part, and made D.H. eat the "nasty" stuff. D.H. further unequivocally and consistently stated that on Christmas Eve of the same year, when D.H. was sleeping on an Aunt's couch, she was awakened to find her hand on J.S's private part, which was hard and outside the zipper of J.S.'s pants.

These statements were at least partially corroborated by A.H.'s testimony that in 2005, A.H. and D.H. spent the night at J.S.'s house. A.H. further testified that D.H. spent Christmas Eve at her aunt's house.

The unequivocal and consistent statement of D.H was not incredibly dubious. Furthermore, D.H.'s statement was not made under coercion and there was circumstantial evidence that D.H. was with J.S. at the time of the molestations. J.S. argues that D.H. should not be believed because (1) she showed no trepidation to visit her aunt when she knew J.S. was going to be there; (2) she received no threats, yet she did not come forward until months after Christmas; and (3) she exhibited no evidence of trauma. These factors all go to weight, and not to "incredible dubiosity." A reasonable jury could have determined that D.H. was a remarkably resilient child who could go to her aunt's house

with the mistaken idea that the presence of others would protect her from J.S. A reasonable jury could have also determined that D.H. was so traumatized that she buried the memories until something triggered remembrance. Finally, a reasonable jury could have determined that she felt threatened despite the lack of explicit threats. The evidence is sufficient to support the convictions.

## III. SENTENCING-ABUSE OF DISCRETION

J.S. contends that the trial court abused its discretion in considering D.H.'s age and his lack of remorse as aggravating circumstances.

When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). If the recitation includes a finding of mitigating or aggravating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*.

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons

for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id*. at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id*. at 491.

In the present case, the trial court cited as aggravators: (1) J.S.'s lengthy history of criminal or delinquent behavior; (2) D.H.'s young age; (3) J.S.'s lack of remorse; (4); J.S.'s position of trust; and (5) the commission of multiple offenses. The trial court also cited a number of mitigators.

J.S. first argues that the trial court abused its discretion in citing D.H.'s age as an aggravating circumstance. Ind. Code § 35-42-4-3(a) states that "[a] person who, with a child under fourteen (14) years of age, performs or submits to intercourse or sexual deviate conduct" commits child molesting. In *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006), we held that a trial court may not use a material element of the offense (such as the age of the victim) as an aggravator unless the child's age is emphasized by the trial court as part of the particular nature and circumstances of the offense.

Here, the trial court emphasized, "The age is part of the sentence, but the youth and naivete of the victim aggravates this beyond the case of somebody who is mature, but simply not of the age of consent." (Sentencing Tr. at 427). Although the court could have been more explicit, it is clear that it is citing D.H.'s age to emphasize the particular nature and circumstances of the offense, i.e. the theft of D.H.'s innocence. We cannot say that the trial court abused its discretion in referring to age as an aggravator.

J.S. argues that the trial court abused its discretion by classifying lack of remorse as an aggravator. The State concedes that lack of remorse cannot be an aggravator when a defendant maintains his innocence throughout the trial, and the evidence comes from a single victim's testimony. *See Dinger v. State*, 540 N.E.2d 39, 40 (Ind. 1989). The trial court appeared to recognize the import of *Dinger*, making reference to J.S.'s right to plead guilty. However, the trial court goes on to talk about an unidentified "animosity." (Sentencing Tr. at 427). Under the circumstances, we cannot say that the trial court properly exercised its discretion to find lack of remorse as an aggravator.

J.S. contends that the trial court abused its discretion in not considering his "Level of Service Inventory" ("LSI-R") as a mitigating factor. The LSI-R is "a standardized actuarial instrument that contains 54 items and produces a summary risk score that can categorized into five risk levels…Higher risk levels reflect an increase in the propensity to commit future criminal acts." *Rhodes v. State*, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008) (quoting Christopher T. Lowenkamp & Kristin Bechtel, *The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System*, 71 Fed. Probation 25, 25-26 (Dec. 2007)). While this actuarial instrument "may be a helpful consideration for a probation department in determining rehabilitative services for an offender, *its use by a trial court to assess a defendant's propensities is contrary to the essential function of the trial court in sentencing*." *Rhodes, id.* (emphasis supplied). The use of a standardized scoring model, such as the LSI-R, "undercuts the trial court's responsibility to craft an

appropriate, individualized sentence." *Id*. Reliance upon a "sum of numbers purportedly derived from objective data cannot serve as a substitute for an independent and thoughtful evaluation of the evidence presented for consideration." *Id*. As our supreme court recently noted, "[a]ny effort to force a sentence from some algorithm based on the number and definition of crimes and various consequences removes the ability of the trial judge to ameliorate the inevitable unfairness a mindless formula sometimes produces." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The trial court properly exercised its discretion in not considering J.S.'s LSI-R results.

Finally, J.S. contends that the trial court abused its discretion in not considering that the offenses "neither caused nor threatened serious harm to persons or property." Appellant's Brief at 19. Grabbing the arm of a trusting grandchild and forcing her to commit a sexual act could certainly be perceived as a threat of serious harm to the child. Furthermore D.H.'s aunt testified that D.H. suffered serious emotional harm from these episodes. Again, the trial court did not abuse its discretion.

## IV. INAPPROPRIATE SENTENCE

J.S. contends that his sentence was inappropriate. A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in

the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied.* The "nature of the offense" portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court's sentence review. *Anglemyer v. State*, 868 N.E.2d at 491. The "character of the offender" portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

Initially, we note that J.S. was sentenced to eight years on Count 1 and four years on Count 2, with the sentences to run concurrently. As noted above, both offenses were Class C felonies. Ind. Code § 35-50-2-6 states that a person who commits a Class C felony "shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."

With regard to the nature of the offenses, we note that J.S., as D.H.'s grandfather, used his position of trust to violate a small child. In the first offense, J.S. chose a cherished family holiday to force semen into the mouth and down the throat of a child who trusted him to care for her. In the second offense, J.S. again chose a family holiday to force a child to partner with him in a sexual act.

With regard to the nature of J.S.'s character, we note that although J.S. had committed only one recent offense, he has had numerous brushes with the legal system. Even more important is the testimony at trial by another one of his victims, again a child who had trusted him.

The nature of the offenses and J.S.'s character lead us to the conclusion that the sentence was not inappropriate.

Affirmed and remanded for correction of the written sentencing statement and judgment.

MATHIAS, J., and CRONE, J., concur.