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IN THE
COURT OF APPEALS OF INDIANA

JOSE A. CORTEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 19A05-0903-CR-117
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable William E. Weikert, Judge
Cause No. 19C01-0712-FA-308

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jose A. Cortez appeals his convictions and sentence for class A and class C felony child molesting. We affirm.

Issues

We reorder and restate the issues as follows:

I. Did the trial court err in admitting the doctor's testimony regarding the pelvic examination of the victim?

II. Did the trial court err in failing to consider Cortez's lack of criminal history as a significant mitigating factor in his sentencing?

III. Is Cortez's forty-five-year sentence inappropriate in light of the nature of the offenses and his character?

Facts and Procedural History

On August 30, 2003, Cortez married Blanca Ramos. About one month later, he began living with Blanca and her two daughters, T.R. and J.R. In October 2003, around the time of T.R.'s seventh birthday, Cortez touched her breasts and buttocks. He continued to come to her bedroom and touch her over a period of two years. When T.R. turned nine, Cortez began "putting his penis in [her]." Tr. at 105. He continued to have sexual intercourse with T.R. once or twice a week for about two years.

On November 14, 2007, the Department of Child Services received a report from T.R.'s family members voicing suspicion that Cortez had been molesting T.R., and an investigation ensued. As part of the investigation, Dr. Robert Maitlen examined T.R. and J.R. Although J.R. showed no signs of sexual abuse, Dr. Maitlen observed that T.R. had several conditions that, taken collectively, led him to conclude that "somebody had either

been inserting something in [T.R.'s vagina] regularly or having intercourse" with her. *Id*. at 221; State's Ex. 1, 2.

On January 2, 2008, the State charged Cortez with class A felony child molesting. On August 26, 2008, the State filed an amended information, charging Cortez with one count of class A felony child molesting and one count of class C felony child molesting. A jury trial began on September 24, 2008. Before the second day of trial, Cortez moved to exclude any testimony by Dr. Maitlen regarding the condition of T.R.'s hymen on the ground that its prejudicial impact highly outweighed its probative value. The trial court characterized his objection as a motion in limine and denied it, finding that the evidence was relevant and the witness would be subject to cross examination. Subsequently, the trial court admitted without objection Dr. Maitlen's verbal testimony, examination notes, and letter summarizing his findings. Dr. Maitlen testified that he was unable to detect a visible hymen or hymenal ring and that this condition, when taken in conjunction with the size and color of T.R.'s vagina, led him to conclude that she had been sexually molested. Tr. at 218-21.

The jury found Cortez guilty as charged. On October 20, 2008, the trial court sentenced Cortez to forty-five years for the class A felony, with an eight-year concurrent sentence for the class C felony. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Doctor's Testimony

Cortez contends that the trial court erred in admitting Dr. Maitlen's testimony. At the

outset, we note both the timing of and the stated basis for Cortez's objection to Dr. Maitlen's testimony. Cortez objected prior to Dr. Maitlen taking the stand. As such, the trial court characterized the objection as a motion in limine. "[A] party may not assert on appeal a claim of trial court error in the overruling of a motion in limine seeking the exclusion of evidence unless the party objected to the evidence at the time the evidence was offered." *Sisk v. State*, 736 N.E.2d 250, 251 (Ind. 2000). Not only did Cortez fail to enter a contemporaneous objection to Dr. Maitlen's verbal testimony, but defense counsel also specifically stated that he had no objection to the admission of Dr. Maitlen's examination notes and letter. Tr. at 221-23. Thus, Cortez has waived appellate review based on his failure to enter a timely objection.

Moreover, at trial, Cortez challenged Dr. Maitlen's testimony on the basis that its prejudicial impact outweighed its probative value. Thus, to the extent he now challenges Dr. Maitlen's testimony on the basis of Indiana Evidence Rule 702(a), his claim is waived for failure to raise it at trial. *See Burnett v. State*, 815 N.E.2d 201, 207 (Ind. Ct. App. 2004) (stating that a defendant may not argue one ground for objection at trial and then raise a new ground on appeal).

Waiver notwithstanding, we will determine whether the trial court committed fundamental error. The fundamental error exception to the waiver rule is extremely narrow, available only "when the record reveals clearly blatant violations of basic and elementary principles of due process, and the harm or potential for harm cannot be denied." *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) (citation, internal quotation marks, and alterations

omitted). Simply stated, it is error that is so prejudicial as to make a fair trial impossible. *Smith v. State*, 891 N.E.2d 163, 171 (Ind. Ct. App. 2008), *trans. denied*.

As stated, Cortez now bases his challenge on Indiana Evidence Rule 702, which provides in pertinent part:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, *or* education, may testify thereto in the form of an opinion or otherwise.

(Emphasis added.) Specifically, Cortez alleges that, because Dr. Maitlen is certified in family medicine rather than gynecology or pediatrics, he lacked the expertise necessary under Rule 702(a) to testify regarding the condition of T.R.'s hymen. We disagree. Under Rule 702(a), the witness may be qualified as an expert based on only one of the characteristics listed. *Burnett*, 815 N.E.2d at 204. The record indicates that Dr. Maitlen has extensive training and experience in both pediatrics and gynecology despite his lack of certification in these areas. He works for government agencies in six counties, regularly performing pediatric examinations on suspected victims of physical and sexual abuse. He has twenty-three years' experience and has performed more than 1,000 pelvic exams during that time. Cortez argues that an unusual condition may account for the absence of a visible hymen and that Dr. Maitlen's lack of certification in gynecology made him less capable of discerning such a condition. However, limitations in Dr. Maitlen's expertise go to the weight, not the admissibility, of his testimony. *Simpson v. State*, 628 N.E.2d 1215, 1222 (Ind. Ct. App. 1994), *trans. denied*. Thus, the trial court did not commit error, let alone fundamental error, in admitting Dr. Maitlen's testimony.

II. Mitigating Factors

Cortez asserts that the trial court erred in failing to properly consider his lack of criminal record as a mitigating factor. Indiana Code Section 35-38-1-7.1(c)(6) provides that the "court *may* consider … as a mitigating circumstance … [that t]he person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime." (Emphasis added.)

Cortez molested T.R. from 2003 to 2007. In 2005, the Indiana General Assembly amended the sentencing statutes, discarding the presumptive sentencing scheme and adopting an advisory sentencing scheme. The new sentencing scheme applies to acts committed after April 25, 2005. The record indicates that Cortez began having intercourse with T.R. when she turned nine; her ninth birthday was October 22, 2005. Thus, the new sentencing scheme was in effect as to the class A felony. However, Cortez fondled T.R. from the time she was seven until the time she turned nine. With regard to the class C felony, it is unclear whether the jury found Cortez guilty of acts committed before or after April 25, 2005. As such, it appears that he committed some of his acts prior to the amendment of the Indiana sentencing statutes.

Under both the old and new sentencing schemes, sentencing decisions are left to the trial court's sound discretion and will be reversed only upon a showing of manifest abuse of discretion. *Klein v. State*, 698 N.E.2d 296, 300 (Ind. 1998); *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs where 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." *Anglemyer*, 868 N.E.2d at 490.

To the extent Cortez challenges the weight assigned to his lack of criminal record, we note that under the new sentencing scheme, trial courts are no longer required to weigh aggravating and mitigating factors when imposing a sentence. *Id*. at 491. Thus, a trial court can no longer be said to have abused its discretion for failing to properly weigh such factors. *Id*. As such, Cortez's claim fails as to the class A felony count because the acts occurred after the effective date of the new sentencing scheme.

Even using the old sentencing scheme, the trial court would not have been required to find that certain mitigators existed or to explain why it found that certain factors were not sufficiently mitigating. *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005). Moreover, under the old sentencing scheme, the trial court would not have been required to credit mitigating factors in the same manner as would the defendant. *Id*.

At sentencing, the trial court listed as significant aggravating factors Cortez's violation of his position of trust and the fact that he engaged in a continuous pattern of abuse against T.R. for approximately four years. The court then considered Cortez's lack of criminal history:

> And the Defendant has no history of delinquency or criminal activity. That's true as a mitigating factor. But taking into consideration he's been in this country for sixteen years, so during that sixteen year period as far as anyone can tell there's no record for this individual by this name. What happened to him..if he's fifty-three he says now …. what happened to him from age thirty-seven back, no one knows whether he had any kind of record in his..in his country or if he..we don't know that. So it's difficult at least to give a great deal of weight to an individual's record or lack thereof under these

> circumstances because we didn't know him, or he didn't live in this country, until he was thirty-seven; and it's not that easy to track records of individuals who have his status. *So I consider that a mitigating circumstance, but minimally.*

Tr. at 305-06 (emphasis added). Cortez entered the country illegally in 1992. *Id*. at 299. The fact that the court lacked access to a record of any criminal activity prior to that time does not translate into proof of no criminal history. Under the circumstances, we find no abuse of discretion in the trial court's treatment of Cortez's criminal history.

III. Appropriateness of Sentence

Cortez challenges the appropriateness of his forty-five-year aggregate sentence. On appeal, "we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the reviewing court that his sentence meets the inappropriateness standard. *Anglemyer*, 868 N.E.2d at 494; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In addressing the nature of the crime, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Anglemyer*, 868 N.E.2d at 494. Class A felony child molesting carries an advisory sentence of thirty years, with a permissible range of twenty to fifty years. Ind. Code § 35-50-2-4. Class C felony child molesting carries an advisory sentence of four years, with a permissible range of two to eight years. Ind. Code § 35-50-2-6. As stated, the trial court imposed an enhanced forty-five-year sentence on the class A felony conviction and a concurrent maximum eight-year sentence on the class C

felony based mainly on Cortez's violation of his position of trust and on the repeated and continuous nature of the abuse. Cortez repeatedly exploited his young stepdaughter by fondling her for two years and having intercourse with her once to twice a week for two more years. Thus, in all, he committed his depraved acts not once but hundreds of times.

Moreover, Cortez's poor character is reflected in the abuse of his position of trust as T.R.'s stepfather. *See Rodriguez v. State*, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007) (noting that stepparent relationships do and should establish a position of trust between the adults and minors living together). He began molesting T.R. just two months after he married her mother. He fondled or had intercourse with her when her mother was not home or was downstairs in the kitchen. In addition, he took her out of school to molest her under the guise that he needed her to accompany him as an interpreter for his doctor appointments, kept her home from church to molest her, and skipped work to molest her when she was absent from school due to illness. Tr. at 105-06, 130-31, 139. In sum, Cortez has failed to persuade us that his forty-five-year sentence is inappropriate. Accordingly, we affirm.

Affirmed.

BRADFORD, J., and BROWN, J., concur.