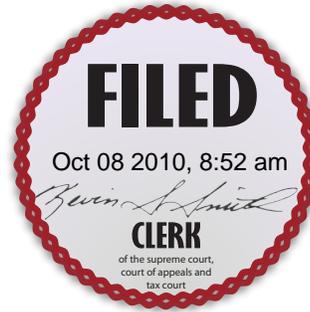


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

STEVEN KNECHT
Vonderheide & Knecht, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JASON D. MILLER,)
)
Appellant-Defendant,)
)
vs.) No. 08A02-1002-CR-129
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-0803-FA-1

October 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jason Darrell Miller (Miller) appeals from his conviction of and sentence for class A felony Child Molesting¹ by deviate sexual conduct and class C felony Child Molesting² by fondling or touching. Miller presents the following issues for our review:

1. Did the trial court violate the *ex post facto* clauses of the Indiana and United States Constitutions by applying the credit-restricted felon statute to Miller's sentencing?
2. Do Miller's convictions for class A felony child molesting and class C felony child molesting violate double jeopardy principles?
3. Did Miller receive a legal sentence where the trial court imposed a thirty-year executed sentence for his class A felony conviction for child molesting a five-year-old victim?
4. Is the evidence sufficient to support Miller's conviction of class A felony child molesting?
5. Is Miller's sentence inappropriate?

We affirm in part, and reverse and remand in part.

On October 27, 2007, five-year-old K.M., her nine-year-old brother, B.M., and their mother, Angel Staniford (Angel) fell asleep watching a movie in the living room of their home. Angel's boyfriend, Jason MaCurdy (Jason), the children's father, was out with his friend, Miller. Jason and Miller returned to the house at approximately 5:30 a.m. on October 28, 2007. Jason went upstairs to go to bed and Miller lay down on the floor in the living room where the children were sleeping.

Angel, who had since gone upstairs to bed, was awakened when Jason, who smelled

¹ Ind. Code Ann. § 35-42-4-3(a)(1) (West, Westlaw through 2010 2nd Regular Sess.).

² I. C. § 35-42-4-3(b).

of alcohol, came upstairs. Angel went downstairs where she tripped over Miller, who also smelled of alcohol. Angel instructed Miller to go into B.M.'s downstairs bedroom since B.M. was asleep in a recliner in the living room. Angel told Jason that Miller was in the house and then told K.M., who was awake, that she could go into B.M.'s room to watch cartoons while Angel went to the store.

K.M. went into her brother's bedroom and climbed up into the loft bed to watch cartoons. As K.M. watched the television, Miller, who was also in the bed, removed her pants and underwear and licked her genitals. K.M. dozed at one point, and then climbed out of the bed to go to the restroom. Upon her return to her brother's bedroom, Miller resumed licking K.M.'s genitals. K.M. told Miller to stop, but he did not, instead telling her that the act would be their secret.

K.M. left the room and Angel returned from the store. Sometime after Angel's return, K.M. told her mother what had happened. Angel told Jason and took both of the children out of the house. Angel called the police after returning to the house.

Indiana State Police Trooper Stephen Buckley responded and took written statements from Angel and Jason. Trooper Buckley contacted the Department of Child Services and Indiana State Police Detective Blaine Butler to assist in the investigation. Detective Butler decided to take DNA samples from K.M. in her home with Angel's assistance. Angel followed Detective Butler's instructions when collecting the samples.

Angel took K.M. to the Heartford House in Lafayette the next day for a forensic interview. The director of the Heartford House, Shalon Perez (Perez), interviewed K.M. K.M. told Perez that while at her house Uncle Darrell took off her pants and her panties and

touched her crotch with his mouth. Miller did not stop when K.M. told him to stop instead telling K.M. to keep it a secret from her parents because they would get mad. K.M. told Perez that her parents “should get mad because that’s a bad thing.” *Supp. Appellant’s Appendix* at 25. While K.M. was at the Hartford House, Detective Butler took a saliva sample from her. Detective Butler later took a saliva sample from Miller.

Indiana State Police Laboratory Forensic DNA Analyst Lisa Robbins analyzed the four swabs taken from K.M. at her home and the saliva standards taken from K.M. and Miller. On the swab of K.M.’s upper right inner thigh, Miller was the source of the major DNA profile and K.M. could not be excluded as a possible contributor of the additional alleles. On the swab of K.M.’s upper left inner thigh, there was a mixture from which K.M. and Miller could not be excluded as possible contributors, but one distant profile was detected that was consistent with Miller. On the swabs of K.M.’s crotch, there was a mixture of major and minor profiles, and K.M. was the major DNA profile and Miller could not be excluded as a possible contributor of the additional alleles.

On March 27, 2008, the State charged Miller with class A felony child molesting by deviate sexual conduct and class C felony child molesting by fondling or touching. Miller testified at his jury trial and asserted his innocence. Miller also presented expert testimony on the issue of the reliability of the DNA results obtained from the Indiana State Police Laboratory. On December 9, 2009, at the conclusion of Miller’s jury trial, he was found guilty of both counts and was sentenced to concurrent sentences of thirty years executed for the class A felony conviction with ten years suspended to probation, and four years executed for the class C felony conviction.

The State filed a motion to correct error arguing that pursuant to Ind. Code Ann. § 35-50-2-2(i) (West, Westlaw through 2010 2nd Regular Sess.), the trial court could only suspend the portion of Miller’s sentence that exceeded thirty years. The trial court held a hearing on the motion and ultimately amended its sentencing order to impose a sentence of thirty years executed for Miller’s class A felony conviction. The trial court then, *sua sponte*, included the restriction that Miller was a credit restricted felon under Ind. Code Ann. § 35-41-1-5.5 (West, Westlaw through 2010 2nd Regular Sess.) and was eligible to receive Class IV credit for time spent incarcerated prior to sentencing. Miller now appeals.

1.

Miller argues that the trial court’s application of the 2008 credit restricted felons statute to him violated the federal and state constitutional prohibition against *ex post facto* laws. “An ex post facto law is one which applies retroactively to disadvantage an offender’s substantial rights.” *Armstrong v. State*, 848 N.E.2d 1088, 1092 (Ind. 2006). Both the United States Constitution and the Indiana Constitution prohibit ex post facto laws. U.S. Const. art. I, § 10; Ind. Const. art. 1 § 24. The ex post facto analysis is the same under both constitutions. *Upton v. State*, 904 N.E.2d 700 (Ind. Ct. App. 2009), *trans. denied*.

The credit restricted felon statute was added by the legislature in Pub. L. 80-2008, Sec. 6, with an effective date of July 1, 2008 and applies only to persons convicted after June 30, 2008. A credit restricted felon is defined by statute as:

- [A] person who has been convicted of at least one (1) of the following offenses:
 - (1) Child molesting involving sexual intercourse or deviate sexual conduct (IC 35-42-4-3(a)), if:

- (A) the offense is committed by a person at least twenty-one (21) years of age; and
- (B) the victim is less than twelve (12) years of age.

I.C. § 35-41-1-5.5. “A person who is a credit restricted felon and who is imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class IV. A credit restricted felon may not be assigned to Class I or Class II.” I.C. § 35-50-6-4(b). “A person assigned to Class IV earns one (1) day of credit time for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing.” I.C. § 35-50-6-3(d)(West, Westlaw through 2010 2nd Reg. Sess.).

In *Upton v. State*, a panel of this court held that application of the credit restricted felon statute to that defendant violated the prohibition against *ex post facto* laws because he was eligible for Class I credit time at the time he *committed* the offense and would have to serve more time in prison with a Class IV assignment. The State concedes that Miller is similarly situated and concedes that application of the credit restricted felon statute to Miller violates the prohibition against *ex post facto* laws. Accordingly, we reverse the trial court’s determination of Miller’s credit time classification and remand for proceedings consistent with this opinion.

2.

Miller also claims that his convictions for class A felony child molesting by criminal deviate conduct and class C felony child molesting by fondling violate double jeopardy principles. In particular, Miller argues that the two offenses constitute the same offense under the actual evidence test.

The Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” Ind. Const. art. 1, § 14. Two or more offenses are the same offense if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). In order to show that two challenged offenses constitute the same offense under the actual evidence test, a defendant must demonstrate a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.*

The actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Lee v. State*, 892 N.E.2d 1231 (Ind. 2008). Double jeopardy principles are not violated “when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.” *Id.* at 1234 (quoting *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002)). Upon review under the actual evidence test, this court identifies the essential elements of each of the challenged crimes and evaluates the evidence from the fact-finder’s perspective. *Lee v. State*, 892 N.E.2d 1231. We may consider jury instructions, argument of counsel, and other factors that may have guided the jury’s determination. *Spivey v. State*, 761 N.E.2d 831.

In order to prove that Miller committed class A felony child molesting by deviate sexual conduct, the State was required to show that Miller, while being at least twenty-one years of age, with K.M., a child under fourteen years of age, performed deviate sexual

conduct. I.C. § 35-42-4-3(a)(1). In order to prove that Miller committed class C felony child molesting by fondling, the State was required to show that Miller performed or submitted to any fondling or touching with K.M. while K.M. was under fourteen years of age, with the intent to satisfy the sexual desires of K.M. and/or the sexual desires of Miller. I.C. § 35-42-4-3(b).

Miller was born on June 11, 1972, and K.M. was five years old at the time of the offense. The evidence at trial established that K.M. came into her brother's bedroom to watch cartoons on his television and climbed into her brother's bed. Miller, who was also in that bed, removed K.M.'s underwear and pants and "licked her private." *Transcript* at 20. K.M. fell asleep and then awoke to go to the restroom. After K.M. returned to the bed Miller began "licking her private" again. *Id.* at 29. K.M. had returned to the bed believing that Miller would not "do it" again. *Id.* at 32. Additionally, the jury was permitted to infer Miller's intent to arouse or satisfy his sexual desires from the circumstantial evidence of the intentional touching of K.M.'s genital area. *Sanchez v. State*, 675 N.E.2d 306 (Ind. 1996).

Further, the trial court instructed the jury as follows:

In this case, the Defendant is charged with two counts of criminal offenses. Although all of the counts are contained within one charging document, you are to consider the law and the evidence as it may apply to each count individually and separately from the other counts.

Appellant's Appendix at 423. In its rebuttal in front of the jury the State emphasized that Miller was facing two counts of child molesting. Our review of the evidence from the fact-finder's perspective under the actual evidence test leads us to conclude that there is no violation of double jeopardy principles here.

3.

Miller challenges the sentence imposed on his class A felony conviction claiming that the trial court misinterpreted I. C. § 35-50-2-2(b) (West, Westlaw through 2010 2nd Regular Sess.). Miller requests that we remand this matter for resentencing.

Miller was initially sentenced on January 8, 2010 to thirty years executed with ten years suspended for the class A felony child molesting conviction. On January 11, 2010, the State filed a motion to correct error in which it argued that pursuant to I.C. § 35-50-2-2(i) the trial court could suspend only that portion of the Miller's sentence that exceeded thirty years. The trial court held a hearing on the matter at the conclusion of which it amended its sentencing order to impose a sentence of thirty years executed for Miller's class A felony conviction. Miller contends now on appeal that the trial court's comments at the hearing on the State's motion to correct error illustrate that the trial court misinterpreted the statute as requiring the imposition of a thirty-year sentence. Miller argues that the trial court could have imposed less than a thirty-year sentence so long as the sentence was fully executed.

The statute at issue provides in relevant part as follows:

- (a) The court may suspend any part of a sentence for a felony, except as provided in this section or in section 2.1 of this chapter.
- (b) Except as provided in subsection (i), with respect to the following crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence
 - (i) If a person is:
 - (1) convicted of child molesting (IC 35-42-4-3) as a Class A felony against a victim less than twelve (12) years of age; and
 - (2) at least twenty-one years of age;the court may suspend only that part of the sentence that is in excess of thirty years.

I.C. § 35-50-2-2.

In the present case, the trial court consistently expressed its opinion that a thirty-year sentence was warranted. The issue that was addressed in the motion to correct error was what portion of that sentence, if any, could be suspended to probation. The trial court stated:

Everyone was under the assumption that the minimum sentence was a – minimum executed sentence was a twenty[-]year sentence and the State must have realized after that the minimum sentence is a thirty[-]year sentence. . . . I would agree that based upon the presentence, and if the Court had the discretion, the Court—I would stand by the sentence that I had imposed on the 8th day of January, but I believe the State is accurate in asking for a Motion to Correct because the statute . . . required the Court to enter an executed— indicating that the advisory sentence of thirty years may not be suspended. . . . [O]bviously, I think had I had discretion, my previous sentence is a sentence that you would have received, but I think the law is the law and the court’s going to follow the law. And, therefore, you’re getting a thirty[-]year sentence, which was the sentence. But I cannot suspend the ten years that I had indicated I would be suspending and placing you on probation.

Motion to Correct Error Transcript at 3-5. Although the trial court talked in terms of minimum sentences,³ the reference addressed the suspendable portion of the sentence. The trial court consistently expressed the opinion that the thirty-year advisory sentence was warranted in Miller’s situation, but had to correct the sentence to reflect the statutory restrictions placed on the trial court’s ability to suspend a portion of the sentence. The trial court did not err.

4.

Miller contends that the evidence is insufficient to support his convictions. Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When

³Miller cites to *Hampton v. State*, 921 N.E.2d 27 (Ind. Ct. App. 2010), *trans. denied*. In that case, the State cross-appealed on the issue of whether I. C. § 35-50-2-2(i) created a new minimum executed sentence for that particular form of child molesting, instead of the general twenty-year minimum sentence for a class A felony conviction. Although Miller argues otherwise, that issue is not before us.

reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Boyd v. State*, 889 N.E.2d 321 (Ind. Ct. App. 2008). We do not assess witness credibility or reweigh the evidence. *Id.* We consider conflicting evidence most favorably to the trial court's ruling. *Id.* We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 325. The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Boyd v. State*, 889 N.E.2d 321.

Miller argues that the incredible dubiousity rule applies to K.M.'s testimony. Under the incredible dubiousity rule, a defendant's conviction may be reversed if a sole witness presents inherently improbable testimony, and there is a complete lack of circumstantial evidence. *Love v. State*, 761 N.E.2d 806 (Ind. 2002). The rule is applicable only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. *Id.* Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.*

K.M., who was five years old at the time of the offenses, and seven years old at the time of trial testified that Miller "licked her private." *Transcript* at 20, 27-29. K.M.'s testimony at trial was inconsistent with some of her prior statements in regard to some details, but her testimony as to how the molestation occurred remained consistent. The jury heard K.M.'s interview at the Hartford House, and heard her testimony during which she forgot some details at certain points only to remember them later. K.M. was thoroughly

cross-examined about the incidents, and there was no evidence of coercion.

Further, K.M.'s testimony was corroborated by the presence of Miller's genetic material on K.M.'s thigh. The inability of the laboratory to eliminate Miller as a contributor to other samples of genetic material taken from her thigh and crotch regions is circumstantial evidence that Miller committed the crimes alleged. Miller was able to present his argument about the propriety of the genetic material collection procedure to the jury through cross-examination of the witnesses. These were appropriate attacks on the weight and credibility of the evidence.

K.M. consistently testified that after she crawled into bed, Miller pulled down her pants and underwear and licked her private, and she was asleep at some point during the molestation. K.M. testified that she went to the restroom and climbed back into bed at which point Miller molested her a second time. At trial, Miller focused on inconsistencies in K.M.'s accounts of when she fell asleep, when she told her mother about the molestations, and other details. "The incredible dubiousity rule applies to conflicts in trial testimony rather than conflicts that exist between trial testimony and statements made to the police before trial." *Buckner v. State*, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006). The incredible dubiousity rule is inapplicable here.

Miller vigorously attacked the credibility of the witnesses and the reliability of the evidence at trial. His arguments here on appeal amount to a request that we reweigh the evidence and reassess the credibility of the witnesses, a task we cannot undertake. *Perez v. State*, 872 N.E.2d 208 (Ind. Ct. App. 2007). There was sufficient evidence to support Miller's convictions.

5.

Miller asserts that his thirty-year sentence is inappropriate in light of the nature of the offense and the character of the offender. 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 (Ind. 2006). Although Rule 7(B) does not require us to be extremely deferential to a trial court’s sentencing decision, we still give due consideration to that decision. *See Rutherford v. State*, 866 N.E.2d 867 (Ind. Ct. App. 2007) (recognizing the unique perspective a trial court brings to its sentencing decisions).

The advisory sentence for a class A felony conviction is thirty years with a sentencing range of between twenty and fifty years. I.C. § 35-50-2-4. Miller received a sentence of thirty years executed for the class A felony conviction.

With regard to the nature of the offense, Miller twice abused a position of trust with the five-year-old daughter of a friend. As for Miller’s character, Miller has a criminal history and was on probation at the time he committed the offenses at issue here. Miller’s past crimes were not similar in nature or time to the current offenses, but do illustrate a pattern of disregard for authority. Miller did produce evidence from his family about his assistance in the care of his elderly grandmother, and his relationship with his mother, with whom he lived. We conclude that the thirty-year sentence for the class A felony conviction and concurrent four-year sentence for his class C felony conviction is not inappropriate in light of

the nature of the offense and character of the offender.

Judgment affirmed in part, and reversed and remanded in part in accordance with this opinion.

BARNES, J., and CRONE, J., concur.