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IN THE
COURT OF APPEALS OF INDIANA

MARBEL FIGUEROA-PEREZ,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 41A04-0907-CR-365
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0804-FB-5

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Marbel Figueroa-Perez appeals his conviction, following a bench trial, and ten-year sentence for child molesting, a Class B felony. Figueroa-Perez raises two issues for our review, which we restate as 1) whether sufficient evidence supports his conviction, and 2) whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding the evidence is sufficient and Figueroa-Perez's sentence is not inappropriate, we affirm.

Facts and Procedural History

On Saturday, February 23, 2008, Kiea Bahling was babysitting her cousin, C.T., age twelve, at C.T.'s home in Franklin, Indiana. Between 9 and 10 p.m. that evening, Bahling and C.T. went to the apartment next door, where Bahling's friend Pablo resided together with five other men including Figueroa-Perez. Bahling talked with Pablo in the kitchen, drank "about five shots" of tequila, and did not converse with the other men in the apartment because "[t]hey really didn't speak much English." Transcript at 15-16. Meanwhile, C.T. sat in the living room talking, watching television, and listening to music with the other men, including Figueroa-Perez. After about two hours, all of the men except Figueroa-Perez went upstairs to go to bed, and then Bahling, who appeared intoxicated to C.T., went upstairs with Pablo. C.T. and Figueroa-Perez were left sitting on the couch together. Thereafter, according to C.T., Figueroa-Perez kissed C.T., grabbed her by the arms, pulled off her clothes, and forced C.T. to submit to sexual intercourse despite her verbal and physical protests. C.T. ran home crying, and about fifteen minutes later she returned to the apartment to look for Bahling, whom she found

having sex with Pablo in the living room. According to C.T., she told Bahling what had happened, and Bahling put on her clothes, punched the wall in anger, and went to C.T.'s residence where she passed out.

On February 25, 2008, C.T., while at school, told a friend about the assault. The friend informed the school counselor, who, after confirming the rape with C.T., brought the matter to the attention of police and C.T.'s parents. C.T.'s father became upset and told C.T. that if she was not telling the truth, she "could go to juvenile for a long time." Id. at 45. Sometime between February 25 and February 27, 2008, C.T. went to the hospital for a physical examination, which "neither negated nor supported" her story of being raped. Id. at 67. On February 28, 2008, C.T. spoke with Detective Scheuermann of the Franklin Police Department, who had put together a lineup of photographs of the men living at the apartment where the assault occurred as well as five men who did not live at the apartment. Upon reviewing the lineup, C.T. identified a photograph of Figueroa-Perez as the man who assaulted her.

On April 2, 2008, the State charged Figueroa-Perez with Count I, rape, a Class B felony, and Count II, child molesting by sexual intercourse, a Class B felony. Figueroa-Perez waived his right to a jury trial, and the case proceeded to a bench trial on October 30, 2008.

At trial, C.T. identified Figueroa-Perez as the man who assaulted her. C.T. testified on direct examination:

> Q. After [Bahling] went upstairs and you were alone with [Figueroa-Perez] downstairs, can you tell me what happened next?

> A. I was sitting on the couch closest to the door, and then he was sitting there too. Then he asked me if he could have a kiss and I said no. Then I moved over to the next couch, then he followed me over there. Then he tried kissing me and I told him no to get off. And he tried pulling down my shirt. And then I got back up and then he was kissing me when I was hollering for [Bahling]. And then he put my arms against the couch and pulled down my pants and I wasn't strong enough to get him off.
> * * *
> Q. Did he also get your underwear down?
> A. Yes he did.
> Q. And . . . you were on the couch, where was he?
> A. He was directly right in front of me.
> Q. On the couch or standing on the floor?
> A. Standing on the floor.
> * * *
> Q. Were you trying [to push him away]?
> A. I was trying.
> Q. What happened then?
> A. And then he had sexual activity with me, and . . .
> Q. And now when you say sexual activity, you need to describe what that means, okay?
> A. His penis went into my vagina.
> * * *
> Q. How long did that happen []?
> A. About two or three minutes, I'm just taking a guess.
> Q. Do you know why he stopped?
> A. No, I was screaming.

Id. at 32-33, 35-36. Figueroa-Perez testified and denied assaulting C.T. or making any sexual advances toward her, although he admitted being alone with C.T. on the living room couch for about three minutes. Three of the other men who were in the apartment that evening, and who were a brother and cousins of Figueroa-Perez, testified they never heard any crying, screaming, or yelling after they went upstairs to go to bed. Bahling testified she did not remember C.T. telling her about being raped, which she testified she would have remembered, despite being under the influence of alcohol, had it happened. The trial court took the case under advisement, and on November 11, 2008, found

Figueroa-Perez guilty on both counts, although it ultimately entered judgment of conviction on Count II only.

On March 12, 2009, the trial court held a sentencing hearing. Figueroa-Perez called a jail minister, who testified Figueroa-Perez had displayed good character while in jail, had claimed innocence, and had never expressed remorse. The trial court took notice of the presentence investigation report, which listed Figueroa-Perez's age as nineteen and stated he had no adult criminal record prior to the instant offense. Figueroa-Perez admitted he did not have legal immigration status when he came to the United States from Mexico three years previously. Figueroa-Perez's attorney stated, "I do believe that, if I'm not mistaken, that there is an immigration hold on [Figueroa-Perez] at this time. And so he . . . will be going back to Mexico upon completion of his sentence." Sentencing Transcript at 7.[1]

The State conceded Figueroa-Perez's youth and lack of criminal history were mitigating factors but argued an advisory sentence of ten years was appropriate based on Figueroa-Perez's illegal immigration status, his lack of expressed remorse, and the facts and circumstances of the crime. The trial court then made the following sentencing statement:

> I recognize and . . . give a great deal of weight to the fact that [Figueroa-Perez] has no prior criminal record, and I recognize his age. I do recognize the testimony of the witness today in regard to this [sic] character and his attitude and the argument that he's not likely to commit another crime. However, I am really giving minimal weight to that as a mitigator for this reason. He is an illegal immigrate [sic]. . . . And so to the opposite end of the scale on the aggravating circumstances, I find it very much a concern to the Court as far as his character and attitude that he is here illegally and I am placing great weight on, on his status as an illegal immigrate [sic] as an

[1] The court reporter prepared separate transcripts for Figueroa-Perez's trial and sentencing hearing.

> aggravating circumstance which the Court is allowed to, and I believe should do under the circumstances. . . . I don't believe this is the most aggravated case, the aggravators far outweighing the mitigators. I place again a great deal of weight on the aggravators . . . being an illegal immigrate [sic], the nature and circumstances of the crime, based on the age of the child, and basically there being no relationship between the two, and pretty much being a stranger, weight [sic] the child molest under the facts and circumstances.

Id. at 12-13. Following the sentencing hearing, the trial court issued an order sentencing Figueroa-Perez to ten years, all executed, at the Department of Correction. Thereafter, the trial court denied Figueroa-Perez's motion to correct error. Figueroa-Perez now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing the sufficiency of the evidence to support a criminal conviction, we neither reweigh the evidence nor judge witnesses' credibility. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Rather, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Therefore, we will affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

B. Class B Felony Child Molesting

To convict Figueroa-Perez of child molesting as a Class B felony, the State must prove beyond a reasonable doubt Figueroa-Perez (1) engaged in sexual intercourse with

C.T., and (2) C.T. was under fourteen years of age. See Ind. Code § 35-42-4-3(a). Figueroa-Perez does not dispute that C.T. was under age fourteen or that he was alone with her in his apartment on February 23, 2008. Rather, Figueroa-Perez argues insufficient evidence supports the trial court's finding he engaged in sexual intercourse with C.T.

"A victim's testimony, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting." Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). This court will make an exception to the rule and reevaluate the credibility of the witness only in cases of "incredible dubiosity," that is, "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt." Id. Here, C.T.'s testimony that Figueroa-Perez engaged in sexual intercourse with her is unequivocal and not inherently contradictory. Further, despite C.T.'s father's insistence she tell the truth, which Figueroa-Perez construes as pressure to adhere to her initial story, there is no evidence C.T.'s testimony is the result of coercion. For these reasons, the incredible dubiosity rule does not apply, and we will not second-guess the trial court's decision to credit C.T.'s testimony even in the absence of physical evidence. Therefore, we conclude sufficient evidence supports Figueroa-Perez's conviction.

II. Inappropriate Sentence

A. Standard of Review

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the 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). Article 7, sections 4 and 6 of the Indiana Constitution authorize "independent appellate review and revision of a sentence imposed by the trial court," Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006) (quotation and emphasis omitted), and we may "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we must examine both the nature of the offense and the defendant's character, and in making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). The defendant bears the burden of persuading this court that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Ten-Year Sentence

Figueroa-Perez argues his ten-year sentence is inappropriate in light of the nature of his offense and his character. Figueroa-Perez received the advisory sentence for a Class B felony. See Ind. Code § 35-50-2-5 ("A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."). In this regard, it is significant that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006).

1. Nature of the Offense

The nature of Figueroa-Perez's offense strikes us as being neutral rather than particularly egregious. On the one hand, Figueroa-Perez forced C.T. to submit to intercourse despite her verbal and physical resistance: C.T. testified she told Figueroa-Perez "no," but he proceeded to pin her arms to the sofa and pull her pants and underwear off, despite her attempts to push him away. See D.B. v. State, 842 N.E.2d 399, 403 (Ind. Ct. App. 2006) (concluding sufficient evidence supported the force element of rape when defendant sat on top of victim and, following her verbal protest and attempt to nudge him off her, pulled down victim's underwear and had sexual intercourse with her). On the other hand, there is no evidence of physical injury to C.T. or that Figueroa-Perez's offense was planned or premeditated; it may well have been an impulsive act Figueroa-Perez is unlikely to repeat. Balancing these considerations, we cannot say the nature of Figueroa-Perez's offense weighs in favor of a less than advisory sentence.

2. Character of the Offender

Figueroa-Perez was nineteen when he committed his offense, and this court has recognized a defendant's youthful age can weigh in his favor in an assessment of character. See Pagan v. State, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004) (concluding maximum sentence was inappropriate based in part on defendant's youth), trans. denied. In addition, Figueroa-Perez's lack of a prior criminal record comments favorably upon his character, as our supreme court has stated it "deserves substantial mitigating weight." Edgecomb v. State, 673 N.E.2d 1185, 1199 (Ind. 1996). These factors weigh in Figueroa-Perez's favor.

However, given Figueroa-Perez has lived in the United States for only three years and he concedes his lack of legal immigration status, we cannot say Figueroa-Perez has been living a law-abiding life for a substantial period of time. See Roney, 872 N.E.2d at 207 (defendant's admission to illegal activities showed he had not been living a law-abiding life, despite minor criminal history); Sanchez v. State, 891 N.E.2d 174, 176-77 (Ind. Ct. App. 2008) (illegal immigration status reflects disregard for the law and comments negatively upon a defendant's character). Figueroa-Perez argues he should receive a lesser sentence because he will likely be deported after his sentence is served. However, in Ruiz v. State, 818 N.E.2d 927, 929-30 (Ind. 2004), our supreme court merely mentioned in passing the defendant's likelihood of deportation and did not indicate that possibility was relevant to either the nature of the offense or the character of the offender. For these reasons, despite Figueroa-Perez's youth and lack of criminal history, we conclude his advisory sentence of ten years is not inappropriate. See id. at 928-29 (remanding to impose advisory sentence of ten years for child molesting when youthful defendant committed several non-forcible molestations and had no history of similar crimes).

Conclusion

Sufficient evidence supports Figueroa-Perez's conviction for child molesting, a Class B felony. Further, Figueroa-Perez's sentence is not inappropriate in light of the nature of his offense and his character.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.