

Appellant-defendant Daniel A. Demaree appeals his convictions for five counts of Child Molesting,¹ a class A felony. Demaree argues that the trial court erroneously admitted certain evidence of uncharged acts in violation of Evidence Rule 404(b). Additionally, Demaree contends that the aggregate 120-year sentence is inappropriate in light of the nature of the offenses and his character. Finding no reversible error and finding that the sentence is not inappropriate, we affirm.

FACTS

Demaree and his wife, Tracy, had three children: Ba.D., a girl born on September 4, 1997, Br.D., a girl born on February 22, 2001, and a boy, L.D. Demaree began touching Ba.D. inappropriately when she was about nine or ten years old. He was a truck driver, and the first time he touched her, they were on a “run” together in his truck in New York.

The first time Demaree molested Ba.D. at home, she was in third grade. He pulled Ba.D. into his bedroom and made her take off her clothes and get on the floor, face down, with her legs spread open. Demaree’s pants were unzipped, and Ba.D. felt something happening to the inside of her “butt,” which really hurt. Ex. 12A p. 44-45. Afterwards, she felt something cold and wet on her “butt,” which Demaree wiped off with a rag. Ba.D. was unable to go to the bathroom afterwards “because it burned.” Id. at 49.

Demaree continued to touch Ba.D. on many occasions. Most of the time, he touched her “butt” with his penis. Tr. p. 362, 365-66. On one occasion, he touched her

¹ Ind. Code § 35-42-4-3.

vagina with his penis and moved his penis around. More than once, Demaree touched the inside of Ba.D.'s vagina with his tongue, causing her pain. These incidents occurred on the floor in Demaree's bedroom. Before the acts, Demaree put lotion on his penis; afterwards, he always put the rags he used to wipe himself and Ba.D. in the washing machine immediately. The last time Demaree molested Ba.D. was about a month before her eleventh birthday. As a result of the molestations, Ba.D. developed hemorrhoids and a rash.

Ba.D.'s younger sister, Br.D., was usually home when the molestations occurred. Ba.D. knew that Demaree also molested her sister, because Br.D. went to Ba.D. afterwards, crying, and told her what had happened. Demaree touched Br.D.'s "front private part" with his pinkie and his tongue. Tr. p. 408-09. He also touched her "butt" with his "dick" and his tongue; at one point putting his "dick" inside Br.D.'s "butt," causing her pain. Id. at 410, 421. These incidents also occurred in Demaree's bedroom.

On occasions, Demaree told the girls that they would have to choose which one would go with him, or he would take both of them. He gave Ba.D. money to do things with him and told her not to tell; he gave Br.D. licorice as a bribe.

The girls' mother, Tracy, eventually found out about the molestations after Ba.D. told her cousin. Tracy took the girls to Morgan County Hospital, where they were examined by gynecologist Dr. Lynnova Reynolds. The girls told Dr. Reynolds that they had been sexually abused by their father, and Br.D. told Dr. Reynolds that she was afraid of men. Dr. Reynolds observed that Br.D.'s hymen had been stretched and that Ba.D.

had a prominent vessel or varicose vein going into her rectal area, which is very unusual for children her age, and she also had a vaginal fissure.

The girls were interviewed by Detective Volitta Fritsche on June 25, 2008. They related their stories to Detective Fritsche. Ba.D. told the detective that Demaree “puts it in [her] front and back,” licked her, stuck his finger inside her, and had her kiss him on the lips. Ex. 22A p. 36. Ba.D. also said that Demaree told her that he would do something really bad if she told anyone. Br.D. said that she could not tell what her father did because she was afraid. Eventually, she said that she was five years old when it first happened, that it happened more than once, and that it also happened when she was six. Detective Fritsche was concerned after these interviews that Tracy was not supportive of the girls. The detective contacted Demaree and interviewed him over the phone; he denied the allegations.

On June 30, 2008, Tracy called the detective and told her that the girls had changed their story. Detective Fritsche interviewed the girls again, at which time the girls said that no one had ever touched their private parts and that they had lied during the previous interview.

In August 2009, Tracy separated from Demaree. After the move, the girls visited Demaree together once and Br.D. visited him on her own one other time. After that, Tracy observed Br.D. sitting in a man’s lap and “getting a little too friendly,” tr. p. 733-34, so she talked with Br.D. about good and bad touches. Br.D. told her mother that Demaree had molested her during her visit.

On September 18, 2009, after Tracy contacted the Department of Child Services, forensic interviewer Emily Perry interviewed the girls. Both girls told Perry about all of the molestations.

On September 22, 2009, the State charged Demaree with four counts of class A felony child molesting and two counts of class C felony child molesting. On March 29, 2010, the State amended the information, charging Demaree with eight counts of class A felony child molesting and two counts of class B felony incest.

During the interviews with Detective Fritsche and Perry, the girls spoke of incidents of molestation that had occurred while they were on the road with Demaree in his truck. Demaree filed a motion in limine to prevent the State and its witnesses from mentioning these instances. The trial court denied the motion, reasoning that “other acts of misconduct against the same victim that are uncharged that are wrapped up in the whole plan, scheme, design, I think are appropriate. So as to the prior acts of misconduct, the motion in limine will be denied.” Supp. Tr. p. 10. Demaree later repeatedly objected to the introduction of this evidence at trial, but the trial court overruled the objections.

Demaree’s jury trial took place on April 19-23, 2010. After the evidence was presented, the trial court granted Demaree’s motion for a directed verdict on three of the counts of class A felony child molesting. The jury found Demaree guilty of the remaining five counts of class A felony child molesting and the two counts of class B felony incest. The trial court found that the two incest convictions were lesser-included

offenses of the child molesting convictions, and consequently took no action on the incest counts.

On May 24, 2010, the trial court held a sentencing hearing. At the close of the hearing, the trial court imposed forty-year sentences for each of the five molesting convictions, with three counts running consecutively and two counts running concurrently. Thus, Demaree received an aggregate sentence of 120 years imprisonment. He now appeals.

DISCUSSION AND DECISION

I. Rule 404(b) Evidence

First, Demaree argues that the trial court erred by admitting evidence of uncharged criminal acts—specifically, the alleged molestations that took place while the girls were with him on the road in his truck. The admission or exclusion of evidence rests within the trial court’s sound discretion, and we review the trial court’s decision for an abuse of that discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). We will consider only the evidence in favor of the trial court’s ruling and unrefuted evidence in the defendant’s favor. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002). We will not reverse if the decision to admit or exclude evidence is sustainable on any ground. Crawford v. State, 770 N.E.2d 775, 780 (Ind. 2002).

Even if we assume solely for argument’s sake that the evidence regarding the uncharged acts of molestation that occurred in Demaree’s truck should not have been admitted, we need not disturb Demaree’s conviction if we find the error harmless. Barber

v. State, 715 N.E.2d 848, 852 (Ind. 1999) (explaining that “[e]rrors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party”).

Here, the record reveals that the challenged evidence was a very minor portion of the overall evidence introduced to support Demaree’s guilt. Statements about what occurred in the truck appear sporadically throughout Ba.D. and Br.D.’s lengthy statements to Detective Fritsche and Perry, and appear briefly in two further exhibits. The jury trial took place over the course of several days, with multiple witnesses testifying and substantial evidence introduced. Because this complained of evidence constituted only a small portion of the overall evidence in the record, we cannot conclude that it affected Demaree’s substantial rights.

Ba.D. and Br.D. testified on the stand regarding Demaree’s actions. Their statements to Detective Fritsche and Perry were introduced into evidence. The State introduced medical testimony that corroborated the girls’ molestation allegations. This evidence readily supports the State’s allegation that Demaree repeatedly and continuously subjected his two young daughters to various sexual acts in the family home. Under these circumstances, we find that any error in the admission of evidence regarding the additional alleged molestations that occurred in Demaree’s truck was harmless, and we decline to reverse on this basis.

II. Sentence

Demaree also argues that the aggregate 120-year sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Demaree was convicted of five counts of class A felony child molesting. Class A felony convictions are subject to a sentence of twenty to fifty years imprisonment, with an advisory term of thirty years. Ind. Code § 35-50-2-4. Had Demaree received five consecutive maximum terms, he would have faced an aggregate sentence of 250 years imprisonment. Instead, the trial court imposed forty-year terms on each of the convictions, which is elevated above the advisory but still ten years short of the maximum, and ordered only three of those terms to be served consecutively.

Turning to the nature of Demaree's offenses, we note that he subjected his two young daughters to repeated and continuous acts of molestation for years. The girls were approximately five and nine years old when the molestation began, and as their father, he occupied a position of trust with respect to Ba.D. and Br.D. He bribed Ba.D. with money and Br.D. with licorice, and at times told the girls that it was up to them to choose who his victim would be that day. He told them not to tell anyone, threatening Ba.D. that he would do something really bad if she told anyone. The girls sustained injuries as a result

of the molestations. Ba.D. was unable to use the restroom because it burned, and she had hemorrhoids, a rash, a varicose vein going into her rectal area, and a vaginal fissure. Br.D.'s hymen was stretched.

As for Demaree's character, he has been convicted of class B felony conspiracy to commit robbery and felony battery on a child under thirteen years of age, causing injury. Demaree has not included his presentence investigation report in the record on appeal, so we have no further details on his criminal history or arrest record.

Although Demaree's criminal history is, perhaps, not the worst of the worst, it is not as though he has been a fully law-abiding citizen up to this point. His prior convictions, in combination with the particularly heinous nature of the offenses against his daughters, support the sentence imposed by the trial court. In other words, we do not find the aggregate 120-year sentence to be inappropriate in light of the nature of the offenses and his character.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.