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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY J. WILSON,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 49A02-1007-CR-725

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0912-FB-101013

February 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a bench trial, Timothy Wilson appeals his convictions and twenty-year sentence for incest as a Class B felony, dissemination of matter harmful to a minor as a Class D felony, and contributing to the delinquency of a minor as a Class A misdemeanor. Wilson raises two issues for our review, which we restate as whether the trial court violated his right to cross examination, and whether his sentence is inappropriate in light of the nature of the offenses and his character. Concluding the trial court did not violate his right to cross examination and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

Wilson and S.W., his girlfriend, told M.A., Wilson's fourteen-year-old sister, they would take her to church the next morning, and M.A. agreed to spend the night with them at S.W.'s home. M.A. later testified that on that night Wilson forced her to drink several shots of hard liquor until she became severely intoxicated. The three then watched two pornographic movies while Wilson fondled S.W.'s vagina in M.A.'s clear view.

M.A. further testified that at some point Wilson and his girlfriend partially dragged M.A. up the stairs and into their second floor bedroom. Once there, the two removed all of their own and M.A.'s clothes and got on the bed. S.W. began kissing M.A., who was still severely intoxicated, and Wilson began kissing and rubbing M.A.'s breasts and body. Wilson penetrated M.A.'s vagina with his penis and engaged in sexual intercourse with her. M.A. said she was in pain, upon which S.W. comforted her and then said she "wanted a turn." Transcript at 12. S.W. then climbed and lay on top of M.A., and Wilson removed his penis from M.A. and began having sex with S.W. – all

three were piled on top of each other. After having sex with S.W., Wilson then penetrated M.A. again.

Wilson was charged with the following eight counts: two counts of incest as Class B felonies; two counts of sexual misconduct with a minor as Class C felonies; intimidation, a Class D felony; two counts of dissemination of matter harmful to a minor, Class D felonies; and contributing to the delinquency of a minor, a Class A misdemeanor.

At trial, Wilson's cross examination focused on M.A.'s credibility in her ability to provide a detailed description of the incident, recall the details of her police report, and explain other statements unrelated to the events at issue but relevant to evaluating her credibility.

The trial court entered a judgment of conviction and, following a sentencing hearing, sentenced Wilson for one count of each of the following offenses: twenty years for incest as a Class B felony, three years for dissemination of matter harmful to a minor as a Class D felony, and one year for contributing to the delinquency of a minor as a Class A misdemeanor.¹ The trial court ordered Wilson to serve all sentences concurrently, for a total of twenty years, of which five were suspended to probation, and ordered the last two years of his executed sentence to be served in community corrections. Wilson now appeals.

¹ The trial court also found Wilson guilty of one count of sexual misconduct with a minor as a Class C felony, but merged this with Wilson's charge for incest as a Class B felony and did not reduce the sexual misconduct finding to a conviction or sentence him for this crime.

Discussion and Decision

I. Cross Examination

A. Standard of Review

Trial judges have broad discretion in determining the permissible scope of cross examination to test the credibility of witnesses. Bredemeier v. State, 463 N.E.2d 1138, 1140 (Ind. Ct. App. 1984). Trial judges are in the best position to observe the trial proceeding, and their exercise of discretion and control over cross examination is reviewed for an abuse of discretion. Marbley v. State, 461 N.E.2d 1102, 1107 (Ind. 1984). “Actual infringement of the right of cross-examination must be shown in order to establish abuse of discretion by the trial court in regulating cross-examination” Bredemeier, 463 N.E.2d at 1140. Explaining the bounds of a trial court’s discretion to control cross examination, our supreme court quoted the Supreme Court of the United States as follows: “[t]rial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness’[s] safety, or interrogation that is repetitive or only marginally relevant.” Marcum v. State, 725 N.E.2d 852, 860 (Ind. 2000) (citation omitted).

B. Objections During Cross Examination

Wilson directs us to twelve incidents during his cross examination of M.A., in which he argues the trial court’s exercise of control prejudiced his right to confront and cross examine witnesses and to select and implement trial tactics.

When a party alleges that a trial court has erred by improperly sustaining objections, we have stated:

it is appropriate and necessary for counsel to make an offer of proof on cross-examination if she believes the trial court has improperly limited a line of questioning or has erroneously sustained an objection by opposing counsel. The offer may be made immediately upon the judge's sustaining of opposing counsel's objection, or before the judge rules on the objection. While such an offer need not be "formal," it must contain the following three elements: it must make the substance of the excluded evidence or testimony clear to the court; it must identify the grounds for admission of the testimony; and it must identify the relevance of the testimony.

Arhelger v. State, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999). The purposes of an offer of proof are to preserve the trial court's alleged error for appeal and to aid the trial court in ruling on an objection. Id.

Of the twelve incidents, the State withdrew one of its objections after M.A. answered despite the objection, and the trial court made no ruling. Accordingly, Wilson has no remedy as to this incident on appeal, especially without explicit argument for such. On nine other objections by the State, Wilson did not make an offer of proof. Consequently, we cannot review the trial court rulings on those objections either. See Arhelger, 714 N.E.2d at 666. For each of the remaining two objections by the State, Wilson did make an offer of proof, but on appeal does not contend or explain why the trial court's ruling was improper. He does not explain why those objections by the State should not have been sustained and appears to have abandoned his firm belief at trial that those objections were sustained improperly. Even beyond these two incidents, Wilson does not explicitly argue or explain why the result of any of the twelve incidents constitutes an abuse of the trial court's discretion. Without his appellate argument supporting why he believes the trial court erred, we decline to hold that the trial court abused its discretion in limiting the scope of his cross examination of M.A.

We set aside for a moment Wilson’s lack of a developed appellate argument of error. To the extent Wilson argues that he did not make an offer of proof following nine of the sustained objections because the trial court prohibited him from doing so or was hostile to his attempt to do so, we disagree. We acknowledge the transcript reveals one exchange between Wilson’s attorney and the trial judge that appears to have been a terse or curt exercise of discretion in the trial court’s sustaining an objection by the State.² We agree with Wilson that trial judges ought to appear open to hearing evidentiary legal argument and should permit counsel to make a proper record for appeal. See Taylor v. State, 602 N.E.2d 1056, 1059 (Ind. Ct. App. 1992) (stating a “trial judge should be an impartial person whose conduct and remarks do not give the jury an impression of partiality”), trans. denied.

However, even in this instance the trial court gave Wilson the opportunity to make an offer of proof.³ In that regard, this case is notably distinguishable from Nelson v. State, 792 N.E.2d 588 (Ind. Ct. App. 2003), trans. denied, in which we stated that “[w]e cannot very well require trial counsel to make an offer of proof to preserve error on

² The relevant portion of the transcript of M.A.’s cross examination follows:

Q: You know what a condom feels like, don’t you?

[State]: Objection

The Court: Sustained.

[Wilson’s attorney]: Your Honor, I don’t understand why this is objectionable. She is talking about it.

The Court: Whether you understand it or not, the objection is sustained. Move on.

[Wilson’s attorney]: Your Honor, I am trying to make a record here. I am trying to make a record for the Court of Appeals so that in case there is a question about credibility issues

The Court: Move on.

[Wilson’s attorney]: Your Honor, I need to make a record.

The Court: Make your record.

[Wilson’s attorney]: My record is that all of these questions I am asking go to credibility. This is a credibility issue.

The Court: You asked a question and I sustained the objection. Now, move on.

Tr. at 31.

³ Again, we note that Wilson does not refer to this offer of proof, included in note 2, supra, to argue the trial court erred in sustaining this or any other specific objection.

appeal, while at the same time we allow the trial court to deny counsel the opportunity to make such a record.” Id. at 594-95. Wilson was not prohibited from making an offer of proof; he failed to do so of his own account, and therefore the general rule requiring him to make an offer of proof applies.

Further, Wilson’s cross examination of M.A. constituted nearly fifty pages of the one hundred-twenty-three page trial transcript. Throughout cross examination of M.A., Wilson questioned M.A. as to particular details of the incident largely chronologically, but repeatedly flashing backward in time to the beginning and repeating questions that he had already asked and M.A. had already answered, and frequently wording questions in ways that confused M.A. This could be an effective strategy to call a witness’s credibility into question, but it also is likely to, and in this case did, lead to objections, particularly for questions asked and answered.

Wilson also alleges reversible error on the basis of the trial court sustaining objections by the State without the State providing a reason for its objections. In this regard we find this case similar to and accordingly reiterate our supreme court’s reasoning in Giberson v. State, 224 Ind. 504, 69 N.E.2d 177 (1946), in which a defendant challenged the trial court’s decisions to sustain objections to his cross examination:

A judge is not obliged to require reasons for an objection if they are apparent. He is supposed to know some law. If . . . the tone or inflection of the judge’s voice, which of course is not shown by the record, indicated some impatience, we suspect that it was directed against counsel for persistence in cross examination as to matters already covered.

Id. at 505-06, 69 N.E.2d at 178.

During the trial and on appeal, Wilson emphasizes that the crux of his defense was to attack M.A.’s credibility to prevent the State from persuading the trial court of guilt

beyond a reasonable doubt. Wilson’s lengthy cross examination of M.A. relative to other portions of the trial and the content of his cross examination demonstrate this trial strategy which was to some extent restrained by the trial court, but only in a permissible way that was consistent with the trial court’s authority and Wilson’s rights.

II. Inappropriate Sentence⁴

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). In making this determination, 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. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). “[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

B. Twenty-Year Sentence

Wilson makes no argument that the nature of his offenses warrants a less severe sentence and we find none. His conduct involved his forcing a young girl to drink hard liquor until she became severely intoxicated, which in itself is a dangerous act that could have led to acute harm to M.A. His conduct also involved exposing a young girl to

⁴ Wilson’s appellate brief refers to our abuse of discretion standard of review of a trial court’s sentencing decision, but he makes no argument to this effect. His argument is limited to the inappropriateness of his sentence in light of the nature of his offenses and his character. Thus, we limit our review accordingly.

sexual imagery properly reserved by the law for viewing by mature adults. Finally, his conduct involved his brute sexual violation of his younger sister, a pubescent teenager, while she was intoxicated and could not protect herself. He was in a position of trust, and first exposed her to danger by forcing her to become intoxicated, then violating her himself, and also allowing her to be sexually molested by another. The nature of his offenses does not make his sentence inappropriate.

As to Wilson's character, he argues his twenty-year sentence is inappropriate because he "had only received two true findings as a juvenile, . . . had no prior convictions as an adult[,] . . . [was the] youthful age of nineteen[] at the time of the commission of the crime, and [had] prior limited contact with the criminal justice system." Brief of Appellant at 13.

Wilson's two true findings as a juvenile were for offenses that would have been Class B felonies if he were an adult. The first incident involved his sexual molestation of another of his younger sisters, T.A. When Wilson was sixteen years old, his mother called the police upon learning that he had been molesting T.A. for five years. T.A., recounting to the responding officer the most recent incident, stated that "her brother[,] Timothy Wilson[,] had grabbed her by the arm in the bathroom while doing chores and took her into her older sister's bedroom and proceeded to have sexual intercourse with her achieving ejaculation before leaving the room." Pre-Sentence Investigation Report ("PSI") at 5 (all capitalization omitted). Following the juvenile court's true finding for one count of child molestation, Wilson successfully completed formal home detention and family and sex offender counseling.

Less than one year later, a juvenile court entered a true finding of Wilson's conspiracy to commit burglary, a Class B felony if he were an adult. Subsequently Wilson twice admitted to violating his probation for "dirty urine screen[s]." Id. at 6.

Less than one year after his conspiracy to commit burglary, and upon becoming an adult while at the Pendleton Juvenile Correctional Facility, Wilson attempted to escape, a Class C felony. He was sentenced to eight years, two of which were to be executed on home detention and six years suspended to probation. Thus, contrary to his appellate argument, he does have a conviction as an adult. In addition, prior to his arrest for the instant offenses, he violated his probation twice.

In addition to the above offenses and probationary violations, Wilson's first involvement with the criminal justice system was at the age of thirteen, and his history also includes charges for battery as a Class A misdemeanor, criminal mischief as a Class A misdemeanor, and theft as a Class D felony if he were an adult. Considering all of the above, we disagree that he has had only limited contact with the criminal justice system. Rather, we agree with the trial court that Wilson had ample opportunity to reform his pattern of unlawful conduct, including counseling as a sex offender and multiple periods of probation. He has continued to engage in dangerously criminal behavior by seriously harming his younger sister in an emotionally scarring manner. This is also the second time he has been adjudicated for sexually molesting one of his younger sisters.

Further still, Wilson reports to have begun drinking alcohol at the age of eleven and using marijuana at age nine. He admitted to daily marijuana use and that his last use was just prior to his arrest for the instant offenses.

Wilson's age of nineteen at the time of committing these offenses does not make his sentence inappropriate, particularly because of his extensive interaction with the criminal justice system and his prior history of sexually molesting a younger sister. Although age may sometimes make a sentence inappropriate, we consider his age as just one indicator of his maturity and character. See Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000) ("Focusing on chronological age is a common shorthand for measuring culpability, but for people in their teens and early twenties it is frequently not the end of the inquiry. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful.").

Considering all of the above, we conclude Wilson's sentence is not inappropriate in light of the nature of his offenses and his character.

Conclusion

The trial court did not abuse its discretion in its exercise of control over Wilson's cross examination of M.A. Further, his twenty-year sentence is not inappropriate, and we therefore affirm.

Affirmed.

RILEY, J., and BROWN, J., concur.