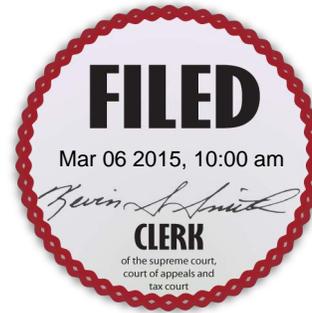


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

David J. Recker, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 6, 2015

Court of Appeals Case No.
63A04-1406-CR-274

Appeal from the Pike Circuit Court;
The Honorable Jeffrey L.
Biesterveld, Judge;
63C01-1209-FB-449

May, Judge.

[1] David J. Recker, Jr. appeals his conviction of Class C felony sexual misconduct with a minor¹ and Class B felony sexual misconduct with a minor.² We affirm.

Facts and Procedural History

[2] S.M. moved in with Recker and his family during the summer of 2010. She was the best friend of Recker’s daughter, M.R. S.M. and M.R. were fourteen years old. Recker and his wife, C.R., treated S.M. as one of their own children. She called them “Mom” and “Dad” and they referred to her as their “daughter.” (Tr. at 220, 250, 300, 367.) The Reckers obtained guardianship over S.M. with the consent of S.M.’s mother.

[3] On three or four occasions, Recker went into S.M.’s bedroom and fondled her vagina over her panties. On one occasion, he inserted his finger into her vagina. By December, 2011, S.M.’s grades had slipped, she cried a lot, she was distant from M.R., and she attempted suicide. S.M. and M.R. started arguing. S.M. decided to move back to her mother’s house. When she announced she was moving out, Recker started acting erratically. Recker read the Bible all night, preached, and called people in the middle of the night. Recker drove to S.M.’s house and tried to see S.M. Recker told S.M.’s mother he could not let S.M. go. S.M. refused to see Recker.

¹ Ind. Code § 35-42-4-9(b)(1) (2012).

² Ind. Code § 35-42-4-9(a)(1) (2012).

- [4] Recker and C.R. were having marital problems and began marriage counseling. Recker confessed he had sinned by masturbating while thinking of S.M. and was aroused by her. Recker said his sins were his wife's fault. Recker moved out of the marital home in March 2012.
- [5] M.R., who wanted to figure out why her parents had separated, went through her mother's cell phone text messages. She found a message stating, "God didn't tell you [to] masturbate while thinking about your sixteen year old daughter." (*Id.* at 259.) M.R. immediately believed the text was in reference to S.M. and tried to contact her. S.M. would not talk to M.R. but did contact M.R.'s mother, C.R.
- [6] C.R. contacted Child Protective Services in April, 2012. On May 3, 2012, S.M. gave a statement at Holly's House.³ The State charged Recker with one count of Class B felony sexual misconduct with a minor and five counts of Class C felony sexual misconduct with a minor. The State dismissed four of the Class C counts. The jury found Recker guilty of the two remaining counts.

³ Holly's House is an organization that supports "victims of intimate crimes" in Southwestern Indiana, with a multi-disciplinary team, including "the Department of Child Service (DCS), law enforcement, and prosecutors, as well as medical and mental health professionals." Holly's House, <http://www.hollyshouse.org/community-partners.html> (last visited February 12, 2015).

Discussion

1. Admission of Evidence

[7] “[A] trial court’s ruling on the admissibility of evidence is reviewed for an abuse of discretion. We will reverse only where the trial court’s decision is clearly against the logic and effect of the facts and circumstances.” *Tolliver v. State*, 922 N.E.2d 1272, 1278 (Ind. Ct. App. 2010) (internal citations omitted), *trans. denied*.

[8] Recker asserts the contents of the text message M.R. discovered -- “God didn’t tell you [to] masturbate while thinking about your sixteen year old daughter,” (Tr. at 259) -- should not have been admitted because it is similar to “course-of-investigation” evidence. (Appellant’s Br. at 8.) Course-of-investigation testimony explains an officer’s actions so the jury understands why the officer took particular steps in the investigation. *See* 1 Wharton’s Criminal Evidence § 4:47 (15th Ed.). However, course-of-investigation evidence may be irrelevant to the defendant’s guilt or innocence, *id.*, and it may also contain inadmissible hearsay. *See Kindred v. State*, 973 N.E.2d 1245, 1253 (Ind. Ct. App. 2012), *trans. denied*. Even if the hearsay is admissible, the evidence may unfairly prejudice the defendant. *See* 1 Wharton’s Criminal Evidence § 4:47 (15th Ed.). In this instance, Recker asserts the contents of the text message implied he had erotic thoughts regarding his biological daughter, which would unfairly prejudice the jury against him.

- [9] We first note the trial court admonished the jury to use the evidence from the text message to understand M.R.'s actions with regard to contacting S.M., and to not use the evidence as proof of the truth of the statement in the text message. (Tr. at 257.) “[T]he law will presume that the jury will follow the court’s admonitions.” *Hernandez v. State*, 785 N.E.2d 294, 303 (Ind. Ct. App. 2003), *trans. denied*. Thus, we presume the jury did not infer anything about Recker’s feelings or thoughts toward his biological daughter from the contents of the text message.
- [10] Several witnesses testified S.M. was known as Recker’s daughter, and Recker himself testified he regarded S.M. as his daughter and she called him “Dad.” (Tr. at 367.) M.R. testified she immediately understood “daughter” to mean S.M. (*Id.* at 259.) Recker testified he had told his pastor about erotic thoughts regarding S.M. and had confessed them to his wife during counseling. (*Id.* at 364-65.) In light of the evidence the word “daughter” in the text message referred to S.M., we see little chance the jurors would have inferred the text was about M.R.
- [11] Even if the text message was inadmissible hearsay, the trial court admonished the jury not to use it to prove the truth of its contents, and the record contained substantial amounts of other evidence demonstrating the text referred to S.M. As such, Recker cannot demonstrate he was prejudiced by the admission of that message, and the court did not abuse its discretion when it admitted the text message into evidence. *See Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014)

(“erroneous admission of hearsay testimony does not require reversal unless it prejudices the defendant’s substantial rights”).

2. *Jury Instructions*

The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. In reviewing a trial court’s decision to give a tendered jury instruction, we consider (1) whether the instruction correctly states the law, (2) is supported by the evidence in the record, and (3) is not covered in substance by other instructions. The trial court has discretion in instructing the jury, and we will reverse only when the instructions amount to an abuse of discretion. To constitute an abuse of discretion, the instructions given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. We will consider jury instructions as a whole and in reference to each other, not in isolation.

[12] *Munford v. State*, 923 N.E.2d 11, 14 (Ind. Ct. App. 2010).

[13] Recker asserts the refusal of the trial court to give his proposed instruction instead of the pattern instruction was an abuse of discretion. Recker wanted an instruction from *Robey v. State*, 454 N.E.2d 1221, 1222 (Ind. 1983), wherein the court upheld a jury instruction with this language:

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant’s innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your

duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

[14] Recker proffered an instruction that stated:

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

[15] (App. at 97) (error in original). Recker's proffered instruction misquotes *Robey* by deleting seventeen words, which renders the second paragraph of the instruction unclear. Thus, we cannot conclude the court abused its discretion by rejecting Recker's instruction and giving the pattern jury instruction instead.

3. Incredible Dubiosity

Under the incredible dubiosity rule we may impinge on the jury's responsibility to judge the credibility of the witness only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. We will reverse a conviction if the sole witness presents inherently improbable testimony and there is no circumstantial evidence of the defendant's guilt.

[16] *Archer v. State*, 996 N.E.2d 341, 351 (Ind. Ct. App. 2013) (internal quotations and citations omitted), *trans. denied*.

[17] Recker asserts S.M.'s testimony was inherently improbable because her statements to friends, at Holly's House, and at her deposition were not consistent; therefore, says Recker, sufficient evidence was not presented to support his convictions. Even if S.M.'s statements to friends, statement at Holly's House, and deposition differed from one another, her trial testimony, including cross-examination, was not contradictory. *See Buckner v. State*, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006) ("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."). It was the jury's province to weigh S.M.'s credibility. *See Holeton v. State*, 853 N.E.2d 539, 542 (Ind. Ct. App. 2006) (discrepancies may be used to weigh testimony and credibility, but not to render testimony incredibly dubious). We decline to impinge on the jury's determination of credibility. The evidence was sufficient to support Recker's convictions.

Conclusion

[18] The trial court did not abuse its discretion when allowing the admission of the text message, it did not abuse its discretion when giving the jury instructions, and S.M.'s testimony was not incredibly dubious. The State presented sufficient evidence Recker committed the crimes with which he was charged. Accordingly, we affirm.

[19] Affirmed.

Barnes, J., and Pyle, J., concur.