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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM JOSEPH ZAPFE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 16A01-0612-CR-578
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DECATUR CIRCUIT COURT
The Honorable John A. Westhafer, Judge
Cause No. 16C01-0606-FC-83

July 27, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, William Joseph Zapfe (Zapfe), appeals his conviction and eight-year sentence for child molesting, a Class C felony, Ind. Code § 35-42-4-3(b).

We affirm.

ISSUES

Zapfe raises seven issues on appeal, which we consolidate and restate as the following five issues:

(1) Whether the State proved by a preponderance of the evidence that Decatur County was the proper venue;

(2) Whether the trial court abused its discretion by limiting Zapfe's questioning of prospective jurors;

(3) Whether the trial court abused its discretion by admitting evidence that Zapfe was previously incarcerated;

(4) Whether the State presented sufficient evidence beyond a reasonable doubt to convict Zapfe of child molesting; and

(5) Whether Zapfe's eight-year sentence is inappropriate in light of his character and the nature of the crime.

FACTS AND PROCEDURAL HISTORY

On December 30, 2005, Rachell Caudill (Caudill) picked up her-twelve-year old sister, T.C., from their father's house. After spending the afternoon together, T.C. asked to spend the night at Caudill's house and subsequently T.C. received permission from her parents. Caudill lived with her boyfriend, Zapfe, their son, E.Z., and Zapfe's other two

children, M.Z. and K.Z. Caudill and T.C. spent the afternoon at Caudill's house; Caudill's infant son was with them. Zapfe arrived home around 5:45 p.m., but left shortly thereafter to pick up M.Z. and K.Z. When Zapfe returned home with the children, Caudill and T.C. went to pick up dinner.

After dinner, around 8:00 p.m., everyone sat down to watch some television. Shortly before 10:00 p.m., T.C. changed into the shorts and t-shirt she planned to wear to bed and laid down on the loveseat in the living room. Caudill and Zapfe were lying on the couch. Around 10:00 p.m., Caudill got up to take a shower. Zapfe, T.C., and Zapfe's two children remained in the living room.

Caudill turned on the shower and then went to the laundry room to get clothes and a towel. Caudill closed the bathroom door while she undressed, but then opened the door in case any of the children needed to use the toilet. In the meantime, Zapfe asked T.C. if she wanted to massage his feet. When she declined, he asked if she wanted him to massage her feet. T.C. accepted. As Zapfe was massaging T.C.'s feet, however, he began tickling her legs. He tickled all the way up her legs, commenting on how smooth they were, until he touched her vagina under her shorts and underwear.

Upon finishing her shower, approximately fifteen minutes later, Caudill alerted everyone she was going to close the door to get dressed. While she was getting dressed, T.C. came into the bathroom, crying, and told Caudill that Zapfe had touched her inappropriately and she wanted to go home. Upon arriving home, T.C. told her family what happened. Her family first took her to the police station, then to the emergency room for an examination.

On June 9, 2006, the State filed an Information charging Zapfe with child molesting, a Class C felony, I.C. § 35-42-4-3(b). On October 12, 2006, a jury found Zapfe guilty as charged. On November 8, 2006, the trial court sentenced Zapfe to eight years imprisonment. The trial court found Zapfe's criminal history, the fact that he was on probation at the time of the instant offense, and his pending Class C burglary charge as aggravators. No mitigators were found.

Zapfe now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Venue*

Zapfe first argues that the State failed to prove by a preponderance of the evidence the instant offense took place in Decatur County. Specifically, Zapfe argues there was vague and ambiguous testimony regarding the location of the child molesting. Conversely, the State maintains there was testimony from which a jury could infer the offense occurred in Decatur County.

In determining whether the State proved by a preponderance of the evidence the child molesting took place in Decatur County, we note that Article I, Section 13 of the Indiana Constitution states, "[i]n all criminal prosecutions, the accused shall have the right to a public trial . . . in the county in which the offense shall have been committed." As venue is not an element of the offense, the State is required to prove venue by a preponderance of the evidence rather than beyond a reasonable doubt. *Smith v. State*, 835 N.E.2d 1072, 1074 (Ind. Ct. App. 2005). The State may establish proper venue by circumstantial evidence. *Eckstein v. State*, 839 N.E.2d 232, 233 (Ind. Ct. App. 2005).

Thus, the State meets its burden of establishing venue if the facts and circumstances permit the trier of fact to infer that the crime occurred in the given county. *Id.*

In the instant case, Zapfe argues there is insufficient testimony to establish venue in Decatur County. Our review of the record, however, reveals sufficient evidence that the instant offense did, in fact, occur in Decatur County. Caudill testified she lived in Decatur County. She also testified that she took T.C. home with her. Furthermore, Zapfe testified he was home with Caudill, T.C. and his children the night the instant offense occurred. Thus, we find sufficient evidence in the record that Decatur County was the proper venue.

II. *Voir Dire*

Next, Zapfe claims the trial court abused its discretion by limiting the scope of his questions regarding reasonable doubt to prospective jurors during *voir dire*. Particularly, Zapfe contends limiting his questions precluded him from properly determining the prospective jurors' understanding of reasonable doubt, thereby preventing him from selecting a fair and impartial jury. However, the State notes and we agree, Zapfe has waived this issue for review because after the trial court's ruling limiting the scope of his *voir dire*, Zapfe never objected or requested any sort of relief. *See Emmons v. State*, 492 N.E.2d 303, 304 n.1 (Ind. 1986) (acceptance of the jury, as evidenced by the defendant's not objecting to the *voir dire* procedures employed by the trial court, has been deemed to be one factual circumstance which supports the inference of a waiver).

Waiver notwithstanding, a trial court has broad discretionary power to regulate the form and substance of *voir dire*. *Wentz v. State*, 766 N.E.2d 351, 357 (Ind. 2002), *reh'g*

denied; *Perryman v. State*, 830 N.E.2d 1005, 1007-1008 (Ind. Ct. App. 2005). The function of *voir dire* examination is not to educate jurors. *Perryman*, 830 N.E.2d at 1008 (citing *Von Almen v. State*, 496 N.E.2d 55, 59 (Ind.1986)). Rather, it is to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence. *Perryman*, 830 N.E.2d at 1008. Jurors are to be examined to eliminate bias, not to condition them to be receptive to the questioner's position. *Id.*

At the same time, the trial court must afford each party a reasonable opportunity to exercise its peremptory challenges intelligently through inquiry. *Id.* Proper examination may therefore include questions designed to disclose the jurors' attitudes. *Id.* As a general matter, instructing the jury on reasonable doubt is for the trial court. *Barber v. State*, 715 N.E.2d 848, 850 (Ind. 1999). However, it is permissible for the parties to ask questions of potential jurors to determine whether they understand reasonable doubt and are capable of rendering a verdict in accordance with the law. *Id.* Zapfe now claims the trial court abused its discretion by limiting his *voir dire* questioning on reasonable doubt because he was "not able to effectively use [his] peremptory challenges;" thus, he was denied his right to "a fair and impartial jury." (Appellant's Br. p. 14).

The following exchange occurred during *voir dire*:

> [ZAPFE'S COUNSEL]: Good morning everyone. My name is Steven Teverbaugh. I'm an attorney representing [] Zapfe. . . . Now, I know that the prosecution has talked to you a little bit about reasonable doubt. I'm going to talk to you a little further about it.
>
> What I want to know is how certain you have to be of [Zapfe's] guilt to find him guilty beyond a reasonable doubt. I want you to give me a percentage.

* * *[1]

> [STATE'S COUNSEL]: Your Honor, at this time, I think I'm going to object to the use of a percentage. That is not the law. The law does not require a percentage or a quantification[.]
>
> [ZAPFE'S COUNSEL]: It's just something to help get a better understanding of their definition of reasonable doubt.
>
> [TRIAL COURT]: Well, let me hear the objection.
>
> [STATE'S COUNSEL]: But the objection is, [] it seems to me that [Zapfe's counsel] is asking that [the prospective jurors] have a [one] hundred percent certainty or they're not going to qualify as a juror.
>
> [ZAPFE'S COUNSEL]: No, that's not what I'm asking.
>
> [STATE'S COUNSEL]: And that is not the law. [We] only have one standard and that's firmly convinced.
>
> [TRIAL COURT]: Well, I guess his point is that you have to be one hundred percent firmly convinced. Is that what you're getting at?
>
> [ZAPFE'S COUNSEL]: No.
>
> [TRIAL COURT]: Well, then [. . .]
>
> [ZAPFE'S COUNSEL]: I guess, I mean I don't want someone, say fifty percent certain or [. . . .]
>
> [TRIAL COURT]: Actually, I think I'm going to sustain the objection because I think it's going to confuse the jurors to try to get into quantifying percentages of conviction.

(Transcript pp. 44-47).

[1] Zapfe's counsel individually asked six prospective jurors for a percentage of how certain they would have to be to convict Zapfe before the State objected.

Because Zapfe was unclear as to why he was asking for percentages of certainty from the prospective jurors, we cannot find the trial court abused its discretion by limiting Zapfe's line of questioning to exclude percentages.

III. *Admission of Evidence*

Zapfe next argues the trial court abused its discretion by admitting evidence of his prior incarceration. Specifically, Zapfe contends evidence that he was previously incarcerated creates the forbidden inference that he has a propensity to engage in wrongful acts, and as a result committed the instant offense. Except, as the State recognizes, again, Zapfe has waived this issue for review as he failed to contemporaneously object to the admission of his previous imprisonment.

Waiver notwithstanding, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *reh'g denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* However, if a trial court abuses its discretion by admitting the challenged evidence, we will only reverse for that error, if "the error is inconsistent with substantial justice" or if "a substantial right of the party is affected." *Id.* (quoting *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)).

Indiana Evidence Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rationale behind Ind. Evid. R. 404(b) is well established: the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity, and therefore, engaged in the charged conduct. *Edwards v. State*, 862 N.E.2d 1254, 1261 (Ind. Ct. App. 2007), *trans. denied* (citing *Goldsberry v. State*, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005)).

In evaluating the admissibility of evidence under Evid. R. 404(b), a trial court must: (1) decide if the evidence of other crimes, wrongs, or acts is relevant to a matter other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evid. R. 403. *Edwards*, 862 N.E.2d at 1261. Even if evidence of prior bad acts is admissible, its probative value must still be weighed against the unfair prejudice its admission may cause a defendant. *Id.*

In the case at bar, our review of the record indicates the testimony at trial did not focus on the details of Zapfe's prior incarceration. While testifying, Caudill engaged in the following dialogue with the State's counsel:

[STATE'S COUNSEL]: And when did you get married to . . .

[CAUDILL]: February 27th.

[STATE'S COUNSEL]: So that was about sixty days after this happened?

[CAUDILL]: Yes.

[STATE'S COUNSEL]: Why hadn't you gotten married before this?

[CAUDILL]: Cause he was in jail.

[STATE'S COUNSEL]: Well is that the only reason, I mean?

[CAUDILL]: No he, we got engaged [on] . . . Valentine's Day.

[ZAPFE'S COUNSEL]: Objection, relevance.

(Tr. p. 167). The mere mention of the fact that Zapfe previously had been in jail was not so prejudicial as to deny him a fair trial. *Serano v. State*, 555 N.E.2d 487, 494 (Ind. Ct. App. 1990), *trans. denied*. In sum, we find that the probative value of this evidence outweighs its prejudicial impact, and the trial court did not abuse its discretion by admitting Caudill's statement.

IV. *Sufficient Evidence*

Zapfe also argues the State presented insufficient evidence to convict him of child molesting. Specifically, Zapfe contends there was not sufficient evidence he fondled or touched T.C. or that he did so with the intent to satisfy his or T.C.'s sexual desires, so as create a reasonable doubt of his guilt. Additionally, he seeks reversal of his conviction on the grounds of incredible dubiosity of the child victim T.C.'s testimony.

A. *Incredible Dubiosity*

Under the incredible dubiosity rule:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. 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.

Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007). This rule is available to appellate courts to impinge upon a jury's function to judge the credibility of a witness. *Id.*

Zapfe claims T.C.'s testimony is incredibly dubious because she initially misstated her date of birth and based on her testimony the molestation was highly unlikely and improbable.

After reviewing the trial transcript, we find that T.C.'s testimony was not so incredibly dubious or inherently improbable that no reasonable person could believe it. There are no inconsistencies in her testimony, nor was her testimony inherently contradictory. Further, there is no evidence her testimony was coerced. T.C. testified:

> . . . [Caudill] said that she was going to get into the shower. And she shut the door and then I was laying down on the love seat and [Zapfe] asked me if I wanted to massage his feet and I said no because I didn't like feet. And then he asked me if I wanted mine massaged and I said yeah. So when he was massaging my feet, that was for about three minutes and then he started tickling my leg and when he started tickling my leg he said my legs are smooth and then he got up closer and then he reached under my shorts and my underwear.

(Tr. 184). Based on T.C.'s testimony, we decline to invoke the incredible dubiosity rule to impinge on the jury's evaluation of the evidence in this case and conclude that a reasonable trier of fact could have found Zapfe guilty beyond a reasonable doubt.

B. *Touching under I.C. § 35-42-4-3(b)*

Zapfe also claims the State offered no evidence he touched T.C. with intent to satisfy his or T.C.'s sexual desires. Rather, Zapfe argues the State merely presented evidence that tickling occurred and tickling alone is insufficient to establish intent to gratify sexual desires. *See Clark v. State*, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998), *reh'g denied* (without more, evidence of tickling alone is insufficient to establish intent to gratify sexual desires). Except, T.C. testified at trial that Zapfe put his hand under her

shorts and underwear and touched her vagina. Zapfe asked T.C. if she liked it and she told him no, pushed his hand away, and went into the bathroom where her sister was getting dressed.

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *White*, 846 N.E.2d at 1030. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.* A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *Id.* Additionally, a conviction for child molesting may rest solely upon the uncorroborated testimony of the victim. *McCoy v. State*, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006).

Child molesting, as a Class C felony, is governed by I.C. § 35-42-4-3(b) and provides, "[a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony." The intent element may be established by circumstantial evidence and inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. *Kanady v. State*, 810 N.E.2d 1068, 1069-70 (Ind. Ct. App. 2004). We have previously held that "the intent to arouse or satisfy sexual desires may be inferred from evidence that the accused intentionally touched a

child's genitals." *Agilera v. State*, 862 N.E.2d 298, 307 (Ind. Ct. App. 2007); *see also Wise v. State*, 763 N.E.2d 472, 475 (Ind. Ct. App. 2002), *trans. denied* (finding sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant put his hand under the shorts and underwear of a child and touched her vagina); *Cruz Angeles v. State*, 751 N.E.2d 790, 797 (Ind. Ct. App. 2001), *trans. denied* (finding sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant touched a child's breasts over her t-shirt eight to twelve times); *Lockhart v. State*, 671 N.E.2d 893, 903 (Ind. Ct. App. 1996) (finding sufficient evidence of touching with intent to satisfy sexual desires where defendant touched a twelve year olds penis and rubbed it for approximately five minutes while the two were seated under a blanket); *Pedrick v. State*, 593 N.E.2d 1213, 1220 (Ind. Ct. App. 1992), *reh'g denied* (finding sufficient evidence to support a finding of touching with intent to satisfy sexual desires where a defendant put his arm around the shoulder of a child and let his hand hang, touching her breast, and where he put his hand on the shoulder of another child and then on her breast).

As in *Wise*, we find the natural and usual sequence of touching a child's vagina is gratification of sexual desires. *See Wise*, 763 N.E.2d at 475. Thus, the crime was complete when Zapfe touched T.C.'s vagina and the evidence was sufficient to support Zapfe's conviction.

V. *Zapfe's Sentence*

Lastly, Zapfe argues his sentence is inappropriate in light of the nature of the offense and his character. Specifically, Zapfe argues his prior convictions did not warrant enhancing his sentence to the maximum sentence available.

"[S]o long as a sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemyer v. State*, --- N.E.2d ---, 2007 WL 1816813, 6 (Ind. June 26, 2007). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). However, "[i]n order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence. . . . This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course[,] such facts must have support in the record." *Anglemyer*, 2007 WL 1816813 at 6 (quoting *Page v. State*, 424 N.E.2d 1021, 1023 (Ind. 1981)). Where the trial court has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, we may only review the sentence under Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute 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." *Anglemyer*, 2007 WL 1816813 at 7.

Zapfe committed child molesting of his girlfriend's twelve-year-old sister when she was to spend the night at his house. Additionally, Zapfe committed this offense in

the same room as two of his sleeping children. The nature of this offense warrants an enhanced sentence. Moreover, with respect to Zapfe's character, at the young age of fifteen, Zapfe committed what would have been Class C child molesting, had he been an adult. In addition, Zapfe has accumulated eight misdemeanor convictions and a Class D felony operating while intoxicated conviction, and his probation has been revoked twice. Now, with three children, Zapfe, who is twenty-one years old, has again committed Class C child molesting. Thus, we find the eight-year sentence imposed by the trial court appropriate in light of the nature of this offense and Zapfe's character.

CONCLUSION

Based on the foregoing, we find: (1) the State proved by a preponderance of the evidence Decatur County was the correct venue; (2) the trial court did not abuse its discretion by limiting Zapfe's questioning of prospective jurors; (3) the trial court did not abuse its discretion by allowing testimony that Zapfe was previously incarcerated; (4) sufficient evidence was presented to convict Zapfe of child molesting; and (5) Zapfe's eight-year sentence was appropriate.

Affirmed.

NAJAM, J., and BARNES, J., concur.