ATTORNEY FOR APPELLANT:

DAVID BECSEY
Zeigler Cohen & Koch
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL D. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0609-CR-517
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Commissioner
Cause No. 49G04-0505-FA-73813

August 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Michael D. Smith ("Smith") appeals his conviction after a jury trial, and his sentences on four counts of child molesting, as class A felonies.

We affirm.

ISSUE

1. Whether the evidence was sufficient to sustain the conviction.
2. Whether Smith's presumptive, consecutive sentences were appropriate.

FACTS

Mother had a daughter, K.J., born on November 1, 1991, from a previous relationship. In March of 1995, Tanya Smith ("Mother") married Michael Smith ("Smith"). Smith became the step-father of K.J. when K.J. was three and a half (3½) years-old. When K.J. was ten years-old, she resided on Rural Street in Marion County, Indiana, with Mother, Smith, and her two brothers.[1] On one occasion, Smith awoke K.J. on the couch in the living room and told her "let's do it." (Tr. 70). Smith took off K.J.'s. pants and put his penis into her vagina and K.J. felt pressure in her stomach. (Tr. 70-71). The next incident occurred when Smith approached K.J. while she was in her bedroom and asked her to do him a favor. Smith told K.J. "let's do it" and K.J. submitted to Smith's request. (Tr. 73) Smith started touching her legs, stomach and vagina with his hands and eventually had intercourse with K.J. on her bed.

Another incident occurred when K.J. was eleven years-old. At that time, K.J. resided with her Mother, Smith, and her two brothers on Boulevard Place in Marion

[1] K.J.'s older brother was sixteen (16) years-old and her younger brother was six (6) years-old.

County. Smith took K.J. to a vacant house that was located next to their residence. While inside the vacant house, Smith took off K.J.'s. clothes and started rubbing and kissing her. Smith put his penis into K.J.'s vagina. Throughout the sexual encounter, Smith would tell K.J. to touch his penis with her hands. K.J. had to move her hand back and forth against his penis until Smith ejaculated.

Another incident occurred when K.J. was thirteen years-old. At that time Smith and Mother were separated. K.J. resided with Mother and her two brothers on Park Avenue in Marion County. One day, in February of 2005, Smith took K.J to her mother's bedroom and asked K.J. to massage his penis. K.J. submitted, and moved her hand back and forth against Smith's erect penis until sperm came out.

The final incident occurred in March of 2005, when Smith came over to K.J. mother's house and asked K.J. to do him a favor. Smith took K.J. upstairs to her mother's bedroom again and put his penis into K.J.'s. vagina. Shortly before Smith ejaculated, he "took his penis out of K.J.'s. vagina and started jacking off by the window." (Tr. 81). K.J. watched while Smith massaged his penis until sperm came out.

Smith told K.J. that there was nothing wrong with them having sex with each other since she was not really his daughter. Smith would get mad at K.J. and threaten to "kill himself" if she did not have sexual intercourse with him. (Tr. 82).

K.J. eventually told Mother that Smith was molesting her. Mother spoke with K.J. about the molestation, and apparently in an effort to test K.J.'s credibility, Mother asked K.J. to describe the area surrounding Smith's genitalia. K.J. gave an accurate and

detailed description of Smith's genital area.[2] Smith denied touching K.J. and stated that K.J. probably experienced these things, but not by him. In Smith's pre-sentence investigation report he also blamed K.J. by stating that she "dressed provocatively." (Tr. 142)

On May 5, 2005, Dr. Roberta Hibbard, a physician working predominantly at Riley Hospital for Children and Wishard Memorial Hospital, examined K.J., but was not able to find any physical injuries or damages as a result of a sexual assault. However, Dr. Hibbard testified at trial that it is very unusual for a child to have physical injuries or damages as a result of a sexual assault.

The State charged Smith with four counts of child molestation, as class A felonies; one count of child molesting, as a class C felony; and one count of fondling in the presence of a minor, as a class D felony. The jury found Smith guilty on all six counts; however, the trial court merged the class C felony conviction into count four and the class D felony conviction into count one.

Following a sentencing hearing on August 22, 2006, the trial court found that Smith's "previous conviction [in February of 1990] for child molest [wa]s a sufficient justification to order consecutive sentences, the presumptive/advisory sentence for each of these four crimes is appropriate." (Tr. 143). The trial court also gave "some slight aggravating weight . . . to the fact that Mr. Smith was arrested for sexual battery [in 1991] although that matter was subsequently pled out for a lesser offense." (Tr. 142). The

---

[2] The record does not reflect in detail, but apparently there was something unique or distinctive about Smith's genitalia or the area thereof that K.J. described to Mother that was confirmed to the jury by K.J. and Mother.

nature and circumstances of the crime was also considered an aggravator because Smith was K.J.'s step-father and the crime visited upon her was a clear violation of trust. The fact that Smith claimed that he was sexually abused as a child was also considered an aggravator. The trial court stated that "a victim of child abuse is in a better position than anyone else to know how damaging sexual abuse can be." (Tr. 142). Therefore, Smith should "have known better." (Tr. 142). Finally, the trial court did not "overlook in the pre-sentence report [Smith's] effort to blame [K.J.] in this case." (Tr. 142).

The trial court did not give any mitigating weight to Smith's self-purported history of substance abuse, or the hardship on Smith's son because that would had been a natural consequence of Smith's incarceration. The court did not give much mitigating weight to Smith's physical health.[3] However, the trial court did give some weight to Smith's mental health, based on his history of depression and his unsuccessful attempts at suicide. Smith was sentenced to serve thirty consecutive years in the Department of Correction for each of the four counts of child molesting, for a total executed sentence of 120 years.

DECISION

1. Sufficiency

Smith contends that the evidence was insufficient to sustain the convictions of child molesting, as class A felonies. When addressing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McHenry v State*, 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we "must consider only the probative evidence and reasonable inferences supporting the verdict." *Id.* Thus, we "must affirm"

[3] Smith's physical health consisted of a number of allergies, such that he was allergic to penicillin, wood, trees, dust, house pets, bee stings, and flowers.

if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

A person who, with a child under the age of fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a class B felony. However, the offense is a class A felony if it is committed by a person at least twenty-one (21) years of age. *See* Indiana Code § 35-42-4-3.

Smith specifically argues that the uncorroborated testimony of K.J. is insufficient to support his convictions. Indiana law clearly holds that a single witness' uncorroborated testimony is sufficient to sustain a conviction. *Ware v. State*, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004) (a molested child's uncorroborated testimony is sufficient to sustain a conviction). K.J. testified to four distinctive and separate acts of intercourse that occurred at different places where the family resided while she was under the age of fourteen and Smith was over the age of twenty-one.[4] The evidence is sufficient to support Smith's convictions.

However, Smith further argues that his conviction should be reversed under the inherent dubiosity rule. Under this rule, "a court will 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'." *White v. State*, 706 N.E.2d 1078, 1079 (Ind. 1999). Smith's reliance on this rule in this case is misplaced. Application of this rule is limited to cases where a sole witness presents inherently contradictory testimony which is equivocal or the result of

[4] At trial, both parties stipulated that Smith's date of birth was July 7, 1968. (Tr. 99).

coercion and there is a complete lack of circumstantial evidence of the appellant's guilt. *White,* 706 N.E.2d at 1079-1080. This Court will only invade the fact finder's province to weigh evidence where the testimony "runs counter to human experience" and no "reasonable person could believe it." *Edwards v. State,* 753 N.E.2d 618, 622 (Ind. 2001).

At trial, Dr. Roberta Hibbard testified that "it is very unusual for a child to have any physical injuries or damages as a result of a sexual assault." (Tr. 61). Dr. Hibbard also testified that "it's unusual for children to report their molest[ation] right after it happen[s]"; therefore, physical evidence regarding sexual contact would not be found or remain after about 24 to 48 hours. (Tr. 61). Further, K.J. told her mother that Smith's pubic hair was "beady,"[5] and her mother conceded that her daughter's description of Smith's pubic hair was accurate. This alone is sufficient circumstantial evidence to link Smith to the crime.

Likewise, K.J. unequivocally testified that, while living at the Rural Street address, her stepfather molested her when she was ten years-old. K.J. recalled that she was asleep on a black leather couch and Smith woke her up and told her "let's do it." (Tr. 70). K.J. testified that when Smith's penis went inside her vagina, it put "pressure on her stomach." (Tr. 72). K.J. testified that on another occasion while still living at the Rural Street address, Smith came into her bedroom and said to her "let's do it, do me a favor." (Tr. 73, 74). K.J. testified that Smith had intercourse with her in her bedroom on her bed.

K.J. also testified that Smith molested her when she was eleven years-old, and the family lived on Boulevard Place. K.J. described how Smith took her to a vacant house

---

[5] K.J. stated that the description of the word "beady" means "curly." (Tr. 92).

next door to where they lived and he "rub[bed] on me, kiss[ed] me, and then he would just stick his penis in my vagina." (Tr. 76). K.J. testified that Smith would make her touch his penis with her hands. K.J. expressed that his penis was erect when she touched it. She also testified that she stimulated him sexually by moving her hand "back and forth against his penis." (Tr. 77). K.J. testified that she observed sperm coming out of his penis.

K.J. further testified that she was thirteen years-old when Smith molested her at the Park Street address. K.J. testified that she was on her menstrual period one day in February of 2005, Smith did not actually put his penis inside of her, but he had her massage his erect penis with her hands until sperm came out. K.J. testified that the following month in March of 2005, Smith asked her, "[c]ould you do me a favor," and she responded by saying "yes"; so, Smith took her to her mother's bedroom and put his penis inside her vagina, but before he ejaculated he removed his penis and "starting jacking off by the window." (Tr. 80).

K.J.'s testimony was not counter to human experience, inherently contradictory, or coerced. Neither was there a complete lack of circumstantial evidence of Smith's guilt. The jury had the opportunity to assess K.J.'s credibility and demeanor in determining the truth of her testimony; therefore, we will not reweigh or attempt to reassess the jury's ultimate determination of credibility. We find that Smith's conviction is not subject to reversal under the incredible dubiosity rule.

2. Sentencing

Smith argues that his consecutive, presumptive sentences were inappropriate.[6] Smith specifically argues that his sentence is inappropriate in light of the nature of the crimes and the character of the offender. We disagree

It is well established that "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Smith has not carried this burden. Under Indiana Appellate Rule 7(B), this "court may revise a sentence authorized by statute 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." *Jones v. State*, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004), *trans. denied*.

Nevertheless, we exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial court in making sentencing decisions. *Foster v. State*, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003), *trans. denied*. We are not at liberty to set aside a legislatively sanctioned penalty merely because it seems too severe. *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997).

Here, as for the nature of the offense, the presumptive sentence is the starting point the legislature has selected as an appropriate sentence for the particular crime committed. The presumptive/advisory sentence for a person who commits a class A felony "shall be

---

[6] The statutory sentencing range for a class A felony was twenty to fifty years, with the presumptive sentence being a fixed term of thirty years. I.C. § 35-50-2-4. Subsequent to the date of Smith's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-4 to provide for an "advisory" rather than a "presumptive" sentence. The amended sentencing scheme was enacted on April 25, 2005. Pub. L. No. 71-2005, § 5 (codified at I.C. § 35-50-2-1.3 (West Supp. 2005)). See Anglemyer v. State, No. 43S05-0606-CR-230, slip op. at 11 (Ind. June 26, 2007).

imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances . . . ." *See* I.C. § 35-50-2-4. Due to the nature of this crime, the trial court took notice that K.J. was Smith's step-daughter, having married her mother when K.J. was only three and a half years-old, and that the crimes visited upon her were the most heinous violation of trust, having occurred multiple times over the course of at least three years.

As for the "character of the offender," the trial court took notice of Smith's criminal history, specifically Smith's previous conviction for child molesting in February 1990, as well as Smith's arrest for sexual battery in January of 1992, even though that matter was pled out to a lesser offense – battery. The trial court also read where Smith attempted to place the blame on K.J. in his pre-sentence investigation report when he stated that K.J. wore provocative clothing. There was testimony that Smith manipulated K.J. by telling her that there was nothing wrong with them having intercourse with each other because she was not really his daughter. The evidence revealed that Smith preyed upon K.J.'s young mind by displaying anger at K.J. and threatening to "kill himself" if she did not have sexual intercourse with him. (Tr. 82). Although the trial court took notice of these aggravating factors, it only imposed the presumptive/advisory sentence of thirty years for each separate and distinct felony.[7] We find no error here.

[7] Smith was convicted of four class A felonies, each of which carry a maximum possible penalty of fifty years. See I.C. § 35-50-2-4. As such, the maximum sentence he could have received is 200 years. Instead, Smith was sentenced to serve an aggregate sentence of 120 years.

Smith further argues that his sentence is inappropriate because the maximum sentences should be reserved for the very worst offenders and offenses. In reaching our decision, we are mindful of the principle that the maximum sentence permitted by law should be reserved for the very worst offenses. *Buchanan v. State*, 759 N.E.2d 641, 648 (Ind. Ct. App. 2001), *trans. denied*.

In *Jones*, the defendant argued that his sentence was inappropriate because maximum sentences should be reserved for the very worst offenders and offenses. On review, we held that Jones' argument was misplaced because the trial court did not impose the maximum possible sentence, but instead imposed the presumptive terms on all of Jones' class A felonies. Here, the trial court did not impose the maximum possible sentence. If the trial court had imposed the maximum possible sentence for each of the crimes Smith was convicted of, he could have received a sentence exceeding 200 years. However, the trial court only imposed four presumptive/advisory consecutive sentence for each of the separate class A felonies, totaling 120 years. Thus, Smith's argument is without merit. Therefore, we are not persuaded that the nature of the offense or character of the offender justifies revising Smith's sentence.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.