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IN THE
COURT OF APPEALS OF INDIANA

VICTOR M. RAMIREZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0703-CR-95
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT NO. 3
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0404-FA-75

October 18, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Victor M. Ramirez (Ramirez), appeals his conviction for Count I, child molesting, a Class A felony, Ind. Code § 35-42-4-3, and Count II, child molesting, a Class A felony, I.C. § 35-42-4-3.

We affirm.

ISSUES

Ramirez raises five issues on appeal, which we restate as the following four issues:

(1) Whether the trial court abused its discretion by excluding testimony;

(2) Whether the trial court properly instructed the jury;

(3) Whether the State presented sufficient evidence to sustain Ramirez's two child molesting convictions; and

(4) Whether the trial court properly sentenced Ramirez.

FACTS AND PROCEDURAL HISTORY

Between April 2003 and April 2004, Ramirez, who was twenty-six years old, lived in Goshen, Indiana. Ramirez spent a considerable amount of time at the household of a family who also resided in Goshen, and who considered him a family member. Ramirez spent much of that time with J.V., Jr., a minor son of the family, who was born October 26, 1994, and J.V., Jr.'s minor cousin, B.S., who was born on November 1, 1994.

Between April 2003 and April 2004, Ramirez molested J.V., Jr. several times. Ramirez would tell J.V., Jr. to pull his pants down and lean over the bed at which point Ramirez would put his penis inside J.V., Jr.'s rectum. Sometimes J.V., Jr. observed "white

stuff" on his legs or the bed. (Tr. p. 168). On several occasions, Ramirez also sucked J.V., Jr.'s penis. Ramirez instructed J.V., Jr. not to tell anyone. J.V., Jr. told his brother because he knew his brother would not tell, but told no one else.

During that same time period Ramirez performed the same acts on B.S. Ramirez also had B.S. perform oral sex on him. Ramirez instructed B.S. not to tell anyone what was happening between the two of them. Out of fear and embarrassment B.S. did not tell anyone.

In March 2004, J.V., Jr. told his mother what Ramirez had been doing to him. J.V., Jr.'s parents confronted Ramirez about J.V., Jr.'s allegations. J.V., Jr.'s mother also asked B.S. if Ramirez had done anything to him. B.S. told her he had.

On April 14, 2004, the State filed an Information charging Ramirez with Count I, child molesting, a Class A felony, I.C. § 35-42-4-3. On January 14, 2005, the State filed an amended Information adding Count II, child molesting, a Class A felony, I.C. § 35-42-4-3. On November 27, 28, and 29, 2006, a jury trial took place. After swearing in the jury, the trial court instructed the jurors about their roles. The trial court also instructed the jury concerning reasonable doubt.

During cross-examination of B.S., outside the presence of the jury, Ramirez made an offer to prove that B.S. told B.C. his brother had previously molested him.[1] However, B.S. denied ever making such a statement and denied knowing B.C. The trial court refused to

[1] There is no indication in the record what B.C.'s relation to B.S. is, if any.

allow the admission of B.C.'s testimony. At the conclusion of the evidence, the jury found Ramirez guilty as charged.

On February 8, 2007, the trial court sentenced Ramirez to advisory sentence of thirty years on both Counts. The trial court found the following aggravating circumstances: (1) there were two victims; (2) there were multiple instances of molestation; (3) Ramirez held a position of trust with J.V., Jr.; and (4) Ramirez had a child he failed to financially support. As mitigating circumstances, the trial court found that Ramirez had no criminal history and no criminal history and an admirable work history, but attributed little weight to his work history. Additionally, the trial court ordered the sentences to be served consecutively.

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

DISCUSSION AND DECISION

I. *Exclusion of Testimony*

Ramirez first contends the trial court erred in excluding evidence that B.S. previously told B.C. he was molested by his brother. The record specifically indicates that when questioned outside the presence of the jury, B.C. stated B.S. told her that his brother had anal sex with him. The trial court determined Ramirez did not lay an adequate foundation for B.C's testimony and thus did not permit the admission of this evidence.

The decision to admit or exclude evidence is within the trial court's sound discretion and is afforded great deference on appeal. *Fugett v. State*, 812 N.E.2d 846, 848 (Ind. Ct. App. 2004). We will generally not reverse a trial court's exclusion of evidence except when the exclusion is a manifest abuse of discretion resulting in a denial of a fair trial. *Id.* An

abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. This court will also find an abuse of discretion when the trial court controls the scope of cross-examination to the extent that a restriction substantially affects the defendant's rights. *Id*.

With some exceptions, Ind. Evid. R. 412 prohibits the admission of evidence of past sexual conduct of a victim or witness in the prosecution of sex crimes. Ind. Evid. R. 412(a). The rule is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and to remove obstacles to reporting sex crimes. *Sallee v. State*, 777 N.E.2d 1204, 1211 (Ind. Ct. App. 2002), *trans. denied*. Certain evidence of a victim's past sexual conduct may be admitted, however, provided it falls within one of the following exceptions: (1) evidence of the victim's or of a witness's past sexual conduct with the defendant; (2) evidence that shows some person other than the defendant committed the act upon which the prosecution is founded; (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or (4) evidence of conviction for a crime to impeach under Ind. Evid. R. 609. *Morrison v. State*, 824 N.E.2d 734, 739 (Ind. Ct. App. 2005), *trans. denied*.

Our review of the record shows that while B.C. stated B.S. told her his brother had anal sex with him, B.S. stated – also outside the presence of the jury – that his brother did not ever touch him in an inappropriate manner. Ramirez now argues that had if B.C. been permitted to testify, the testimony would have impeached B.S.'s testimony. However, as the trial court determined, any evidence related to sexual contact between B.S. and his brother

was irrelevant and, as such, the evidence was inadmissible. Therefore, there was no testimony to impeach B.S. Where relevancy is concerned, we conclude the trial court was correct. Any possible sexual contact between B.S. and his brother is unrelated to the molestation of B.S. by Ramirez. Further, Evid. R. 412 only permits impeachment with evidence of a conviction of a crime under Evid. R. 609. The record before us does not reveal an offer of proof of impeachment by such means. Consequently, we cannot find the trial court abused its discretion in excluding B.C.'s testimony regarding B.S.'s statement about anal sex with his brother.

II. *Jury Instructions*

Ramirez next argues the trial court (1) failed to properly instruct the alternate jurors, and (2) improperly instructed the jury as a whole on reasonable doubt. As to the alternate jurors, Ramirez contends the trial court failed to properly admonish the alternates as to their role during deliberations; as to reasonable doubt, Ramirez claims the instruction misstates the burden of proof.

A. *Standard of Review*

It is well established that instructing the jury is within the sole discretion of the trial court. *White v. State*, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), *trans. denied*. Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Id*. at 1032-33. A contemporaneous objection is generally required to preserve an issue for appeal. *Id*. at 1033.

B. *Alternate Juror Instruction*

With respect to alternate jurors, as stated in *Taylor v. State*, 687 N.E.2d 606, 608 (Ind. Ct. App. 1997), *trans. denied*:

> Beginning with the case of *Johnson v. State*, [369 N.E.2d 623 (Ind. 1977), *cert. denied*, 436 U.S. 948 (1978)], Indiana courts have consistently held that an alternate juror may, in the trial court's discretion, retire with the jury for deliberations so long as the alternate is first properly instructed that he [or she] is not to participate in the deliberations unless it becomes necessary for him [or her] to replace one of the original jurors.

Indiana Trial Rule 47(B) also states that "[i]f alternate jurors are permitted to attend deliberations, they shall be instructed not to participate." *See Taylor*, 687 N.E.2d at 608-09. As in *Taylor*, no admonishment was given to the alternate jurors in the instant case. However, as Ramirez concedes, a defendant who fails to object to the trial court's final instructions and fails to tender a competing set of instructions at trial waives any claim of error on appeal, unless the error rises to the level of fundamental error. *Id.*

The fundamental error doctrine is extremely narrow. *White*, 846 N.E.2d at 1033. Fundamental error is defined as an error so prejudicial to the rights of a defendant a fair trial is rendered impossible. *Id*. To qualify as fundamental, an error "must constitute a blatant violation of basic principles, the harm, or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Id*. (quoting *Spears*, 811 N.E.2d 485, 489 (Ind. Ct. App. 2004)).

In the instant case no instruction, preliminary or final, was given with respect to the alternate jurors and their role during deliberations. Rather, the only admonishment given to the alternate jurors was before they were selected as such. Specifically, the trial court stated:

> I will tell you that the alternate is asked to do a very difficult job. He or she must attend to the evidence while it is being presented. They retire to the jury room with the jurors and listen to discussions of the evidence as the trial proceeds. They also retire during deliberations and listen to the deliberations. They are not permitted to participate in the deliberations unless called upon to replace a regular juror. Some people find it very difficult to be quiet when discussions are going on around them, but alternate jurors are asked to perform that difficult task.

(Tr. p. 118).

Although the alternate juror in *Taylor* was actually given an instruction to "retire with the jury to the jury room to deliberate," we find the potential for harm occasioned by the trial court's lack of instruction in the instant case to be the same as the instruction given in *Taylor*. *Taylor*, 687 N.E.2d at 608. In *Taylor*, we found that if the alternate participated in the deliberations, Taylor was subjected to a trial by jury of thirteen members. *Id.* at 609. Nothing in the federal or Indiana constitutions explicitly guarantees a specific number of jurors, and juries of fewer than twelve members have therefore been accepted. *See Williams v. Florida*, 399 U.S. 78, 103 (1970) ("[W]e conclude that petitioner's Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were not violated by . . . a six-man rather than a 12-man jury."); *In re Public Laws Nos. 305 and 309*, 334 N.E.2d 659, 662 (Ind. 1975) ("We hold that [a provision for six-member juries] is constitutional. Our decision in this regard today represents a change of law in Indiana. . . ."). Additionally, Indiana provides a statutory right of a trial by a jury of twelve persons for a defendant

charged with murder, a Class A felony, Class B felony, or Class C felony. I.C. § 35-37-1-1. A defendant entitled to a jury of twelve may agree to be tried by a lesser number at any time prior to verdict. I.C. § 35-37-1-1(b)(1); *Smith v. State*, 373 N.E.2d 1112, 1113 (Ind. Ct. App. 1978).

In the instant case, the State argues that even though the only instruction given to the alternate jurors with respect to their role during deliberations occurred during jury selection, the alternate jurors were questioned about their ability to listen, but not participate in deliberations unless they were properly replaced. Additionally, the State notes that Ramirez never challenged either alternate juror; and perhaps most importantly, the State contends Ramirez does not establish he would suffer harm by the alternates' participation. We agree.

As in *Taylor*, we find "the element of harm is not shown by the fact that a defendant was ultimately convicted; rather, it depends upon whether his right to a fair trial was detrimentally affected." *Taylor*, 687 N.E.2d at 609 (quoting *David v. State*, 669 N.E.2d 390, 392 (Ind. 1996), *reh'g denied*). The record in the instant case does not leave us with the certainty that Ramirez could not possibly have had a fair trial with the lack of instruction given or that the verdict was clearly wrong. Therefore, we conclude that although the failure to give an instruction was improper, the error did not rise to the level of fundamental error.

C. *Reasonable Doubt*

Ramirez also argues the trial court improperly instructed the jury on reasonable doubt. Specifically, Ramirez claims the instruction misled the jury regarding the proper standard from which to determine his guilt or innocence.

Ramirez only specifically objected to the trial court's proposed Preliminary Instruction Number 7; we will review the trial court's final instructions for whether: (1) they correctly state the law; (2) there is evidence in the record to support the giving of the instruction; and (3) the substance of the tendered instruction is covered by the instructions that are given. *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). Ramirez must convince us that the instruction interfered with his substantive rights. *Id.*

In the present case, the following preliminary and final instruction regarding reasonable doubt was given to the jury:

> The State of Indiana has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, but in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, you should find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty.

(Appellant's App. p. 206). Ramirez challenges the reasonable doubt instruction because it states the jury *should* find him guilty if all reasonable doubt is removed. However, our

supreme court has affirmed the language of the instruction verbatim. *See Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000). Therefore, we find the trial court's reasonable doubt instruction was a correct statement of law, and not an abuse of discretion.

III. *Sufficiency of the Evidence*

Ramirez also challenges the sufficiency of the evidence to support his conviction. Specifically, he claims there was no physical evidence of molest, and the timing of reporting the molest was delayed.

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.* Additionally, a victim's testimony, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

To convict Ramirez of child molesting as a Class A felony the State was required to prove beyond a reasonable doubt that (1) Ramirez was at least twenty-one years old; (2) caused J.V., Jr. and B.S., both under fourteen years old; (3) to submit to deviate sexual conduct. *See* I.C. § 35-42-4-3. Our review of the record indicates the evidence was sufficient to prove the required elements beyond a reasonable doubt.

J.V., Jr. testified that several times between April 2003 and April 2004, when he was nine years old, Ramirez had him pull his pants down and lean over the bed. Ramirez would then put his penis inside J.V., Jr.'s rectum. J.V., Jr. testified Ramirez also sucked his penis. Ramirez was over twenty-one years old when these events took place.

B.S. testified that multiple times between April 2003 and April 2004, when he was nine years old, Ramirez had him pull his pants down, bend over the bed, and put his face in a pillow. Ramirez then put his penis inside B.S.'s rectum and B.S. felt Ramirez ejaculate. Ramirez also had B.S. perform oral sex on him. Ramirez was over twenty-one years old when these events took place.

Ramirez's argument that the boys changed their testimony essentially goes to credibility, which we do not review. *See White*, 846 N.E.2d at 1030. Ramirez additionally claims there was no physical evidence. As in many child molestation cases, there was no physical evidence of Ramirez's molestation of J.V., Jr. or B.S. However, physical evidence is not an element of the crime. *See* I.C. § 35-42-4-3. Thus, we find the evidence sufficient to support Ramirez's convictions for child molesting.

IV. *Sentencing*

Lastly, Ramirez disputes his sentence, specifically arguing the trial court erred in imposing consecutive sentences and that his sentence is inappropriate with respect to the nature of the offense and his character.

A. *Standard of Review*

In evaluating Ramirez's contentions, we must first address a recent change in Indiana's criminal sentencing scheme. Our legislature responded to *Blakely v. Washington*, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. *Weaver v. State*, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), *trans. denied*. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" *Id*. (quoting I.C. § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence was required to be supported by *Blakely*-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

In the instant case, Ramirez committed the crimes for which he was convicted before the date the new sentencing scheme took effect, but was sentenced after this date. In such situations, the retroactivity of the new sentencing scheme determines which scheme applies. *See Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), *trans. denied*. There is a split in this court as to whether the advisory sentencing scheme should be applied retroactively. *Compare Settle v. State*, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) *and*

Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), *trans. denied* (concluding that application of advisory sentencing statute violates the prohibition against *ex post facto* laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) *with Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that the change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of the advisory sentencing scheme is proper when a defendant is sentenced after the effective date of the amendment even though the offense was committed before); *see also Primmer v. State*, 857 N.E.2d 11, 15 (Ind. Ct. App. 2006), *trans. denied*. Our supreme court has not yet had the opportunity to resolve this issue.

It is our view that the change from presumptive to advisory sentencing is substantially procedural, especially in a case like the one before us, where the sentence would stand regardless of which sentencing scheme is applied. As a result, we choose to review Ramirez's sentence under the advisory sentencing scheme.

Our supreme court recently guided us through the process of this review in *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), where it stated, "[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." 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). Further, a trial court may impose any sentence within the statutory range without regard to the existence of aggravating or mitigating circumstances. *Anglemyer*, 868 N.E.2d at 489.

However, to perform our function of reviewing the trial court's sentencing discretion, "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." *Id*. at 490 (quoting *Page v. State*, 424 N.E.2d 1021, 1023 (Ind. 1981)). Such facts must have support in the record. *Anglemyer*, 868 N.E.2d at 490.

Accordingly, 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 through Appellate Rule 7(B). *Id*. at 491. This rule 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." App. R. 7(B).

B. *Consecutive Sentences*

In the present case, Ramirez was convicted of two Counts of Class A felony child molesting. A Class A felony carries an advisory sentence of thirty years, with a minimum sentence of twenty years and a maximum sentence of fifty years. *See* I.C. § 35-50-2-4. Here, the trial court imposed the advisory sentence for each conviction and ordered the sentences to be served consecutively, for an aggregate sentence of sixty years. Ramirez alleges the trial court improperly imposed consecutive sentences because the first two aggravators found by the trial court – two separate victims and multiple instances of molestation – were improper. We disagree.

Our supreme court has previously held that when a "perpetrator commits the same offense against two victims, enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003). In the instant case, the trial court did not enhance and impose consecutive sentences; rather, the trial court imposed advisory and consecutive sentences. Thus, in light of *Serino*, we cannot find the trial court improperly imposed consecutive sentences when there were in fact two separate victims and separate instances of molestation.

C. *Indiana Appellate Rule 7(B)*

Additionally, while Ramirez admits the offenses he committed were contemptible, he contends his sentence is inappropriate in light of the nature of the offense and his character. As support, Ramirez directs our attention to our supreme court's decision in *Walker v. State*, 747 N.E.2d 536 (Ind. 2001). However, the facts and resulting sentence in *Walker* differ somewhat from the instant case. Walker was convicted of two Counts of child molestation for two acts against one victim and sentenced to an enhanced forty-year sentence for each count to be served consecutively. *Id.* at 537-38. The trial court found aggravators which included committing the crimes while on probation and fleeing the jurisdiction. *Id.* at 538. The trial court also noted there was no physical injury to Walker's victim, and Walker did not have a history of criminal behavior. *Id.*

Here, Ramirez committed two Counts of child molestation as a result of several acts of molestation against two victims. Ramirez was sentenced to the advisory sentence after four

aggravators and two mitigators were found and ordered the sentences to be served consecutively. Furthermore, the acts occurred in one of the victim's home over an entire year where Ramirez he used his position of trust as a surrogate uncle to the victims. We are not persuaded the sentence imposed by the trial court is inappropriate with respect to the nature of the offense.

Nor has Ramirez persuaded us his sentence is inappropriate with respect to his character. Although we acknowledge he has "no criminal record and an admirable work history," Ramirez violated his position of trust with J.V., Jr. continually over a year's time. (Appellant's Brief p. 33). Additionally, the victims were afraid of Ramirez, preventing them from turning him in earlier. Thus, Ramirez, who was in a position of trust and scared his victims into not revealing the inappropriate behavior he inflicted upon them, has not persuaded us his sentence is inappropriate.

CONCLUSION

Based on the foregoing, we find the trial court (1) did not abuse its discretion by excluding testimony; (2) properly instructed the jury; (3) presented sufficient evidence to sustain Ramirez's two child molesting convictions; and (4) properly sentenced Ramirez.

Affirmed.

FRIEDLANDER, J., concurs.

SHARPNACK, J., concurs in Issues I – III and concurs in result in Issue IV.