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# IN THE
# COURT OF APPEALS OF INDIANA

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| BRIAN TYLER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 69A04-0702-CR-120 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl Taul, Judge
Cause No. 69C01-0603-FA-1

**October 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Brian Tyler appeals his convictions of vicarious sexual gratification as a Class D felony[1] and two counts of Class A felony child molesting.[2] He also claims his sentence for those offenses and an habitual offender enhancement[3] are inappropriate. We affirm.

## FACTS AND PROCEDURAL HISTORY

On December 30, 2005, Tracy Pickett and Jennifer Gayheart left their five children (three girls and two boys, all under the age of eight) in the care of a babysitter, Katrina Ensinger. Ensinger had cared for the children for more than a year and often brought along Tyler, who was her boyfriend. That evening Ensinger was called by another employer and told to come to work. With the permission of the parents, she left the children with Tyler.

While Tyler was alone with the children, he exposed himself to them and asked the three girls to touch his penis. Two of the girls did so. Tyler then removed the pants of the youngest Gayheart girl, put his mouth on her genitalia, and "humped" her. (*See, e.g.,* Tr. at 284-89, 335.) Tyler took the three girls to the bathroom and locked the door. He exposed himself again and had the girls touch his penis. He also touched the genitalia of the Pickett girl and ejaculated into the toilet.

Ensinger and Tyler babysat the children again the next day. The girls told Ensinger that Tyler had exposed himself. Tyler became upset and left. After the parents and police were notified, the children were interviewed at the Cincinnati Children's

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[1] Ind. Code § 35-42-4-5(c).

[2] I.C. § 35-42-4-3.

[3] I.C. § 35-50-2-8.

Hospital. These interviews were recorded, and three of them were admitted into evidence at Tyler's trial. The jury also heard live testimony from all five children.

The jury found Tyler guilty of all charges and also found he was an habitual offender. The trial court found Tyler's low intelligence, his history of institutionalization, and the lack of physical injury to the children to be mitigating factors. The trial court also found aggravating factors, including Tyler's criminal history, his abuse of a position of care, and the danger he presents to others. The trial court sentenced Tyler to forty years for each of the Class A felonies and ordered them to be served consecutively. Tyler was also sentenced to three years for the Class D felony, to be served concurrently with the other sentences. Finally, the court attached the thirty-year habitual offender enhancement to one of the Class A felonies, for a total sentence of 110 years.

## DISCUSSION AND DECISION

1. Admission of Taped Interviews

Tyler asserts the trial court erred by admitting the children's taped interviews. At trial, he objected to the admission of the tapes on the ground they were not sufficiently reliable to be admitted pursuant to the protected person statute.[4] He now claims the tapes were inadmissible because they were cumulative, *see* Ind. Evidence Rule 403, and exposed the jury to a "'repetitive drumbeat' of allegations." (Appellant's Br. at 8.) "It is well-settled law in Indiana that a defendant may not argue one ground for objection at

[4] Ind. Code § 35-37-4-8 (governing admission of videotaped testimony of children less than fourteen years of age).

trial and then raise new grounds on appeal." *Gill v. State*, 730 N.E.2d 709, 711 (Ind. 2000). Therefore, Tyler has not preserved the new argument for appeal.

Nevertheless, Tyler claims the admission of the tapes was fundamental error. "The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible." *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001).

Tyler argues his case is like *Stone v. State*, 536 N.E.2d 534, 541 (Ind. Ct. App. 1989), in which we reversed a conviction for child molesting because the State used multiple witnesses to produce a "drum beat repetition" of the child's story. In *Stone*, the State had four adult witnesses testify to out-of-court statements made by the child, and at least one of the adults testified before the child took the stand. The child's story was repeated a total of seven times during the trial. We found the child's credibility "became increasingly unimpeachable as each adult added his or her personal eloquence, maturity, emotion, and professionalism to [the child's] out-of-court statements," so that the "presumption of innocence was overcome long before [Stone] got to the stand." *Id*. at 540.

Tyler's trial is easily distinguishable from *Stone*. The children's live testimony was presented first. Tyler was able to cross-examine them immediately, and he questioned them about the taped testimony. Furthermore, the children's testimony was not artificially bolstered by testimony from adults. The only repetition was the playing of the recorded interviews, which showed the children giving their own account of Tyler's

actions. There was no undue repetition of any single witness's story. Therefore, the admission of the tapes was not so prejudicial as to render a fair trial impossible.

2. Tyler's Sentence

Tyler argues Ind. Code § 35-50-2-1.3 prohibited the trial court from imposing consecutive aggravated sentences. However, our Supreme Court recently held that statute does not so limit the trial court. *Robertson v. State*, 871 N.E.2d 280 (Ind. 2007).

Tyler also claims his sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court's decision, recognizing the special expertise of the trial court in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* __ N.E.2d __ (Ind. 2007). Although we conduct an independent review under App. R. 7(B), we "assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate." *Gibson v. State*, 856 N.E.2d 142, 147 (Ind. Ct. App. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Tyler does not appear to dispute the seriousness of the aggravators found by the trial court. Tyler abused a position of trust with the five children and their parents. At the time he was sentenced, Tyler was only twenty-three years old, but already had a long string of convictions and juvenile adjudications, most of which involved violence. Both of the offenses underlying the habitual offender charge were committed while in prison.

Tyler has apparently had substantial hardships in his life, including having a low IQ and being physically abused. While these circumstances are regrettable, they do not change the fact Tyler is a danger to society. He is unable to conform his conduct to the law even in the highly structured environment of a prison. Therefore, we cannot find his sentence inappropriate in light of his character and the nature of his offenses.

Affirmed.

CRONE, J., and DARDEN, J., concur.