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IN THE
COURT OF APPEALS OF INDIANA

CHARLES EASTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0606-CR-257
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0502-FC-51

November 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Charles Easton ("Easton") appeals his sentencing, after being convicted by a jury of child molesting, as a class C felony; and two counts of dissemination of matter harmful to a minor, as class D felonies.

We affirm.

ISSUES

1. Whether the trial court's enhanced sentence is in violation of the Sixth Amendment because a jury did not find aggravating circumstances used for enhancement purposes.

2. Whether Easton's sentence is inappropriate.

FACTS

At some point during the summer of 2004, while Easton's step-grandsons, J.W. (age 4) and T.H. (age 6) were in his care, Easton showed the boys a "nasty" movie. (Tr. 36). The movie depicted "a boy and a girl kissing" (Tr. 37), "tak[ing] their clothes off" (Tr. 65), and the boy "making the girl put their [sic] mouth on [the boy's] private part." (Tr. 65). T.H. asked Easton to turn the movie off, but Easton refused saying, "this is how it's going to be in real life." (Tr. 66). J.W. turned the movie off himself and ejected the tape from the VCR. Easton turned the movie back on and resumed viewing.

During the fall or winter of 2004, while T.H. was using the bathroom, Easton entered and touched T.H.'s penis, while "moaning and groaning" like the actors in the "nasty" movie. (Tr. 70). Easton instructed T.H. not to tell anyone what had happened, but T.H. told his mother, Alice "Patrice" McFerren and several other relatives. McFerren notified law enforcement officials.

On February 14, 2005, the State charged Easton with child molesting, as a class C felony; and two counts of dissemination of material harmful to a minor, as class D felonies. After a jury trial from March 20, 2006 through March 22, 2006, Easton was convicted on all counts.

On May 16, 2006, the trial court held Easton's sentencing hearing. Easton, two of his children, and his pastor asked the trial court to impose a suspended sentence. Subsequently, McFerren testified that "Charles Easton has a history of sexual abuse. He not only touched my boys, but I was also a victim from the age of nine to about fifteen or sixteen. He sexually abused me." (Sentencing Tr. 27).

Thereafter, defense counsel expressed concern that the trial court would consider McFerren's allegations as aggravating factors, and the following colloquy ensued between the trial court, defense counsel, and the State:

> Court: I have a witness who has come in and taken an oath to testify truthfully, and she's claiming she herself was a victim of this defendant for a period of five, six, or seven years. Am to [sic] regard that entirely?
>
> Defense: I believe so, your Honor.
>
> Court: You can cross-examine her.
>
> Defense: That doesn't change the fact, Judge, that there has been no charge filed, and there has been no conviction for anything involving Ms. McFerren. And I don't believe that under those circumstances it is appropriate for the Court to consider the testimony that she's just given on that subject in terms of factual –
>
> Court: Totally disregard it is what you're saying?
>
> Defense: Yes.
>
> Court: Really? What's your position, Mr. Prosecutor?

State: I think it is entirely appropriate. It goes to character which is something the Court uses –

Court: Well, I certainly wish some Court of Appeals [sic] would educate us poor trial judges on what we're supposed to do in a very complicated human case where we have somebody charged with child abuse who has been convicted by a jury of certain counts where there's then a sentencing hearing where people come in to testify. They are subject to cross-examination. They make claims that they themselves were victims. The defense attorney is given an opportunity to cross-examine them. And I'm being told to disregard her credibility as a witness.

Defense: What I am saying, your Honor, is that I don't believe the subject matter in and of itself is something that the Court should consider in fashioning the sentence. Again , there was no –

Court: Especially in a case where there is a claim of child abuse and – by somebody who was in the household for a period of some five, six, or seven years, many years before, and I'm supposed to consider danger to the community among other things and whether there's an ongoing threat to the community. I'm not supposed to consider this at all?

* * * * *

Defense: Judge, I think the issue here is one that involves Blakely. This was a fact that wasn't found by the jury to be true.

* * * * *

State: If I may, your Honor, in addition to whether Blakely applies or not, assuming that Blakely would apply, Blakely doesn't apply for sentences that would be below . . . what used to be called the presumptive [sentence]. All of that evidence is admissible up to the presumptive amount. You can have that. It is not a requirement. It is only when you want to use those for aggravators, and aggravators meaning over the presumptive.

(Sentencing Tr. 29-33). After an extended discussion among the parties, the State presented evidence of Easton's prior criminal history, which consisted of seven misdemeanors and three felonies.[1]

Prior to imposing sentence the trial court stated,

> [T]here is in this case enough material here that is very disturbing to this Court. And it is on the defendant's criminal history that I lay great weight in fashioning the sentences I fashion.
>
> And I am expressly talking about the criminal history . . . in the pre-sentence report. And I noted that . . . the things that were denied by the defendant or explained by the defendant I have taken into note. But I note that there was albeit in 1965 Robbery by Violence, one to ten years. There was a minor offense indeed but furnishing alcohol to a minor which I find disturbing which was in 1966.
>
> There was Assault and Battery with Intent to Commit a Felony, which was in 1966. There was a charge that the defendant explained was the result of an initial investigation for murder but was never actually apparently charged, and instead he was charged with and convicted of Carrying a Dangerous Weapon. And that was in '72.
>
> There was another charge of Carrying a Dangerous Weapon in '76, which was a conviction. There was a conviction for Assault Excluding Sexual in 1977. There was an attempt to Possess Cocaine which was a C felony charge. It was apparently pled to Attempt to Possess Cocaine, D felony, which was then treated as a Class A misdemeanor.
>
> * * * * *
>
> There was in August of 2001, Battery, as a Class A misdemeanor, which was also a conviction. I am only talking about conviction[s]. And then there was this [instant offense] which is from 2004.
>
> . . . I understand there are some very old, old cases, but there are also per force of circumstance a very long history. The first conviction was in 1964. This case was in 2004. That is a criminal history that covers forty

[1] Easton challenged one misdemeanor conviction for failure to provide for a child, and further advised that his conviction for attempt to possess cocaine, as a class D felony, was ultimately treated as a misdemeanor conviction.

> years of this defendant's adult life. That is a long pattern of violence and disregard for the law.
>
> I also take into account the fact that at the time, . . . of the offense one child was then eight [six] years of age, which I consider to be of tender years, and the other was of five [four] years of age, and I consider that to be even more tender years.

(Sentencing Tr. 48-50). After finding that the ages of the victims and Easton's criminal history were aggravating circumstances, the trial court sentenced Easton to serve seven years on the child molesting conviction. For the convictions for dissemination of material harmful to a minor, the trial court imposed two two-year sentences. The trial court ordered the latter sentences served concurrently to each other, but consecutively to the sentence for child molesting, for an aggregate sentence of nine years. Easton now appeals.

DECISION

1. Sixth Amendment

Easton contends that the trial court erred when it enhanced the sentences for his felony convictions in violation of *Blakely v. Washington,* 124 S.Ct. 2531 (2004), by relying on aggravating circumstances not found by a jury beyond a reasonable doubt. Easton argues that the trial court "specifically used [the] serious nature of [McFerren]'s accusations to enhance his sentence." Easton's Br. 4. The State responds that Easton's Sixth Amendment right to trial by jury is not implicated here because the trial court relied on at least one aggravating factor that is "indisputably valid" under *Blakely* -- namely Easton's criminal history. State's Br. 5.

Blakely applied the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which stated, 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.'" Prior convictions are exempt from the *Apprendi/Blakely* analysis because they have already been proven beyond a reasonable doubt. *Pinkston v. State*, 836 N.E.2d 453, 459 (Ind. Ct. App. 2005).

Here, the record indicates that the trial court considered Easton's criminal history in determining sentence. (Tr. 48). Dating back to 1964, Easton's criminal record spanned a forty-year period and consisted of ten criminal convictions. As the State correctly notes, a single aggravating factor can justify the imposition of an enhanced sentence. *Tracy v. State*, 837 N.E.2d 524, 529 (Ind. Ct. App. 2005). We find that because the trial court considered Easton's extensive criminal history -- an aggravating factor that does not violate *Blakely* -- the Sixth Amendment was not implicated when the trial court imposed a sentence above the advisory sentence but less than the statutory maximum.[2]

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[2] The State cites *Apprendi* for the proposition that "nothing . . . suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481.

Easton was convicted of a class C felony and two class D felonies. A class C felony calls for a term of incarceration between two and eight years, with the advisory sentence being four years. Likewise, a class D felony calls for a term of incarceration between six months and three years, with the advisory sentence being one and one-half years. The combined statutory maximum sentence for these convictions was fourteen years. Here, the trial court, in its sound discretion, imposed an aggregate sentence of nine years, well below the statutory maximum sentence prescribed by law.

2. Sentence

Next, Easton challenges the appropriateness of his sentence. We may revise a sentence if, after 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. Ind. Appellate Rule 7(B). With regard to the nature of the offense of dissemination of material harmful to a minor, the facts reveal that Easton introduced his grandsons, J.W. and T.H., (ages 4 and 6 respectively) to a "nasty" movie depicting graphic sexual material. (Tr. 36). T.H. asked Easton to turn the movie off, but Easton rebuffed him saying, "This is how it's going to be in real life." (Tr. 66). With regard to the nature of the child molestation offense, the facts reveal that on a separate occasion, Easton touched T.H.'s penis with his hand, and instructed T.H. not to tell anyone about the incident. (Tr. 70).

As regards Easton's character, his criminal history spans a forty-year period. In 1965, he was convicted of robbery by violence and simple assault. In the years since, Easton has been convicted of assault; assault and battery with intent to commit a felony; attempted cocaine possession; battery; carrying a handgun; frequenting a gambling house; and malicious trespass. Of Easton's ten prior criminal convictions, three were felonies and the remaining seven were misdemeanors. We find no error from the trial court's ruling that Easton's sentence should be enhanced based upon his extensive criminal history.

Affirmed.[3]

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

[3] At the sentencing hearing, the trial court asked, in the event of an appeal, that a panel of this court consider whether it could properly consider McFerren's accusations as an aggravating factor in imposing sentence. We decline to address this question here, and leave the matter for another day, given the presence, under the instant facts, of a valid aggravating factor upon which to base Easton's enhanced sentence.