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**IN THE
COURT OF APPEALS OF INDIANA**

MARCUS A. BARBER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 35A02-0706-CR-486

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0604-FB-00021

November 14, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Marcus A. Barber appeals his convictions and twelve-year sentence for two counts of Child Molesting,¹ a class C felony. Specifically, Barber argues that (1) the trial court abused its discretion when it denied his motion for a continuance; (2) the trial court considered improper aggravating factors; and (3) his sentence is inappropriate in light of the nature of the offenses and his character. Concluding that the trial court did not abuse its discretion by denying Barber's motion for a continuance and that his twelve-year sentence is supported by at least one proper aggravator and is not inappropriate, we affirm the judgment of the trial court.

FACTS

In 2003, Christi Atkins and her two daughters, K.S.² and Kyra, lived in a two-bedroom mobile home in Huntington with Christi's brother, Khrystopher, and Khrystopher's friend, Barber. Christi shared one bedroom with K.S. and Kyra, and Khrystopher and Barber shared another bedroom. Khrystopher and Barber paid Christi approximately \$50 per week in rent, and Christi deducted money from the rent when Khrystopher or Barber babysat the girls.

On one occasion when Barber was babysitting, he had K.S. touch and rub his penis with her hand. Barber told K.S. to move her hand up and down over Barber's penis, and K.S. felt the texture of his penis change. Tr. p. 204-206. On another occasion, Barber instructed K.S. to "pull down [her] pants." Id. at 208. Barber placed one hand on K.S.'s bottom and rubbed her vagina in a circular motion with his other hand. These incidents occurred

¹ Ind. Code § 35-42-4-3(b).

² K.S. was born on April 25, 1996.

between October 2003 and July 2004. Although Kyra was not present, K.S. eventually told her sister what had happened.

Barber joined the National Guard and left Huntington in July 2004. Christi became pregnant, and she, K.S., and Kyra moved to another home in August 2004. Kyra eventually told her mother that Barber had molested K.S., and Christi confronted her brother, Khrystopher. Christi chose not to pursue the matter because K.S. did not want to talk about it.

In April 2006, when K.S. was in the fourth grade, her school presented an educational program on the topic of “good touch, bad touch.” Id. at 216. After the program, K.S. indicated that she had been touched and wanted to talk to someone about it. K.S. was interviewed, and the case was referred to the Department of Child Services.

Barber was charged with one count of class B felony child molesting and two counts of class C felony child molesting on April 25, 2006. The class B felony charge was ultimately dismissed, and a jury found Barber guilty of the remaining charges on February 2, 2007. A sentencing hearing was held on March 12, 2007, and the trial court sentenced Barber to six years imprisonment on each count with the sentences to run consecutively. The trial court suspended seven years to probation, for an aggregate term of five years imprisonment. Barber now appeals.

DISCUSSION AND DECISION

I. Continuance

On February 1, 2007—the morning the jury trial was scheduled to begin—Barber requested a continuance so that he could obtain his medical records from the National Guard. Barber argued that the medical records would show that he had a rash in his “groin area” during the time the alleged child molestation occurred and that the records would impugn K.S.’s credibility if she did not mention Barber’s rash at trial.³ Tr. p. 40. The National Guard had informed Barber’s attorney the week before trial that the records would not be available in time for the trial. Therefore, Barber did not subpoena the records because he knew that they would not be ready for trial. The trial court concluded that “these records have not been subpoenaed for trial nor have there been specific witnesses subpoenaed for trial and since they have not been subpoenaed for trial I’m going to deny the motion [for continuance].” Id. at 45.

Indiana Trial Rule 53.5 provides, in relevant part, that a “trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence.” When, as here, a motion for a continuance is based on non-statutory grounds or the motion fails to meet the statutory criteria,⁴ the decision

³ While Barber did not actually join the National Guard until July 2004, he averred to the trial court that the National Guard performed a medical examination in June 2003—before the incidents with K.S. occurred. Tr. p. 43.

⁴ The applicable statutory criteria are set forth in Indiana Code section 35-36-7-1:

- (a) A motion by a defendant to postpone a trial because of the absence of evidence may be made only on affidavit showing:
 - (1) that the evidence is material;

to grant or deny the motion is within the discretion of the trial court. Hamilton v. State, 864 N.E.2d 1104, 1108-09 (Ind. Ct. App. 2007). We will not disturb the trial court’s decision absent a clear demonstration that the trial court abused that discretion. Id. at 1109. An abuse of discretion occurs when the ruling is against the logic and effect of the facts and circumstances before the trial court or when the record demonstrates prejudice resulting from the denial. Id. For a denial of a continuance to constitute reversible error, the defendant must demonstrate that he was prejudiced by the denial. Macklin v. State, 701 N.E.2d 1247, 1250 (Ind. Ct. App. 1998).

Barber concedes that the trial court’s ruling was discretionary. Appellant’s Br. p. 6. However, he argues that the trial court abused its discretion by denying his motion because the medical records would have shown that he had a rash on his pelvic area before he molested K.S. Thus, Barber argues that “[t]he fact that [K.S.] did not mention a rash suggests that she did not see or touch Mr. Barber’s penis.” Id. at 7.

We cannot conclude that Barber was prejudiced by the trial court’s failure to grant his continuance. K.S.’s failure to notice Barber’s alleged rash while she was being molested does not necessarily impugn her credibility. Furthermore, Barber was able to obtain medical records before trial from a doctor who treated him multiple times between 1998 and 2005;

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- (2) that due diligence has been used to obtain the evidence; and
 - (3) the location of the evidence.

(d) A defendant must file an affidavit for a continuance not later than five (5) days before the date set for trial. If a defendant fails to file an affidavit by this time, then he must establish, to the satisfaction of the court, that he is not at fault for failing to file the affidavit at an earlier date.

however, those medical records do not refer to a skin condition affecting Barber's pelvic region. Tr. p. 40, 42. Thus, we conclude that the trial court did not abuse its discretion by denying the continuance Barber requested the day of trial.

II. Sentencing

Barber molested K.S. before the amended sentencing statutes took effect on April 25, 2005. Thus, the applicable sentencing statute provides that the presumptive sentence for a class C felony is four years, with no more than four years to be added for aggravating circumstances and no more than two years to be subtracted for mitigating circumstances. Ind. Code § 35-50-2-6 (2003). The trial court identified three aggravating factors: Barber was in a position of trust when he molested K.S., Barber showed no remorse, and Barber molested K.S. on two separate occasions. The trial court found Barber's lack of criminal history to be a mitigating factor. After balancing the mitigating and aggravating factors, the trial court imposed six years imprisonment on each conviction and ordered the sentences to run consecutively. The trial court suspended seven years, for an aggregate term of five years imprisonment.

A. Aggravating Factors

Barber does not challenge the trial court's finding that he was in a position of trust with K.S. However, he argues that the trial court erred when it found his lack of remorse and the two incidents of molestation to be aggravating factors.

If the court relies on aggravating or mitigating circumstances to deviate from the presumptive sentence, it must (1) identify all significant mitigating and aggravating

circumstances; (2) state the specific reason why each circumstance has been determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. Merlington v. State, 814 N.E.2d 269, 272 (Ind. 2004). When an enhanced sentence is challenged on appeal, we examine the record to ensure that the sentencing court explained its reasons for selecting the sentence it imposed. Id.

A single aggravating factor may be sufficient to support an enhanced sentence. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001). If one or more aggravating circumstances cited by the trial court are invalid, we must determine whether the remaining factors are sufficient to support the sentence imposed. Hollen v. State, 761 N.E.2d 398, 402 (Ind. 2002).

Barber consistently maintained his innocence throughout trial and sentencing, and K.S.'s uncorroborated testimony was the only direct evidence of his guilt. Thus, as the State concedes, the trial court improperly considered Barber's lack of remorse to be an aggravating factor. Appellee's Br. p. 8 (citing Dockery v. State, 504 N.E.2d 291, 297 (Ind. Ct. App. 1987) (holding that while a trial court may typically consider a defendant's lack of remorse to be an aggravating factor, the finding is not proper if the defendant consistently maintained his innocence and the victim's testimony is uncorroborated)).

Barber argues that the trial court improperly considered the fact that he molested K.S. on two separate occasions to be an aggravating factor because he was convicted for both of those incidents. A fact that comprises a material element of a crime cannot also be used as an aggravating factor to support an enhanced sentence. Manns v. State, 637 N.E.2d 842, 844 (Ind. Ct. App. 1994). In Kien v. State, we held that it was improper for the trial court to

consider the defendant's multiple acts of molestation to be an aggravating factor because he had been convicted for each offense. 782 N.E.2d 398, 411 (Ind. Ct. App. 2003). However, we also held that because the trial court elaborated on the multiple incidents of molestation by "considering the ongoing nature of the acts and the effect that they had upon [the victim,]" it was a "proper consideration for the trial court to make upon the number of offenses [the defendant] committed." Id.

While the trial court herein found the two incidents of molestation to be an aggravating factor, it did not elaborate on the effects of the crimes on K.S. However, even if we assume for the sake of the argument that the trial court improperly considered Barber's multiple offenses to be an aggravating factor, the trial court properly found Barber's position of trust with K.S. to be an aggravating factor—a finding that Barber does not challenge on appeal. Bacher v. State, 722 N.E.2d 799, 802 (Ind. 2000) (holding that a defendant's position of trust with the victim can be a valid aggravating factor); Watson v. State, 784 N.E.2d 515, 523 (Ind. Ct. App. 2003) (holding that defendant was in a position of trust when he babysat the victim).

As previously noted, a single aggravating factor may be used to support an enhanced sentence. Here, the trial court could have enhanced Barber's sentence by up to four years on each count, I.C. § 35-50-2-6, but, instead, enhanced the sentence on each count by two years. In light of the significant position of trust Barber held over K.S. when he molested her, we conclude that this aggravating factor outweighs Barber's lack of criminal history and supports an aggravated sentence.

B. Appropriateness

Barber argues that his enhanced, consecutive sentences are inappropriate in light of the nature of his offenses and his character. Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence 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." However, sentence review under Appellate Rule 7(B) is deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offenses, Barber lived in the same home as K.S. when he molested her. K.S.'s mother, Christi, trusted Barber to babysit her daughters and look after their best interests and, instead, Barber abused that position of trust and violated K.S. twice while she was between seven and eight years old. We do not find the nature of Barber's offenses to aid his inappropriateness argument.

Turning to Barber's character, we applaud his decision to join the National Guard and acknowledge his lack of criminal history. However, we cannot disregard the fact that he had time to reflect on his actions and the harm he was causing K.S. before, during, and after he molested her. But, instead of placing K.S.'s best interests above his own sexual desires, Barber molested K.S. on more than one occasion. This inability to place a child's interests

above his own desires reflects poorly on his character. In sum, we do not find Barber's twelve-year sentence to be inappropriate in light of the nature of the offenses and his character.

The judgment of the trial court is affirmed.

MAY, J., and CRONE, J., concur.