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IN THE
COURT OF APPEALS OF INDIANA

STEVEN M. BABCOCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A02-0612-CR-1083
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0601-FA-4

November 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Steven M. Babcock appeals his conviction and sentence for Class A felony child molestation. We affirm.

Issues

Babcock raises three issues, which we restate as follows**:**

I. Whether the prosecutor committed misconduct warranting reversal of his conviction;

II. Whether the trial court abused its discretion by instructing the jury to judge Babcock's testimony as it would the testimony of any other witness; and

III. Whether his sentence is appropriate in light of the nature of his offense and his character.

Facts and Procedural History

Babcock lived with his wife, Trina, and her three young children from a previous relationship, B.C., R.C., and E.C. Babcock's children from his previous marriage, N.B. and A.J.B., stayed in the Babcocks' home during regular visitation periods. Babcock and Trina shared a bedroom on the first floor of their home. On June 19, 2005, R.C. was sleeping in his room upstairs, and E.C. slept on the living room couch. B.C., N.B., and A.J.B. shared a second upstairs bedroom. A.J.B. slept on a toddler bed, while B.C. and N.B. shared a bunk bed. When all the children were in bed, Babcock walked into the girls' room and told ten-year-old B.C. to switch bunks with N.B. B.C. was not wearing a nightgown because she was hot. The other girls were cold, so Babcock left the room to get them blankets. When he returned, Babcock got into bed with B.C. He put his finger in B.C.'s vagina, put his mouth

on her breasts and her vagina, touched her vagina with his penis, and kissed her, placing his tongue in her mouth.

Trina dozed off around 10:00 p.m. and then awoke at 10:45 p.m. and noticed that Babcock had not returned from taking blankets to the girls. She went upstairs to find him and heard voices coming from the girls' room. As she entered the room, she heard "chatter." A blanket was hanging from the top bunk, blocking Trina's view of the bottom bunk. She noticed that A.J.B. and N.B. were asleep. Babcock was sitting at the head of B.C.'s bed in "pajama shorts" and B.C. was sitting on her knees at the foot of the bed. Tr. at 41. Babcock stood up and began to walk out of the room. Trina asked him why he had been in bed with B.C. Babcock stated that he had been talking with B.C. about school issues. After he left the room, Trina asked B.C. if there was anything she wanted to talk about. B.C. told Trina that Babcock had been touching her.

Trina told B.C. to get dressed. She went downstairs to confront Babcock, and he denied touching B.C. Trina attempted to examine B.C. for signs of abuse, but she realized that she was not properly trained to do so. She then called her sister-in-law, Shirley Cox, and asked her to accompany her and her children to the hospital. While Trina waited for Cox to arrive, Babcock walked around the house carrying a knife and "just chucking at" a piece of wood. Tr. at 46. B.C. was scared, so Trina put her in the truck parked outside and told her not to let anyone inside except Cox, B.C.'s brother, or Trina. Trina packed some clothes, and then she woke R.C. and E.C. and told them to come with her.

Trina, Cox, and Trina's three children drove to Jasper County Hospital. After they waited for several hours, a physician informed Trina that B.C. should be examined at Riley

Children's Hospital since she was under the age of thirteen. The family drove to Riley in Indianapolis, where they were then directed to Wishard Hospital.

At Wishard, medical personnel removed B.C.'s underwear and placed it in a bag that was then secured. They examined B.C. and took swab tests of her mouth and her vagina. In the months following that night, B.C. ate very little, threw frequent temper tantrums, and was admitted to a state hospital on two occasions. She lived with her biological father for a time and then returned to live with Trina, who was no longer living with Babcock.

The White County Sheriff's Department collected hair, pubic hair, and saliva from Babcock. Testing determined that Babcock's amylase, or saliva, was present in B.C.'s underwear. On January 5, 2006, the State charged Babcock with one count of class A felony child molestation.

A jury trial was held on September 26 and 27, 2006. Babcock testified on his own behalf. Outside the presence of the jury, the parties and the trial court discussed final jury instructions. The trial court's proposed final jury instruction number 11 stated: "You should judge the testimony of the Defendant as you would the testimony of any other witness." Appellant's App. at 31. Babcock objected to this instruction on the basis that it "single[d] out the [Babcock's] testimony for special attention by the jury[.]" Tr. at 360. The court overruled the objection and included Instruction 11 in the jury's final instructions. The jury found Babcock guilty as charged.

On October 24, 2006, the trial court held a sentencing hearing. As mitigating factors, the court noted Babcock's lack of criminal history and the potential hardship of incarceration upon his dependent children. The court assigned little weight to the latter factor, however.

The court sentenced Babcock to the advisory sentence of thirty years, with five years suspended to probation due to the lack of aggravating factors. Babcock now appeals.

Discussion and Decision

I. Prosecutorial Misconduct

Babcock alleges that the prosecutor committed misconduct on several occasions during his trial, primarily during the State's opening and closing arguments. He argues that the prosecutor injected several evidentiary harpoons into his opening statement when he repeatedly suggested that Babcock had committed past crimes against B.C. He alleges that the prosecutor mischaracterized Trina's testimony during his closing argument. He alleges that the prosecutor used his closing statement to remind the jury of an allegedly inadmissible statement made by Trina during her testimony. Finally, he alleges that the prosecutor committed misconduct by discussing a friend's recent newspaper editorial about the prevalence of criminal activity throughout the United States and the world. In this context, the prosecutor inserted his own opinion that "our community is like all other communities, full of sex offenders." Tr. at 391.

As the State notes, a timely objection at trial is necessary to preserve for review the issue of prosecutorial misconduct. *Mftari v. State*, 537 N.E.2d 469, 473 (Ind. 1989). According to the transcript, Babcock objected to only one of these alleged instances of misconduct, and in that case, his objection was not timely. Babcock objected to the prosecutor's statement about the large number of sex offenders in the community only *after* the jury had retired to deliberate. At that time, the trial court stated,

[F]irst of all, the trial court would agree with Defense counsel that it was

> probably an objectionable statement and had it been made at the time the statement was made the Court would have sustained that objection and if there was a Motion to Strike made the Court would have stricken it, however at this point in the procedure it's too late and the objection[']s noted and overruled.

Tr. at 401. Because Babcock failed to object in a timely manner to all of the instances of alleged misconduct identified in his brief, all of his claims of prosecutorial misconduct are waived for review.

Alternatively, Babcock claims that the prosecutor's misconduct rose to the level of fundamental error, in which case his failure to object would not preclude us from reviewing his claims. *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). For prosecutorial misconduct to constitute fundamental error, it must "make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm." *Id*. (quoting *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)). In light of the other significant evidence supporting Babcock's conviction—e.g. B.C.'s testimony and DNA evidence—we cannot conclude that the prosecutor's statements made a fair trial impossible or presented an undeniable and substantial potential for harm. There was no fundamental error here.

II. Final Jury Instructions

Babcock also argues that the trial court erred in giving final jury instruction 11, which stated, "You should judge the testimony of the Defendant as you would the testimony of any other witness." Appellant's App. at 31. In this instance, his counsel made a timely objection

to the instruction, arguing that it "single[s] out the testimony of the Defendant for special attention by the jury." Tr. at 360. After researching the issue, the trial court later overruled Babcock's objection because it found the pattern instruction to be "appropriate" in this case.[1] Tr. at 363.

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable the jury to understand the case and arrive at a just, fair, and correct verdict. *Buckner v. State*, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). Instructing the jury lies within the sound discretion of the trial court and is reviewed only for an abuse of that discretion. *Id*. To obtain a reversal of his conviction on the basis of an improper instruction, the defendant must affirmatively demonstrate that the instructional error prejudiced his substantial rights. *Id*. "Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. An instruction error will result in reversal when the reviewing court cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction not been given." *Smith v. State*, 755 N.E.2d 1150, 1152 (Ind. Ct. App. 2001) (quoting *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001)), *trans. denied*.

Babcock does not dispute the fact that Instruction 11 is a correct statement of the law. In his brief, Babcock speculates about how this instruction might have caused the jury to

[1] The trial court noted that "there's no indication in the pattern instruction book that [Instruction 11] is either optional or mandatory." Tr. at 362.

give "special attention" to his testimony. Appellant's Br. at 30. He fails, however, to affirmatively demonstrate how this instruction, if it was given in error, prejudiced his substantial rights. Moreover, as discussed briefly above, there is sufficient evidence to sustain Babcock's conviction, and we cannot confidently say that the jury's verdict would have been different had Instruction 11 not been given. Any error was harmless, and Babcock's claim must fail.

III. Appellate Review of Sentence

Finally, Babcock asks us to review his sentence pursuant to Indiana Appellate Rule 7(B) which states, "The 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." Babcock was sentenced to thirty years, the advisory sentence for a class A felony, with five years suspended to probation. *See* Ind. Code § 35-50-2-4 (sentencing range for a class A felony is twenty to fifty years, with an advisory sentence of thirty years). Thus, his executed sentence is twenty-five years.

Babcock claims that he deserves a lesser sentence, mainly because of his alleged character strengths, including a lack of criminal history, completion of his high school education, his employment history, his strong family relationships, and "no indication of drug or alcohol use." Appellant's Br. at 29. He also notes that the legislature took into account the seriousness of the offense when it established the applicable sentencing range.

Our review of the record indicates that, while his own daughters slept in the same room, Babcock molested B.C. in multiple ways on the night that Trina discovered him in bed

with her. Both Trina and B.C. testified as to the serious emotional consequences of this abuse upon B.C. She began exhibiting uncontrollable anger and often refused to eat, once for a period of twenty-four straight days. These issues have resulted in two periods of hospitalization since the molestation. Clearly, Babcock's crime has severely damaged this young girl.

As for Babcock's character, the positive qualities he alleges are not sufficient to justify a reduction of his sentence. The trial court suspended five years of his advisory sentence because it found two mitigating factors (one of which it assigned very little weight) and no aggravating factors. We cannot say that this sentence is inappropriate in light of the nature of Babcock's offense and character.[2]

Affirmed.

DARDEN, J., and MAY, J., concur.

[2] Shortly after the briefs were filed in this case, our supreme court decided *Anglemyer v. State*, which clarifies appellate review of sentences imposed under the advisory sentencing scheme. 868 N.E.2d 482 (Ind. 2007). Babcock does not explicitly ask us to review the trial court's consideration and balancing of aggravators and mitigators, but he discusses these factors at length in his brief. For purposes of clarity, we note that pursuant to *Anglemyer*, we can no longer find that a trial court has abused its discretion in failing to properly weigh aggravators and mitigators. "[O]nce the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then 'impose any sentence that is … authorized by statute; and … permissible under the Constitution of the State of Indiana.'" *Anglemyer*, 868 N.E.2d at 491 (quoting Ind. Code § 35-38-1-7.1(d)).