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IN THE
COURT OF APPEALS OF INDIANA

HAROLD FERRIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0907-CR-429
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0807-FA-174418

January 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Harold Ferrin appeals his convictions for Child Molesting,[1] a class A felony, and Child Molesting,[2] a class C felony. Specifically, Ferrin contends that the trial court abused its discretion by not asking the jury if it was at an impasse. In addition, Ferrin challenges the thirty-year sentence that was imposed on the class A felony conviction, arguing that the trial court erroneously applied Indiana Code section 35-50-2-2(i) in violation of the prohibitions against ex post facto laws contained in the United States and Indiana Constitutions. Finding no reversible error, but observing that the trial court erroneously believed that it was required to sentence Ferrin to a thirty-year executed term on the class A felony, we affirm and remand with instructions.

FACTS

On July 10, 2008, R.F. (Mother) was bathing her six-year-old daughter, M.Y., when she noticed redness on M.Y.'s genital area. The next day, Mother decided to take M.Y. to Ferrin's house. M.Y. refers to Ferrin as "Papaw Dick" because her stepfather is Ferrin's son. Tr. p. 114. While in transit, Mother asked M.Y. if anyone had "touched her down there." Id. at 120. M.Y. covered her mouth and said that she could not tell because "Papaw Dick said she would be in trouble." Id. After Mother reassured M.Y. that she was not in trouble and that she had not done anything wrong, M.Y. responded, "Yes, I did. I went like this." Id. M.Y. moved her hand in a back and forth motion as

[1] Ind. Code § 35-42-4-3(a).

[2] I.C. § 35-42-4-3(b).

she told her Mother what she had done to Ferrin. Mother immediately took M.Y. to St. Vincent's hospital to be examined.

M.Y. was examined by Dr. Jason Little. Dr. Little noted that M.Y. had minimal redness on her genital area, but that the exam was otherwise normal. Dr. Little explained that such redness is usually attributable to poor hygiene and that the exam did not reveal whether M.Y. had been sexually abused.

On July 23, 2008, Ferrin was charged with four counts of child molesting that allegedly occurred between June 16, 2007, and June 15, 2008. Counts I and II were charged as class A felonies and counts III and IV were charged as class C felonies.

On May 18, 2009, Ferrin's jury trial commenced. M.Y. testified that she touched Ferrin's "private" in his bedroom when his clothes were off. Id. at 86. M.Y. stated that she had both hands on Ferrin's "private" and that she rubbed it with and "up and down" motion. Id. at 86-87. M.Y. explained that it was Ferrin's idea to put lotion on her hand, and that she had touched him this way more than once, including one time in the barn where he "peed" on the rug. Id. at 87-88, 96-97, 106-07.

M.Y. further testified that she and Ferrin were not wearing clothes when his "private" and finger touched her "little girl." Id. at 83-84, 90, 98. In addition, neither of them was wearing clothes when Ferrin had M.Y. put her finger inside his anus. After each of these incidents, Ferrin admonished M.Y. not to tell anyone. Ferrin denied having any sexual activity with M.Y., but admitted that he had touched her vagina and buttocks when he applied diaper rash cream because she was red all of the time.

After three to four hours of deliberating, the jury sent out a note stating, "A few of the jurors have reasonable doubt and feel they will not []/cannot . . . change their opinion based on the evidence we have on all counts." Id. at 290. Defense counsel requested that the trial court ask the jury whether they were at an impasse, while the State urged the trial court to instruct the jury to continue deliberations. Over defense counsel's objection, the trial court instructed the jury to continue deliberations, but noted that at some point, if a decision was not reached, it would have to ask the jury whether it was at an impasse. Less than an hour after the trial court had instructed the jury to continue deliberations, the jury found Ferrin not guilty on count I, but guilty on counts II, III, and IV.

At the June 4, 2009, sentencing hearing, the trial court concluded that Ferrin's lack of criminal history, his history of gainful employment, and his service in the National Guard were mitigating circumstances. In aggravation, the trial court observed that Ferrin had violated a position of trust. The trial court noted that under Indiana Code section 35-50-2-2(i), the minimum sentence for count II was thirty years executed, stating that the

> [s]entencing range for a Class A Felony is twenty to fifty years; however, because of the special nature of the offense, given the age of the victim, the Legislature has [seen] fit to set the penalty, minimum penalty for this at the advisory sentence, and has also made it non-suspendible. So despite the Court having, otherwise having the option to choose aggravating and mitigating circumstances, Court is limited by the specific language of the Legislature.

Id. at 311. The trial court sentenced Ferrin to consecutive terms of thirty years and four years on counts II and III respectively, but did not enter judgment on count IV because of double jeopardy concerns. Ferrin now appeals.

DISCUSSION AND DECISION

I. Jury Impasse

Ferrin argues that the trial court erred by not asking the jury if it was at an impasse and utilizing Indiana Jury Rule 28 (Rule 28) to assist the jurors.[3] Rule 28 states:

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

(emphases added). Rule 28 gives trial courts discretionary authority to assist jurors confronted with an apparent impasse in order to avoid mistrials. Ronco v. State, 862 N.E.2d 257, 259-60 (Ind. 2007). Recently, our Supreme Court stated that "[j]udicial resort to Rule 28 techniques is not mandatory." Henry v. Curto, 908 N.E.2d 196, 205 (Ind. 2009). Consequently, we decline to find error on the basis that the trial court did not invoke Rule 28. See Id. (declining to find reversible error based on the trial court's discretionary decision not to employ Rule 28).

Nevertheless, Ferrin asserts that because the trial court refused to assist the jury, the "hold outs against conviction gave way to the will of the majority rather than continue to engage in fruitless deliberations." Appellant's Br. p. 10. In support of this contention,

[3] The State responds to this argument by contending that Ferrin has waived this argument for failing to request a mistrial at trial; however, the State has failed to cite to any authority in support of this contention. Thus, we conclude that the State's argument is waived. Ind. Appellate Rule 46(A)(8)(a); Bean v. State, 913 N.E.2d 243, 253-54 (Ind. Ct. App. 2009), trans. denied.

Ferrin highlights the fact that the jury returned a verdict thirty minutes after the trial court instructed the jurors to continue deliberations.

When a jury is properly instructed, "it may be presumed on appeal that they followed such instruction." Chandler v. State, 581 N.E.2d 1233, 1237 (Ind. 1991). Here, the jury was instructed that:

> To return a verdict, each of you must agree to it. Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end deliberations. After the verdict is read in court, you may be asked individually whether you agree with it.

Appellant's App. p. 150 (emphasis added). We will presume that the jurors obeyed the above instruction. Thus, Ferrin's claim fails.

II. Erroneous Sentence

Ferrin contends that the trial court erred by concluding that Indiana Code section 35-50-2-2(i) (Subsection (i)) applied to him, thereby requiring the trial court to sentence Ferrin to a minimum executed term of thirty years on count II, a class A felony. Specifically, Ferrin argues that the application of Subsection (i) to him violates the constitutional prohibition against ex post facto laws contained in the United States and Indiana Constitutions.

As an initial matter, we note that Ferrin assumes that the ex post facto analysis is the same under both the United States and Indiana Constitutions. Recently, our Supreme Court held that an independent analysis should be applied to ex post facto claims under the Indiana Constitution because even though the same test is used, the results may be different. Wallace v. State, 905 N.E.2d 371, 377-78 (Ind. 2009), reh'g denied. In the instant case, because Ferrin does not present a separate analysis under the Indiana Constitution, he has waived the issue.[4] See Carroll v. State, 822 N.E.2d 1083, 1087-88 (Ind. Ct. App. 2005) (holding that the appellant waived review under the Indiana Constitution by failing to present a separate and independent analysis under the Indiana Constitution).

Proceeding to the merits, Article I, Section 10 of the United States Constitution states that "[n]o State shall . . . pass any . . . ex post facto Law." For a criminal law to be ex post facto, it must be retrospective and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981). In addition, the ex post facto prohibition includes "the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." Id. at 30.

Subsection (i), which took effect on July 1, 2007, provides:

If a person is:

[4] The State also argues that Ferrin waived the issue because he failed to object to the trial court's application of Subsection (i) to him. While a failure to preserve an issue for appeal usually results in waiver, an ex post facto application of a criminal statute is fundamental error. Settle v. State, 709 N.E.2d 34, 35 n.3 (Ind. Ct. App. 1999).

> (1) convicted of child molesting (IC 35-42-4-3) as a Class A felony against a victim less than twelve (12) years of age; and
>
> (2) at least twenty-one (21) years of age;
>
> the court may suspend only that part of the sentence that is in excess of thirty (30) years.

To apply Subsection (i) to Ferrin, the State was required to prove that count II occurred on or after July 1, 2007. Here, the charging information for the count II read:

> <u>On or about or between June 16, 2007, and June 15, 2008</u>, Harold Ferrin, being at least twenty-one (21) years of age, did perform or submit to deviate sexual conduct, an act involving the anus of Harold Ferrin and the finger of M.Y. when M.Y. was then under the age of fourteen (14), that is: five (5) years of age.

Appellant's App. p. 25 (emphasis added). Inasmuch as the State failed to present evidence indicating the specific date on which the offense in count II occurred, the offense could have occurred any time between June 16, 2007, and June 15, 2008. But from June 16, 2007 until June 30, 2007, Subsection (i) was not in effect. Thus, the trial court's application of Subsection (i) to Ferrin, was ex post facto.

Notwithstanding the above analysis, the State argues that Ferrin's sentence is entirely appropriate. Under Indiana Appellate Rule 7(B), an appellate 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." Thus, for purposes of judicial economy, we will analyze Ferrin's sentence under Rule 7(B).

Here, even though the application of Subsection (i) was ex post facto, the trial court had the authority to sentence Ferrin to an executed term of thirty years on count II. See I.C. § 35-50-2-4 (providing that "[a] person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years"). As for the nature of the offense, the trial court observed that Ferrin had violated a position of trust. Indeed, M.Y. considered Ferrin to be her grandfather and followed him around whenever she visited.

In addition, the evidence indicates that Ferrin molested M.Y. on numerous occasions. Specifically, M.Y. testified that she touched Ferrin's "private" in his bedroom when his clothes were off. Tr. p. 86. M.Y. explained that she had touched Ferrin like this more than once, including one time in the barn where he "peed" on the rug. Id. at 87-88, 96-97, 106-07.

As for Ferrin's character, the trial court noted Ferrin's lack of criminal history, record of steady employment, and service in the military. Nevertheless, in light of the fact that Ferrin violated a position of trust and committed repeated acts of molestation against M.Y., we cannot say that the advisory sentence of thirty years is inappropriate.

Although we acknowledge that Ferrin's sentence is not inappropriate and that suspending a portion of a defendant's sentence is a matter of grace, the trial court erroneously believed that it was required to sentence Ferrin to an executed term of thirty years. Therefore, we affirm the judgment of the trial, but remand to give the trial court

the opportunity to resentence Ferrin on count II if it so chooses. The trial court is instructed to enter judgment within thirty days and without further hearing.

The judgment of the trial court is affirmed and remanded with instructions.

KIRSCH, J., and DARDEN, J., concur.