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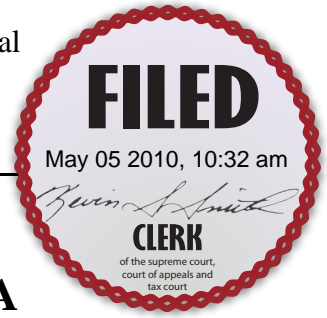
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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY DEARBORN,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 13A05-0904-CR-209

APPEAL FROM THE CRAWFORD CIRCUIT COURT
The Honorable Kenneth Lynn Lopp, Judge
Cause No. 13C01-0806-FA-2

May 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Larry Dearborn appeals his convictions and sentence for two counts of class A felony and one count of class C felony child molesting. We affirm.

Issues

Dearborn raises the following issues for review:

- I. Did the trial court abuse its discretion in admitting the pretrial videotaped statement of the victim?
- II. Did the trial court abuse its discretion in excluding evidence that the victim was also molested by another perpetrator?
- III. Is the evidence sufficient to sustain his child molesting convictions?
- IV. Is his sentence inappropriate in light of the nature of the offenses and his character?

Facts and Procedural History

K.T. was born on September 8, 2002. She lived with her mother Sarah Dearborn, her stepfather Dearborn, and her two half-siblings. On March 26, 2008, while K.T. was spending spring vacation with her father Justin Trinkle, his girlfriend Ashley Adams, and their two children A.B. and E.T.,¹ K.T. told A.B. that Dearborn had “humped her.” Tr. at 451, 456, 465, 478. A.B. immediately reported this information to Ashley, who called Justin home from his workplace nearby. K.T. told Ashley that Dearborn made her put lotion on her “ta-ta” and then “humped her.” *Id.* at 466. When Justin returned home, he spoke briefly with K.T., but never asked her for specific details about the molestation. *Id.* at 480. That same

¹ A.B. is Ashley’s daughter, and E.T. is Ashley and Justin’s son.

day, Justin called the Clark County Department of Child Services (“DCS”), which immediately referred the investigation to DCS in Crawford County, where Dearborn’s residence is located.

On March 27, 2008, Justin and K.T. met with Kara Rice of Comfort House Child Advocacy Center and scheduled an interview for the next day. Comfort House is a facility that investigates child abuse allegations and conducts interviews using a single interviewer, while a team of multi-disciplinary observers communicates with the interviewer through an earpiece. During the March 28, 2008 videotaped interview, K.T. stated that Dearborn told her to go into his bedroom, took off her pajamas, climbed on top of her, put lotion on her “private,” and stuck his “pee-pee” in her private. *Id.* at 692, 695, 700. K.T. reported that Dearborn’s pee-pee felt like a “wet bottle.” *Id.* at 701. She also reported that he actually “put a bottle” in her private and “moved it like this.” *Id.* at 696.² She said that when she was in the bedroom with Dearborn, her younger half-brother entered the room to ask Dearborn if he could watch a movie, and Dearborn shouted “no.” *Id.* at 695. He threatened to ground her if she did not do what he told her to do, and he stuck his pee-pee in her private on at least two occasions. *Id.* at 702-03. K.T. further reported that when Dearborn stuck his pee-pee in her private, he “made it all wet.” *Id.* at 713. K.T. stated that Dearborn did these things to her when it was cold outside and her mother was working at the Jay-C grocery store. *Id.* at 714.³

² During a subsequent search of Dearborn’s residence, Rice found a lotion bottle matching the description provided by K.T. Tr. at 731, 749.

³ Sarah’s work records indicate that she worked at the Jay-C grocery store from July 22 to December 31, 2006.

On April 2, 2008, K.T. underwent a medical examination at Floyd Memorial Hospital. Sexual assault nurse examiner Kathy Scifres performed a detailed examination of K.T.'s vaginal structures with a culposcope and testified that K.T.'s hymen exhibited redness with hypervascularity. *Id.* at 789. She observed no injury to K.T.'s inner vaginal structures or hymen, but testified at trial that penetration could occur through the labia majora without such injury. *Id.* at 790-91. She also testified that factors such as the child's cooperation and the use of lubricants can decrease the likelihood of injury to the hymen. *Id.* at 794, 842.

On June 17, 2008, the State charged Dearborn with two counts of class A felony child molesting and one count of class C child molesting. The State amended its information on June 25, 2008. On October 17, 2008, the State filed a motion in limine seeking the exclusion of certain evidence based on Indiana Rape Shield laws.⁴ On October 21, 2008, the trial court granted the State's motion in limine.

On October 28, 2008, the State filed a motion to admit K.T.'s videotaped statement pursuant to the Indiana Protected Person Statute ("PPS"), Indiana Code Section 35-37-4-6. The trial court granted the motion following a November 12, 2008 hearing. On November 13, 2008, Dearborn filed a motion for relief from the trial court's order in limine. The trial court conducted a hearing on November 17, 2008, and on November 21, 2008, entered findings of facts and conclusions thereon, denying Dearborn's motion for relief from the order in limine and granting the State's motion to admit out-of-court statements.

⁴ This evidence involved K.T.'s allegations that she was also molested by her step-grandfather "Papaw B." Tr. at 553.

A jury trial ensued on November 24, 2008. On December 4, 2008, the jury found Dearborn guilty as charged. On January 22, 2009, the trial court sentenced Dearborn to concurrent forty-year terms, with thirty-five years executed and five years suspended for each of the two class A felony convictions and a concurrent four-year term for the class C felony conviction. Dearborn now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Videotaped Statement

Dearborn challenges the trial court's admission of K.T.'s videotaped pretrial statement pursuant to the PPS. The decision to admit a statement or videotape under the PPS lies within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. *Mishler v. State*, 894 N.E.2d 1095, 1099 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before it. *Id.*

Regarding the use of videotaped statements, the statute provides in pertinent part:

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness

Ind. Code § 35-37-4-6(e). Neither party disputes that K.T. is a protected person as defined by

the statute. Ind. Code § 35-37-4-6(c). Factors used in determining reliability include: “(1) the time and circumstances of the statement, considering whether there was significant opportunity for coaching; (2) the nature of the questioning; (3) whether there was a motive to fabricate; (4) use of age-appropriate terminology; and (5) spontaneity and repetition.” *Id.*

Here, the trial court made the following findings regarding the reliability of K.T.’s videotaped statement:

3. On March 26, 2008, [A.B., K.T.,] and [E.T.] were playing when [K.T.] spontaneously told [A.B.] that her Step Dad, [Dearborn], got on top of her and humped her.
- 4 [A.B.] immediately told her Mother the statements [K.T.] made about her stepfather. [K.T.] related the same information to Ashley who then contacted Justin Trinkle to come home Upon his arrival home he was told of the allegations [K.T.] made.
5. Justin Trinkle talked to [K.T.] about her statements made regarding Larry Dearborn. On March 26, 2008, based upon the information learned by [A.B.], Ashley and Justin[,] Clark County Department of Child Services (DCS) was called.
6. Clark County referred the investigation to Crawford County since the alleged acts occurred at Larry Dearborn’s residence in Crawford County. Kara Rice, a family case manager with the Crawford County DCS, met with [K.T.] on March 27th, 2008.
7. [K.T.] was interviewed at Comfort House Child Advocacy Center in Milltown, Crawford County Indiana on March 28, 2008. The interviewer was Kara Rice from DCS. The Finding Words-RATAC approach was used during the interview. *This interview was completed within 48 hours of the report.*
8. The State of Indiana timely filed a Petition for Hearing to Introduce Out of Court Statements pursuant to I.C. 35-37-4-6. [K.T.], born September 8, 2002, is under the age of fourteen and meets the definition of a protected person. Said hearing was conducted on November 12, 2008. [K.T.], a protected person was present at the hearing and subject to

cross examination. The Court determined that [K.T.] knew the difference between telling the truth and lying.

9. [A.B.], age 7, was determined to understand the difference between the truth and a lie and testified regarding the content and circumstances of her conversation with [K.T.] on March 26, 2008.
10. Ashley Adams, the live-in girlfriend of Justin Trinkle, testified as to the time frame, content and circumstances of [K.T.'s] disclosures.
11. Justin Trinkle, [K.T.'s] Father, testified as to the time, content and circumstances of [K.T.'s] disclosure on March 26, 2008. He also testified regarding the meeting with Kara Rice from DCS on March 27, 2008 and the subsequent interview at Comfort House on March 28, 2008.
12. Through the testimony of Donna Lloyd Black, Executive Director of Comfort House about multi-disciplinary teams, Finding Words Training, the RATAAC methodology and the Comfort House Child Advocacy Center in Milltown it was established that *the interview was conducted in a manner which avoided suggestibility* [T]he interview is preserved by recording it on a DVD and the system does not allow for alteration of said recording.
13. Kara Rice from [sic] DCS testified to her visit with [K.T.] on March 27th, 2008 and her subsequent forensic interview on March 28, 2008. The interview (DVD) was submitted to the Court to observe on November 18, 2008.
14. [K.T.] is scheduled to testify at the jury trial.
15. Based on the foregoing there is *no evidence of a motive to fabricate*. The *statements were made spontaneously* in the presence of two (2) children and *within minutes* to a responsible adult who *immediately* contacted the appropriate authorities. Further *no evidence was presented to indicate that [K.T.] was coached* into giving these statements. [K.T.] was in the presence of people who lived as a family unit in which she felt safe to divulge what happened to her in her step-father's home.

Appellant's App. at 76-77 (emphases added). The trial court concluded that "after hearing

testimony and viewing the videotape ... the time, content and circumstances surrounding the statements made before and during the interview provide sufficient indications of reliability and that statements including the taped statement are admissible in this action.” *Id.* at 78. The trial court’s findings specifically address nearly every factor enumerated in *Mishler*, and the record supports such findings.

First, the only factor not specifically addressed in the trial court’s findings was the use of age-appropriate terminology. Nonetheless, the record indicates that K.T. consistently communicated using terms such as “pee-pee,” “private,” and “humped.” Moreover, expert testimony regarding the Finding Words method indicates that K.T. was not questioned using terminology that was inappropriately sophisticated for her tender age. Second, the record indicates that K.T. was playing with her stepsister A.B. and half-brother E.T. at her father’s house when she spontaneously told A.B. that Dearborn had molested her. Third, Executive Director Black’s testimony regarding the questioning methods employed at Comfort House supports the trial court’s finding that the questions were not suggestive. Fourth, the record is devoid of any evidence indicating that K.T. might have a motive to lie about the molestations.

Finally, regarding the opportunity for coaching, Dearborn relies on *Nunley v. State*, 916 N.E.2d 712 (Ind. Ct. App. 2009), *trans. denied* (2010). In *Nunley*, the videotaped interview did not take place until more than a year after the child first accused the defendant of molesting her. During the interview, the child made two new allegations that she had not reported to her parents one year prior. As a result, in *Nunley*, we found that due to the

significant opportunity for coaching during the interim, the convictions supported only by the two new allegations must be reversed. *Id.* at 717, 719. We declined to draw a bright line rule regarding the amount of time that can elapse between the molestation, the initial report, and the interview. Often, factors such as suppression or fear of retaliation can affect the length of time it takes the child to report the incident. Instead, we emphasized that intervening delays, especially *after* the report and before the interview, create the potential for an adult to plant a story or cleanse one. *Id.* at 718 (citing *Pierce v. State*, 677 N.E.2d 39, 45 (Ind. 1997)). Here, although more than one year elapsed between the molestation and the time K.T. told A.B. about it, A.B. immediately relayed the information to her mother, who immediately called Justin. Justin, in turn, immediately reported it to authorities. As a result, the recorded interview took place within forty-eight hours after K.T.'s initial report of the molestation. In the meantime, both Ashley and Justin specifically declined to ask K.T. for details surrounding the molestation. Tr. at 80, 89. In sum, the record supports the trial court's conclusion that K.T.'s videotaped interview bore sufficient indications of reliability. As such, the trial court acted within its discretion in admitting the videotape as evidence.

II. Exclusion of Evidence

Dearborn contends that the trial court erred in excluding evidence that K.T. was molested by her step-grandfather. The decision to exclude evidence lies within the trial court's sound discretion; as such, we review the trial court's determination for an abuse of discretion. *Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006).

Dearborn asserts that he was denied his constitutional right to confront and cross-

examine witnesses based on the trial court's exclusion of certain evidence under the Rape Shield Rule, which states in part:

In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:

- (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
- (2) evidence which shows that some person *other than* the defendant committed the act upon which the prosecution is founded;
- (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
- (4) evidence of conviction for a crime to impeach under Rule 609.

Ind. Evidence Rule 412(a) (emphasis added); *see also* Ind. Code § 35-37-4-4 (stating that evidence of sex crime victim's past sexual conduct may not be admitted except in certain circumstances involving evidence which "in a specific instance of sexual activity shows that some person other than defendant" committed the charged act).

Dearborn claims that the trial court erred in excluding K.T.'s allegation that "Papaw B" also molested her. He bases this assertion on the fact that K.T.'s description of Papaw B's acts is nearly identical to her description of his acts; he therefore argues that this evidence shows that someone other than he committed the acts against K.T. However, in *Beckham v. State*, 531 N.E.2d 475 (Ind. 1988), our supreme court upheld the trial court's exclusion of the child victim's prior report that he had been molested by a person other than the defendant despite the fact that the child had similarly described the physical acts involved in the distinct incidents. *Id.* at 477; *see also Baughman v. State*, 528 N.E.2d 78, 79 (Ind. 1988) (holding that evidence of prior molestation by different person was the very type of evidence the legislature intended to exclude).

Here, the record indicates distinct incidents of molestation involving the same victim, but different perpetrators. The fact that the young victim would use similar terms to describe similar sex acts that occurred during more than one incident is not surprising. To the extent Dearborn claims that K.T. was merely confused about whether it was he or Papaw B who molested her, we note that K.T. specifically testified that both men had molested her. *See* Tr. at 555 (responding, “They both did it” when asked whether it was Dearborn or Papaw B who put his pee-pee in her). In her initial report to A.B., K.T. named only Dearborn and not Papaw B. Moreover, she repeatedly testified that Dearborn “humped her” and put his “pee-pee” inside her. *Id.* at 638, 640-42, 659, 666, 673. Her testimony was specific enough to include an incident in which her younger half-brother entered the bedroom while Dearborn was molesting her, and Dearborn yelled at him. *Id.* at 695. In sum, in excluding evidence of K.T.’s report that Papaw B molested her, the trial court was not excluding evidence that someone *other than* Dearborn committed the act upon which the prosecution was founded; rather, it was excluding evidence that someone *in addition to* Dearborn had molested K.T. This is exactly the type of evidence that the rape shield laws were designed to exclude. *Baughman*, 528 N.E.2d at 79. Thus, we find no error here.

III. Sufficiency of Evidence

Dearborn challenges the sufficiency of evidence to sustain his two class A felony child molesting convictions. When reviewing a sufficiency of evidence claim, we neither reweigh evidence nor judge witness credibility; rather, we look only to the probative evidence and reasonable inferences supporting the verdict to determine whether a reasonable trier of fact

could conclude that the defendant was guilty beyond a reasonable doubt. *Riehle v. State*, 823 N.E.2d 287, 292 (Ind. Ct. App. 2005), *trans. denied*. We will affirm if substantial evidence of probative value exists to support the verdict. *Id.* The testimony of the victim, even if uncorroborated, is sufficient to sustain a conviction. *Mishler*, 894 N.E.2d at 1102.

To obtain a conviction for class A felony child molesting, the State was required to prove that Dearborn, who was at least twenty-one years of age, knowingly performed or submitted to sexual intercourse with K.T., who was under fourteen years of age. Ind. Code § 35-42-4-3(a)(1). Dearborn bases his sufficiency claim on the “incredible dubiousity” rule, which provides that “if a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed.” *Surber v. State*, 884 N.E.2d 856, 868 (Ind. Ct. App. 2008) (citation and quotation marks omitted), *trans. denied*. The rule is rarely applied; instead, it “is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of [such] incredible dubiousity that no reasonable person could believe it.” *Id.* at 868-69 (citation and quotation marks omitted). Inconsistencies in a child victim’s statements are not enough to command the application of the incredible dubiousity rule where “the inconsistencies are appropriate to the circumstances presented, the age of the witness, and the passage of time between the incident and the time of her statements and testimony.” *Id.* at 869 (citation and quotation marks omitted).

Here, circumstantial evidence existed, which included Rice’s testimony that she observed a bottle of lotion at Dearborn’s residence that matched the one K.T. had described

to her. Moreover, Dearborn's argument that the inconsistency of K.T.'s pretrial and trial statements, in citing anywhere from two to five incidents of intercourse, renders the evidence insufficient, is merely an invitation to reweigh evidence and judge credibility, which we may not do. "[A] child need not be a model witness, have an infallible memory, or refrain from making inconsistent statements." *Kien v. State*, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007) (citation and quotation marks omitted), *trans. denied*. In sum, the evidence is sufficient to support the jury's determination that Dearborn committed two counts of class A felony child molesting.

IV. Appropriateness of Sentence

Dearborn challenges the appropriateness of his forty-year aggregate sentence. We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We do not look to see whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is "inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

First, we note that although Dearborn frames his argument in terms of Appellate Rule 7(B), he also challenges the validity of the aggravating and mitigating circumstances found

by the trial court. As such, we review that challenge under an abuse of discretion standard. *Anglemyer*, 868 N.E.2d at 490.

At sentencing, the trial court noted two aggravating factors: the age of the victim and the violation of a position of trust. First, the court noted that K.T.'s age, approximately five years old, was "well in excess under the level that made these a Class 'A' felony on Counts I and II." Tr. at 1033; *see also* Ind. Code § 35-42-4-3(a)(1) (stating that child molesting is a class A felony when a person over age twenty-one has sexual intercourse with a child under age fourteen). Regarding Dearborn's violation of trust, we note that a violation of position of trust is a proper aggravator. *Edrington v. State*, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), *trans. denied*. The court emphasized Dearborn's relationship as K.T.'s caretaker, and the record shows that he repeatedly took advantage of his young stepdaughter while his wife was not home. To the extent he complains that the trial court failed to give proper mitigating weight to his lack of criminal history, we note that this claim is not subject to review. *Anglemyer*, 868 N.E.2d at 493-94.

We now address the appropriateness of Dearborn's sentence pursuant to Appellate Rule 7(B). In considering the nature of a defendant's offense, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Id.* at 494. Here, Dearborn was convicted of two counts of class A felony child molesting. The advisory sentence for such offenses is thirty years. *See* Ind. Code § 35-50-2-4 (setting sentencing range for class A felony at twenty to fifty years, with advisory sentence of thirty years). On these two counts, the trial court sentenced him to concurrent forty-year terms, with thirty-five

years executed and five years suspended to probation. Dearborn also was convicted of one count of class C felony child molesting, for which he received a concurrent advisory four-year sentence. *See* Ind. Code § 35-50-2-6(a) (setting sentencing range for class C felony at two to eight years, with advisory sentence of four years).

Dearborn asserts that the offenses do not command a sentence that exceeds the advisory thirty-year sentence. However, he molested his stepdaughter, who was not merely “under fourteen years of age”; she was only five years old. He then threatened to discipline her if she were to tell anyone of his depraved acts. Moreover, we note that, due to Dearborn’s eligibility for consecutive sentencing, his sentence exposure was eighty years. Ind. Code § 35-50-1-2. The trial court clearly took this into consideration by stating at sentencing that his sentences would “not be consecutive because I feel that the lack of the criminal history is one of the important factors here to consider. And to have a sentence of eighty years for your first time in front of the Court would not be appropriate.” Tr. at 1034.

Likewise, Dearborn’s violation of his position of trust reflects his poor character. He molested his young stepdaughter while babysitting her. While he was violating *her* trust, he expected her to maintain *his* trust by not revealing his heinous acts. The record also indicates that on at least one occasion, he molested K.T. while serving as caretaker for his younger son as well. *Id.* at 695. Lack of criminal record notwithstanding, we find that Dearborn has failed to meet his burden of establishing the inappropriateness of his sentence. Accordingly, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.