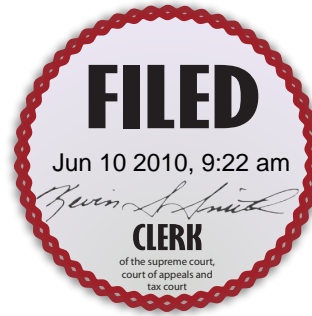


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN WILSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0910-CR-1047

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
The Honorable Stanley E. Kroh, Master Commissioner
Cause No. 49G04-0812-FB-279151

June 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Steven Wilson appeals his two convictions for Class B felony child molesting. Finding no error in the trial court's denial of Wilson's motion to dismiss and that there is sufficient evidence to sustain Wilson's convictions, we affirm.

Facts and Procedural History

In 1989 five-year-old N.C. lived in a townhouse with her mother, her two-year-old sister, and Wilson, her mother's boyfriend. One morning N.C. woke up and went downstairs to watch cartoons. When N.C. had to use the bathroom, Wilson followed her. He stood outside the door and told her not to wipe. He then told her to stand up and bend over. When N.C. did as she was told, Wilson grabbed her by the hips and licked her vagina. On another occasion, N.C. was lying on the living room couch and Wilson was lying on top of her under a blanket. Wilson attempted to kiss her, but N.C. would not let him. Wilson went under the blankets, pushed N.C.'s underwear down her legs, and "touch[ed] his tongue to [her] vagina." Tr. p. 51. He then "stuck his penis in [her] vagina." *Id.* Wilson penetrated N.C. "several" times that year. *Id.* at 53. He told N.C. that if she told anyone, he would hurt her mother and her sister. Wilson moved out in December 1989.

In 1994 ten-year-old N.C. watched an episode of Oprah about child molestation and rape. After watching the program, she told her two best friends that Wilson molested her. Her friends told her to tell her mother. N.C. told her mother and stepfather. Her mother called the police. N.C. and Wilson were each interviewed by the police, but no charges were filed.

In 2008, fourteen years later, N.C. started to have nightmares about Wilson molesting her oldest son, who was about the same age as N.C. when Wilson molested her. These nightmares prompted her to again report to the police that Wilson had molested her in 1989.

The State charged Wilson with two counts of Class B felony child molesting. Ind. Code § 35-42-4-3. Before trial, Wilson filed a motion to dismiss based on the alleged violation of his speedy trial rights. In its response, the State argued that Wilson's speedy trial rights were not violated, the statute of limitations did not bar prosecution, and Wilson had not suffered any prejudice. The trial court held a hearing on the motion to dismiss and denied it.

A jury found Wilson guilty as charged. The trial court sentenced Wilson to eighteen years with six years suspended on each conviction and ordered the sentences to run concurrently. Wilson now appeals.

Discussion and Decision

Wilson contends that the trial court erred in denying his motion to dismiss and that there is insufficient evidence to sustain his convictions.

I. Motion to Dismiss

Wilson first contends that the trial court erred in denying his motion to dismiss. A defendant has the burden of proving, by a preponderance of the evidence, all facts necessary to support a motion to dismiss. *Johnson v. State*, 810 N.E.2d 772, 775 (Ind. Ct. App. 2004), *trans. denied*. When a party appeals from a negative judgment, we will

reverse the trial court's ruling only if the evidence is without conflict and leads inescapably to the conclusion that the party was entitled to dismissal. *Id.*

A prosecution for child molesting involving sexual intercourse or deviate sexual conduct is barred unless commenced before the date that the alleged victim reaches the age of thirty-one. Ind. Code §§ 35-41-4-2(e)(1), -42-4-3(a). Wilson's prosecution properly commenced before N.C. turned thirty-one. Thus, instead of invoking a statute of limitations argument, Wilson alleges that the trial court erred in denying his motion to dismiss in light of the inordinate pre-charge delay.

The Due Process Clause of the Fifth Amendment protects defendants against excessive pre-indictment delay. *Marshall v. State*, 832 N.E.2d 615, 626 (Ind. Ct. App. 2005) (citing *United States v. Marion*, 404 U.S. 307, 324 (1971)), *trans. denied*. A charge filed within the statutory limitations period will generally be considered timely. *Johnson*, 810 N.E.2d at 775. However, if the prosecution deliberately utilizes delay to strengthen its position by weakening that of the defense or otherwise impairs a defendant's right to a fair trial, an inordinate pre-indictment delay may be found to violate a defendant's due process rights. *Id.* To successfully raise a due process challenge under the Fifth Amendment in this regard, the defendant must demonstrate that he suffered actual prejudice and that there was no justification for the delay. *Id.* The mere passage of time is not presumed to be prejudicial, and to satisfy the threshold burden of prejudice, a defendant must make specific and concrete allegations of prejudice that are supported by the evidence. *Allen v. State*, 813 N.E.2d 349, 366 (Ind. Ct. App.

2004) (citing *United States v. Spears*, 159 F.3d 1081, 1084 (7th Cir. 1998)), *trans. denied*.

Regarding prejudice, Wilson argues that his loss of memory due in part to long-term alcohol abuse prevented him from testifying in his own defense. He also asserts as prejudice his inability to locate the two friends to whom N.C. made the initial disclosure or the counselor she saw at around the time of the disclosure, the lack of physical evidence such as the living room couch or a medical exam, which was never conducted at the time of the disclosure, and his inability to remember where he was at the time of the offense or to recover work records, which may have exculpated him.

Wilson's claims of prejudice are similar to those in *Johnson*. In that case, Johnson was charged with burglary thirteen years after the alleged offense. 810 N.E.2d at 774. Johnson filed a motion to dismiss based on the pre-charge delay. *Id.* The trial court denied the motion. *Id.* at 775. On appeal, Johnson contended that the victim and several potentially important witnesses were dead and that there were no photographs of or fingerprints taken from the crime scene. *Id.* at 775-76. This Court found that whether the deceased witnesses would have provided testimony helpful to Johnson's defense was speculative and that, notwithstanding the delay, Johnson had the same access to evidence and surviving witnesses as did the State. *Id.* at 776. We thus concluded that Johnson failed to demonstrate actual prejudice resulting from the pre-charge delay. *Id.*

Wilson similarly asks us to speculate that there was prejudice, which we will not do. Indeed, while there was the possibility of prejudice, it is also possible that the testimony of N.C.'s friends and counselor would have helped the State, evidence from the

couch would have implicated him, a medical exam would have corroborated N.C.'s allegations, and his work records would have shown that he was not working at the time of the offenses. We simply cannot know. Wilson has failed to demonstrate actual prejudice.

Moreover, even if he had shown prejudice, he has not shown that the pre-charge delay was without justification. At the hearing on the motion to dismiss, the State explained the delay:

In 1994 . . . [N.C.] was interviewed and defendant was interviewed. The two police officers either had a discussion or whatever, and they decided that they would not file the case, because, basically there was no corroborating evidence. Back in 1994 we didn't file a lot of these cases without corroborating evidence. Things have changed now and we have decided that we can, we go forward on testimony only in child molest cases.

Tr. p. 19. We note that a prosecutor is vested with broad discretion in the performance of his duties, and such discretion includes the decision of whether and when to prosecute a suspect. *Allen*, 813 N.E.2d at 368. It is proper for a prosecutor to delay filing charges until he is completely satisfied that he will be able to establish guilt beyond a reasonable doubt. *Id.* Wilson acknowledges the State's justification for the delay in a footnote, *see* Appellant's Br. p. 5 n.2, but fails to provide us with any argument as to why the State's justification is not a valid reason. He has not demonstrated that the pre-charge delay was without justification.

Wilson has failed to show a violation of his due process rights, and the trial court thus did not err in denying his motion to dismiss.

II. Sufficiency of the Evidence

Wilson next contends that there is insufficient evidence to sustain his convictions. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

Wilson was convicted of two counts of Class B felony child molesting. Indiana Code section 35-42-4-3(a) provides, “A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony.” Sexual intercourse is defined as “an act that includes any penetration of the female sex organ by the male sex organ.” Ind. Code § 35-41-1-26. Deviate sexual conduct is defined as “an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” *Id.* § 35-41-1-9.

Here, Count I of the charging information alleged that “Steven Wilson did perform or submit to sexual intercourse with [N.C.] when [N.C.] was . . . five (5) years of age.” Appellant’s App. p. 21. Count II alleged that “Steven Wilson did perform or submit to

deviate sexual conduct, an act involving the sex organ of [N.C.] and the mouth of Steve Wilson, when [N.C.] was . . . five (5) years of age.” *Id.*

The evidence most favorable to the verdicts reveals that Wilson licked N.C.’s vagina and “stuck his penis in [her] vagina.” This is sufficient evidence to sustain both of his child molesting convictions.

Wilson nonetheless contends that the evidence is insufficient because N.C.’s testimony was incredibly dubious. The incredible dubiousity rule provides that a court may “impinge on the jury’s responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant’s guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. “[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.” *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001) (quotation omitted).

Wilson states, “N.C.’s testimony was inherently improbable as she was five years old at the time and this allegedly took place with her sister and maybe others in the same room. N.C. could not properly recollect the details of when she came forward at age 10, getting the identity of the person who called the police wrong (mother, not step-dad) and the day of the week wrong as well (Saturday, not Friday).” Appellant’s Br. p. 8-9.

While portions of N.C.'s testimony conflicted with other evidence presented, we do not find her testimony so inherently improbable that no rational jury could believe it. There is clear, unequivocal testimony from N.C. that establishes the necessary elements of the charged offenses, and we thus decline to invoke the incredible dubiousity rule to impinge on the jury's evaluation of the evidence. We find sufficient evidence to sustain Wilson's convictions.

Affirmed.

NAJAM, J., and BROWN, J., concur.