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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. BALASQUIDE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0912-CR-1238
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0905-FA-44095

July 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Michael A. Balasquide appeals his convictions for Child Molesting,[1] a class A felony, and Incest,[2] a class B felony. Balasquide argues that the evidence is insufficient to support the convictions and that the prosecutor committed misconduct resulting in fundamental error. Finding sufficient evidence and no error, we affirm.

FACTS

When D.B. was eight years old, her father, Balasquide, inserted his penis into her mouth and forced her to perform fellatio until he ejaculated. As the years passed, there were other similar incidents, which usually occurred when D.B. wanted something or needed permission from her father to do something. At some point, Balasquide began using flavored condoms. When D.B. was fifteen years old, Balasquide engaged in sexual intercourse with her. D.B. testified that on that occasion, her father used a condom, that she remembered him moaning, that he had been wearing a silk shirt printed with a dragon, and that the intercourse had occurred in a second floor bedroom.

On May 1, 2009, the State charged Balasquide with two counts of class A felony child molesting, class B felony sexual misconduct with a minor, class B felony incest, and class C felony incest.

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[1] Ind. Code § 35-42-4-3(a)(1).

[2] Ind. Code § 35-46-1-3.

D.B. has three sisters—T.L., B.B., and N.B.—all of whom have also accused Balasquide of molestation. Before trial, Balasquide filed a motion in limine seeking to exclude "any other alleged bad acts" and any other "allegations made by any other persons other than [D.B.] and which are not charged in this matter." Appellant's App. p. 46-48. The trial court granted the motion in limine.

At Balasquide's November 9, 2009, jury trial, defense counsel asked D.B. why she had come forward with the present allegation, and D.B. testified that it was because B.B. had recently admitted that Balasquide was abusing her. Defense counsel also elicited from D.B. that T.L. had made similar accusations against Balasquide. Defense counsel then called T.L. as a witness and specifically questioned T.L. about her prior allegations. T.L. testified that she had made the allegations so that she could be emancipated from her parents' control, and defense counsel suggested during closing argument that D.B. made her original allegation for the same reason. In response to this evidence that was elicited by D.B., when he took the stand in his own defense, the State asked him during cross-examination, "All three of your daughters that grew up in your household have accused you of touching them inappropriately, is that correct?" Tr. p. 141. Defense counsel objected based upon the order in limine, but the trial court overruled the objection because the issue of uncharged allegations had already been heard by the jury. Following the trial, Balasquide refused the trial court's offer to make an admonishing jury instruction regarding these past allegations.

The jury found Balasquide guilty of one count of class A felony child molesting and class B felony incest; it found him not guilty of the remaining charges. On

November 18, 2009, the trial court sentenced Balasquide to concurrent terms of thirty-five years imprisonment for child molesting and four years for incest. Balasquide now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Balasquide first argues that there is insufficient evidence supporting his convictions. When evaluating the sufficiency of evidence, we neither reweigh evidence nor assess witness credibility. Carter v. State, 754 N.E.2d 877, 879 (Ind. 2001). Instead, we look to the evidence and to the reasonable inferences from that evidence that support the verdict, and will affirm if there is probative evidence from which a reasonable factfinder could find guilt beyond a reasonable doubt. Id. at 880. Convictions of child molesting and incest may rest solely upon the uncorroborated testimony of the victim. Id.

To convict Balasquide of class A felony child molesting, the State was required to prove beyond a reasonable doubt that he was at least twenty-one years of age when he submitted to oral sex from D.B. when she was under fourteen years of age. I.C. § 35-42-4-3(a)(1). To convict him of class B felony incest, the State was required to prove beyond a reasonable doubt that he was at least eighteen years of age when he engaged in sexual intercourse with D.B., who he knew to be his own daughter, before her sixteenth birthday. I.C. § 35-46-1-3.

D.B. testified that she engaged in oral sex and sexual intercourse with her father when she was age eight and fifteen, respectively. The State further established that

Balasquide was at least twenty-one years old when these acts happened and that he was, in fact, D.B.'s father and knew himself to be such.

Balasquide argues that the rule of incredible dubiosity permits us to assess D.B.'s credibility as a witness in this case. According to this rule,

> "If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application 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."

Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007) (quoting Love v. State, 761 N.E.2d 806, 810 (Ind. 2002)). Inconsistencies between the testimony that a witness gives at trial and the statements that the same witness might have provided to investigators or during depositions before trial goes to the weight of the trial testimony and does not render it incredibly dubious. Holeton v. State, 853 N.E.2d 539, 542 (Ind. Ct. App. 2006).

Here, D.B.'s trial testimony was internally consistent. At no time during her trial testimony did she deviate from or contradict her main allegation—that she had engaged in sex acts with her father. She recounted various specific details about the encounters. We find that this internal consistency is sufficient to defeat application of the doctrine. Berry v. State, 703 N.E.2d 154, 160 (Ind. 1998). Balasquide's arguments to the contrary amount to requests that we assess witness credibility and reweigh the evidence, which we do not do when evaluating sufficiency of the evidence. Therefore, we find that there is sufficient evidence supporting Balasquide's convictions.

II. Prosecutorial Misconduct

Balasquide next argues that the prosecutor committed misconduct by asking him about his other daughters' prior molestation allegations during cross-examination and again referring to those allegations during closing argument. When determining whether a prosecutor committed misconduct, we must first consider whether the comment constituted misconduct, and second, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. Baer v. State, 866 N.E.2d 752, 756 (Ind. 2007). The gravity of the peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

Here, although Balasquide objected to the question during cross-examination, he failed to object during closing argument. Furthermore, the trial court offered to give the jury a limiting instruction to the effect that any evidence of uncharged misconduct should be considered only for a limited purpose. Balasquide rejected the instruction. Under these circumstances, Balasquide has waived the argument regarding prosecutorial misconduct. Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003).

Waiver notwithstanding, under the circumstances of this case we do not find that any misconduct occurred. Although there was an order in limine preventing the admission of evidence of prior uncharged bad acts, it was Balasquide himself who opened the door to this evidence, in trying to prove that D.B. was making the instant allegations to emancipate herself from her parents' control just as T.L. had allegedly

done. The prosecutor was entitled to question Balasquide about this evidence to clarify the issue. See Beauchamp v. State, 788 N.E.2d 881, 895 (Ind. Ct. App. 2003) (holding that when a defendant introduces an issue at trial that leaves the factfinder with a false or misleading impression of the related facts, he opens the door to evidence that would be otherwise inadmissible). Because Balasquide opened the door to this evidence, the State was entitled to rebut the theory. Therefore, the prosecutor did not commit misconduct by referring to D.B.'s sisters' allegations during cross-examination and closing argument.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.