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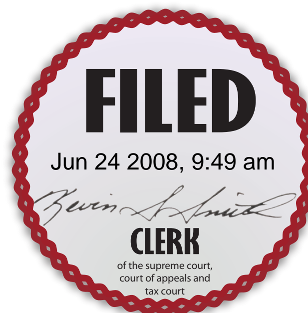

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IN THE
COURT OF APPEALS OF INDIANA

SEAN WAYNE KEITH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 76A05-0710-CR-592

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0612-FA-1357

June 24, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Sean Wayne Keith ("Keith") was convicted in Steuben Superior Court of two counts of Class A felony child molesting and was sentenced to two consecutive terms of forty-five years incarceration. Keith appeals and claims that the evidence is insufficient to support his convictions as Class A felonies and that the sentence imposed by the trial court was inappropriate. We affirm.

Facts and Procedural History

At the time relevant to this appeal, Keith was married to the mother of R.K. R.K. was born on September 13, 1990, and was the oldest of seven children. On July 25, 2004, R.K.'s mother was arrested and taken to jail. Around midnight on that day, Keith came home drunk, forced his way into R.K.'s bedroom, took off his clothes, and asked R.K. to remove her clothes. When R.K. refused, Keith forced himself on top of the girl and had sexual intercourse with her. R.K. screamed and told Keith to stop, but he continued. When he had finished, Keith told R.K. not to tell anyone what had happened because if she did, "they would split up the family." Tr. p. 167. Three days later, on July 28, 2004, Keith again came home drunk, went into R.K.'s bedroom, and forced her to have sexual intercourse with him.

R.K. was eventually placed in a foster home due to her mother's incarceration, and her siblings were placed in another foster home. When R.K.'s foster mother told her that Keith was trying to obtain custody of her siblings, R.K. told her foster mother what Keith had done. R.K. explained that she "wasn't going to put [her] siblings through it," meaning, "what [Keith] did to me." Tr. p. 173.

The State charged Keith with two counts of Class A felony child molesting on December 6, 2006. A trial was held on September 6, 2007, and the jury found Keith guilty as charged. The trial court held a hearing on September 24, 2007, at the conclusion of which it sentenced Keith to forty-five year sentences on each count, to be served consecutively, for an aggregate term of ninety years. Keith now appeals.

I. Sufficiency of Evidence

Keith first claims that the evidence is insufficient to support his convictions for child molesting as a Class A felony. A person who is at least twenty-one years of age who performs sexual intercourse with a child under fourteen years of age commits child molesting as a Class A felony. Ind. Code § 35-42-4-3(a)(1) (2004 & Supp. 2007). Keith claims that the evidence at trial shows that R.K. was fourteen years old at the time she was molested.[1] Specifically, Keith claims that R.K. testified that she was born on May 15, 990. If so, then R.K. would not have been under fourteen years of age when Keith committed his crimes in July of 2004.

Keith acknowledges that the probable cause affidavit alleged that R.K. was born in September 1990, but observes that neither this affidavit nor any other documents were introduced at trial to establish R.K.'s date of birth. Keith also admits that R.K. testified that she was seventeen years old at the time of trial in September of 2007, and appears to acknowledge that this could be circumstantial evidence that she was under the age fourteen at the time Keith molested her. He claims, however, that this cannot prove her age beyond a reasonable doubt.

[1] Keith does not contend that he was less than twenty-one years of age at the time of the crimes.

The trial transcript did originally show that R.K. testified that she was born on "5-15-1990." Tr. p. 159. However, after Keith filed his notice of appeal, the State filed a motion in this court requesting to hold the briefing schedule in abeyance and to remand to the trial court to correct the transcript. On February 19, 2008, this court issued an order holding the briefing schedule in abeyance for forty-five days to allow the trial court an opportunity to rule on the State's motion to correct the transcript. The trial court then held a hearing on February 27, 2008, at which the court reporter testified that she had incorrectly transcribed R.K.'s testimony regarding her date of birth. The court reporter testified that the recordings of the trial revealed that R.K. had actually testified that she was born on "9-13-1990," but the court reporter had mistakenly transcribed this as "5-15-1990." Supplemental Tr. p. 4. After the hearing, the trial court ordered the transcript to be amended and corrected to show that R.K. had testified that she was born on "9-13-1990."

This amended and corrected transcript, which Keith does not challenge, combined with R.K.'s testimony that she was seventeen at the time of the trial, is sufficient evidence to establish that R.K. was in fact thirteen years old at the time that she was molested by Keith in July of 2004. Thus, Keith's argument that the evidence is insufficient to support his convictions as Class A felonies must fail.

II. Appropriateness of Sentence

Keith also claims that his sentence of two consecutive terms of forty-five years is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise authorized by statute if, after due consideration of the trial court's decision, we

find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006); McKinney v. State, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007), trans. denied.

Keith claims that his ninety-year aggregate sentence is effectively a life sentence, which is inappropriate because his crimes were not the "worst offenses" and he is not the "worst offender." Keith refers to the proposition that the maximum possible sentences should generally be reserved for the worst offenders and offenses. See, e.g., Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied; Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

Here, Keith was not sentenced to the maximum sentence; he was sentenced to forty-five years on each Class A felony conviction, rather than the maximum possible sentence of fifty years on each conviction. See Ind. Code § 35-50-2-4 (2004 & Supp. 2007). Thus, the "worst offender, worst offense" analysis is inapplicable to Keith's sentences.

Regarding the nature of Keith's offenses, he claims his acts of child molesting were not among the worst because there was "no excessive brutality, no use of a weapon, and no physical injury." Brief of Appellant p. 11. While any of these additional facts might have made Keith's offenses more heinous, we are not persuaded that the nature of Keith's offenses warrants a reduction in sentence. Keith was the stepfather of a thirteen-year-old child and betrayed his position of trust by forcibly having sexual intercourse

with her. R.K. testified that Keith had molested her in a similar manner many times. As the State notes, Keith never used a condom when he molested R.K., subjecting her to an increased risk of sexually transmitted diseases and pregnancy. After molesting R.K., Keith attempted to prevent her from reporting his conduct by claiming that if she did so, her family would be split apart.

Keith's character likewise does not persuade us that the trial court's sentence was excessive. Keith has eleven prior felony convictions and at least one prior misdemeanor conviction. The vast majority of these convictions involve the use of controlled substances and alcohol. Keith admitted having an alcohol problem and to frequent marijuana use. Keith was intoxicated when he committed the instant crimes against R.K. Keith is a repeated felon who has shown no indication that his previous contacts with the criminal justice system has altered his behavior for the better. Under these facts and circumstances, we cannot say that Keith's sentence of two consecutive terms of forty-five years is inappropriate.

Affirmed.

MAY, J., and VAIDIK, J., concur.