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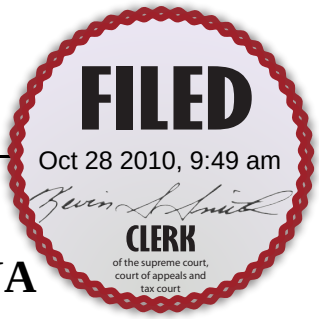

IN THE COURT OF APPEALS OF INDIANA

DONALD A. PIERCE,	)	
	)	
Appellant-Defendant/Cross-Appellee,	)	
	)	
vs.	)	No. 13A04-0908-CR-480
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff/Cross-Appellant.	)	

APPEAL FROM THE CRAWFORD CIRCUIT COURT
The Honorable K. Lynn Lopp, Judge
Cause No. 13C01-0706-FA-2

October 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

A child molester appeals his convictions and resulting 124-year sentence. He molested his fiancée's daughter repeatedly over the course of a year. Several years earlier, he was convicted of molesting another child. On appeal, he challenges the sufficiency of the evidence supporting his convictions arguing that his current victim provided inconsistent versions of his repeated molestations to family members and therapists prior to trial, and therefore her trial testimony cannot be believed. He also asserts that the trial court abused its discretion when it excluded certain evidence, and that the trial court additionally erred when it denied his initial attempt to remove one of the jurors who he believed was biased. Finally, he asks that we revise and reduce his 124-year sentence. The State cross-appeals, pointing out that the trial court made a sentencing error that should be corrected on remand. Finding the evidence sufficient, no abuse of discretion by the trial court in excluding evidence, and no error in the trial court's denial of the initial attempt to remove the juror, we affirm the convictions. Although we decline the repeat molester's invitation to reduce his sentence, we remand to the trial court with instructions to correct the sentencing error indicated by the State.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that J.W. was born on October 10, 1995. Her parents eventually divorced, and J.W. lived with her mother, Michelle. Michelle began dating Donald A. Pierce, and around the time J.W. was turning ten years old,

Pierce moved into the home J.W. shared with her mother. Due to Michelle's work schedule, Pierce regularly spent time alone with J.W.

One day, in April of 2006, Pierce was home alone with J.W. when he began touching her on her vagina through her clothes. Pierce then asked J.W. if she wanted to play a game. Pierce instructed J.W. to take off her clothes and lie on the couch. Pierce removed his clothes, laid on top of J.P., and put his "private" on her "private." Tr. at 491. Pierce then began to move up and down on top of J.W. After Pierce was finished, J.W. discovered that her "private" was all wet. *Id.* J.W. felt disgusted.

Pierce and J.W. played that "game" again the following weekend. *Id*. at 492. They played the game approximately every other weekend, when J.W. was not visiting her father, for over one year. On some occasions, Pierce put his mouth on J.W.'s "private." *Id*. at 493. On some occasions, Pierce put his penis inside J.W.'s "private." *Id*. at 497. And, on some occasions, Pierce touched J.W.'s "private" with his hand. *Id.* at 499.

On June 12, 2007, the State charged Pierce with two counts of class A felony child molesting. On June 14, 2007, the State also charged Pierce with being a repeat sexual offender based upon the fact that Pierce had been convicted of class C felony child molesting on October 21, 1999. The State amended its charging information on April 7, 2008, and charged Pierce with three counts of class A felony child molesting and one count of class C felony child molesting. Prior to trial, the State filed a motion in limine to exclude any evidence of J.W.'s past sexual conduct. The State also filed a motion in limine to exclude

any evidence regarding an investigation of J.W.'s father and grandfather by the Department of Child Services. The trial court granted both motions.

A jury trial was held on September 22-25, 2008. The jury found Pierce guilty as charged. During the sentencing hearing, on February 19, 2009, the trial court found Pierce to be a sexual violent predator and a repeat sexual offender pursuant to Indiana statute. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Pierce to a forty-year sentence on each of the class A felony convictions with ten years suspended on each, and sentenced Pierce to four years executed on the class C felony conviction. The trial court ordered that those sentences be served consecutively. Due to Pierce's status as a repeat sexual offender, the trial court then sentenced Pierce "to an additional Ten (10) years for the enhancement of the prior sexual offense" and provided that the ten years was "to run concurrently" with all other counts. Appellant's App. at 290. This resulted in an aggregate sentence of 124 years. Pierce now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Pierce first contends that the State presented insufficient evidence to sustain his convictions for child molesting. Specifically, Pierce argues that J.W. provided uncorroborated testimony of incredible dubiosity and, thus, his convictions are not supported by sufficient evidence. We disagree.

When reviewing a sufficiency of the evidence claim, this Court neither reweighs the evidence nor assesses the credibility of witnesses. *Mork v. State*, 912 N.E.2d 408, 411 (Ind.

Ct. App. 2009). We consider conflicting evidence most favorably to the verdict and we will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. However, on rare occasions, appellate courts may apply the incredible dubiosity rule to "impinge upon a jury's function to judge the credibility of a witness." *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007). Our supreme court has explained,

> 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.

Love v. State, 761 N.E.2d 806, 810 (Ind. 2002) (citations omitted).

At trial, J.W. testified that one day Pierce asked her to play a game and told her to remove her clothes. When she was naked, Pierce told J.W. to lie down. J.W. stated that Pierce also undressed, laid on top of her, put his "private" on her "private," and moved up and down on top of her. Tr. at 490-91. When Pierce got off of J.W., her "private" was all wet. *Id*. J.W. testified that these sexual encounters began to happen every other weekend for approximately one year. She stated that, on more than one occasion, Pierce used his mouth on her "private." Tr. at 493. J.W. also testified that, on more than one occasion, Pierce put his penis inside her "private." Tr. at 497. This testimony was clear and unequivocal.

Pierce makes much of the fact that, prior to trial, J.W. made inconsistent statements to therapists and family members regarding her encounters with Pierce. It is well settled that a

conviction may stand on the uncorroborated evidence of a minor witness. *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002), *trans. denied*. Moreover, we will not conclude that a child's testimony is inherently improbable or incredibly dubious merely because the witness has given inconsistent statements prior to trial. *Newsome v. State*, 686 N.E.2d 868, 875 (Ind. Ct. App. 1997). Although "equivocations, uncertainties, and inconsistencies appear," they are understandable and appropriate in view of "the age of the witness," and the "passage of time" between the incidents and the time statements were made and trial testimony was given. *Fajardo*, 859 N.E.2d at 1209. Here, we see no reason to impinge upon the jury's evaluation of J.W.'s credibility. J.W. provided sufficient clear and unequivocal trial testimony to establish the necessary elements of each of the charged offenses of child molesting. Based upon the evidence presented, a reasonable trier of fact could have found Pierce guilty beyond a reasonable doubt. The incredible dubiosity rule is inapplicable.

II. Exclusion of Evidence

We next address Pierce's contention that the trial court abused its discretion when it excluded evidence that J.W.'s father and grandfather had been previously accused of sexual misconduct by another child. The admission of evidence is within the trial court's discretion, and we review the trial court's decision for an abuse of discretion. *Allen v. State*, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004), *trans. denied*. We will generally not reverse a trial court's decision to excluded evidence except when the exclusion is a manifest abuse of discretion resulting in a denial of a fair trial. *Fugett v. State*, 812 N.E.2d 846, 848 (Ind. Ct. App. 2004).

An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Indiana's Rape Shield Rule, Evidence Rule 412(a), provides that 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.

Indiana's Rape Shield Rule embodies the basic principles of Indiana's Rape Shield Statute, Indiana Code Section 35-37-4-4; however, to the extent there are any differences, Rule 412 controls. *Fugett*, 812 N.E.2d at 848-49. Additionally, there is a common law exception when a defendant seeks to introduce evidence of a victim's prior false accusation of rape. *Id.* at 849. Evidence of prior false accusations of rape may be admitted, but only if (1) the complaining witness admits that he or she made a prior false accusation of rape; or (2) the accusation is demonstrably false. *Id.* (citing *Williams v. State*, 779 N.E.2d 610, 613 (Ind. Ct. App. 2002)).

Here, Pierce sought to elicit testimony from J.W.'s father and grandfather that another child, not J.W., had accused them of sexual misconduct.[1] During an offer to prove, J.W.'s

[1] As mentioned above, the State filed a pretrial motion in limine to exclude any reference to the accusation or any reference to the investigation of the accusation by the Department of Child Services. The trial court granted the motion.

grandfather testified that an allegation of sexual misconduct had been made against him by a friend's step-granddaughter. J.W.'s grandfather denied having molested that child. During the same offer to prove, J.W.'s father testified that he had been questioned by the Department of Child Services regarding accusations made by the friend's step-granddaughter that he had touched that child in an inappropriate manor. J.W.'s father denied the allegation. Pierce did not call J.W. as a witness during his offer to prove. Thereafter, the trial court excluded any evidence regarding the prior allegations against J.W.'s father and grandfather.

Pierce argues that the trial court's denial of his proffered evidence regarding J.W.'s father and grandfather precluded him from presenting evidence that "some other person other than the defendant committed the act upon which the prosecution is founded." Ind. Evidence Rule 412; *see also* Ind. Code § 35-37-4-4(b)(2). However, identity of the molester in this case was never an issue. If identification of the assailant is not at issue, evidence of the victim's past sexual conduct is not admissible. *See Caley v. State*, 650 N.E.2d 54, 56 (Ind. Ct. App. 1995), *trans. denied*. J.W. consistently and unequivocally named Pierce as the perpetrator of the acts of molestation, and she testified regarding the specific circumstances of the molestations. J.W. never indicated that her father or grandfather engaged in any inappropriate behavior. Pierce has failed to show that his proffered evidence falls within an exception to Evidence Rule 412.

Moreover, contrary to Pierce's contention, we fail to see how an allegation made by another child against different perpetrators falls within the common law exception to Evidence Rule 412 regarding prior false accusations of rape. There is no evidence that J.W.

made any prior allegation at all, much less that she disavowed a prior allegation or that the allegation was demonstrably false. The trial court properly excluded the evidence sought to be introduced by Pierce.

III. Juror Challenge

Pierce next asserts that the trial court abused its discretion when it denied his challenge to one of the prospective jurors for cause. Again, we disagree.

A trial court has discretion to grant or deny juror challenges for cause. *Woolston v. State*, 453 N.E.2d 965, 967 (Ind. 1983). We will affirm the decision on appeal unless it is illogical or arbitrary. *Id*. Indiana recognizes "the exhaustion rule," which provides that a defendant's claim of error arising from the denial of a challenge for cause is waived unless the defendant used any remaining peremptory challenges to remove the challenged juror or jurors. *Merritt v. Evansville-Vanderburgh Sch. Corp.*, 765 N.E.2d 1232, 1235 (Ind. 2002). Our supreme court has consistently held that to preserve error for appeal, the defendant bears the burden of demonstrating at the time he challenged a juror for cause, he had exhausted his peremptory challenges. *Id*.; *Collins v. State*, 464 N.E.2d 1286, 1289 (Ind. 1984). Eventual use of all peremptory challenges is not enough to satisfy the exhaustion requirement. *Merritt*, 765 N.E.2d at 1235.

Pierce argues that, during voir dire, a juror disclosed that she may have trouble being fair and impartial because her four-year-old daughter had been a child molestation victim. After questioning that juror extensively, the trial court denied Pierce's challenge for cause. Rather than demonstrating how he was prejudiced by the trial court's denial, Pierce simply

maintains that "[i]t was serious error to deny Pierce's challenge for cause." Appellant's Br. at 21. However, Pierce has not preserved any error for our review. At the time the trial court denied Pierce's challenge for cause, Pierce had not yet exhausted his peremptory challenges. Indeed, Pierce used one of his four remaining peremptory challenges to remove the juror, and therefore the alleged biased juror did not serve on Pierce's jury. Pierce's eventual use of his other peremptory challenges is not enough to satisfy the exhaustion requirement and to preserve a claim for reversal on appeal. *Merritt*, 765 N.E.2d at 1235. As such, Pierce's claim that the trial court abused its discretion when it denied his challenge for cause is waived.

IV. Sentencing

Following a sentencing hearing, the trial court sentenced Pierce to a forty-year sentence, with ten years suspended, for each of his three class A felony convictions, and sentenced Pierce to the advisory four-year sentence for his class C felony conviction. The court ordered those sentences to be served consecutively, for a total sentence of 124 years. Due to his prior conviction for class C felony child molesting, Pierce was found to be a repeat sexual offender pursuant to Indiana Code Section 35-50-2-14, and the trial court sentenced him to an additional ten years "for the enhancement of the prior sexual offense." Appellant's App. at 11. The court ordered the ten-year enhancement to be served concurrently with his other sentences.

Pierce contends that his 124-year sentence is inappropriate based upon the nature of the offense and his character and invites us to reduce his sentence. The State cross-appeals,

arguing that the trial court erred when, rather than enhancing one of Pierce's felony sentences based upon his status as a repeat sexual offender, it entered a separate sentence and ordered that sentence to be served concurrently with Pierce's other sentences. The State urges us to remand to the trial court with instructions to attach the ten-year enhancement to one of Pierce's class A felony sentences. We will address these respective arguments in turn.

Appropriateness

Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise 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 character of the offender." The defendant bears the burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

As to the nature of the offenses, Pierce repeatedly molested J.W., a child, over the course of a year. He molested her at different times and in different ways, subjecting her to ongoing confusion, humiliation, and pain. Most appalling, Pierce violated a position of trust. Pierce was engaged to J.W.'s mother and lived in J.W.'s home. Pierce spent significant amounts of time alone with J.W. while her mother was working. J.W. testified that she loved

and trusted Pierce. The heinous nature of Pierce's offenses certainly supports a substantial aggregate sentence such as the sentence imposed by the trial court.

We also conclude that Pierce's sentence is quite appropriate in light of his demonstrated poor character. Pierce's criminal history speaks volumes as to his character. He has a prior conviction for class C felony child molesting. Simply put, Pierce is a repeat child molester. Moreover, as stated, Pierce severely and repeatedly abused a position of trust. Pierce has not met his burden of persuading us that the sentence imposed by the trial court is inappropriate, and we decline the invitation to reduce his sentence.

Repeat Sexual Offender Enhancement

Finally, the State cross-appeals the trial court's order that Pierce serve his ten-year repeat sexual offender enhancement concurrently with all four of his felony child molesting sentences. Specifically, the State argues that because the ten-year term is not a separate sentence but rather a sentence enhancement, the trial court erred when it failed to attach the enhancement to one of Pierce's felony sentences and also when it ordered the ten-year enhancement to be served concurrently with Pierce's other sentences. We agree.

Indiana Code Section 35-50-2-14(e)[2] provides that the trial court "may sentence a person found to be a repeat sexual offender to an *additional* fixed term that is the advisory sentence for the underlying offense. However, the *additional* sentence may not exceed ten (10) years." (emphases added). We agree with the State that the repeat sexual offender

[2] This language is now found at Indiana Code Section 35-50-2-14(f) as amended by Pub. Law 125-2009, Sec. 8.

enhancement is similar to the habitual offender enhancement authorized by Indiana Code Section 35-50-2-8. We have previously held that a habitual offender finding does not constitute a separate crime, nor does it result in a separate sentence. *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). Instead, it results in a sentence enhancement. *Id.* Here, although the trial court refers to a sentence "enhancement," it appears from the trial court's sentencing order that it entered a separate ten-year sentence based upon Pierce's status as a repeat sexual offender and then ordered that ten-year sentence to run concurrently with the sentences on Pierce's four felony convictions. Appellant's App. at 11. This was error. We remand to the trial court with instructions to attach the additional fixed ten-year term to one of Pierce's class A felony sentences.[3] Because the trial court has already ordered those sentences to be served consecutively, this will result in an aggregate sentence of 134 years.

Affirmed in part and remanded in part with instructions.

FRIEDLANDER, J., and BARNES, J., concur.

[3] Because the advisory sentence for a class A felony is thirty years, the trial court is statutorily authorized to enhance one of Pierce's class A felonies by the maximum enhancement of ten years based upon Pierce's status as a repeat sexual offender. Ind. Code § 35-50-2-4 and § 35-50-2-14(e).