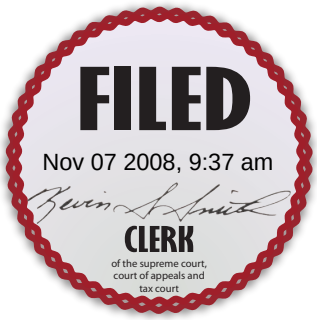

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IN THE COURT OF APPEALS OF INDIANA

ALLAN G. BECKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0801-CR-38
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0706-FA-1115

November 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Allan Becker appeals his convictions and sentences for one count of child molesting as a class A felony,[1] and two counts of child molesting as class C felonies.[2] Becker raises four issues, which we revise and restate as:

I. Whether there was sufficient evidence to convict Becker of child molesting as a class A felony;

II. Whether the trial court abused its discretion in sentencing him; and

III. Whether Becker's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm in part and vacate in part.[3]

The relevant facts follow. M.B., who was born in 1996, and B.B., who was born in 1998, were best friends, and M.B. would sometimes sleep over at B.B.'s house. Becker, B.B.'s father, played "tickle fights" with the girls. Becker touched M.B. on her "pee-pee" area with his hand about "four or five, maybe six" times, and touched B.B.'s "privates" about six times. Transcript at 28-29, 32. Becker moved M.B.'s underwear and touched her "in the private." Id. at 32. Becker also spanked M.B. and B.B. Becker

[1] Ind. Code §35-42-4-3 (2004) (subsequently amended by Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

[2] Id.

[3] Becker also raises the issues of whether the trial court committed fundamental error by allowing the State to file amended charging informations after the omnibus date and whether his convictions for Count I, child molesting as a class C felony, and Count III, child molesting as a class A felony, violate the prohibition against double jeopardy. Because we vacate Becker's conviction for Count III, we need not address these issues.

began touching M.B.'s privates before Christmas 2006. Becker touched M.B.'s privates between Christmas 2006 and December 2007.

On May 18, 2007, M.B. slept over at B.B.'s house, and she was awakened by Becker rubbing her "private" or genital area. Id. at 33. M.B. turned around because she did not want Becker to touch her. Becker turned M.B. around, patted her on the butt, and left the room. M.B. woke B.B. up, and they went to sleep in Becker's truck. The next morning, M.B., B.B., and B.B.'s parents went to garage sales for a few hours. When they returned home, M.B. told B.B.'s cousin that Becker had touched her. Sometime after two o'clock in the early afternoon, M.B. then told B.B.'s mom, Dawn Becker ("Dawn"), that Becker had touched her. Dawn hit Becker with a brush and told him to leave. Becker took all of his clothes and left.

Dawn, M.B., and B.B. went for a walk and talked. Dawn took M.B. home. Dawn did not want to talk to M.B.'s mother, Wendy Myers, until M.B.'s father, Jeremy Booker, arrived home. Booker came home from work at around five-thirty, and Dawn told M.B.'s parents what had happened. Booker talked with M.B. in the "mid-evening." Id. at 54. M.B. was "extremely embarrassed" and was "not wanting to talk at all." Id. M.B.'s parents took her for a car ride "to get her calmed down enough" to talk and "to get her out, away from the other children, so she would feel like she could talk." Id. at 55, 92. M.B. told her dad everything that Becker did to her.

On June 19, 2007, the State charged Becker with two counts of child molesting as class C felonies.[4] On November 26, 2007, the State charged Becker with Count III, child molesting as a class A felony, and Count IV, child molesting as a class B felony.[5]

At some point, Becker drove to South Carolina but was eventually arrested and brought back to Indiana. While in jail, Becker told Dennis McCollum, a fellow inmate, that he felt like he was being set up and that if he could get to a phone "he could make both the mother and the daughter disappear and all the charges would go away." Id. at 184.

During the jury trial which began on December 4, 2007, M.B. testified that Becker touched her private area. On cross examination, M.B. testified that she did not feel Becker's fingers go inside her "pee hole area" and that Becker never placed any object or finger "inside the hole down there." Transcript at 34, 45.

The prosecutor asked Booker, M.B.'s father, what M.B. had told him. Becker objected on hearsay grounds, and the trial court allowed the prosecutor to ask some questions regarding the timing of the molestation and Booker's conversation with M.B. After some further questions, the prosecutor again asked what M.B. had told Booker. Becker objected again on hearsay grounds, and the trial court overruled the objection.

[4] These charges related to events that occurred "on one or more occasions from on or about January 1, 2006, through May 20, 2007." Appellant's Appendix at 3-4.

[5] Counts III and IV related to events that occurred on May 18, 2007.

Booker described M.B.'s emotional state as "very, very, very withdrawn" and "it took maybe fifteen minutes worth of telling her it was okay to talk to finally get some answers out of her." Id. at 59. Booker also stated that M.B. was "[v]ery, very distraught and wanting to constantly hide her head and teary eyed, and begin [sic] crying that she had to even talk about this at all." Id. at 61-62. The prosecutor then asked Booker, "[T]ell the jury what, if anything . . . [M.B.] said to you in response to your questions about the incident between herself and [Becker]?" Id. at 62. Becker's attorney again objected on "hearsay" grounds, and the trial court overruled the objection. Id. Booker then testified, "To what extent that the touching happened, did he put a finger in your pee-pee, she told my [sic] yes. And I asked how much, how far, went through the exercise with the finger, she told me the finger tip. . . . I asked if his hand had ever went inside her panties before during the tickle game, and she said that it had, but that he had never inserted before, until this time, during the sleep over." Id. at 63.

The prosecutor then asked Booker a few questions unrelated to what M.B. had told him. Specifically, the prosecutor asked Booker for the date of the sleepover, what happened after he spoke with M.B., and whether the police came to his house and interviewed him. The following exchange then occurred:

> Q . . . Did [M.B.] tell you that [Becker] placed his hand on [M.B.]'s private places?
>
> A Yes.

Q Did she tell you that he inserted his finger into her pee-pee spot.

A Yes, finger tip.

Q Did she tell you that he inserted the finger up to his first finger tip knuckle?

A Yes.

Q Inside her body?

A Yes.

Id. at 65. Becker did not object during this exchange.

During the direct examination of Wendy Myers, M.B.'s mother, the prosecutor asked her what M.B. had told her, Becker objected on hearsay grounds, and the trial court overruled the objection. Wendy testified that she asked M.B. how far Becker had stuck his finger inside of her, and M.B. told her that the tip of his finger went inside of her.

During the direct examination of Dawn, B.B.'s mother, the prosecutor asked Dawn what M.B. had told her. Becker objected on hearsay grounds, which the trial court overruled. Dawn testified that M.B. initially said that Becker had touched her "in [her] private parts." Id. at 145. Dawn also testified that after Becker left she "started getting the entire story as to what happened." Id. at 146. M.B. told Dawn that Becker "touched her and that he used, that he was trying to put his finger inside of her," but "she woke up and he stopped." Id. M.B. also told Dawn that Becker "tried to finger inside of her." Id. at 147.

After trial, Becker was found guilty as charged. The trial court found that Count IV was an included offense of Count III and dismissed Count IV. The trial court found the following aggravators: (1) the harm, injury, loss, or damage suffered by the victims was significant and greater than the elements necessary to prove the commission of the offense; (2) Becker's criminal history; (3) Becker's position of trust; and (4) the victims' ages were less than what was necessary to convict. The trial court found no mitigating factors. The trial court sentenced Becker to seven years in the Indiana Department of Correction for Counts I and II, and forty-five years for Count III. The trial court ordered that the sentences be served consecutively for a total sentence of fifty-nine years.

I.

The first issue is whether there was sufficient evidence to convict Becker of child molesting as a class A felony. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at

147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of child molesting as a class A felony is governed by Ind. Code § 35-42-4-3(a), which, in relevant part, provides: "A person who, with a child under fourteen (14) years of age, performs or submits to . . . deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if . . . it is committed by a person at least twenty-one (21) years of age . . . ." 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." Ind. Code § 35-41-1-9. Thus, the State was required to prove beyond a reasonable doubt that Becker, a person at least twenty-one years of age, penetrated the sex organ of M.B., a child under fourteen years of age, by an object.

Becker argues that no object ever penetrated M.B.'s sex organ, and points to the following exchange that occurred during the cross examination of M.B.:

> Q Did you feel Allen's fingers go inside, a little bit, in that pee hole area?
>
> A Uh, no.
>
> * * * * *
>
> Q And he, he touched the outside of your . . . was it his hand, his skin on your skin?
>
> A Yes.

Q Okay. But, if I understood you correct he never placed any object or his finger inside the hole down there, did he?

A No.

Transcript at 34, 45.

On the other hand, M.B.'s parents testified that M.B. told them that Becker inserted his finger into M.B.'s vagina. Becker argues that the testimony of M.B.'s parents was inadmissible because it constituted hearsay and did not fall under the excited utterance exception. The State argues that the testimony of M.B.'s parents falls under the excited utterance exception and, alternatively, that Becker did not object to all of Booker's testimony.

We first address the State's argument that some of Booker's testimony was admitted without objection. "For purposes of sufficiency review, '[o]therwise inadmissible hearsay evidence may be considered for substantive purposes and is sufficient to establish a material fact at issue when the hearsay evidence is admitted without a timely objection at trial.'" Marcum v. State, 725 N.E.2d 852, 863 (Ind. 2000) (quoting Humphrey v. State, 680 N.E.2d 836, 840 (Ind. 1997)), reh'g denied.

When the prosecutor asked Booker what M.B. had told him, Becker objected on hearsay grounds. After some further questions, the prosecutor again asked what M.B. had told Booker. Becker objected again on hearsay grounds, and the trial court overruled

the objection. After Booker described M.B.'s state of mind, the following exchange then occurred:

> Q Given all of that will you please tell the jury what, if anything, . . . [M.B.] said to you in response to your questions about the incident between herself and [Becker]?
>
> [Becker's Attorney]: Objection, hearsay.
>
> THE COURT: Overruled.
>
> A [M.B.] told me that she woke up in the middle of the night, because she felt somebody's hand. She looked up and [Becker] had his hands inside of her panties. And when I preceded [sic] to question about whether he had exposed himself, she said not [sic] he had not. To what extent that the touching happened, did he put a finger in your pee-pee, she told my [sic] yes. And I asked how much, how far, went through the exercise with the finger, she told me the finger tip. I questioned on whether this had happened in the past or not, she said during some tickle games that he had started tickling her side, and this hand would go down there and he would tickle. Uh, I asked if his hand had ever went inside her panties before during the tickle game, and she said that it had, but that he had never inserted before, until this time, during the sleep over. I asked why she didn't come and tell mom and dad before, and she said that the threat was made that if she had told about it, that [B.B.] would have to move to Missouri, because he would no longer be there to provide support and she would lose her friend. And uh, that was, to my recollection the conversation that we had.
>
> Q Did [M.B.] tell you how long this had been going on?
>
> A She said the tickle games had perhaps started over the last year. So a year previous to this night of the sleepover.

Transcript at 62-64. The prosecutor then asked Booker for the date of the sleepover, what happened after he spoke with M.B., and whether the police came to his house and interviewed him. The State points to the following exchange, which then occurred:

> Q . . . Did [M.B.] tell you that [Becker] placed his hand on [M.B.]'s private places?
>
> A Yes.
>
> Q Did she tell you that he inserted his finger into her pee-pee spot.
>
> A Yes, finger tip.
>
> Q Did she tell you that he inserted the finger up to his first finger tip knuckle?
>
> A Yes.
>
> Q Inside her body?
>
> A Yes.

Id. at 65. Becker did not object to this specific exchange; however, he repeated specific objections just prior to this exchange. The unrelated questions between Booker's initial testimony to which Becker objected and the subsequent testimony that the State relies upon covered only one page of the transcript. Further, the substance of the unobjected to testimony had already been elicited from Booker after Becker's timely objection. Specifically, Booker had already testified, ". . . did he put a finger in your pee-pee, she told my [sic] yes. And I asked how much, how far, went through the exercise with the finger, she told me the finger tip." Id. at 63. Under these circumstances, we cannot say

that Becker failed to object to this testimony. We conclude that Becker preserved this issue. See Murray v. State, 742 N.E.2d 932, 933 (Ind. 2001) (holding that the defendant had preserved the alleged error by objecting to the cross-examination during a colloquy between counsel and the trial court that concluded with the trial court advising counsel and the court reporter to "note the objection"); Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995) (holding that an initial objection was sufficient to preserve the claim of error as to the witness's subsequent testimony). Thus, we will address the merits of Becker's argument that the testimony of M.B.'s parents constituted inadmissible hearsay.

"[T]he decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal." Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or it misinterprets the law. Id. at 703.

Hearsay is a statement made out-of-court that is offered to prove the fact or facts asserted in the statement itself. Ind. Evidence Rule 801(c). Hearsay is not admissible unless it fits within some exception to the hearsay rule. Ind. Evidence Rule 802. Ind. Evidence Rule 803(2) states that an excited utterance is not excluded by the hearsay rule even though the declarant is available as a witness.

> For a hearsay statement to be admitted as an excited utterance, three elements must be shown: (1) a startling event occurs; (2) a statement is made by a declarant while under the stress of excitement caused by the

> event; and (3) the statement relates to the event. Application of these criteria is not mechanical. Rather, under Rule 803(2) . . . *the heart of the inquiry is whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. The statement must be trustworthy under the facts of the particular case*.

Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996) (citations omitted) (emphasis added).

Here, a startling event occurred and M.B.'s statements relate to the event. Thus, we focus our inquiry on whether M.B.'s statements were made while she was still under the stress or excitement caused by the event. The record reveals that M.B. slept over at B.B.'s house on May 18, 2007. At some point M.B. was awakened by Becker rubbing her "private" or genital area. Transcript at 33. M.B. woke B.B. up, and they went to sleep in Becker's truck. The next morning, M.B., B.B., and B.B.'s parents went to garage sales for a few hours. Booker came home from work around five-thirty, and Dawn told M.B.'s parents what had happened. Booker talked with M.B. in the "mid-evening." Id. at 54. M.B. was "extremely embarrassed" and "not wanting to talk at all." Id. M.B.'s parents took her for a car ride "to get her calmed down enough" to talk and "to get her out, away from the other children, so she would feel like she could talk." Id. at 55, 92. Booker testified that "it took maybe fifteen minutes worth of telling [M.B.] it was okay to talk to finally get some answers out of her." Id. at 59. Booker asked M.B. whether Becker had inserted his finger into her "pee-pee." Id. at 63. Wendy, M.B.'s

mother, testified that she asked M.B. how far Becker had stuck his finger inside of her, and M.B. told her that the tip of his finger went inside of her.

Given the time between the event and the time M.B. talked with her parents, the fact that M.B.'s parents "calmed" her down, and the parents' leading questions, we cannot say that M.B. made her statements to her parents while she was under the stress of excitement caused by the event or that M.B. was incapable of thoughtful reflection. Under these circumstances, we conclude that the testimony of M.B.'s parents did not qualify as an excited utterance and was inadmissible, and the trial court abused its discretion by admitting this testimony. See, e.g., D.G.B. v. State, 833 N.E.2d 519, 527 (Ind. Ct. App. 2005) (holding that the statements of the victim to detective at the police department were not excited utterances because the victim had spent the day resting, had been released from the hospital, and an entire day had passed since the event took place); McGrew v. State, 673 N.E.2d 787, 795-796 (Ind. Ct. App. 1996) (holding that victim's statements did not constitute an excited utterance when victim traveled some distance, ordered a drink, and calmed herself), reh'g denied, summarily affirmed in relevant part, 682 N.E.2d 1289, 1292 (Ind. 1997); cf. Burdine v. State, 751 N.E.2d 260, 265 (Ind. Ct. App. 2001) (noting that the victim's statements were not elicited by leading questions and holding that child molesting victim's statement was an excited utterance even though victim had taken a nap and interacted with others after the molestation), trans. denied.

Without the testimony of M.B.'s parents, we must conclude that the evidence is insufficient to permit a jury to infer beyond a reasonable doubt that Becker inserted his finger into M.B.'s sex organ. Therefore, the evidence was insufficient to convict Becker of child molesting as a class A felony. See Krebs v. State, 816 N.E.2d 469, 472 (Ind. Ct. App. 2004) (holding that the evidence was insufficient to permit a jury to infer beyond a reasonable doubt that the defendant inserted an object into the victim's sex organ).

II.

The next issue is whether the trial court abused its discretion in sentencing Becker. We note that Becker's offenses were committed after the April 25, 2005, revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that

"are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

The trial court found the following aggravators: (1) the harm, injury, loss, or damage suffered by the victims was significant and greater than the elements necessary to prove the commission of the offense; (2) Becker's criminal history; (3) Becker's position of trust; and (4) the victims' ages were less than what is necessary to convict. The trial court found no mitigating factors.

Becker argues that the trial court erred when it found the harm to the victims as an aggravator. At trial, the trial court noted that the effect on the victims had been "significant and profound," and that they have had problems in school, and their relationships with other people have been affected. Transcript at 374. Even assuming that the trial court abused its discretion by relying on the impact on the victims as an aggravator, we can say with confidence that the trial court would have imposed the same sentence given the remaining aggravators, which the trial court found to be "significant" and which Becker does not challenge. Id. at 377.

III.

The next issue is whether Becker's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Becker played tickle fights with his daughter, B.B., and her best friend M.B. Becker touched M.B. on her "pee-pee" area with his hand about "four or five, maybe six" times. Transcript at 28-29. Becker touched his own daughter, B.B., in her "private area" "probably six" times. Id. at 29, 32. Becker also spanked M.B. and B.B. At one point, Becker moved M.B.'s underwear and touched her "private." Id. at 32.

Our review of the character of the offender reveals that Becker has an interest in pre-pubescent girls that started when he was fourteen. The presentence investigation report reveals that Becker recalled that when he was a teenager he "played a game of 'hide the sticker'" with a younger girl who lived next door in which Becker "would hide the sticker down her pants so that he could look." Appellant's Appendix at 464. When Becker was fourteen or fifteen years old, he sexually abused the ten-year-old sister of one of his friends by first penetrating her vagina with his finger and later by having sexual

intercourse with the girl on numerous occasions. When Becker was twenty-seven years old, a ten-year-old girl who lived next door went into Becker's apartment, and Becker "threw her on the bed" and "attempted to molest her." Id. Becker became frightened that he would be charged and left the country for six months. After the current offenses, Becker drove to South Carolina, but he was eventually arrested and brought back to Indiana. While in jail, Becker told Dennis McCollum, a fellow inmate, that he felt like he was being set up and that if he could get to a phone "he could make both the mother and the daughter disappear and all the charges would go away." Transcript at 184.

The record also reveals that Becker was charged with indecent liberties with a child as a class 1 felony in Illinois in 1983, and Becker pleaded guilty to the amended charge of contributing to the sexual delinquency of a minor as a class A misdemeanor.[6] Becker also has a conviction for indecent exposure in Nevada.[7] Becker is admittedly addicted to child pornography. The probation officer that completed the presentence investigation report stated that Becker "did not express remorse for the victims," "appears to see himself as the victim of legal injustice when he is by his own admission guilty of many more crimes of a sexual nature than he has ever been held accountable for," and

[6] Becker was twenty years old and the victim was fourteen years old. Becker and the victim became reacquainted after sixteen years and were married.

[7] According to Becker, he was arrested for urinating in an alley.

"manipulates others' trust by abusing their religious faith and is therefore more of a danger to others." Appellant's Appendix at 465.

After due consideration of the trial court's decision, we cannot say that the sentences for the two convictions of child molesting as class C felonies imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., McCoy v. State, 856 N.E.2d 1259, 1264 (Ind. Ct. App. 2006) (holding that the defendant's forty-five-year sentence for molesting his stepdaughter was not inappropriate); Robbins v. State, 839 N.E.2d 1196, 1201 (Ind. Ct. App. 2005) (maximum consecutive sentences for two counts of child molesting as class B felonies for molesting daughter was not inappropriate).

For the foregoing reasons, we vacate the judgment of conviction entered for Count III, child molesting as a class A felony, but affirm Becker's convictions and sentences for two counts of child molesting as class C felonies.

Affirmed in part and vacated in part.

BAKER, C. J. and MATHIAS, J. concur