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IN THE COURT OF APPEALS OF INDIANA

ANTHONY J. DEMARCO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A03-0603-CR-128
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSCO SUPERIOR COURT
The Honorable Duane G. Huffer, Judge
Cause No. 43D01-0503-FA-35

December 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Anthony J. Demarco appeals his convictions on four counts of Child Molesting,[1] a class A felony. Specifically, Demarco argues that the trial court erred in allowing evidence establishing that the victim had observed Demarco molest another individual and that it was error to permit a probation officer to testify at sentencing that there were four additional charges pending against Demarco. Demarco further argues that the 120-year aggregate sentence was inappropriate.

We conclude that the trial court did not err in allowing evidence demonstrating that Demarco had molested another individual. We also note that the trial court properly permitted the probation officer to testify at the sentencing hearing that Demarco had four additional pending charges of child molesting. However, we find that Demarco's sentence was inappropriate when considering the nature of the offense and his character. Thus, we affirm in part, reverse in part, and remand this cause to the trial court with instructions to issue an amended sentencing order and all other necessary documentation to reflect a sentence of thirty years each as to counts I and II to be served consecutively, with the two remaining counts to run concurrently, thus yielding a total executed sentence of sixty years.

FACTS

D.B., who was born on October 14, 1989, met Demarco while attending the fifth grade at a Kosciusco County elementary school. Demarco worked as a teacher's aide and basketball coach at D.B.'s school. At some point during the school year, Demarco accepted D.B.'s invitation to ride four-wheelers at D.B.'s house. Thereafter, Demarco and D.B. went

[1] Ind. Code § 35-42-4-3.

to movies and played basketball on a regular basis. The following year, Demarco was at D.B.'s house two or three times per week.

After D.B. completed the sixth grade, Demarco moved in with D.B.'s family. D.B.'s parents permitted Demarco to reside with them because they liked him and Demarco said that he was unable to afford the costs of room and board while he attended college. Demarco initially stayed in D.B.'s bedroom and slept in a queen-sized bed with him, but later moved into another room.

Sometime prior to October 2003, Demarco began to discuss sexual issues with D.B. Demarco eventually asked D.B. if he wanted to try masturbation. Approximately two weeks later, Demarco rubbed D.B.'s penis until D.B. ejaculated. Demarco continued this routine on a daily basis. D.B. and Demarco also engaged in anal sex on numerous occasions.

On one occasion, D.B. walked in on Demarco as he was performing oral sex on another boy, J.B., in D.B.'s bedroom. Thereafter, Demarco moved out of the residence at D.B.'s insistence. Demarco was angry with D.B. and began calling him and emailing him, stating that he was going to kill D.B. However, when D.B. was in the ninth grade, the two began talking again. On one occasion, D.B. went to Demarco's mother's home and Demarco performed oral sex on D.B. D.B. then drove home with Demarco in his truck and Demarco performed oral sex on D.B. in the vehicle.

The State ultimately filed four class A felony child molesting charges against Demarco, alleging that the acts had occurred sometime prior to October 2003. Prior to trial, Demarco filed a motion in limine regarding evidence of wrongful acts against other victims.

The trial court issued an order on the motion and ruled that the State was prohibited from introducing such evidence. However, the order made it clear that "if any such victim was a witness to any act or statement of child molestation between Defendant and the victim, D.B., said evidence may be introduced." Appellant's App. p. 17.

At a jury trial that commenced on January 16, 2006, the evidence established that an individual by the name of Stacy Klosowski knew Demarco from the local YMCA. Klosowski believed that Demarco was like a "big brother" to her son. Tr. p. 201. On several occasions, Klosowski heard Demarco speak about how close he felt to a boy named D.B. Klosowski understood Demarco's conversation to mean that D.B. had an intimate relationship with Demarco. Specifically, Demarco often talked to Klosowski about "road head," which Klosowski knew to mean one person performing oral sex on another while the recipient was driving. Id. at 204.

T.M. knew Demarco from school because Demarco was a "student helper teacher" in one of his seventh grade classes. Id. at 212. On one occasion, T.M. went to the YMCA and played pool with Demarco. Demarco wanted to perform oral sex on T.M. and told him that D.B. liked it. D.B. also told another boy, T.B., that he and Demarco performed oral sex on each other. T.M. told Steven Jungbauer, the chief executive officer of the Kosciusco Community YMCA, what he knew about Demarco and D.B. and also contacted the police.

During the trial, the State introduced testimony from both D.B. and J.B. about Demarco performing oral sex on both of them. In particular, both J.B. and D.B. testified about the comment that D.B. had made to J.B. when he walked in on Demarco and J.B.,

where D.B. told J.B. to "just let him finish; he does it to me, it feels good." Tr. p. 293, 453. Demarco objected to this testimony, arguing that the order in limine had prevented D.B. from "stating anything that he may have witnessed [Demarco] do." Tr. p. 290. However, the trial court allowed the testimony, and Demarco moved for a mistrial. Demarco argued that the State improperly admitted the testimony because it was prohibited under Indiana Evidence Rule 404(b). The State responded that the only reason for the admission of the evidence was to address a credibility attack on the victim. The trial court denied Demarco's motion for a mistrial, and J.B. was allowed to relate this same conversation later in the trial. The jury ultimately found Demarco guilty as charged.

During the sentencing phase of the trial, the State presented evidence in an effort to establish aggravating circumstances. Specifically, the State moved to incorporate all evidence it presented during the first phase of the trial, and the trial court granted the motion. Additionally, Ronald Babcock, the Chief Probation Officer of the Kosciusco County Probation Department, testified that there were four additional child molesting charges pending against Demarco. Although those exhibits were not admitted into evidence, Babcock testified that child molesters are generally repeat offenders. Babcock also explained that without safeguards, Demarco would likely commit additional crimes. Babcock then testified that Demarco was in need of correctional and rehabilitative treatment that could best be provided by a penal facility and that placing Demarco on probation would depreciate the seriousness of the crime.

Also during the sentencing phase, Warsaw Police Detective Joe Stanley, who had been involved in approximately 100-150 child molest cases, testified that Demarco's offenses were more heinous than others because Demarco had methodically repeated his offenses over the course of several years. Detective Stanley further testified that the nature and circumstances of Demarco's offenses should be considered an aggravating circumstance in this case.

Brenda Bruner, D.B.'s stepmother, testified that Demarco violated his position of trust with her son. Bruner acknowledged that Demarco was not the man that she thought he was, and, therefore, his character was an aggravating circumstance. Following the presentation of this evidence, the jury identified the following aggravating circumstances: (1) Demarco violated a position of trust with D.B.; (2) there is a risk that Demarco will commit additional offenses; (3) the nature and circumstances of the crime; (4) Demarco's character; (5) Demarco is in need of correctional and rehabilitative treatment that can best be provided by his commitment to a penal facility; and (6) the imposition of a reduced sentence or suspension of the sentence would depreciate the seriousness of the crime. The trial court found Demarco's lack of prior criminal history to be a mitigating factor and concluded that the aggravating factors outweighed this sole mitigating factor. As a result, Demarco was sentenced to the advisory term of thirty years of incarceration on each count, which were ordered to run consecutively to each other. Demarco now appeals.

I. Evidence Regarding Other Victims

Demarco contends that the trial court's admission of evidence regarding acts of molestation against other victims violated the provisions of Indiana Evidence Rule 404(b), which prohibits the admission of evidence regarding uncharged criminal conduct. Specifically, Demarco argues that D.B. and J.B.'s testimony regarding Demarco's alleged molestation of J.B. was prejudicial and constitutes reversible error.

In resolving this issue, we initially observe that a trial court's evidentiary rulings are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Put another way, a trial court's decision to admit evidence will not be reversed absent a showing of a manifest abuse of the trial court's discretion resulting in the denial of a fair trial. Id.

Indiana Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. Goldsberry v. State, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005).

In assessing the admissibility of 404(b) evidence, a trial court should undertake a two-step analysis. First, it must: (1) determine that evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act.

Id. It must then balance the probative value of the evidence against its prejudicial effect. Id. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Id. By the same token, the trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. Id.

In this case, it is apparent that the purpose of the admission of the evidence regarding the molestation of J.B. was to inform the jury of D.B.'s statement to J.B.: "Just let [Demarco] finish; he does it to me, it feels good," tr. p. 293, 453, which referred to Demarco's act of oral sex upon J.B. In essence, when J.B. testified that this statement was made, D.B.'s testimony about Demarco's acts of molestation against him was corroborated. In other words, the evidence was highly probative of whether Demarco had molested D.B., because J.B.'s testimony effectively refuted any claim by the defense that D.B. may have fabricated the story at a later time.

Additionally, we note that the probative value of this evidence clearly outweighed its prejudicial effect. The testimony was brief, and it was the only evidence offered establishing that Demarco had performed oral sex on J.B. In light of the other evidence that had already admitted at trial about Demarco's repeated molestation of D.B., we cannot say that the brief testimony regarding the act that Demarco committed against J.B. was overly prejudicial to Demarco. As a result, we conclude that the trial court did not improperly admit this evidence at trial.

Finally, even assuming solely for argument's sake that the evidence was improperly admitted, the error was harmless. Our Supreme Court has determined that errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. Barber v. State, 715 N.E.2d 848, 852 (Ind. 1999).

In this case, the other evidence presented at trial showed that approximately two weeks after Demarco moved into D.B.'s family's residence, Demarco rubbed D.B.'s penis until D.B. ejaculated. Tr. p. 280. The behavior continued, and Demarco began performing this act on a regular basis. Id. at 281-83. Demarco also engaged in anal sex with J.B. on multiple occasions. Id. at 284-87. Additionally, Klosowski testified that it was her understanding that J.B. and Demarco were having a sexual relationship. Id. at 204. Indeed, Demarco admitted to Klosowski that such a relationship existed. Id. at 215-16. In light of this independent evidence that was presented at trial, the admission of the statement that D.B. made to J.B. regarding Demarco's molestation of J.B. amounted to harmless error. Thus, Demarco's claim of error with respect to this issue fails.

II. Admission of Evidence at Sentencing

Demarco next argues that the trial court erred in permitting Babcock to testify at the sentencing hearing that four additional child molesting charges were pending against Demarco. Specifically, Demarco argues that the admission of this evidence was unduly prejudicial because it ignored his presumption of innocence.

We initially observe that Indiana Evidence Rule 101(c)(2) provides that rules of evidence other than those concerning privileges do not apply to sentencing proceedings. See

Smith v. State, 829 N.E.2d 1021, 1027 (Ind. Ct. App. 2005), trans. denied. Additionally, this court has held that a defendant's arrest record may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime. Bluck v. State, 716 N.E.2d 507, 513-14 (Ind. Ct. App. 1999). Finally, criminal charges pending at the time of sentencing may also be used to enhance a sentence.[2] Id.

In this case, the prosecutor showed Babcock four exhibits regarding the charges that were pending against Demarco. Tr. p. 618. The exhibits were not admitted into evidence, and Babcock testified that child molesters generally repeat their offenses. Id. at 619-20. Also, as noted above, Babcock testified that Demarco would likely commit additional crimes if safeguards were not in place. Id. at 621. In our view, Babcock's testimony and his opinion regarding Demarco's likelihood to reoffend based on the pending child molesting charges were not error for purposes of establishing the existence of aggravating factors at sentencing. Therefore, Demarco's allegation that his sentence cannot stand on this basis fails.

III. Improper Sentence

Finally, Demarco contends that he was improperly sentenced in light of the aggravating and mitigating circumstances that the trial court found. Specifically, Demarco asserts that "the aggravators considered by this Court in sentencing [him] simply do not measure up to justify four (4) thirty (30) year consecutive sentences." Appellant's Br. p. 12.

[2] Following the United States Supreme Court's opinion in Blakely v. Washington, 542 U.S. 296 (2004), this court determined that a pending charge was clearly an improper aggravator under Blakely. Williams v. State, 840 N.E.2d 433, 438 (Ind. Ct. App. 2006). However, in that case, the trial court found the aggravating factors rather than a jury. Id. at 437-38. Here, because a jury found the existence of the aggravating factors, there was no Blakely violation.

At the outset, we note that Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. The State alleged that Demarco committed the instant offenses before this statute took effect, but he was sentenced after the effective date. Under these circumstances, a split of authority exists on this court as to whether the advisory or presumptive sentencing scheme should apply. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

While our Supreme Court has not explicitly ruled which sentencing scheme applies in these situations, a recent decision seems to indicate the date of sentencing to be critical. Prickett v. State, 856 N.E.2d 1203 (Ind. 2006). The defendant in Prickett committed the crimes and was sentenced before the amendment date. In a footnote, our Supreme Court stated that "[w]e apply the version of the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an 'advisory' sentence." Id. at *3

n.3 (emphasis added). Inasmuch as Demarco was sentenced on February 20, 2006, we will apply the amended statute and refer to Demarco's "advisory" sentence.

Under the new sentencing statutes, if a trial court chooses to impose a sentence greater than the advisory term, it is not required to make findings as to the existence of mitigating or aggravating factors. If it does identify aggravators and/or mitigators, however, the trial court must simply state its reasons on the record for choosing the particular sentence that departs from the advisory term. I.C. § 35-38-1-3(3).

We also note that when the new sentencing scheme is applied, a defendant may no longer claim that a trial court abused its discretion under statutory guidelines in imposing the sentence. Because we can no longer reverse a sentence because a trial court improperly found and/or weighed aggravating and mitigating circumstances, our review is now confined to an analysis under Indiana Appellate Rule 7(B): "The Court may revise a sentence 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 the character of the offender." We also observe, however, that we are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct a Rule 7(B) review. See, e.g., Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same).

In this case, because we revise Demarco's sentence when considering the nature of the offense and his character, we need not address the propriety of the aggravators and mitigators

that were found under the former sentencing scheme, even if we were to conclude that Demarco was entitled to a review of his sentence under the former scheme.

As our Supreme Court observed in Duncan v. State, No. 79S05-0611-CR-451, slip op. at 8 (Ind. Nov. 21, 2006):

> The Indiana Constitution gives this Court "in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed." Ind. Const. Art. VII, § 4. We currently exercise this power under the standard set forth in Indiana Appellate Rule 7(B): "The Court may revise a sentence 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 the character of the offender."

Additionally, we note that although our review of sentences must give due consideration to the trial court's sentencing determination because of its special expertise in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied. Buggs v. State, 844 N.E.2d 195, 204 (Ind. Ct. App. 2006), trans. denied.

As to the nature of the offenses, the record reflects that Demarco was convicted of four class A felony child molesting offenses that he committed against the victim, D.B. The evidence at trial showed that he committed various sex offenses against D.B. over a long period of time, which included oral and anal sex. Tr. p. 280-87. Indeed, the aggravating factors noted above that were found by the jury support the imposition of consecutive sentences. See Jones. v. State, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004), trans. denied (holding that a single aggravating circumstance may support the imposition of consecutive sentences).

By the same token, it was also established that Demarco had no prior criminal history.

In our view, while Demarco's conduct was certainly vile and despicable, we cannot say that the imposition of a 120-year aggregate sentence was warranted in these circumstances. Put another way, we cannot agree that the imposition of consecutive sentences on each of the four counts was appropriate. Accordingly, we agree with the trial court that the appropriate sentence for Demarco is the advisory thirty-year term on each count; however, we conclude that the sentences as to counts I and II should to run consecutively and the remaining sentences should run concurrently for a total executed term of sixty years. As a result, we remand this cause to the trial court with instructions to issue an amended sentencing order and all other necessary documentation to reflect a sentence of thirty years each as to counts I and II to be served consecutively, with all remaining counts to run concurrently, yielding a total executed sentence of sixty years.

Remanded with instructions.

KIRSCH, C.J., and SHARPNACK, J., concur.