

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

DONALD W. PAGOS
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JAMES ROSETTO,)

Appellant-Defendant,)

vs.)

No. 46A04-0609-CR-500

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LaPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Jr., Judge
Cause No. 46C01-0308-FA-101

December 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-defendant James Rosetto appeals from his convictions of and sentences for two counts of Class A felony Child Molesting.¹ Rosetto contends that the trial court abused its discretion in admitting videotaped victim statements, that the jury's verdicts were inconsistent, that the State produced insufficient evidence to sustain his convictions, that the trial court improperly responded to jury questions, and that the trial court abused its discretion in imposing consecutive sentences. We affirm.

FACTS

One night in July 2003, forty-six-year-old Rosetto was looking after seven-year-old M.C., her best friend nine-year-old M.P., and M.P.'s younger brother at his LaPorte County trailer in the park in which all four lived. At some point after M.P.'s brother fell asleep in the living room, Rosetto, M.C., and M.P. were watching television in Rosetto's bedroom when he removed his pants and underwear. As he lay on his bed, Rosetto told M.C. and M.P. that whichever of them "sucked on [his] privates the longest will get some ice cream." Tr. p. 62. M.P. fellated Rosetto first, followed by M.C., who soon stopped because her throat hurt. M.P. resumed her fellatio of Rosetto, and eventually "creamy stuff came out [of h]is pee pee[,]" which M.P. swallowed at Rosetto's direction. Tr. p. 118. Rosetto gave M.P. some ice cream, which she shared with M.C. After M.C. told her aunt's best friend of the incident, the matter soon came to the attention of the authorities.

On August 1, 2003, police videotaped an interview with M.P., who recounted the incident involving Rosetto and M.C. and also claimed that Rosetto had forced her to

¹ Ind. Code § 35-42-4-3 (2003).

fellate him on several other occasions while he babysat her. On August 5, 2003, police interviewed M.C., who also told them of the incident involving Rosetto and M.P. The State charged Rosetto with three counts of Class A felony child molesting, two stemming from the alleged incident involving M.C. and M.P. and one from M.P.'s allegations that he had caused her to fellate him on other occasions.

At Rosetto's trial, the State sought successfully to show the jury M.C.'s and M.P.'s videotaped statements to police pursuant to Indiana Code section 35-37-4-6 (2003). Additionally, both M.C. and M.P. testified at trial. After retiring to deliberate, the jury sent out the following questions:

1. What if we can't find the defendant guilty or not guilty[?]
2. How long do we have to wait for a hung jury[?]
3. Can we find the defendant guilty or not guilty on one charge, but be "hung" on other other [sic] charges[?]

Appellant's App. p. 63. The trial court's response, to which Rosetto did not object, was, "You should continue to deliberate to attempt to reach any verdicts you are able to." Appellant's App. p. 63.

The jury found Rosetto guilty of two counts of Class A felony child molesting, and the trial court sentenced him to two consecutive terms of twenty-five years of incarceration with five years of each suspended to probation. The trial court found, as aggravating circumstances, that Rosetto had molested M.P. "on multiple occasions[,] that he occupied a position of trust with regard to M.P., and that the molestations of M.C. and M.P. for which he was convicted took place in front of the other when both were under eighteen years of age. Tr. p. 716.

DISCUSSION AND DECISION

I. Videotaped Statements

Rosetto contends that the trial court abused its discretion in admitting M.C.'s and M.P.'s videotaped statements. The admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. *State v. Lloyd*, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.*

It must be borne in mind, however, that "any error in the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted." *Candler v. State*, 837 N.E.2d 1100, 1105 (Ind. Ct. App. 2005), *reh'g denied*. Our review of the record leads us to conclude that the content of M.C.'s and M.P.'s videotaped statements was, in all relevant respects, essentially the same as that of their testimony. Although there are differences (*e.g.*, M.C. said in her interview that Rosetto told the girls to "go down on him" but did not testify that he used that term), they are inconsequential. State's Ex. 4 p. 2. Indeed, Rosetto agrees that the videotaped interviews "amounted to nothing more than corroboration of the witnesses' in-court testimony." Appellant's Reply Br. p. 3. Even if the trial court did abuse its discretion in admitting the videotaped interviews, any error in that regard can only be considered harmless, and we need not further address Rosetto's specific claims.

II. Inconsistent Verdicts

Rosetto contends that the jury could not have convicted him of two counts of Class A felony child molesting while acquitting him of a third, because all three charges, he claims, were based on the same evidence. While it is true that verdicts may be so extremely contradictory and irreconcilable as to require corrective action, in resolving such a claim, we will not engage in speculation about the jury's thought processes or motivation. *Jackson v. State*, 540 N.E.2d 1232, 1234 (Ind. 1989). Each count of a multi-count indictment or information is regarded as a separate indictment or information, and a defendant may be found guilty or acquitted on one or more or all of several charges. *Jordan v. State*, 692 N.E.2d 481, 484 (Ind. Ct. App. 1998).

In reviewing a claim of inconsistent verdicts, the central question is whether the evidence is sufficient to support the conviction in question. *Vela v. State*, 832 N.E.2d 610, 614 (Ind. Ct. App. 2005). A verdict will survive a claim of inconsistency where the conviction being challenged is supported by sufficient evidence. *Id.* We will not reweigh evidence and will only look to the evidence most favorable to the verdict and all reasonable inferences to be drawn therefrom to determine whether the evidence supports the verdict beyond a reasonable doubt. *Burks v. State*, 838 N.E.2d 510, 521 (Ind. Ct. App. 2005), *trans. denied*.

In order to sustain Rosetto's convictions, the State was required to establish that he, "with a child under fourteen (14) years of age, perform[ed] or submit[ted] to sexual intercourse or deviate sexual conduct [and was himself] at least twenty-one (21) years of age[.]" Ind. Code § 35-42-4-3(a). There is no dispute that Rosetto was over twenty-one,

that M.C. and M.P. were under fourteen, and both testified unequivocally that Rosetto submitted to deviate sexual conduct performed by them at his direction. In short, both of Rosetto's convictions are supported by sufficient evidence, and it seems apparent that the jury simply believed M.C.'s and M.P.'s testimony regarding the "contest" but were not convinced beyond a reasonable doubt that Rosetto had molested her on other occasions. The guilty verdicts here are not fatally inconsistent.

III. Sufficiency

Rosetto contends that the M.C.'s and M.P.'s versions of the events in question were so contradictory as to require his acquittal due to insufficient credible evidence. "In addressing a claim of insufficient evidence, an appellate court must consider only the probative evidence and reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, and determine therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007) (citing *Whedon v. State*, 765 N.E.2d 1276, 1277 (Ind. 2002)). "Appellate courts may, however, apply the 'incredible dubiousity' rule to impinge upon a jury's function to judge the credibility of a witness." *Id.* (citing *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002)).

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 dubiousity. 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, 761 N.E.2d at 810 (citations omitted).

The incredible dubiousity rule does not apply in this case for the simple reason that two witnesses testified to the events supporting Rosetto's convictions. Moreover, neither M.C.'s nor M.P.'s testimony was inherently improbable, their accounts were unequivocal and almost completely consistent, and there is no indication anywhere in the record that their testimony was coerced. The State produced sufficient evidence to sustain Rosetto's convictions.

IV. Jury Question

Rosetto contends that the trial court's response to the jury's questions during deliberations was erroneous. Rosetto, however, did not lodge a contemporaneous objection to the response in question and has therefore waived the issue for appellate consideration. The purpose of the rule is to promote a fair trial by preventing a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him. *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), *trans. denied* (citation omitted). Because Rosetto failed to object to the trial court's response, we need not address his claim further.

V. Consecutive Sentences

"In general, 'the law in effect at the time that the crime was committed is controlling.'" *Walsman v. State*, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006), *reh'g denied* (2007) (citing *Holsclaw v. State*, 270 Ind. 256, 261, 384 N.E.2d 1026, 1030 (1979)). Because Rosetto committed his crimes in 2003, we will therefore apply the law in effect at that time. At that time, the trial court's sentencing discretion included the

determination of whether to increase presumptive penalties, impose consecutive sentences on multiple convictions, or both. *Perry v. State*, 751 N.E.2d 306, 308-09 (Ind. Ct. App. 2001) (citation omitted). In so doing, the trial court determined which aggravating and mitigating circumstances to consider, and was solely responsible for determining the weight to accord each of these factors. *Id.* When the trial court exercised its discretionary authority to impose enhanced and/or consecutive sentences, the trial court was required to enter, on the record, a statement which (1) identified all of the significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance was considered to be mitigating or aggravating; and (3) show that the court evaluated and balanced the mitigating circumstances against the aggravating circumstances in order to determine if the aggravating circumstances offset the mitigating circumstances. *Becker v. State*, 695 N.E.2d 968, 974 (Ind. Ct. App. 1998). As with sentence enhancement, even a single aggravating circumstance may have supported the imposition of consecutive sentences. *Ajabu v. State*, 722 N.E.2d 339, 344 (Ind. 2000).

As the Indiana Supreme Court recently noted, one thing as true in 2003 as it is today is that “sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). “An abuse of discretion occurs if the decision is ‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.’” *Id.* (citing *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

As previously mentioned, the trial court found, as aggravating circumstances, that Rosetto had molested M.P. “on multiple occasions[,]” that he occupied a position of trust with regard to M.P., and that the molestations of M.C. and M.P. for which he was convicted took place in front of the other when both were under eighteen years of age. Tr. p. 716. Of the three aggravating circumstances, Rosetto challenges only the first. Even assuming, *arguendo*, that the trial court abused its discretion in this regard, we find that the remaining two aggravating circumstances (particularly that Rosetto occupied a position of trust) fully justify the imposition of consecutive sentences. Regarding his position of trust, Rosetto babysat M.P. and her brother almost daily, and M.C. at least once, during the summer of 2003 and he abused the trust placed in him by forcing M.P. and M.C. to fellate him. Moreover, Rosetto attempted to ensure his victims’ silence by threatening them. The trial court did not abuse its discretion in imposing consecutive sentences.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.