ATTORNEY FOR APPELLANT:

WILLIAM BYER, JR.
Byer & Byer
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

STEVEN A. BALDWIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0702-CR-116
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON COUNTY COURT
The Honorable David W. Hopper, Judge
Cause No. 48E01-0411-FD-493

October 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Steven A. Baldwin ("Baldwin") appeals his convictions for Vicarious Sexual Gratification/Fondling in the Presence of a Minor,[1] Dissemination of Matter Harmful to Minors,[2] and Public Indecency,[3] each as a Class D felony.[4] We affirm the first two convictions, and reverse the Public Indecency conviction.

Issues

Baldwin presents two issues for review:

I. Whether the State presented sufficient evidence to support his convictions; and

II. Whether he was entitled to a change of judge at the sentencing hearing.

Facts and Procedural History

On August 27, 2004, Baldwin accompanied nine-year-old E.H., nine-year-old K.M., six-year-old A.M., and nine-year-old J.B. to a park and then to the home of E.H.'s grandmother. An inoperable van located in the backyard served as the girls' playhouse. Baldwin entered the van with the girls present. He then displayed a Playboy magazine, unzipped his pants and masturbated until he ejaculated.

On November 9, 2004, Baldwin was charged with Vicarious Sexual Gratification, Dissemination of Matter Harmful to Minors, and Public Indecency. His jury trial commenced on June 19, 2006. Baldwin was found guilty as charged. The sentencing

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[1] Ind. Code § 35-42-4-5.
[2] Ind. Code § 35-49-3-3.
[3] Ind. Code § 35-45-4-1.

hearing commenced on August 24, 2006, and was scheduled to continue on December 18, 2006. On December 15, 2006, Baldwin filed a motion for a change of judge.

The trial court denied Baldwin's motion for a change of judge, and the sentencing hearing continued on December 18, 2006 and on January 8, 2007. The trial court imposed an eighteen-month sentence for Vicarious Sexual Gratification, and an eighteen-month sentence for Dissemination of Matter Harmful to Minors, to be served consecutively. Eighteen months were suspended to probation. Upon the Public Indecency conviction, the trial court imposed an eighteen-month sentence, to be served concurrently because "Count III is very similar to Count I and kind of connected to Count I." (Tr. 526.) This appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence

Baldwin claims that the evidence is insufficient to support each of his convictions. More specifically, he alleges that the victims offered contradictory and implausible testimony, and that he performed no act in a "public" place so as to support his conviction for Public Indecency.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and the reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). In so doing, we do not assess witness credibility or reweigh the evidence. Id. We will affirm the conviction unless no

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[4] Baldwin stipulated that he had a prior conviction for Public Indecency, to support the elevation of the offense from a Class A misdemeanor to a Class D felony.

reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

To convict Baldwin of Vicarious Sexual Gratification/Fondling in the Presence of a Minor, as charged, the State was required to show that he, being at least eighteen years old, knowingly or intentionally touched or fondled his own body in the presence of children less than fourteen years of age, with the intent to arouse or satisfy the sexual desires of a child or himself. See Ind. Code § 35-42-4-5(c)(3); App. 66.

To convict Baldwin of Dissemination of Matter Harmful to Minors, as charged, the State was required to show that he knowingly or intentionally displayed to minors matter harmful to the minors in an area to which the minors have visual, auditory, or physical access, and said minors were not accompanied by a parent or guardian. See Ind. Code § 35-49-3-3(a)(2); App. 66.

To convict Baldwin of Public Indecency, as charged, the State was required to show that he knowingly or intentionally, in a public place, fondled his genitals or the genitals of another person. See Ind. Code § 35-45-4-1(a)(4); App. 67.

E.H. testified that she, the other children, and Baldwin got into a van/playhouse located in her grandmother's back yard. She testified further that Baldwin took out a Playboy magazine, "pulled out his wiener," and rubbed it. (Tr. 74.) K.M. testified that Baldwin had a Playboy magazine and she saw "naked people." (Tr. 121.) K.M. used anatomically correct dolls to recreate poses from the magazine, one with a girl doll straddling a boy doll and a second with a girl doll on top of the boy doll. K.M. also testified that

Baldwin "took his private parts out" and she heard her little sister, A.M., exclaim "eew he peed" to which Baldwin replied, "no that's my sperm." (Tr. 129, 132.)

A.M. testified that Baldwin appeared to "pee on himself when his wiener was out of his pants." (Tr. 209-10.) J.B. described seeing Baldwin "take out his stuff" and "grab" it. (Tr. 227-28.) Using an anatomically correct doll, J.B. identified a penis as the body part she called "stuff." (Tr. 227.) From this evidence, the fact-finder could conclude that Baldwin fondled his body in the presence of children and displayed harmful material to them. There is sufficient evidence to support his convictions for Vicarious Gratification/Fondling and Dissemination of Material Harmful to Minors.

With regard to the conviction for Public Indecency, Baldwin argues that the State failed to show he was in a public place. In construing the public indecency statute, this Court has defined a public place as "a place where members of the public are free to go without restraint." Long v. State, 666 N.E.2d 1258, 1261 (Ind. Ct. App. 1996). Here, the van was located in a private backyard. It was not moveable, was furnished as a playhouse, and was lit with strands of patio lights. It was not accessible to the public. Thus, the State did not establish that Baldwin committed an act of public indecency.[5]

II. Change of Judge Motion

Baldwin argues that he was entitled to a change of judge before his sentence was

[5] Furthermore, the evidence discloses that Baldwin engaged in only one act of fondling himself. In Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002), our Supreme Court recognized that five traditional categories of double jeopardy are prohibited by rules of statutory construction and common law, including conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been

imposed because the sitting judge lacked "ability to carry out his judicial responsibility with integrity and impartiality." Appellant's Brief at 18. According to Baldwin, the trial judge's bias and prejudice is demonstrated by the admission at the sentencing hearing of (1) improper statistical testimony regarding sex offender recidivism from a non-expert witness and (2) testimony that Baldwin asked a teenager if she wanted to see his penis and "started to pull it out." (App. 186.)

The relevant grounds applicable to requests for changes of judge in Indiana criminal cases are set forth in Indiana Criminal Rule 12, section (B), which provides as follows:

> In felony and misdemeanor cases, the state or defendant may request a change of judge for bias or prejudice. The party shall timely file an affidavit that the judge has a personal bias or prejudice against the state or defendant. The affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice.

A change of judge is neither automatic nor discretionary, but rather requires the trial judge to make a legal determination of actual bias or prejudice, treating the facts recited in the affidavit as true. Voss v. State, 856 N.E.2d 1211, 1216 (Ind. 2006). The mere assertion that certain adverse rulings made by a judge constitute bias and prejudice does not establish the requisite showing. Id. at 1217 (citing Ware v. State, 567 N.E.2d 803, 806 (Ind. 1991)).

The record reveals that, at the sentencing hearing, the trial court made certain evidentiary rulings that were adverse to Baldwin. The trial court then explained that any

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convicted and punished and conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted.

irrelevant material would be disregarded and Baldwin's sentence would be imposed based upon a consideration of "the nature of the offense itself and criminal history." (Tr. 454.) In his affidavit, Baldwin offered no facts supporting a rational inference of bias or prejudice apart from his allegations that Judge Hopper denied a motion for continuance and permitted improper testimony at the sentencing hearing. The bald assertions of adverse rulings do not entitle Baldwin to a change of judge. See id.

Conclusion

Baldwin's convictions for Vicarious Gratification/Fondling in the Presence of a Minor and Dissemination of Material Harmful to Minors are supported by sufficient evidence. However, his conviction for Public Indecency is reversed due to insufficient evidence. Baldwin was not entitled to a change of judge at the sentencing hearing.

Affirmed in part; reversed in part.

BAKER, C.J., and VAIDIK, J., concur.