ATTORNEY FOR APPELLANT:

JEFFRY G. PRICE
Peru, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TOBY E. VAUTAW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 85A02-0706-CR-469
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0411-FA-135

December 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Toby Vautaw was convicted of Child Molesting[1] as a class A felony and Sexual Misconduct with a Minor[2] as a class B felony. Vautaw was subsequently sentenced to an aggregate term of forty years imprisonment. On appeal, Vautaw presents four issues for review:

1. Did the trial court properly limit Vautaw's wife's testimony when she was not named as a witness until the day of trial?

2. Did the trial court properly deny Vautaw's motion for mistrial after the victim made two generalized references to prior "accusations" in violation of a motion in limine?

3. Does the statute of limitation for sexual misconduct with a minor violate the privileges and immunities clause of the Indiana Constitution?

4. Is the evidence sufficient to support Vautaw's convictions?

We affirm.

L.N., born December 21, 1987, is Vautaw's nephew. Beause L.N.'s family was extremely dysfunctional, L.N. lived with various relatives and friends throughout his childhood. Around 1997 or 1998, L.N.'s two younger brothers lived with Vautaw and his wife, Shelly, in Urbana, Indiana, and L.N. visited and spent the night "pretty often". *Transcript* at 37. Vautaw was the only "father figure" in L.N.'s life. *Id*. at 38. While L.N. stayed at Vautaw's Urbana home, Vautaw inappropriately touched him on several occasions. Vautaw would take L.N. into his bedroom, lay him on the bed, undress him, and then "grind" on L.N. and fondle him. *Id*. at 39. On other occasions, L.N. would be

[1] Ind. Code Ann. § 35-42-4-3(a)(1) (West, PREMISE through 2007 1st Regular Sess.).

[2] I.C. § 35-42-4-9(a)(1) (West, PREMISE through 2007 1st Regular Sess.).

asleep on the couch and Vautaw would kneel beside him and perform oral sex on him. L.N. testified that Vautaw performed oral sex on him "pretty regularly", estimating that the act occurred between thirty and forty times. *Id*. at 42. Vautaw would tell L.N. that "if you love your uncle, you won't tell nobody." *Id*. at 40. L.N., who told Vautaw numerous times to "stop" and/or "quit", was humiliated and embarrassed about what Vautaw was doing. *Id*. Despite feeling this way, L.N. continued to visit Vautaw's home to see his brothers and because "it was better to be around [Vautaw] then [sic] to be at home and be . . . beat . . . unmercifully" by his abusive mother. *Id*.

After a couple of years, Vautaw, Shelly, and one of L.N.'s brothers moved to a trailer in Lakeview. L.N., who was thirteen or fourteen at the time, eventually moved into the trailer as well and lived there for approximately three or four months. During that time, Vautaw continued fondling L.N. and performing oral sex on him. L.N. testified that Vautaw would grab his penis and "start to jack [him] off", and L.N. would tell him to "quit, stop." *Id*. at 46. Vautaw would tell L.N. to be quiet and that if L.N. loved him, he would let him continue.

When Vautaw and Shelly moved to a third home on Ross Avenue, L.N. moved in with them. Vautaw inappropriately touched L.N. at the Ross Avenue home by continuing to fondle and perform oral sex on L.N. L.N. estimated that Vautaw performed oral sex on him more than twenty times while he was staying at the home on Ross Avenue. Vautaw would also ask L.N. to perform oral sex on him, but L.N. refused. On occasion, Vautaw would have L.N. masturbate him to ejaculation. L.N. continued to protest Vautaw's conduct, telling him numerous times, "Stop. Quit. Do you have to do this? I

don't . . . like this". *Id*. at 54-55. Eventually, L.N. left Vautaw's home and moved in with another uncle, Vautaw's half-brother.

L.N. testified that he waited over a year to tell anyone what had occurred because he was embarrassed and humiliated. Prior to opening up about the abuse, L.N. would deny that Vautaw had molested him even when directly confronted. In the fall of 2004, L.N. finally disclosed Vautaw's molestation to his girlfriend and her mother, and shortly thereafter, to his grandmother. L.N. then disclosed the offenses to the police.

On November 9, 2004, the State charged Vautaw under Count I with child molesting as a class A felony and under Count II with sexual misconduct with a minor as a class B felony. Count I related to the time period prior to December 21, 2001, when L.N. was less than fourteen years of age. Count II related to the time period between December 21, 2001 and December 20, 2003, when L.N. was between the ages of fourteen and sixteen. At the conclusion of the jury trial, the jury found Vautaw guilty as charged. The trial court entered judgment of convictions and sentenced Vautaw to fifteen years for the class B felony offense to be served concurrently with a forty-year sentence for the class A felony offense.

1.

Vautaw argues that he was denied a fair trial and the right to present witnesses in his favor when the trial court limited Shelly's testimony to answering one question, thereby effectively excluding her as a witness on his behalf.

Just days prior to trial, Vautaw filed a supplemental answer to discovery identifying for the first time several defense witnesses. The State objected to the late-

disclosed witnesses, and the following day, the court held a hearing and directed Vautaw to make all prospective witnesses available to the prosecutor, taking under advisement whether to exclude the witnesses. At that hearing, Vautaw orally disclosed for the first time his intention to call his wife, Shelly, as a defense witness, and the State objected. The trial court ordered that Shelly be excluded as a witness for not having been previously disclosed.

As guaranteed by the Sixth Amendment of the United States Constitution and article 1, section 13 of the Indiana Constitution, a criminal defendant has the right to present witnesses in his favor, require their attendance through compulsory process, and receive a fair trial. As recently recognized by our Supreme Court, "Indiana jurisprudence recognizes a strong presumption to allow defense testimony, even of late-disclosed witnesses". *Vasquez v. State*, 868 N.E.2d 473, 476 (Ind. 2007) (*citing Wiseheart v. State*, 491 N.E.2d 985 (Ind. 1986)). Nevertheless, the trial court has inherent discretionary power on the admission or exclusion of evidence. *See Vasquez v. State*, 868 N.E.2d 473. To reverse a trial court's decision to exclude evidence, there must be error by the court that affected the defendant's substantial rights, and the defendant must have made an offer of proof or the evidence must have been clear from the context. *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004). *See also Wiseheart v. State*, 491 N.E.2d 985. "This offer to prove is necessary to enable both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded." *Wiseheart v. State*, 491 N.E.2d. at 991. By failing to make an offer of proof,

the defendant does not adequately preserve the exclusion of the witness's testimony as an issue for appellate review. *Wiseheart v. State*, 491 N.E.2d 985.

During trial, the trial court reconsidered its ruling to exclude Shelly as a witness and, per Vautaw's request, permitted Shelly to testify for the limited purpose of explaining her sleeping habits—specifically, that she slept with her bedroom door open, which testimony was contrary to L.N.'s testimony. Vautaw did not make an offer of proof as to other matters that Shelly would have testified to that were excluded by limiting Shelly's testimony. Vautaw has therefore waived appellate review of this issue.[3] *See, e.g., Dylak v. State*, 850 N.E.2d 401 (Ind. Ct. App. 2006) (holding that defendant's failure to make an offer of proof resulted in waiver of issue of whether court erred in excluding testimony of defendant's expert witness), *trans. denied*.

2.

Vautaw argues that the trial court erred in not declaring a mistrial upon his motion. Prior to trial Vautaw filed a motion in limine regarding prior convictions and other misconduct, which the trial court granted without objection by the State. During L.N.'s testimony, L.N. made two generalized references to prior "accusations" against Vautaw in violation of Vautaw's motion in limine. *Transcript* at 55, 56. Specifically, L.N. testified as to the conduct giving rise to the instant offenses, and then, when questioned

[3] In his appellant's brief, Vautaw asserts that Shelly's testimony would have "significantly rebutted" L.N.'s testimony in that Shelly would have testified to "the frequency with which they [she and Vautaw] slept together as husband and wife" and "their sexual relationship". *Appellant's Brief* at 7. The nature of Shelly's testimony, as alluded to by Vautaw in his appellant's brief, does not establish that any relevant testimony was excluded. Vautaw's sexual relationship with his wife was not relevant to Vautaw's acts of molestation against L.N., thus Shelly's testimony in this regard would not have been admissible. *See* Ind. Evidence Rule 402.

about why he finally moved out of Vautaw's home, L.N. stated, "Because of the accusations that were made before." *Transcript* at 55. Vautaw did not object. L.N. was then questioned about how he felt about Vautaw prior to moving out, and L.N. responded, "I was, it was very emotional when I left. I mean a lot of things were going through me. The accusations that were brought upon him and then . . . ." *Id*. at 56.

Vautaw objected arguing a violation of the motion in limine and then moved for a mistrial on the basis that the jury was informed of prior accusations having been made against him. The State responded, arguing that the references to accusations were general and vague and that there was no reason to believe that the jury thought the referenced "accusations" were made by anyone other than L.N. The trial court denied Vautaw's motion for mistrial, concluding that the jury could interpret L.N.'s reference to "accusations" as being about his own and thus, the jury was not tainted. Vautaw refused the trial court's offer to admonish the jury.

"'A mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error.'" *Randolph v. State*, 755 N.E.2d 572, 575 (Ind. 2001) (*quoting Warren v. State*, 725 N.E.2d 828, 833 (Ind. 2000)). "'A timely and accurate admonition is presumed to cure any error in the admission of evidence.'" *Id*. (*quoting Heavrin v. State*, 675 N.E.2d 1075, 1084 (Ind. 1996) (quotation omitted)). Refusal of an offer to admonish the jury, however, constitutes a waiver of any error in the denial of the motion. *Randolph v. State*, 755 N.E.2d 572; *see also Walker v. State*, 497 N.E.2d 543 (Ind. 1986) (finding trial court did not abuse its discretion in denying motion for mistrial where defendant declined trial court's request to admonish the jury).

Here, Vautaw refused the trial court's offer to admonish the jury, believing that further comment by the court would overly emphasize the objectionable testimony. Vautaw has therefore waived the issue for review. *See Randolph v. State*, 755 N.E.2d 572, 575 (finding defendant's refusal of trial court's offer to admonish the jury because such "would likely rather hurt than help" waived the issue for review); *Boyd v. State*, 430 N.E.2d 1146, 1149 (Ind. 1982) (concluding that defendant's refusal of trial court's offer to admonish jury, where defendant believed such "would call undue attention to the [challenged] remark", constituted waiver of any error in denial of the motion for mistrial).

Waiver notwithstanding, Vautaw has not demonstrated that he would prevail on the merits of his claim. A decision to grant or deny a motion for mistrial is within the sound discretion of the trial court. *Randolph v. State*, 755 N.E.2d 572. We will reverse a trial court's determination only for an abuse of discretion. *Id*. "To prevail, the appellant must establish that he was placed in a position of grave peril to which he should not have been subjected." *Id*. at 575.

Here, L.N. made two brief, general references to "accusations" in response to questions as to why he moved out of Vautaw's residence and how he felt about Vautaw at the time. L.N. did not elaborate as to any specific misconduct, past or present. Having reviewed the record, we agree with the trial court's assessment that, in context, the jury likely interpreted L.N.'s reference to "accusations" as being about his own accusations against Vautaw, not accusations made by another. In any case, Vautaw has not shown that he was prejudiced by L.N.'s testimony, let alone placed in a position of grave peril,

thereby invoking the extreme remedy of a mistrial. We thus find that the trial court did not abuse its discretion in refusing to grant Vautaw's motion for mistrial.

3.

Vautaw contends that the statute of limitation for sexual misconduct with a minor violates article 1, section 23, the privileges and immunities clause, of the Indiana Constitution. Specifically, Vautaw challenges the constitutionality of Ind. Code Ann. § 35-41-4-2 (West, PREMISE through 2007 1st Regular Sess.), which provides, in pertinent part, as follows:

> (a) Except as otherwise provided in this section, a prosecution for an offense is barred unless it is commenced:
>
> (1) within five (5) years after the commission of the offense, in the case of a Class B, Class C, or Class D felony;
>
> * * *
>
> (c) A prosecution for a Class A felony may be commenced at any time.
>
> * * *
>
> (e) A prosecution for the following offenses is barred unless commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age:
>
> (1) IC 35-42-4-3(a) (Child molesting).
> (2) IC 35-42-4-5 (Vicarious sexual gratification).
> (3) IC 35-42-4-6 (Child solicitation).
> (4) IC 35-42-4-7 (Child seduction).
> (5) IC 35-46-1-3 (Incest).

Vautaw contends that subsection (e), which extends the general statute of limitation for certain offenses to coincide with the victim's age, is unconstitutional. We need not address Vautaw's argument because subsection (e) is clearly not applicable to the offense of sexual misconduct with a minor. *See Citizens Nat'l Bank of Evansville v.*

Foster, 668 N.E.2d 1236, 1242 (Ind. 1996) (expressing a "preference for reviewing the constitutional validity of statutes as they are applied to particular parties in a case" and observing that analysis should "focus first on potentially dispositive non-constitutional issues before turning to the constitutionality of the two statutes' application to the Fosters"). Therefore, the standard five-year statute of limitation under subsection (a)(1) applied to that offense. Vautaw's charge and conviction for sexual misconduct with a minor does not place him within a class of persons subjected to the alleged disparate treatment of I.C. § 35-41-4-2(e).

Moreover, we note that L.N. testified about an ongoing pattern of molestation and sexual misconduct committed by Vautaw beginning in 1998 and continuing until L.N. moved from Vautaw's residence in the fall of 2003 when L.N. was fifteen years old. Vautaw was subsequently charged and convicted of class A felony child molesting for the acts occurring prior to December 21, 2001, when L.N. was less than fourteen years old. *See* I.C. § 35-42-4-3. The acts committed after L.N.'s fourteenth birthday, between December 21, 2001 and the fall of 2003, gave rise to the charge and subsequent conviction for class B felony sexual misconduct with a minor. *See* I.C. § 35-42-4-9. The prosecution for such offense was commenced when the charging information for sexual misconduct with a minor was filed on November 9, 2004. *See* I.C. § 35-41-4-2(i)(1) (providing that a prosecution is considered commenced at least as of the date of the filing of the information). The prosecution for the sexual misconduct offense was therefore timely commenced within the five-year limitation period for a class B felony established under I.C. § 35-41-4-2(a)(1). Because the prosecution was timely commenced under the

standard five-year statute of limitation and the exception found in subsection (e) is inapplicable to Vautaw's sexual misconduct offense, we need not address Vautaw's constitutional challenge to the extended statute of limitation for the offenses specified in I.C. § 35-41-4-2(e)(1-5).

4.

Vautaw argues that the evidence is insufficient to sustain his convictions. Vautaw seeks to invoke the incredible dubiosity rule by arguing that L.N.'s testimony was incredible, dubious, and inherently improbable. Specifically, Vautaw asserts that L.N.'s testimony was vague with respect to when the offenses first occurred, the exact dates when the offenses were committed, and the frequency with which the acts occurred. Vautaw also directs us to the testimony of several witnesses who stated that L.N. denied that Vautaw had molested him. Finally, Vautaw points out that L.N. chose to live with Vautaw even though Vautaw was molesting him.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)). The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. *Pinkston v.*

State, 821 N.E.2d 830 (Ind. Ct. App. 2004), *trans. denied*. That principle applies when that witness is the victim of the child-molesting allegation upon which the testimony centers. *Manuel v. State*, 793 N.E.2d 1215 (Ind. Ct. App. 2003), *trans. denied.*

"Within the narrow limits of the 'incredible dubiosity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). For testimony to be disregarded based on a finding of "incredible dubiosity," it must be inherently contradictory, wholly equivocal, or the result of coercion. *Love v. State*, 761 N.E.2d 806. In other words, the testimony must be so incredibly dubious or inherently improbable that no reasonable person could believe it. *Copeland v. State*, 802 N.E.2d 969 (Ind. Ct. App. 2004). Moreover, there must also be a complete lack of circumstantial evidence of the defendant's guilt. *Id*. This rule is rarely applicable. *Id*.

At trial, L.N. testified that between 1998 and 2003, when he was between the ages of ten and fifteen, Vautaw, who was between the ages of twenty-six and thirty-one, repeatedly fondled his penis and performed oral sex on him. Vautaw also forced L.N. to touch Vautaw's penis by grabbing L.N.'s hand and placing it on Vautaw's penis. On occasion, Vautaw forced L.N. to masturbate him to ejaculation. This evidence establishes the elements of both child molesting and sexual misconduct with a minor. Moreover, contrary to Vautaw's claims, L.N.'s testimony was clear, consistent, and unequivocal. Vautaw's arguments challenging L.N.'s credibility were matters to be considered by the trier of fact. We therefore conclude there was sufficient evidence to

support Vautaw's convictions for class A felony child molesting and class B felony sexual misconduct with a minor.

Judgment affirmed.

SHARPNACK, J., and RILEY, J., concur.