MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ricky Allan Brown,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 28, 2022

Court of Appeals Case No. 21A-CR-1714

Appeal from the Huntington Circuit Court

The Honorable Kathleen Lang, Senior Judge

Trial Court Cause No. 35C01-2002-F1-85

Vaidik, Judge.

Case Summary

[1] Ricky Allan Brown was convicted of four counts of Level 1 felony child molesting, one count of Level 4 felony child molesting, and one count of Level 6 felony dissemination of matter harmful to minors for molesting his seven-year-old daughter and showing her sexual videos. The trial court sentenced him to sixty-six years and eleven months in prison. Brown appeals, arguing the trial court erred in admitting the victim's statements, the evidence is insufficient to support his convictions, and his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] Brown and Luciana Brown ("Mother") have three children, including C.Y. ("Child"), who was born in December 2011. In 2019, they lived in Warren in a rental property owned by Merritt Hethcote, who lived next door. Child referred to Hethcote as "Papaw." In December, Child, who was seven but about to turn eight, told Hethcote she had a secret. When Hethcote asked about the secret, Child said her "daddy [had] given [her] a dollar to put his thing in one place and three dollars to put it in another and five dollars to put it in another." Tr. Vol. IV p. 104 (cleaned up). Hethcote told Child that was not a secret she had to keep and that he would "put a stop to that right now." *Id.* Hethcote then confronted Brown. When Mother returned home the next day, December 12, Hethcote told her about Child's allegations, and Mother contacted authorities. Mother did not discuss the allegations with Child.

[3] The next morning, on December 13, a forensic interview of Child was conducted at McKenzie's Hope, a child-advocacy center in Huntington. The interview was recorded. *See* Ex. 21. During the interview, Child disclosed that Brown had put his penis in her mouth, vagina, and anus and his mouth on her breasts and vagina. Child said the molestations occurred several times over the past two years when Mother was not home. Child also said Brown would reward her with money or a treat and told her it was their secret and not to tell anyone. Child said Brown had showed her a video on his cell phone of him and Mother engaged in various sexual acts because he wanted to do the same things with her. Finally, Child said Brown had a tattoo on his penis. After the interview, the police told Mother what Child had said. Mother was "very distraught" and vomited in a trash can. Tr. Vol. IV p. 247.

[4] The police obtained search warrants for Brown's cell phones. A review of the phones revealed a video of Brown and Mother engaged in various sexual acts. Ex. 27. The police also obtained a search warrant to photograph Brown's penis, and the photograph shows he has a tattoo on his penis. Ex. 30.

[5] In February 2020, the State charged Brown with Count I: Level 1 felony child molesting (sexual intercourse); Count II: Level 1 felony child molesting ("other sexual conduct"); Count III: Level 1 felony child molesting ("other sexual conduct"); Count IV: Level 1 felony child molesting ("other sexual conduct"); Count V: Level 4 felony child molesting (fondling or touching); and Count VI: Level 6 felony dissemination of matter harmful to minors. The State alleged the

offenses occurred between July and December 12, 2019. The State also alleged Brown is a habitual offender.

[6] The State moved to "introduce statements [Child] made regarding the alleged child molestation" under Indiana Code section 35-37-4-6, Indiana's Protected Person Statute. The State wanted to introduce Child's statements to Hethcote and the forensic interview. A protected-person hearing was held; Child was in a conference room in the courthouse and communicated via Zoom. Defense counsel examined Child about her allegations against Brown. Child's testimony resembled her forensic interview. *See* Appellant's App. Vol. II p. 116. Child said she never discussed the matter with Mother and that neither Mother nor any other adult had told her what to say.

[7] Mother testified that although she and Brown were married and lived together in December 2019, they were not in a relationship then. Mother explained she let Brown live with them because he was on house arrest. Mother was dating another man, whom Brown knew about. Mother testified Brown told her that if they separated, he would seek to be the main caregiver of their children. Mother also testified that after Hethcote told her about Child's allegations, she did not discuss the allegations with Child.

[8] Finally, Dr. Siquilla Liebetrau, a clinical psychologist and clinical director at Bowen Center, testified. Dr. Liebetrau interviewed Child for about two hours in January 2021, when Child was nine years old. Dr. Liebetrau also administered tests to Child and Mother. According to Dr. Liebetrau, the results from the

Behavioral Assessment System for Children (BASC) showed that Child's behaviors were in the "clinically significant" range for anxiety, depression, somatization, emotional self-control, and negative emotionality and in the "at-risk" range for hyperactivity, atypicality, adaptability, and anger control. The results from the Trauma System Checklist for Young Children (TSCYC) showed that Child's trauma-related scale elevations were "clinically significant" in anxiety, depression, post-traumatic stress intrusion, post-traumatic stress avoidance, post-traumatic stress arousal, post-traumatic stress total, dissociation, and sexual concerns. Dr. Liebetrau believed Child was "preoccupied with the sexual abuse" and experienced "additional distress" because she was mad at her father yet still loved him. Tr. Vol. III p. 85. Dr. Liebetrau observed that when Child was asked about the events, her "tone very much changed to the point that she struggled to verbally answer the questions and asked to be able to write the answers down instead." *Id.* at 97 (cleaned up). Child was also "distressed" about the idea of testifying in court. *Id.* Based on all the evidence, Dr. Liebetrau concluded Child's "testifying in front of the defendant, her biological father, would cause [her] serious emotional distress to the point that she would not be reasonably able to communicate." *Id.* at 86-87 (cleaned up). After the hearing, the trial court issued an order finding Child's statements to Hethcote and the forensic interview were admissible at trial under the Protected Person Statute.

[9] A jury trial was held in July 2021. Child's forensic interview was admitted into evidence and played for the jury, and Hethcote testified about what Child had

told him. The jury found Brown guilty as charged, following which Brown admitted he is a habitual offender.

[10] At the sentencing hearing, the trial court found five aggravators: (1) Brown has eight prior convictions, including two convictions for Class B felony child molesting; (2) Child was seven years old at the time of the offenses; (3) Brown is Child's biological father and took care of her; (4) Brown violated community corrections in December 2019 when these events were alleged to have occurred (Cause No. 85C01-1903-F6-353); and (5) Brown was "arrested and released on his own recognizance for a misdemeanor offense" in September 2019 when these events were alleged to have occurred (Cause No. 90D01-1909-CM-352). Appellant's App. Vol. II p. 58. The court found one mitigator: Brown's age and medical conditions (including a nasal tumor) made long-term imprisonment difficult.

[11] The trial court sentenced Brown to forty-five years for each of Counts I-IV, ten years for Count V, and 700 days for Count VI. The court enhanced Count I by twenty years for being a habitual offender. The court ordered Counts I-V to be served concurrent with each other but consecutive to Count VI, for a total sentence of sixty-six years and eleven months.

[12] Brown now appeals.

Discussion

I. Protected Person Statute

[13] Brown contends the trial court erred in admitting Child's statements to Hethcote and the forensic interview under the Protected Person Statute. As with challenges to the admissibility of other evidence, the decision to admit evidence under the Protected Person Statute is reviewed for an abuse of discretion. *Mishler v. State*, 894 N.E.2d 1095, 1099 (Ind. Ct. App. 2008).

[14] The Protected Person Statute allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are "protected persons." Ind. Code § 35-37-4-6; *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009). Here, the statute applies because Child was the victim of a sex crime and under fourteen years old. I.C. § 35-37-4-6(a)(1), (c)(1). The purpose of the Protected Person Statute is to "spare children the trauma of testifying in open court against an alleged sexual predator." *Tyler*, 903 N.E.2d at 466. But as our Supreme Court has explained, the statute "impinges upon the ordinary evidentiary regime" and therefore the "trial court's responsibilities thereunder carry with them . . . a special level of judicial responsibility." *Carpenter v. State*, 786 N.E.2d 696, 703 (Ind. 2003) (quotation omitted).

[15] The Protected Person Statute lists certain conditions that must be met before otherwise inadmissible hearsay evidence will be allowed. As relevant here, the trial court must find, in a hearing attended by the protected person (either in person or by closed-circuit television) and outside the presence of the jury "that

the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability." I.C. § 35-37-4-6(e)(1). In addition, the protected person must either testify at trial or be found "unavailable as a witness" for one of three reasons, including:

> From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

Id. at (e)(2)(B). Finally, if the protected person is found to be "unavailable as a witness," the protected person must be available for cross-examination at the hearing or when the statement or videotape was made. *Id.* at (f).

[16] Brown first argues the trial court erred in finding Child's statements are sufficiently reliable. Considerations for determining whether a protected person's hearsay statements are sufficiently reliable include: "(1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) use of age appropriate terminology, and (6) spontaneity and repetition." *Surber v. State*, 884 N.E.2d 856, 862 (Ind. Ct. App. 2008), *trans. denied*.

[17] Brown claims Child's statements are unreliable because they "appear to be the product of coaching" by Mother, who had a motive to coach "for custody advantages during a divorce." Appellant's Br. p. 22. Nothing in the record

suggests Child's statements resulted from coaching. At the protected-person hearing, Mother testified that after Hethcote told her about Child's allegations on December 12, she didn't discuss the incident with Child. The very next day, December 13, Child underwent a forensic interview. When the police told Mother what Child said during the interview, Mother vomited in a trash can. Child also testified at the protected-person hearing that she didn't discuss the incident with Mother and that neither Mother nor any other adult had told her what to say. There is no evidence that Mother discussed the allegations with Child, much less coached her.[1]

[18] Brown next argues the trial court erred in finding that Child's testifying in his physical presence would cause her serious emotional distress such that she could not reasonably communicate. Brown notes that during the forensic interview, Child was "very relaxed, responsive, communicative and never faded off, nor ever entered a fugue state of non-communication." Appellant's Br. p. 21. Brown also notes that during the protected-person hearing, Child did not "breakdown, enter a fugue state, become non-responsive, or fail to communicate or even demonstrate any emotional distress." *Id.* at 21-22. However, Brown does not address or challenge Dr. Liebetrau's testimony. Dr.

[1] Brown also claims Child's statements are unreliable because there is "no independent corroboration" of her allegations. Appellant's Br. p. 23. Brown cites no authority for the proposition that independent corroboration is a requirement of admissibility. In any event, as explained below, there is circumstantial evidence.

Liebetrau interviewed Child for about two hours and administered tests to Child and Mother. Dr. Liebetrau testified about the results of the tests and her observations of Child. Based on the evidence, Dr. Liebetrau concluded Child's testifying in Brown's physical presence would cause her serious emotional distress such that she could not reasonably communicate. Dr. Liebetrau's testimony supports the trial court's finding. The court did not abuse its discretion in admitting Child's statements to Hethcote and the forensic interview under the Protected Person Statute.

II. Sufficiency of the Evidence

[19] Brown next contends the evidence is insufficient to support his convictions. When reviewing such claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We will only consider the evidence supporting the verdict and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[20] Brown acknowledges Child stated he molested her; however, he argues her statements should be disregarded under the incredible-dubiosity doctrine. Under that doctrine, we can impinge upon a fact-finder's responsibility to judge the credibility of the witnesses when "the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Hampton v.*

State, 921 N.E.2d 27, 29 (Ind. Ct. App. 2010), *trans. denied.* The doctrine "requires that there be: 1) a sole testifying witness; 2) testimony that is inherently contradictory, equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence." *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). Application of this rule is rare. *Leyva v. State*, 971 N.E.2d 699, 702 (Ind. Ct. App. 2012), *trans. denied.*

[21] Brown cannot meet this high standard. First, Brown has failed to prove there was "a complete absence of circumstantial evidence." During the forensic interview, Child said Brown showed her a video on his cell phone of him and Mother engaged in various sexual acts and that Brown had a tattoo on his penis. Search warrants were obtained, and a video was found on Brown's phone and a tattoo was found on his penis.

[22] Brown tries to explain away this circumstantial evidence by claiming Child could have learned about the tattoo on his penis "during an accidental exposure" and could have viewed the videos on his phone with no assistance from him. Appellant's Br. p. 26. This, however, is pure speculation on Brown's part.[2]

[23] Second, Brown has failed to prove Child's testimony was inherently contradictory, equivocal, or the result of coercion. Brown argues Child's

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[2] At the protected-person hearing, defense counsel asked Child if she had ever accidentally seen her father's penis, such as when he was showering or using the restroom, and Child said no. *See* Tr. Vol. III pp. 196-97.

testimony was "clearly unreliable" because she did not "cry out, ask for help, or garner the attention of others in the home," which is "contrary to what would be perceived as the normal human experience." *Id.* at 27, 28. But Brown cites nothing as support for this assertion. Instead, the opposite seems to be true; children are often molested when they are alone, and the molesting often goes unreported for years because of the molester's influence over them. This is precisely what Child said during the forensic interview: Brown molested Child when Mother was not home, he told Child it was their secret and not to tell anyone, and he would reward Child with money or a treat. The incredible-dubiosity doctrine does not apply here.

III. Inappropriate Sentence

[24] Finally, Brown contends his sentence of sixty-six years and eleven months is inappropriate and asks us to reduce it. Indiana Appellate Rule 7(B) provides an appellate 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." The appellate court's role under Rule 7(B) is to "leaven the outliers," and "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 159-60 (Ind. 2019) (quotation omitted). "Ultimately, our constitutional authority to review and revise sentences boils down to our collective sense of what is appropriate." *Id.* at 160 (quotation omitted).

[25] The sentencing range for a Level 1 felony child-molesting offense is twenty to fifty years with an advisory sentence of thirty years. I.C. § 35-50-2-4(c). The sentencing range for a Level 4 felony is two to twelve years with an advisory sentence of six years. I.C. § 35-50-2-5.5. The sentencing range for a Level 6 felony is six months to two-and-a-half years with an advisory sentence of one year. I.C. § 35-50-2-7(b). Finally, the range for the habitual-offender enhancement is six to twenty years. I.C. § 35-50-2-8(i). The trial court sentenced Brown to forty-five years for each of the Level 1 felonies, ten years for the Level 4 felony, 700 days for the Level 6 felony, and twenty years for the habitual-offender enhancement. Brown's total sentence is sixty-six years and eleven months years. But as the State points out, it could have been "over 200 years." Appellee's Br. p. 21.

[26] Brown acknowledges the nature of the offenses is "horrific." Appellant's Br. p. 16. Indeed, Brown molested his seven-year-old daughter several times. He subjected Child to vaginal intercourse, anal intercourse, and oral sex. He also showed Child a video of him and Mother engaged in various sexual acts because he wanted to do the same things with her.

[27] Brown's character is no better. As he also acknowledges, he has "an extensive criminal history that spans a long number of years." *Id.* at 32. Brown has eight prior convictions, including two convictions for Class B felony child molesting for which he was sentenced to twenty years. *See* Appellant's App. Vol. II p. 192. Brown also violated community corrections and was arrested for a misdemeanor when these offenses were alleged to have occurred. We

recognize, as the trial court found, that Brown was fifty-three years old at the time of sentencing and has several health issues.[3] But these do not outweigh the nature of the offenses or Brown's criminal history. This is not an exceptional case warranting sentencing revision.

[28] Affirmed.

Najam, J., and Weissmann, J., concur.

[3] Within his inappropriate-sentence argument, Brown argues the trial court should have found the hardship to his dependents as a mitigator. The court did not abuse its discretion in failing to find this as a mitigator given that he molested his own daughter.