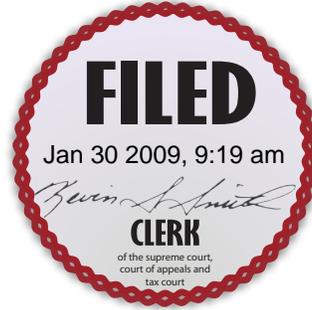


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRED McCORMICK,)
)
Appellant-Defendant,)
)
vs.) No. 38A02-0712-CR-1154
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause No. 38C01-8709-CR-23

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Fred McCormick was convicted after a jury trial of two counts of child molesting, a Class A felony.¹ He raises three issues on appeal, which we expand, reorder, and restate as:

1. Whether the trial court erred in denying McCormick's Motion to Correct Error and Belated Motion to Correct Error;
2. Whether the court abused its discretion when it excluded evidence McCormick wished to admit;
3. Whether the evidence was sufficient to support McCormick's conviction; and
4. Whether the trial court properly sentenced McCormick.

We affirm.

FACTS AND PROCEDURAL HISTORY

In late May of 1986, T.W., 14 years old, and J.S., 15 years old, were driven from their hometown of Winchester to Union City to see J.S.'s boyfriend. Her boyfriend was not home so the girls walked to a nearby store, where they saw two boys who were friends from school. The boys were with McCormick, their stepfather. They invited T.W. and J.S. to come "party" with them at a nearby cemetery. Once there, the group drank beer and some smoked marijuana.

McCormick asked T.W. to come talk to him behind some trees. Once there, McCormick began to grope T.W. and forced her to perform oral sex. When T.W. resisted, McCormick pulled out a knife, held it to T.W.'s throat, and forced her to

¹ Ind. Code § 35-42-4-3.

continue. Eventually, T.W. was able to get away and go back to the car. T.W. was crying and indicated to the others McCormick had forced her to perform oral sex.

Shortly thereafter, McCormick took J.S. to the wooded area, pulled out his knife, and forced her to perform oral sex. He threatened both girls not to tell anyone what had happened.

On September 8, 1987, McCormick was charged with two counts of child molesting as Class A felonies. A trial commenced on July 25, 1989, and the jury returned guilty verdicts on both counts. The trial court sentenced McCormick to fifty years imprisonment on each Class A felony and ordered the terms served consecutively.

On September 22, 1989, McCormick filed a Motion to Correct Error, alleging juror misconduct. A hearing was held, and the judge denied the motion on October 18, 1989. In July of 1993, McCormick filed a Belated Motion to Correct Error, again alleging juror misconduct and that his sentence was unconstitutionally excessive. The court denied the motion without a hearing.

In August of 1996, McCormick filed a praecipe. The trial court noted that a transcript had been filed in 1989 and McCormick should contact his attorney to obtain a copy. In August of 2006, McCormick moved for a copy of transcript. The motion was denied, as there were no pending matters before the court.

On December 10, 2007, McCormick requested pauper counsel to pursue post-conviction relief. The motion was granted.

On February 28, 2008, counsel moved for permission to file a belated appeal. On March 25, 2008 we granted the motion, and on April 2, 2008 McCormick filed a Notice of Appeal.

DISCUSSION AND DECISION

1. Denial of Motion to Correct Error

McCormick contends the jury foreperson was the daughter of his Alcoholics Anonymous counselor in prison and the counselor had discussed McCormick's case with members of his family. He further argues the trial court erred in denying his Motion to Correct Error because the State did not rebut the presumption there was juror misconduct. We disagree.

The decision to deny a motion to correct error lies within the sound discretion of the trial court. *Griffin v. State*, 754 N.E.2d 899, 901 (Ind. 2001). A defendant seeking a new trial based on juror misconduct must show the misconduct was gross and probably harmed his defense. *Reed v. State*, 479 N.E.2d 1248, 1251 (Ind. 1985).

When a juror communicates with outside persons during deliberation there is a rebuttable presumption of prejudice arising from such misconduct, but only if there is proof beyond a reasonable doubt that such misconduct occurred. *Pagan v. State*, 809 N.E.2d 915, 921 (Ind. Ct. App. 2004). If there was misconduct the defendant must show his defense was prejudiced. *Hall v. State*, 796 N.E.2d 388, 396 (Ind. Ct. App. 2003).

McCormick waived this argument because he did not provide a transcript of the evidence produced at the hearing. McCormick, as the appellant, has the responsibility to submit a record sufficient to support his claim of error so we may conduct an intelligent

review of the issues. *Miller v. State*, 753 N.E.2d 1284, 1287 (Ind. 2001), *reh'g denied*. If the appellant does not submit a complete record of the issues for which he claims error, he waives the right to appellate review. *Id.*

The record does not include a transcript of the hearing at which the court denied McCormick's motion to correct error on the ground of jury misconduct.² Without a transcript of that hearing, we cannot determine what testimony was given or what evidence was presented, and we are unable to determine if there was an abuse of discretion by the trial court. McCormick has waived this issue for appeal because he has not provided a sufficient record to permit us to fairly decide his juror misconduct claim.

2. Excluded Line of Questioning

McCormick argues the court erred in limiting his cross-examination of T.W. about her previous accusations of child molesting. It did not.

Admissibility determinations are reviewed for an abuse of discretion. *Jackson v. State*, 697 N.E.2d 53, 54 (Ind. 1998). We will reverse only when the decision is clearly against the logic and effect of the facts and circumstances. *Id.* In child molesting cases, evidence of prior false accusations may be admitted only if there is an admission that a false accusation was made or the accusation is demonstrably false. *Fuggett v. State*, 812 N.E.2d 846, 849 (Ind. Ct. App. 2004).

In a hearing outside the presence of the jury, T.W. testified she had been molested when she was five or six years old. She told her parents but no charges were brought. The State objected to the line of questioning, and the court sustained the objection. T.W.

² Nor did McCormick provide a statement of the evidence pursuant to Appellate Rule 31.

did not admit the accusations were false, and the court did not find a pattern or established record demonstrating T.W.'s accusations had been false. The trial court did not abuse its discretion in sustaining the State's objection.

3. Sufficiency of Evidence

McCormick argues the finding he used a knife was unsupported by the evidence.³ McCormick notes contradictory testimony regarding who smoked marijuana, T.W.'s testimony that she has vision problems, and differences in the witnesses' descriptions of the knife.

When reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). The conviction will be affirmed if there is sufficient probative evidence from which the trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

There was ample evidence from which the jury could conclude McCormick used a knife while committing both counts of child molesting. McCormick testified he engaged in oral sex with T.W., who was fourteen years old at the time. T.W. and J.S. testified they were forced to perform oral sex on McCormick. Both girls testified McCormick had a knife and held it to their throats until they performed oral sex. There was testimony McCormick was seen with a knife that evening. The evidence was sufficient to support

³ At the time of McCormick's offenses, child molesting was a Class C felony, but was a Class A felony if committed by using or threatening the use of a deadly weapon. *See* Ind. Code § 35-42-4-3 (1981).

the jury finding he used the knife, or threatened its use, in committing child molesting. We may not set aside McCormick's convictions of child molesting.

4. Sentence

Sentencing decisions rest within the sound discretion of the trial court and we will review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds* 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We review a trial court's finding of aggravators and mitigators for an abuse of discretion.

A. One Episode of Criminal Conduct

McCormick argues he should not have been sentenced to consecutive terms because his conduct constituted one episode of criminal conduct. We disagree.

McCormick relies on *Trei v. State*, 658 N.E.2d 131 (Ind. Ct. App. 1994), where Trei confined two minors and sexually assaulted one of them. He was found guilty of one count of sexual misconduct and two counts of criminal confinement. The first two counts were to be served concurrently but consecutive to the third count. We held the convictions arose out of one episode of criminal conduct and Ind. Code § 35-50-1-2 mandated the aggregate sentence could not exceed fifty years. *Id.* at 134.

McCormick fails to develop an argument as to how the trial court erred. His argument section merely cites the *Trei* case, which he admits is based on 1994 statutory amendments. He does not explain how this 1994 change in the law demonstrated trial court error during his trial some five years earlier. "The argument must contain the

contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on.” Ind. Appellate Rule 46(A)(8)(a). A party waives an issue if the party does not develop a cogent argument or provide adequate citation to authority. *Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005). McCormick has waived this allegation of error.

B. Aggravating Factors

McCormick argues the court inappropriately considered three aggravating factors. It did not.

At the sentencing hearing, the court found thirteen aggravating factors, including McCormick’s history of violence against women, prior similar offenses, extreme violence, perjury at trial, criminal history, history of mental illness, lack of remorse, and the age of the victims. McCormick contends the court wrongly considered his lack of remorse, the age of the victims, and his history of mental illness. McCormick does not contest the remaining aggravating factors.

Lack of remorse may not be considered an aggravating factor when the only evidence is the uncorroborated testimony of the victim. *Dockery v. State*, 504 N.E.2d 291, 297 (Ind. Ct. App. 1987). In this case, there was more. T.W. and J.S. both testified McCormick forced them to perform oral sex and threatened them with a knife. A witness testified he saw McCormick with a knife and heard him threaten J.S. The court did not abuse its discretion in considering lack of remorse as an aggravating factor.

McCormick also contends the court erred in considering the age of the victims as an aggravating factor. The court may consider as an aggravating factor the nature and circumstances of the crime. *Shane v. State*, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002). At the sentencing hearing, the court recognized it could not specifically consider the age of the victims as an aggravator. However, the court considered the victims' ages as a part of a "scheme" or "fantasy," (Sent. Tr. at 34.), and noted McCormick's history of crimes against teenage females. We find no abuse of discretion.

Finally, McCormick argues the court erred in considering as an aggravating factor his history of mental illness. Mental illness may be an aggravating or mitigating circumstance depending on the sentencing goals. *Scott v. State*, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), *trans. denied*. The court considered McCormick's mental health history and previous treatment. McCormick had been given lenient sentences for past convictions as a result of his mental health history. The court determined McCormick had "apparent incurability," (Sent. Tr. at 36), and determined his mental health history had become an aggravating factor. We cannot say that decision was an abuse of discretion.

Even if there had been error in the consideration of three of the thirteen aggravating factors, McCormick has not established he was prejudiced by the error. McCormick has not argued the court would not have imposed the same sentence had the court not considered those three aggravating factors. A trial court may impose an enhanced or consecutive sentence based on a single aggravating factor. *Miller v State*, 716 N.E.2d 367, 371 (Ind. 1999). A defendant's criminal history may be considered in

evaluating whether to impose an enhanced or consecutive sentence. *Id.* The trial court considered McCormick's prior criminal record as an aggravating circumstance.⁴ It was within the trial court's discretion to impose consecutive maximum sentences.

Affirmed.

NAJAM, J., and ROBB, J., concur.

⁴ McCormick's criminal record includes a prior conviction of child molesting, several assault and battery convictions, and parole violations.