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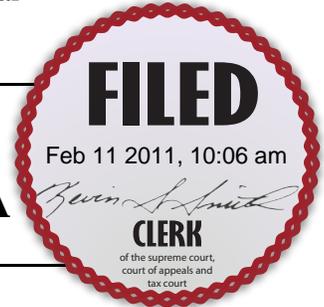
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**IN THE
COURT OF APPEALS OF INDIANA**



JAMES E. McGEE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 45A04-1007-CR-413

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0907-FA-00029

February 11, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

James E. McGee (“McGee”) appeals his conviction of two counts of child molesting, both as Class A felonies.¹ We affirm.

Issue

McGee presents three issues for our review, which we restate as:

- I. Whether there was sufficient evidence to convict McGee of child molesting as a Class A felony?
- II. Whether the trial court erred in instructing the jury and was otherwise biased against him such that it fundamentally deprived him of a fair trial?
- III. Whether his sentence of forty (40) years is inappropriate in light of his character and the nature of his offense?

Facts and Procedural History

McGee was an Illinois police officer who lived in Indiana. B.D., a minor, is the daughter of McGee’s cousin, Laquita Hughes.² B.D. and her family lived in Harvey, Illinois, and McGee would often stop by their house. B.D. would also frequently visit McGee’s house in Indiana, as McGee’s daughter is approximately the same age as B.D.

B.D. testified that, on one of these visits to Indiana when she was nine years old, she was sleeping on the couch and McGee “came and set [sic] at the end of my feet and he started rubbing in between my legs.” Tr. 103. She further testified that McGee put his hands “on my vagina” and “rubbed it” for about two minutes. Tr. 104-105. On another visit, when

¹ Ind. Code § 35-42-4-3.

² B.D.’s biological mother gave up custody of B.D. when B.D. was three. She was raised by her maternal uncle, Claude Davis, and his wife, Laquita Davis.

she was twelve, B.D. was riding with McGee and her younger brother in McGee's van. McGee dropped B.D.'s younger brother off at the Boys and Girls Club for a basketball tournament, and then pulled his van into a vacant lot. B.D. testified that, in the lot, McGee forced B.D. to have vaginal sex with him. B.D. recounted that on another occasion, also in McGee's van, McGee forced B.D. to "suck on him." On another visit, according to B.D., McGee made B.D. play with his penis, and he ejaculated on the steering wheel.

On July 30, 2009, the State charged McGee with two counts of child molesting as a Class A felony, and one count as a Class C felony. A jury trial was held, and, on March 19, 2010, the jury found McGee guilty on all three charges. Because of double jeopardy concerns, the trial court entered a judgment of conviction only as to Counts I and II, and sentenced McGee to forty years imprisonment for each Class A felony count, to be served concurrently. He now appeals.

Discussion and Decision

I. Sufficiency of the Evidence Supporting McGee's Conviction

McGee argues that the State failed to prove his guilt beyond a reasonable doubt as to both charges against him. Regarding Count I, McGee argues that the State failed to show he had "sexual intercourse" with B.D. because it did not introduce evidence of "penetration." As to Count II, McGee argues that the State failed to prove that he had "deviate sexual conduct" with B.D. Finally, he argues that B.D.'s testimony is "incredibly dubious."

Sufficiency of the Evidence Supporting the Child Molestation Charges

When reviewing the sufficiency of the evidence, we consider only the probative

evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). “The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

In order to convict McGee of child molesting as a Class A felony, the State was required to prove beyond a reasonable doubt that, as to Count I, McGee performed or submitted to sexual intercourse with a child under fourteen (14) years of age while he was over twenty-one (21) years of age, and, as to Count II, McGee performed sexual deviate conduct with a child under fourteen (14) years of age while he was over twenty-one (21) years of age. I.C. § 35-42-4-3; App. 7. “Sexual intercourse” is an act that includes any penetration of the female sex organ by the male sex organ. I.C. § 35-41-1-26. “Deviate sexual conduct” means, among other things, an act involving a sex organ of one person and the mouth or anus of another person. I.C. § 35-41-1-9.

As to the first count for sexual intercourse, the prosecutor asked B.D., a seventeen year old at the time of trial, whether there ever came a time when she had vaginal sex with McGee, and B.D. responded in the affirmative. She explained that it occurred in McGee’s van when she was twelve years old, and McGee pulled her panties down and “forced himself (sic) on me.” Tr. 107. The prosecutor asked her again on direct examination whether this

was the first time she had “vaginal intercourse” with McGee and she responded in the affirmative and added that it lasted a minute or so because it was hurting. Tr. 109.

While B.D. did not describe the actual act of penetration, “a detailed anatomical description of penetration is unnecessary and undesirable.” Spurlock v. State, 675 N.E.2d 312, 315 (Ind. 1996). Moreover, McGee did not object to B.D.’s competency as to sexual concepts at trial, and therefore the jury was entitled to conclude that she understood the prosecutor’s questions regarding whether McGee had “vaginal intercourse” and “vaginal sex” with her. Nor was B.D.’s testimony equivocal as to whether the act of sex had actually occurred. See id. (holding that there was insufficient evidence of penetration where a witness, who understood sexual concepts, testified that defendant “tried” to have sex with her but that she did not know whether his penis was inside her). On appeal, we do not judge the credibility of witnesses, and we consider not only the evidence presented, but the reasonable inferences that can be drawn from the evidence. Drane, 867 N.E.2d at 146. Based on B.D.’s testimony, we conclude that the State introduced sufficient evidence of “penetration” from which a jury could convict McGee of child molesting.

As for Count II, B.D. testified that McGee forced her to “suck on him” while they were in his van. Tr. 110. She described how he was kneeled down in the middle of his van, and that “[h]e unzipped his pants, he didn’t unbutton or take his pants off. He pulled it out of his pants, and forced my head on it.” Tr. 110. The prosecutor followed up by asking B.D. whether she “actually saw his penis”, and B.D. answered “yes.” Tr. 110. Although the State failed to elicit specific statutory language from the witness, the jury could reasonably

conclude from this follow-up question and the surrounding circumstances that McGee engaged in deviate sexual conduct (oral sex) with B.D., and that B.D.'s description of "him" and "it" referred to McGee's penis. McGee suggests that "him" could refer to his finger, mouth, nipple, or any other body part. Appellant's Br. p. 11. McGee's argument is simply an invitation for us to reweigh the evidence, which we will not do.

Incredible Dubiosity of B.D.'s Testimony

McGee also argues that his convictions should be overturned because B.D.'s testimony was incredibly dubious. Our Supreme Court has stated the standard for incredible dubiousity:

Under the incredible dubiousity rule, a court will impinge on a jury's responsibility to judge witness credibility only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Tillman v. State, 642 N.E. 2d 221, 223 (Ind. 1994). The incredible dubiousity rule, however, is limited to cases where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion *and* there is a complete lack of circumstantial evidence of the defendant's guilt. Id.

Majors v. State, 748 N.E.2d 365, 367 (Ind. 2001).

McGee maintains that B.D.'s testimony is incredibly dubious because she made prior inconsistent statements to Vashonda Mack, a social worker. Appellant's Br. p. 12. We observe that "witness testimony that contradicts witness's earlier statements does not make such testimony 'incredibly dubious.'" Stephenson v. State, 742 N.E.2d 463, 498 (Ind. 2001). At trial, B.D. unequivocally stated that McGee forced her to perform various sexual acts on him, and therefore her testimony is not inherently contradictory.

B.D.'s testimony is also supported by circumstantial evidence. Officer Rodriguez testified that he discovered a blue and white van registered in James McGee's name, which matched B.D.'s description. He also testified that B.D. was able to lead him to the vacant lot near the Boys and Girls Club where McGee forced her to have sex. Moreover, photographic evidence introduced at trial shows a mole below McGee's waist (Ex. 3), and although B.D. testified that McGee had a mole on his penis (Tr. 3), we do not find her testimony to be so "wholly uncorroborated" that we will impinge on the jury's credibility determination. Majors, 748 N.E.2d at 367.

Finally, McGee does not direct us to any evidence that B.D.'s testimony was coerced. He merely speculates that her trial testimony "may be indicative of some coercion on the part of her family or other people involved." Appellant's Reply Br. p. 7-8. Consequently, we do not find B.D.'s testimony to be incredibly dubious.

II. Fundamental Error

Jury Instruction

McGee argues that his conviction on Count II should be reversed because the trial court issued a flawed jury instruction. The trial court instructed that the State had to prove that McGee knowingly performed or submitted to "deviate sexual intercourse" with B.D. Tr. 531. McGee correctly points out that there is no such element in Indiana Code section 35-42-4-3. However, McGee did not object to this instruction at trial; consequently, he asks us on appeal to review this instruction for fundamental error.

"[F]undamental error is extremely narrow and available only when the record reveals

a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.” Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). To establish fundamental error based on a jury instruction, the appellant must show that there was erroneous instruction and that the incorrect instruction, in the context of all “relevant information given to the jury,” including closing arguments and other instructions, caused him to suffer a due process violation. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002). “There is no resulting due process violation where all such information, considered as a whole, does not mislead the jury to a correct understanding of the law.” Id.

The trial court’s preliminary instructions, which were read to the jury, properly state that Count II requires “deviate sexual conduct.” Tr. 41. The trial court also properly stated Count II in final instruction number 1, and defined “deviate sexual conduct” for the jury in instruction number 6, after it misspoke and announced that Count II required a finding that “deviate sexual intercourse” had occurred. Tr. 528-34. McGee’s attorney even defined Count II in his closing argument as “oral sex” for the jury, not as sexual intercourse. Tr. 506. Given the plethora of information presented to the jury on Count II, we do not find that McGee was fundamentally deprived of a fair trial based on the erroneous jury instruction.

Trial Court Bias

McGee next argues that his conviction should be overturned because the trial court was biased against him. When the impartiality of a trial judge is challenged on appeal, we will presume that the judge is unbiased and unprejudiced. Smith v. State, 770 N.E.2d 818,

823 (Ind. 2002). To rebut the presumption, a defendant must establish that the judge's conduct caused actual bias or prejudice that placed the defendant in jeopardy. Id. Such bias and prejudice exists only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding. Resnoyer v. State, 507 N.E.2d 1382, 1391 (Ind. 1987), cert. denied, 484 U.S. 1036 (1988). The test for determining whether a judge should recuse himself is “whether an objective person, knowledgeable of all the circumstances, would have reasonable basis for doubting the judge’s impartiality.” James v. State, 716 N.E.2d 935, 940 (Ind. 1999). “Adverse rulings and findings by the trial judge are not sufficient reasons to believe the judge has a personal bias or prejudice.” Thomas v. State, 486 N.E.2d 531, 533 (Ind. 1985).

As is the case with any error, a party must raise a claim of judicial bias at the trial level in order to preserve the issue for appeal. Garrett v. State, 737 N.E. 2d 388, 391 (Ind. 2000). Here, McGee made no such objection at trial, and, consequently, he waived review of the issue of judicial bias.

Waiver notwithstanding, a party can still prevail on appeal if he can establish that the trial court’s bias or prejudice rose to the level of fundamental error. Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002). As we noted above, fundamental error is “extremely narrow” and it is available only in cases of a “clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied.” Jewell, 887 N.E.2d at 942. Fundamental error must be argued on appeal to warrant our consideration, or else it is waived. Davenport v. State, 734 N.E.2d 622, 623 (Ind. Ct. App. 2000) (“[f]ailure to put forth

a cogent argument acts as waiver of the issue on appeal”).

As best we can tell,³ McGee only raises the issue of fundamental error as it pertains to his proposed admission of B.D.’s mental health records. The court excluded these records by granting the State’s motion in limine. It later reaffirmed its ruling. After the State rested and McGee informed the court that he would not be testifying or presenting evidence on his behalf, McGee then asked the court to admit the mental health records and make them part of the trial record. The judge denied his request, and McGee argues that the following exchange demonstrates that the judge acted improperly and in a biased fashion by dissuading him from making a proper offer of proof to admit exhibits and make them part of the record:

COURT: Counsel, as you know, documents that are not admitted into evidence don’t become part of the record. They become part of the record if admitted. But in the course of any criminal trial, there is any number of documents or photographs or other exhibits that both parties offer, and they are rejected by the Court and are not admitted into evidence, and those documents don’t become part of the record because they are not admitted.

DEFENSE: There’s a lot of things that get marked that don’t get admitted, but they are still part of the record.

COURT: I beg your pardon?

DEFENSE: There’s things like, for example, State’s 27 is this detective’s report. It was offered to refresh Detective Rodriguez’ [sic] memory about testimony that he was providing, that was marked and it is still going to become part of the record while it won’t go to the jury.

³ Although McGee does not couch any of his bias arguments in terms of fundamental error, he does cite the fundamental error doctrine as well as caselaw in his discussion of the trial court’s alleged dissuasion of his offer of proof. Appellant’s Br. p. 23. While we acknowledge the State’s contention that McGee has failed to argue fundamental error, Appellee’s Br. p. 11, and agree that it is not our province to develop parties’ arguments on appeal, we conclude that McGee has sufficiently raised the issue of fundamental error as it pertains to his attempted offer of B.D.’s medical records.

COURT: No, no, no, that's – it does not. If a document is offered into evidence and it's refused, the document and the content of the document do not become part of the record. A reference to the document is part of the record, but the document itself is not.

DEFENSE: Yes, your Honor. I'm just going to withdraw C and D then.

Tr. 488-89; Appellant's Br. p. 22.

The foregoing record does not support McGee's argument. In this exchange, the judge merely reaffirmed two prior rulings it had made on the exclusion of B.D.'s mental health records, and explained the rules of evidence to counsel. The judge did not attempt to dissuade McGee from presenting his case. In fact, McGee had already made the decision not to present evidence. Tr. 486. Moreover, McGee's counsel states, after the exchange above, "we would present a case in chief if I was able to present [the mental health records]. But since we're not, I don't have a case in chief." Tr. 490. This indicates that it was the judge's ruling on admissibility that dissuaded McGee from presenting a case in chief, and, again, "adverse rulings and findings by the trial judge are not sufficient reasons to believe the judge has a personal bias or prejudice." Thomas, 486 N.E.2d at 533. Therefore, we do not find that the above exchange between the judge and McGee's counsel demonstrates bias or partiality, let alone fundamental error.

III. McGee's Sentence

McGee contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in

determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a 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 burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to “leaven the outliers.” Id. at 1225. “Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Id. at 1224.

The sentencing range for a Class A felony runs between twenty and fifty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4. McGee’s sentence on each count was ten years above the advisory, and his sentences are to be served concurrently. McGee now argues that his sentence should be revised.

The nature of the offense is such that McGee, as a cousin to B.D., violated the special trust of a family member who has known McGee her whole life. McGee often fetched B.D. from her house and drove her to Indiana, where she spent the night at McGee’s house and played with his daughter. McGee molested B.D. on several occasions over the course of

many years. He also tried to hide his crime by telling B.D. not to tell anyone of these incidents, and paying her \$50.00 on one occasion to secure her silence. McGee was also a police officer, and by committing these crimes, he violated the public trust he was to uphold.

The character of the offender is such that McGee did not have a history of criminal activity before these crimes, and does not have a history of drug or mental health problems. Prior to this offense, he was also gainfully employed. Nevertheless, given the duration of these illicit relations, along with the breach of family and public trust, we find that, on balance, McGee's sentence is not inappropriate.

Conclusion

The State presented sufficient evidence to support the jury's finding that McGee had performed sexual intercourse and sexual deviate conduct with B.D., and B.D.'s testimony was not incredibly dubious. Nor did the trial court commit fundamental error in instructing the jury, and it did not exhibit bias against McGee. Finally, McGee's sentence is not inappropriate given the nature of his offense and his character.

Affirmed.

NAJAM, J., and DARDEN, J., concur.