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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL J. EARNEST,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 50A03-1011-CR-602

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0905-FA-5

July 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a jury trial, Michael Earnest appeals his two convictions of child molesting as Class A felonies. He raises two issues for our review, which we expand and restate as three: whether sufficient evidence was presented to sustain his convictions of child molesting, whether the trial court abused its discretion in sentencing him, and whether his sentence is inappropriate. We conclude the evidence was sufficient regarding the first count of child molesting but insufficient regarding the second count of child molesting. However, we also conclude that sufficient evidence was presented of incest as a Class B felony, and remand for judgment of conviction on that count. Finally, we conclude the trial court did not abuse its discretion in sentencing Earnest, and his fifty-year sentence for one count of child molesting as a Class A felony is not inappropriate. Consequently, we affirm Earnest's conviction of one count of child molesting and his sentence as to the same, reverse his conviction of the second count of child molesting, and remand for entry of judgment of conviction of one count of incest as a Class B felony and sentencing on that offense.

Facts and Procedural History

A.M. was born on October 26, 1994, and at all times relevant to this case lived with her mother and Earnest, her biological father. A.M.'s younger brother was born on October 27, 2005. In 2009, A.M. reported two specific instances of sexual abuse by Earnest, which she and her mother described at trial.

In the first incident, Earnest called A.M. to his bedroom and told her to put her mouth on his penis. A.M. did so for several minutes until she heard her mother approach. A.M.'s mother entered the bedroom and saw A.M.'s head appear from under the bed

blankets near Earnest's groin. Earnest emerged from the blankets with an erect penis and told A.M.'s mother that if she reported him to anyone then her children would be taken away. He also told A.M. that if she told anyone what he did to her, he would kill her and their family. A.M. later confirmed her mother's suspicion that Earnest had her put her mouth on his penis. A.M.'s mother testified this incident occurred when A.M. was twelve or thirteen years old, and A.M. testified it occurred when her younger brother was one or two years old and when it was hot outside.

The second incident occurred while Earnest was engaged in sexual intercourse with A.M.'s mother. While lying on the bed, Earnest called A.M. into the bedroom where her mother was lying on top of him, he pulled A.M.'s shorts down, began rubbing her rear-end, and "insert[ed] his finger in [A.M.'s] butt." Transcript at 31. Earnest then told A.M. and her mother to engage in sexual acts with each other. A.M.'s mother refused and A.M. finally heeded her mother's repeated directions to leave the room. A.M.'s mother tried to call 911, but Earnest grabbed the phone from her hand, threw it to the ground, and told her that if she reported him to anyone he would "take and do away with [her] and [her] daughter and he would be gone with [her] son before anybody would find out that [they] were dead." *Id.* at 54 (testimony of A.M.'s mother). This incident occurred three to six months after the first incident.

In April 2009, A.M. told her older half-brother about these two incidents, and her older brother then contacted authorities. Earnest was charged with two counts of child molesting as Class A felonies and two counts of incest as Class B felonies. Following trial, a jury found Earnest guilty of all charges. The trial court merged the counts of incest into the counts of child molesting and entered a judgment of conviction on two

counts of child molesting as Class A felonies. After a sentencing hearing, the trial court sentenced Earnest to concurrent fifty-year terms in prison for each of the two counts of child molesting. Earnest now appeals. Additional facts will be supplied as appropriate.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or reweigh the evidence, and we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). When confronted with conflicting evidence, we must consider it in a light most favorable to the conviction. Id. We affirm the conviction “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. . . . The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quotations and citations omitted).

B. Child Molesting

To convict Earnest of child molesting as a Class A felony, the State was required to prove that Earnest engaged in sexual intercourse or performed deviate sexual conduct with A.M., and that A.M. was less than fourteen years old. Ind. Code § 35-42-4-3(a). Deviate sexual conduct means an act involving the sex organ of one person and the mouth or anus of another person. Ind. Code § 35-41-1-9. Earnest’s sole contention is that the State failed to prove that A.M. was less than fourteen years old at the time of each incident.

A.M. was born on October 26, 1994, and turned fourteen years old on October 26, 2008. A.M.'s mother testified the first incident occurred when A.M. was twelve or thirteen years old. This testimony alone is sufficient to sustain Earnest's conviction for the first incident because we do not assess the credibility of witnesses or reweigh evidence. See Drane, 867 N.E.2d at 146.

A more specific estimate of the date of the first incident is crucial, however, to sustain Earnest's conviction for the second incident because the only indication of when the second incident occurred was in relation to the first. A.M.'s mother testified the second incident occurred three to six months after the first. If the first incident occurred in the last three to six months of the year following A.M.'s thirteenth birthday, then the second incident might have occurred after A.M. turned fourteen. A.M. testified the first incident occurred when her younger brother was one or two years old, and consequently it could have occurred as late as October 26, 2008 – the last day her brother was two and also the day of A.M.'s fourteenth birthday. We need not and are not now reassessing the credibility of a witness or reweighing evidence. No specific testimony or evidence was presented that the second incident occurred before A.M. turned fourteen, and therefore insufficient evidence was presented to sustain Earnest's conviction regarding the single count of child molesting for his conduct in the second incident.

C. Incest

As mentioned, sufficient evidence was presented to sustain Earnest's conviction of child molesting as a Class A felony as to the first incident. Further, the State charged and the jury was instructed and found Earnest guilty of incest as a Class B felony for his conduct in the second incident. The trial court did not reduce this finding to a conviction,

instead merging it with the conviction of child molesting for Earnest's conduct in the second incident.

When a conviction is reversed because of insufficient evidence, we may remand with instruction to enter a judgment of conviction upon an offense for which the charging instrument factually includes all elements of the crime, if the evidence is sufficient to support that conviction. See Neville v. State, 802 N.E.2d 516, 519 (Ind. Ct. App. 2004) (regarding lesser-included offenses), trans. denied.

To convict Earnest of incest as a Class B felony, the State was required to prove that Earnest engaged in deviate sexual conduct with A.M., his child, that he knew of his biological relationship, and that A.M. was less than sixteen years old. See Ind. Code § 35-46-1-3. Evidence was presented as to each of these elements, and therefore sufficient evidence supports the jury's finding of Earnest's guilt of incest as a Class B felony for his conduct in the second incident.

Therefore, we affirm Earnest's conviction for the first count of child molesting, reverse his conviction as to the second count of child molesting, and remand with instruction to enter a judgment of conviction on the jury's guilty verdict of incest as a Class B felony regarding the second incident.

II. Abuse of Discretion in Sentencing

Sentencing decisions "rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 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, or the reasonable, probable, and actual deductions to be

drawn therefrom.” Id. (quotations and citation omitted). A trial court may abuse its discretion by failing to enter a sentencing statement, entering findings of aggravating and mitigating factors unsupported by the record, omitting factors clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. Id. at 490-91. “Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491.

Earnest correctly notes that he received the maximum sentence of fifty years for each count of child molesting, to be served concurrently. See Ind. Code § 35-50-2-4 (providing a range of twenty to fifty years imprisonment for each Class A felony conviction). Although we concluded above that one of these convictions must be reversed and a judgment of conviction of incest as a Class B felony must be entered, we continue to review Earnest’s challenge to his fifty-year sentence for the single conviction of child molesting that we affirm.

Earnest argues the trial court abused its discretion in relying on facts not in the record to aggravate his sentence. Specifically, he directs us to the trial court’s sentencing order which states the following as an aggravating factor: “[t]he acts committed occurred over an extended period of time and not just on the dates noted in the charging information.” Appellant’s Appendix Volume I at 21. The only evidence in the record that might support this statement is Earnest’s dismissed charge of child molesting as a Class C felony in 1993, as stated without additional detail in the Pre-Sentence Investigation Report (“PSI”). While this is admittedly tenuous support for the trial

court's statement, we need not conclude that the trial court abused its discretion in sentencing Earnest for at least two reasons.

First, other aggravators identified by the trial court are sufficient to support Earnest's maximum sentence. The trial court noted that Earnest was the father of A.M., which is a suitable aggravating circumstance. See Ind. Code § 35-38-1-7.1(a)(8). The trial court also considered Earnest's threatened harm if she reported his abuse to be an aggravating circumstance, which was proper. See Ind. Code § 35-38-1-7.1(a)(10). These valid aggravators support the enhancement of Earnest's sentence. See Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) ("Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist.").

Second, we need not remand for resentencing as to Earnest's conviction of child molesting regarding the first incident because we can say with confidence that the trial court would have imposed the same sentence based on the reasons mentioned above that are supported by the record. Cf. Anglemyer, 868 N.E.2d at 491. For these reasons, we conclude the trial court did not abuse its discretion in sentencing Earnest to the maximum of fifty years for one count of child molesting.

III. Inappropriateness of Sentence

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v.

State, 848 N.E.2d 1073, 1080 (Ind. 2006). “[W]hether 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.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Earnest does not make any argument that the nature of the offense warrants a lesser sentence, and accordingly we conclude that the nature of the offense justifies his maximum sentence. Indeed, the trial court appropriately noted that the offense involved Earnest violating a position of trust as A.M.’s father, which by itself constitutes a valid aggravating circumstance, and alone supports the maximum sentence enhancement for child molesting. See McCoy v. State, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006). A.M.’s written statements prior to sentencing reveal how severely Earnest’s conduct harmed A.M. emotionally:

[M]y father abused me not just sexually [sic] but he would hit me and pull my hair. He would call me names and tell me he was going to kill me. I wish he would of [sic] been a father and he would of taken [sic] care of me and loved me like a father should instead of being a controllitive, [sic] abusive, and hurtful person that he was.

I am very upset that this happened I wish my dad would have been a dad instead of hurting me and my family.

Appellant’s Appendix Volume II at 27.

As to Earnest’s character, he argues that his relative lack of criminal history does not warrant the maximum sentence. However, Earnest does not altogether lack criminal history. In 1979, Earnest was convicted of possession of marijuana; in 1994, he was convicted of operating a vehicle while intoxicated; in 1995, he was convicted of dealing in marijuana, and two counts of theft as Class D felonies. This criminal history spans a

long period of time, and has increased in severity with each passing decade and offense. As such, this varied and increasingly harmful history of convictions does not reflect well on Earnest's character.

In addition, Earnest's conduct in these incidents with A.M. also reflects poorly on his character. Even setting aside his inability to control his impulsive and perverse sexual desires, his clear and forceful threats to A.M. and her mother are deplorable. The State also notes that Earnest hid his paternity of A.M. for an extended period of time because he wanted to avoid paying child support in the event he separated from A.M.'s mother. This calculated attempt to avoid responsibility also does not bode well for Earnest's character.

In addressing a claim of inappropriateness, we do not review sentences to determine whether they are "correct," but to "leaven the outliers."¹ Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). The nature of Earnest's offenses alone makes his maximum sentence appropriate. His character, including a relatively sparse criminal record, does not make his fifty-year sentence for one count of child molesting inappropriate.

¹ Our supreme court recently revised a defendant's sentences for various convictions, following a careful reassessment of aggravating and mitigating factors. Horton v. State, No. 48S04-1106-CR-386, 2011 WL 2552661 (Ind., June 28, 2011). The supreme court concluded that a fully enhanced sentence of fifty years for one Class A felony child molesting conviction was warranted, but that the advisory sentence was appropriate for each of the other five Class A felonies which, in addition to other revisions, reduced the aggregate sentence from 324 years to 110 years.

Here, where we reverse Earnest's conviction for one of the two counts of child molesting, we need not remand for resentencing as to the first count because the trial court did not engage in the type of itemized enhancement of sentences as our supreme court did in Horton. Here, the trial court, assessing the aggravating and finding no mitigating factors, ordered two sentences equally enhanced to the maximum. Our reversing one would not impact the trial court's assessment of the other.

Conclusion

Evidence was sufficient to sustain Earnest's conviction of child molesting for his conduct in the first incident, but insufficient to sustain his conviction of child molesting for his conduct in the second incident. However, sufficient evidence was presented to support the jury's guilty verdict for incest as a Class B felony as to Earnest's conduct in the second incident. The trial court did not abuse its discretion in ordering Earnest to serve fifty years for one count of child molesting, and this sentence is not inappropriate. We affirm Earnest's conviction of one count of child molesting and sentence as to the same, reverse his conviction of the second count of child molesting, and remand for entry of judgment of conviction of incest as a Class B felony and sentencing on that offense.

Affirmed in part, reversed in part, and remanded for entry of judgment and sentence consistent with this opinion.

NAJAM, J., and CRONE, J., concur.