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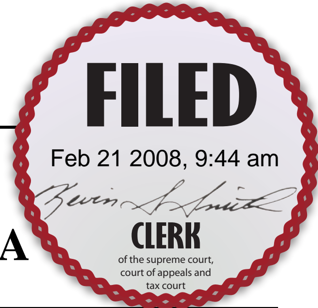

IN THE
COURT OF APPEALS OF INDIANA

BILLY LONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0708-CR-390
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0512-FA-61

February 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Billy Long appeals his conviction and sentence for two counts of class A felony child molesting. We affirm.

Issues

We restate the issues as follows:

I. Whether sufficient evidence supports Long's convictions; and

II. Whether Long's sentence is inappropriate in light of the nature of the offenses and his character.

Facts and Procedural History

The facts most favorable to the convictions indicate that a couple years before December 2005, Long moved into the South Bend home of his third cousin and her husband and children. Long got along well with the family and was entrusted to watch the children in their parents' absence. Long slept on the attic floor. One of his cousin's daughters, S.H., would occasionally watch TV in the attic.

On the evening of December 12, 2005, seven-year-old S.H. watched TV in the attic with the fifty-one-year-old Long. Long inserted his penis into and placed his mouth on S.H.'s vagina. S.H's mother entered the attic and saw Long standing and adjusting his sweatpants while S.H. was on the floor. S.H.'s mother stood there for a minute, and S.H. pulled the covers over her head. S.H.'s mother told S.H. to go downstairs. S.H. began acting "real fidgety and nervous" and then told her mother that Long had touched her. Tr. at 159.

S.H.'s mother's husband called the police, who took Long to the police station for questioning and took S.H. and her mother to the hospital for a medical examination. The

examining physician noted a "considerable amount of redness of [S.H.'s] vagina" that was consistent with both penile penetration of the labia majora and oral contact with the vagina. *Id*. at 215, 219-22. Seminal material was detected on a comforter taken from the attic. Long's DNA profile matched samples of genetic material extracted from a stained area of his sweatpants, and S.H. could not be excluded as a possible contributor.[1]

The State charged Long with two counts of class A felony molesting. Count I alleged that Long "did perform sexual intercourse, to-wit: by placing his penis in the sex organ of [S.H.]" Appellant's App. at 4. Count II alleged that Long "did perform deviate sexual conduct, to-wit: by placing his mouth on the sex organ of [S.H.]" *Id*. On May 10, 2007, a jury found Long guilty as charged. On June 8, 2007, the trial court sentenced Long to concurrent forty-year terms. This appeal ensued.

Discussion and Decision

I. Sufficiency of Evidence

Long challenges the sufficiency of the evidence supporting his convictions. Our standard of review is well settled:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to

[1] The State asserts that "[t]he presence of seminal material was positive" on rectal swabs and external genital swabs obtained from S.H.'s rape kit, as well as "on two areas in her underwear." Appellee's Br. at 3 (citing Tr. at 292). According to Indiana State Police forensic DNA analyst Sharon Pollock, a "presumptive test for seminal material called acid phosphatase" was positive for the presence of seminal material on those items. Tr. at 292. Pollock testified, though, that "presumptive tests are very sensitive, which means they can detect very dilute samples of seminal material, however they are not specific. Which means there are things other than seminal material that can cause the purple color to develop [thus indicating the presence of acid phosphatase]." *Id*. at 293. Pollock further testified that subsequent serology testing "did not confirm the presence of seminal material on those items." *Id*. at 292.

> determine whether it is sufficient to support a conviction.... Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations, quotation marks, footnote, and alterations omitted) (emphasis in *Drane*). "The testimony of a single witness is sufficient to sustain a conviction even when that witness is the victim." *Waldon v. State*, 684 N.E.2d 206, 207 (Ind. Ct. App. 1997), *trans. denied*.

Here, S.H. testified that Long put his penis inside and placed his mouth on her vagina. Tr. at 140, 142. Contrary to Long's assertion, S.H.'s testimony is both consistent with and corroborated by the aforementioned medical evidence.[2] To the extent Long contends that the State failed to prove that he performed sexual intercourse and deviate sexual conduct as those terms are defined by statute, we disagree. "'Sexual intercourse means an act that includes any penetration of the female sex organ by the male sex organ." Ind. Code § 35-41-1-26. Our supreme court has emphasized that "proof of the slightest penetration is enough to support a conviction." *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996). Here, S.H. testified that Long put his penis inside her vagina, and the examining physician testified that the "considerable amount of redness of [S.H.'s] vagina" was consistent with penile penetration of the labia majora. Tr. at 215, 219-22. Indiana Code Section 35-41-1-9 defines

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[2] As such, Long's reliance on the "incredible dubiosity" rule is misplaced. *Cf. Gray v. State*, 871 N.E.2d 408, 416-17 (Ind. Ct. App. 2007) ("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. For testimony to be disregarded based on a finding of 'incredible dubiosity,' it must be inherently contradictory, wholly equivocal, or the result of coercion. Moreover, there must also be a complete lack of circumstantial evidence of the defendant's guilt. This rule is rarely applicable.") (citations and quotation marks omitted), *trans. denied*.

"deviate sexual conduct" in pertinent part as an act involving "a sex organ of one person and the mouth … of another person[.]" S.H. testified that Long placed his mouth on her vagina, and the examining physician testified that the redness of her vagina was consistent with such activity. In sum, Long's argument is merely an invitation to assess witness credibility and reweigh the evidence in his favor, which we may not do. Therefore, we affirm Long's convictions.

II. Appropriateness of Sentence

Long asks that we revise his sentence of concurrent forty-year terms for two counts of class A felony child molesting. Indiana Appellate Rule 7(B) provides that this 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." Our supreme court has stated that "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id*. at 1081. The advisory sentence for a class A felony is thirty years; the maximum sentence is fifty years. Ind. Code § 35-50-2-4.

Long acknowledges that he has prior criminal convictions, which date back to 1983 and include several driving-related offenses, public intoxication, carrying a handgun without a permit, criminal conversion, and battery. He notes, however, that he has no history of sexual crimes against children, and cites *Cotto v. State* for the proposition that the significance of a defendant's history "varies based on the gravity, nature and number of prior

offenses as they relate to the current offense." 829 N.E.2d 520, 526 (Ind. 2005) (quotation marks and citation omitted). Notwithstanding Long's lack of prior child molesting convictions, his lengthy criminal history does not reflect favorably on his character. Moreover, the trial court found, and we agree, that Long violated a position of trust in molesting seven-year-old S.H., which speaks both to the egregious nature of the offenses and to the unsavoriness of Long's character. Long has failed to persuade us that his forty-year aggregate sentence for two counts of class A felony child molesting is inappropriate in light of the nature of the offenses and his character.

Affirmed.

BAILEY, J., and NAJAM, J., concur.