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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY BLANTON, JR.,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 53A01-0606-CR-226

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Douglas R. Bridges, Senior Judge
Cause No. 53C05-0404-FA-360

April 19, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Larry Blanton, Jr. (Blanton), appeals his conviction and sentence for Count I, attempted child molesting, a Class A felony, Ind. Code §§ 35-41-5-1 and 35-42-4-3; Count II, child molesting, a Class A felony, I.C. § 35-42-4-3; Count III, child molesting, a Class A felony, I.C. § 35-42-4-3; and Count IV, child molesting, a Class C felony, I.C. § 35-42-4-3.

We reverse and remand.

ISSUES

Blanton raises two issues on appeal, which we restate as follows:

- (1) Whether the evidence was sufficient to sustain Blanton's convictions; and
- (2) Whether the trial court properly sentenced Blanton.

FACTS AND PROCEDURAL HISTORY

In the fall of 2001, eleven-year-old T.D. lived with his father and stepmother in Effingham, Illinois. His mother and stepfather, Blanton, lived in Bloomington, Indiana. T.D.'s mother had visitation every other weekend from the time he was three years old. That fall Blanton sexually touched T.D. on four consecutive visits to Bloomington. At the time of all the touchings Blanton was forty-two years old and T.D. was eleven.

The first incident occurred between midnight and one in the morning. T.D. felt Blanton kneeling on his bed. Blanton told T.D. they were going to the dump in the morning; T.D. rolled over to go back to sleep, but Blanton did not leave. Instead, Blanton picked up T.D.'s right arm and put it on his erect penis having T.D. stroke it several times. Then, Blanton rubbed his penis on T.D.'s face and lips trying to insert it

into T.D.'s mouth. T.D. pretended he was asleep, keeping his eyes closed and mouth shut as tight as possible, to avoid any further actions by Blanton. All the while, T.D. could see his mother asleep in her bedroom. The next day, T.D. accompanied Blanton to the dump. T.D. did not address the incident with Blanton, nor did he report the incident to his mother when she drove him back to Effingham. He did not tell his father or stepmother once he returned to Effingham.

Two weeks later T.D. returned to Bloomington for the weekend. Again, Blanton's kneeling on T.D.'s bed awakened him. He forced T.D. to stroke his erect penis, rubbed his penis on T.D.'s face and lips, and unsuccessfully attempted to insert his penis into T.D.'s mouth. T.D. rolled away from Blanton. Blanton inserted his finger into T.D.'s anus. T.D. silently wept due to the pain of the violation.

Two weeks later Blanton repeated his acts. This time, after forcing T.D. to stroke his erect penis and rubbing it on T.D.'s face and lips, he ejaculated on T.D.'s face. T.D. still did not report any of the incidents to his mother, father, or stepmother for fear of his mother and his safety.

The final molestation occurred two weeks later. Blanton again made T.D. touch his erect penis before attempting to force T.D. to perform oral sex on him. Prior to leaving, however, Blanton placed T.D.'s penis in his mouth. T.D. closed his eyes, turned his head, and hoped for it to end. During each of T.D.'s encounters with Blanton T.D. believed Blanton was intoxicated, as he could smell alcohol emanating from Blanton.

After the fourth incident, the molestations stopped. T.D. did not feel confident for approximately a month that it would not happen again, but tucked himself extra tight into

his sheets. Eventually T.D.'s relationship with Blanton became less strained when T.D. noticed Blanton stopped drinking.

For two years T.D. did not say anything about the incidents to anyone. In seventh grade T.D. had sexual education classes and his friends began talking about sex. It was then he began realize what had really happened between Blanton and himself. Then, at the beginning of his eighth grade year, his mind began to wander. Whenever his mind was not occupied, he thought of the encounters with Blanton and his grades began to suffer. His father and stepmother asked repeatedly what was causing this change in his behavior, but still T.D. did not disclose what happened. Eventually, while watching a special on Michael Jackson, T.D. began to cry and told his father about the abuse.

On April 26, 2004, the State filed an Information charging Blanton with Count I, attempted child molesting, a Class A felony, I.C. § 35-41-5-1; Count II, child molesting, a Class A felony, I.C. § 35-42-4-3; Count III, child molesting, a Class A felony, I.C. § 35-42-4-3; and Count IV, child molesting, a Class C felony, I.C. § 35-42-4-3. On February 21 and 22, 2006, a jury trial was held; the jury returned verdicts of guilty on all Counts. On May 4, 2006, the trial court sentenced Blanton to three consecutive sentences of thirty-five years, with ten years suspended from each sentence for the Class A felony counts, and one term of five years for the Class C felony to be served concurrently. The trial court found no mitigating factors and Blanton's criminal history as the only aggravating factor.

Blanton now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Blanton first contends the evidence presented at trial was insufficient to support his conviction. He seeks reversal of all convictions on the grounds of incredible dubiousity of the child victim T.D.'s testimony.

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *White v. State*, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.* A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt.

Id.

Under the incredible dubiousity rule:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo v. State, 2007 WL 109607, 5 (Ind. Jan. 16, 2007). This rule is available to appellate courts to impinge upon a jury's function to judge the credibility of a witness.

Id.

Blanton argues T.D.'s testimony is incredibly dubious because T.D. did not report the charged offenses for over two years, he had multiple opportunities to report the offenses to his mother, father, or stepmother when Blanton was not present, T.D.'s fears were irrational, there was no corroborating evidence, and Blanton denied committing the offenses. Additionally, Blanton claims T.D.'s denial that anything had happened is inconsistent with his later accusations.

First, it is important to note that a conviction for child molesting may rest solely upon the uncorroborated testimony of the victim. *McCoy v. State*, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006). Therefore, we will focus our attention on Blanton's contentions that T.D.'s testimony is improbable. After reviewing the trial transcript, we find that T.D.'s testimony was not so incredibly dubious or inherently improbable that no reasonable person could believe it. T.D. explains multiple times that he waited so long to tell anyone about the incidents because he was afraid for his safety and the safety of his mother, father, and stepmother. Although Blanton argues that T.D.'s fears are not rational, the State proffers that "the fears of young children are not always as rational as adults." (Appellee's Br. p. 6). We agree, noting that T.D. witnessed Blanton throwing a shoe at his mother in the heat of an argument and also knew Blanton kept a handgun in the house. As such, we decline to invoke the incredible dubiousity rule to impinge on the jury's evaluation of the evidence in this case and conclude from the evidence that a reasonable trier of fact could have found Blanton guilty beyond a reasonable doubt.

II. *Blanton's Sentence*

We first note that Blanton committed the crimes against T.D. prior to April 25, 2005, when the General Assembly responded to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) by amending Indiana's sentencing statutes. Blanton was sentenced under the "presumptive" sentencing scheme. This court is divided as to whether the presumptive sentencing scheme or the amended advisory sentencing scheme applies to a crime committed before April 25, 2005, but sentenced after that date. *See, e.g. Weaver v. State*, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), *trans. denied* (application of new sentencing statutes to defendants convicted before effective date of amendments, but sentenced afterward, violates prohibition against ex post facto laws); *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (change in sentencing statute is procedural rather than substantive; therefore, we analyze this issue under amended statute that provides for advisory rather than presumptive sentences). Furthermore, this court has held in *White v. State*, 849 N.E.2d 735, 743 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*, I.C. § 35-50-2-1.3 adds no restrictions on the ability of trial courts to impose consecutive sentences beyond the restrictions already in place by virtue of Indiana Code § 35-50-1-2(c).

Here we need not analyze the difference between the two statutes, however, because Blanton appeals his sentence pursuant to Ind. Appellate Rule 7(B), which provides for an independent appellate review in light of the nature of the offense and the

character of the offender¹ and we now choose to exercise our discretion under Appellate Rule 7(B). Here, all of Blanton's crimes were child molest or attempted child molest with his step-son. There was no excessive brutality, no use of a weapon, and no physical injury. The incidents did not continue after Blanton stopped drinking. His four prior misdemeanor offenses, used as an aggravating circumstance to both aggravate his sentence and order his sentences to be served consecutively, were all drug or alcohol related offenses. We do not believe that such a criminal history justifies the aggravated sentence imposed by the trial court and find that the presumptive or advisory sentence of thirty years to be appropriate.

Although these are serious crimes, we find that that the aggravating circumstance is not sufficient to support consecutive sentencing either. The aggregate sentence of 105 years is inappropriate based on Blanton's character and nature of offense. Therefore, we instruct the trial court on remand to sentence Blanton to thirty years on Count I, II and III and to remove the consecutive disposition of Blanton's sentences and order his aggregate sentence to be thirty years in the Department of Correction.

CONCLUSION

Based on the foregoing, we find the sentence imposed by the trial court to be inappropriate. Rather, the thirty-five year sentences with ten years for Counts I, II, and III need be replaced by the presumptive sentence of thirty years and all Counts should be run concurrently.

Reversed and remanded with instructions.

¹ *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006).

KIRSCH, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

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STATE OF INDIANA,)	
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FRIEDLANDER, Judge, dissenting

I agree with the majority that the evidence was sufficient to support the convictions, but respectfully dissent from reversal of the sentence imposed by the trial court.

The trial court imposed 35-year sentences for each of the class A felony convictions, and suspended 10 years of each of those sentences. Those sentences were then imposed consecutive to each other and concurrent to the 5-year sentence imposed on the class C felony conviction, for a total executed sentence of 75 years. It appears to me that the majority does not disagree with the trial court's assessment that the aggravating circumstances outweigh the mitigating circumstances. Rather, the conclusion seems to be that the aggravating circumstance, i.e., Blanton's criminal history, is of comparatively low weight and does not justify enhanced or consecutive sentences. In reviewing the sentence for appropriateness under Appellate Rule 7(B), I believe the sentence imposed

by the trial court is sustainable based upon Blanton's criminal history, and other reasons as well.

The Majority notes that "all of Blanton's crimes were child molest or attempted child molest with his step-son. There was no excessive brutality, no use of a weapon, and no physical injury." *Slip op.* at 8. These facts are cited as reasons to reduce the enhanced and consecutive sentences imposed by the trial court. Although I understand the Majority's point, I am wary of considering what a crime did *not* involve in order to support reversing an enhanced sentence. To be sure, other child molest cases involve physical brutality, weapons, and the infliction of physical injury – and Blanton did none of those things. This court has noted before, however, the peril of what might be called sentencing by comparison, or "compar[ing] the facts of the case before us with either those of other cases that have been previously decided, or – more problematically – with hypothetical facts calculated to provide a 'worst-case scenario' template against which the instant facts can be measured." *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002). I believe that when we consider appropriateness under App. R. 7(B), we should "focus[] on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Id.* Applying that standard I would affirm the sentence.

Although it is true that all of Blanton's crimes were of the same kind and all were committed against the same victim, it must be borne in mind that they were separate and distinct acts committed over a period of weeks. In view of Blanton's criminal history, the serial nature of the offenses, and the violation of a young boy's trust that they represent,

see McCoy v. State, 856 N.E.2d 1259 (Ind. Ct. App. 2006), I would affirm the 75-year sentence imposed by the trial court.