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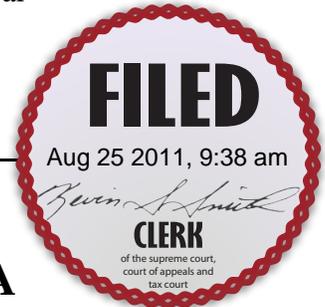
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**IN THE
COURT OF APPEALS OF INDIANA**

JEREMY K. HIDAY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 35A04-1102-CR-80

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-1005-FA-130

August 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The State charged Jeremy Hiday with one count of class A felony child molesting and one count of class B felony incest. A jury found Hiday guilty as charged. The trial court vacated the incest conviction on double jeopardy grounds. Hiday now appeals the child molesting conviction, claiming insufficient evidence and that the trial court's limitation of his cross-examination of the victim violated his right to confront the witnesses against him. We affirm.

Facts and Procedural History

The facts most favorable to the verdict indicate that in August of 2009, Hiday molested his thirteen-year-old niece, J.H., while she was on a camping trip with him, his son, and one of his son's friends. While Hiday's son and his friend were asleep, Hiday unzipped J.H.'s sleeping bag and began fondling her breasts. J.H. was not asleep, but she rolled around to give Hiday the impression that she was waking up so that he would stop molesting her. Still, Hiday continued molesting her by inserting his fingers inside her vagina. Next, he attempted to remove J.H.'s bra until she rolled onto her back. When Hiday left the tent to smoke a cigarette, J.H. sent a text message to a friend about the incident. The next day, she messaged the same friend saying that she did not feel safe around her uncle and that she wanted to leave the campground. The recipient's mother discovered the text and contacted school officials, who contacted the authorities.

The State charged Hiday with class A felony child molesting and class B felony incest. The jury found Hiday guilty as charged. The trial court vacated the incest conviction

based upon double jeopardy. Hiday now appeals his child molesting conviction.

Discussion and Decision

I. Sufficiency of the Evidence

Hiday first appeals the sufficiency of the evidence used to convict him of child molesting. When we are asked to review the sufficiency of the evidence supporting a conviction, we do not reweigh the evidence or reassess the credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We focus upon the evidence most favorable to the verdict and the reasonable inferences that may be drawn from it. *Cooper v. State*, 940 N.E.2d 1210, 1213 (Ind. Ct. App. 2011), *trans. denied*. The verdict will be overturned only when no reasonable factfinder could have found the elements of the crime were proven beyond a reasonable doubt. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Our supreme court has “held that the uncorroborated testimony of the victim is sufficient to sustain a criminal conviction for child molesting even though the victim is a minor.” *Maynard v. State*, 513 N.E.2d 641, 645 (Ind. 1987).

The incredible dubiousity doctrine allows this Court to reassess the credibility of a witness, and possibly reverse his conviction, when a “sole witness presents improbable testimony and there is a complete lack of circumstantial evidence.” *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007), *superseded by statute on other grounds*. This doctrine is appropriate only where the court has “confronted improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Id.* “It requires a defendant to show more than some inconsistency or irregularity in a witness’s testimony.”

Cowan v. State, 783 N.E.2d 1270, 1278 (Ind. Ct. App. 2003). Instead, the defendant has to show that the testimony runs “counter to human experience.” *Campbell v. State*, 732 N.E.2d 197, 207 (Ind. Ct. App. 2000). ”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.” *Bradford v. State*, 675 N.E.2d 296, 300 (Ind. 1996).

Hiday believes that the doctrine of incredible dubiousity is implicated by J.H.’s testimony that she rolled over “fifty times or so” to avoid being molested by him, and that only she and Hiday were awake while it happened. Tr. at 324. Hiday argues that no reasonable person could believe it would be possible for him to molest her if she was constantly rolling over to avoid him, especially if the other two people in the tent remained asleep.

We do not find the evidence in this case to be incredibly dubious. J.H.’s testimony about how she was molested was not improbable, coerced, equivocal, or wholly uncorroborated. While Hiday focuses on J.H.’s testimony about the number of times she rolled over, even that testimony is not so improbable that a reasonable person could not believe it. The fact that a victim would continuously roll over to avoid being molested is not inherently improbable or counter to human experience. Furthermore, the text messages that she sent to her friend corroborate her testimony. J.H. testified that she sent her friend text messages saying that she did not feel safe and she wanted to leave. *Id.* at 328. Although those text messages were not introduced at trial, J.H., her friend, and his mother all testified about them.

Because we conclude that the doctrine of incredible dubiousity is inapplicable, we must reject Hiday's invitation to reweigh evidence and reassess credibility in his favor. In sum, J.H.'s testimony was sufficient to sustain his child molesting conviction.

II. Limitation of Hiday's Right to Cross-Examine

A month before the molestation, J.H. told her grandfather, Donald Hiday, about a recurring nightmare that she had about being kidnapped through her bedroom window. At trial, Hiday attempted to cross-examine J.H. about the nightmares. The State objected. The trial court sustained the objection because the testimony was outside the scope of the State's direct examination. Hiday alleges that that this limitation violated his right confrontation clause rights.

The Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution guarantee the right of an accused to confront the witnesses against him. Our supreme court has stated that "the right to vigorous cross-examination is fundamental to our adversary process, and wide latitude is allowed by sides in a dispute to ask pointed and relevant questions on cross-examination in an attempt to undermine the opposition's case." *Sears v. State*, 258 Ind. 561, 563, 282 N.E.2d 807, 808 (1972). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such-cross examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Thornton v. State*, 712 N.E.2d 960, 963 (Ind. 1999) (quoting *Delaware v. Arsdall*, 475 U.S. 673, 679 (1986)).

“We review a trial court’s evidentiary rulings for abuse of discretion.” *Hape v. State*, 903 N.E.2d 977, 995 (Ind. Ct. App. 2009), *trans. denied*. Generally, the scope of cross-examination is limited to subjects brought out on direct examination. *Orta v. State*, 940 N.E.2d 370, 375 (Ind. Ct. App. 2011), *trans. denied*. A trial court abuses its discretion to control the scope of cross-examination to the extent that a restriction substantially affects the defendant’s rights. *Zawacki v. State*, 753 N.E.2d 100, 102 (Ind. Ct. App. 2001), *trans. denied*. To show that the trial court abused its discretion to control the extent of cross-examination, the defendant must demonstrate how he was prejudiced by the trial court’s actions. *Marbley v. State*, 461 N.E.2d 1102, 1107 (Ind. 1984).

When a defendant believes that the trial court has improperly limited a line of questioning, “it is necessary for counsel to make an offer of proof.” *Arhelger v. State*, 714 N.E.2d 659, 666 (Ind. Ct. App. 1999); *see also* Ind. Evidence Rule 103 (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance was made known to the court by proper offer of proof, or was apparent from the context within which questions were asked.”). The offer of proof “must make the substance of the excluded evidence or testimony clear to the court, it must identify the grounds for admission of the testimony, and it must identify the relevance of the testimony.” *Arhelger*, 714 N.E.2d at 659. “The failure to make an offer to prove results in a waiver of the asserted evidentiary error.” *Carter v. State*, 932 N.E.2d 1284, 1287 (Ind. Ct. App. 2010).

The trial court did not abuse its discretion by limiting Hiday’s cross-examination. At

the time counsel attempted to ask J.H. about her dreams, the subject was outside the scope of the State's direct examination. Hiday then failed to make an offer of proof and therefore waived any claim of error regarding the limitation of J.H.'s testimony. Furthermore, on the State's redirect examination of J.H., she was asked whether her testimony was a dream or whether the molestation actually occurred. At that point, Hiday could have inquired into the dream on recross-examination, but he failed to do so. Having found no abuse of discretion, we affirm Hiday's child molesting conviction.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.