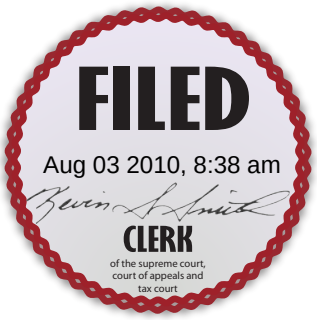

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IN THE COURT OF APPEALS OF INDIANA

JAMES CHENOWETH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0912-CR-566
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0705-FA-00028

AUGUST 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant James Chenoweth appeals his convictions of child molesting, Class A felonies. We affirm.

STATEMENT OF THE ISSUES

Chenoweth raises three issues for our review, which we restate as:

I. Whether the trial court abused its discretion in admitting the victim's videotaped forensic interview.

II. Whether trial counsel was ineffective because he did not introduce the transcript of the taped interview.

III. Whether the trial court abused its discretion and/or imposed an inappropriate sentence.

FACTS AND PROCEDURAL HISTORY

In 2006, A.S., the victim's mother, dated Chenoweth for approximately three months. During this time, A.S., who suffered from a multitude of mental disorders, routinely allowed Chenoweth to care for the four-year-old victim. J.S., A.S.'s mother, also routinely cared for the victim. Because of her mental disorders, A.S. was considered by J.S. to be developmentally between twelve and fourteen years old.

After A.S. and Chenoweth broke up, they remained friends, and Chenoweth often cared for the victim. A.S. married E.S., and the couple allowed the forty-year-old Chenoweth to move in with them and care for the victim. Indeed, while A.S. was

hospitalized for approximately three weeks of mental treatment, Chenoweth spent a considerable amount of time with the victim.

During this time, J.S. observed the victim simulating oral sex with her dolls. When A.S. was released from the hospital, J.S. informed her of the victim's behavior. A.S. was indifferent and told J.S. to mind her own business.

In January or February of 2007, J.S. again observed the victim simulating sexual behavior with the dolls by placing an unclothed male doll on its back and straddling him with an unclothed female doll. J.S. informed A.S. and E.S. of the behavior, but no action was taken.

From March 9-11, 2007, Chenoweth was permitted to watch the victim for three consecutive days at his own residence. On March 13, 2007, Chenoweth again watched the victim, and after Chenoweth had left for the evening, the victim told E.S. that she had pain in her "hoo-hoo," the term she used for her vagina. E.S. and A.S. inspected the victim and noticed that both the exterior and interior of the victim's vagina were red and cracking "like dried dirt." (Tr. at 519-20).

On March 17, 2007, Chenoweth watched the victim while E.S. and A.S. went out for St. Patrick's Day. While at a bar, they discussed the victim's condition with friends, who urged them to take further action. Consequently, E.S. and A.S. left the bar and called the police.

On March 23, 2007, Gayla Konanz, a forensic interviewer with the Child and Advocacy Center ("CAC") conducted a forensic interview of the victim. During the interview, the victim indicated that Chenoweth had touched her vagina with his finger, had placed his finger inside her vagina, had inserted his penis in her vagina, and had ejaculated after placing his penis in the victim's mouth. The victim also said that Chenoweth had touched her "butt" and that it had hurt. The victim said that Chenoweth had told her not to tell anyone and to keep a secret about his penis or he would go "bye-bye."

The State charged Chenoweth with two counts of Class A felony child molesting. A jury found him guilty on both counts, and he now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF THE FORENSIC VIDEOTAPE

Chenoweth contends that the trial court abused its discretion in admitting the videotaped forensic interview of the victim. Specifically, Chenoweth contends that there is no sufficient indication of the time frame between the alleged acts of molestation and the date the videotape was made. Chenoweth maintains that this factor shows that there was an insufficient indication of the tape's reliability.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *Surber v. State*, 884 N.E.2d 856, 862 (Ind. Ct. App. 2008). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances

before the trial court. *Id.* We will not reweigh the evidence and will consider conflicting evidence in favor of the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005).

The trial court admitted the videotaped interview after holding a hearing pursuant to Ind. Code § 35-37-4-6, commonly referred to as the "Protected Person's Statute ("PPS")," which requires the trial court to exercise a "special level of judicial responsibility." See *Carpenter v. State*, 786 N.E.2d 696, 703 (Ind. 2003). The statute allows statements of child sex crime victims, among others, to be admissible at trial when certain conditions are met. A "protected person" under the statute includes "a child who is less than fourteen (14) years of age." Ind. Code 35-37-4-6(c)(1). The parties agree that the victim is a "protected person" under the statute.

The statute provides in pertinent part:

> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
>
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
>
> (3) is not otherwise admissible in evidence;
> is admissible in evidence in a criminal action for [child molesting] if the requirements of subsection (e) are met.
>
> (e) a statement or videotape described in subsection (d) is admissible in evidence in a criminal action [for child molesting] if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person;
that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

(ii) The protected person cannot participate in the trial for medical reasons.

(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(f) If a protected person is unavailable to testify at trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:

(1) at the hearing described in subsection (e)(1); or

(2) when the statement or videotape was made.

The trial court found that the time, content, and circumstances of the videotape provided sufficient indications of reliability. The factors for making the reliability determination under the statute include: (1) the time and circumstances of the statement;

(2) whether there was significant opportunity for coaching; (3) the nature of the questioning; (4) whether there was a motive to fabricate; (5) use of age appropriate terminology; and (6) spontaneity and repetition. *Surber*, 884 N.E.2d at 862.

The crux of Chenoweth's argument is that the timing of the videotape is a clear indication of lack of reliability. The charging information asserts that the molestations took place on or between September 1, 2006 and March 31, 2007. J.S. observed the victim's simulation of sexual acts on two occasions: January or February of 2007 and March of 2007. Examination of the injuries to the victim's vagina took place on March 14, 2007, and the videotaped interview was conducted on March 28, 2007.

In support of his argument that the trial court abused its discretion, Chenoweth relies on *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003), *Pierce v. State*, 677 N.E.2d 39 (Ind. 1997), and related cases. In *Carpenter*, our supreme court concluded that a videotaped interview of a three-year-old child molest victim failed to exhibit sufficient indications of reliability under the Protected Person Statute. 786 N.E.2d at 704. The court emphasized a combination of circumstances: (1) no indication that the victim's statements were made close in time to the alleged molestations; (2) the statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing; and (3) the victim was unable to distinguish between truth and falsehood. *Id.* In *Pierce*, the court emphasized the timing and circumstances, including a "potentially disorienting physical examination" prior to an interview. 677 N.E.2d at 45. The court

noted that the victim's mother suggested several answers during the interview and asked several leading questions. *Id*.

In *Surber*, the defendant presented an argument similar to Chenoweth's. In finding that statements and a videotaped interview exhibited sufficient indications of reliability, we found *Carpenter* distinguishable even though it was unclear exactly when the molestations in *Surber* occurred. 884 N.E.2d at 863. We noted that all of the victim's statements had come close in time to each other; the victim used age-appropriate terminology; the victim was able to distinguish between truth and falsehood; and the victim had no reason to fabricate. *Id*. We further noted that the record revealed no indication of coaching. *Id*.

The indicia in the present case are stronger than those in *Carpenter* and *Pierce*. First, the victim in the present case, like the victim in *Surber*, was able to distinguish truth and falsehood. Second, unlike in *Pierce*, the victim was interviewed by a single individual, a forensic interviewer, without the intervention of a parent. The trial court found that the forensic interviewer had been trained in questioning those who make claims of abuse and that she followed a specific protocol that requires the interviewer to discuss the allegations in age-appropriate language and to avoid suggestive or leading questions. Third, as the trial court found, there was no indication of coaching. J.S., A.S., and E.S. all testified that they did not discuss the matter with the victim or with anyone else in the victim's presence. More importantly, the victim stated in the videotape that

she liked Chenoweth, and at the protected person hearing that Chenoweth was her best friend, thus indicating that she had not been coached and did not have a motive to lie. Based upon our review of the record and the court's findings, we conclude that there were sufficient indications of reliability to warrant admission of the videotape. Thus, the trial court did not abuse its discretion in doing so.

II. ASSISTANCE OF COUNSEL

Chenoweth contends that trial counsel was ineffective in not entering into evidence a transcript of the PPS hearing. Chenoweth points out that the sole evidence against him was the victim's account in the videotaped interview. He reasons that counsel should have tendered the PPS hearing transcript to show that the victim testified that all he did was touch the outside of her vagina with his finger. Chenoweth further contends that transcript would have impeached J.S. by showing that her testimony at trial as to whether she told A.S. and E.S. about the inappropriate play with dolls differed from her testimony at the PPS hearing.

A petitioner must satisfy two components to prevail on his ineffective assistance claim. *Curtis v. State*, 905 N.E.2d 410, 414 (Ind. Ct. App. 2009), *trans. denied*. He must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is "representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by

the Sixth Amendment." *Curtis, id* (quoting *Brown v. State,* 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008)). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Id.* (quoting *Ritchie v. State,* 875 N.E.2d 706, 714 (Ind.2007)). Prejudice occurs when a reasonable probability exists that, but for counsel's errors the result of the proceeding would have been different. *Curtis, id.* We can dispose of claims upon failure of either component. *Id.*

In introducing helpful portions of the PPS hearing transcript into evidence, Chenoweth's trial counsel would have opened the door to the introduction of prejudicial evidence to the jury. See Indiana Rule of Evidence 106 (permitting, when fairness dictates, the admission of an entire writing). Thus, Chenoweth's trial counsel would have shown that (1) the victim was in fear of Chenoweth; (2) the victim had to sit on the prosecutor's lap during a portion of the questioning; and (3) a child psychologist testified that the victim described several sexual acts that involved her and Chenoweth. Additionally, trial counsel would have revealed that the victim now was afraid to enter bathrooms because of sexual acts that Chenoweth committed with her in his bathroom. Furthermore, trial counsel would have revealed the child psychologist's testimony that post-traumatic distress caused the victim's change of testimony. Given the nature of these portions of the victim's PPS hearing testimony, trial counsel's decision to forgo the use of the transcript does not constitute ineffective assistance of counsel.

III. SENTENCING

A. ABUSE OF DISCRETION

Chenoweth contends that the trial court abused its discretion by considering inappropriate aggravators in ordering forty-year concurrent sentences. He further contends that the sentence is inappropriate. Pursuant to Ind. Code § 35-50-2-4, the sentencing range for a Class A felony is between twenty and fifty years, with the advisory sentence being thirty years.

When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). If the recitation includes a finding of mitigating or aggravating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*.

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* 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*. One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are

not supported by the record. *Id*. at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id*. at 491.

Chenoweth contends that the trial court abused its discretion by using the victim's age, an element of the offense, as an aggravator. Chenoweth further contends that the trial court abused its discretion in not considering that none of his four prior misdemeanor convictions were for crimes of violence or sexual in nature, and that the last offense was committed in 1999. Finally, Chenoweth contends that the trial court abused its discretion in admitting information about uncharged prior bad acts.

The trial court made the following statement about Chenoweth and the victim's age:

> I'm also cognizant of the fact that this child was placed in the defendant's care. He was thus in a position of trust with regard to this child, and he violated that trust by molesting her. Moreover, at the time that he did this, she was four years of age. Her tender years did not enable her to resist his illegal conduct. And I view that as a very serious consideration in imposing a sentence.

(Sentencing Tr. at 887).

A trial court may properly consider a victim's age, even if it is an element of the offense. See *Garland v. State*, 855 N.E.2d 703, 710 (Ind. Ct. App. 2006), *trans. denied*. Here, the trial court tied the victim's age with the particularized facts of the case—the victim's tender years did not enable her to resist Chenoweth's illegal conduct. This consideration was approved in *Buchanan v. State*, 767 N.E.2d 967, 971 (Ind. 2002).

The trial court also stated:

> I have considered a number of things in arriving at an appropriate sentence in this case. He has no prior felonies, and his four misdemeanor convictions are not recent. But I also considered the fact that he violated the terms of probation on at least three separate occasions, which indicates to me a disdain on the part of the defendant for the law and for orders of court.

(Sentencing Tr. at 887). It is clear that the trial court did not consider the ten-year-old misdemeanors as aggravators. Chenoweth does not argue, and we cannot say, that it is improper to consider his record of violating probation as aggravating circumstances.

Finally, the trial court stated:

> As I apparently failed to articulate adequately, I understand that the law permits me to take uncharged criminal acts into consideration in assessing the character of the defendant. But in order for me to consider them, they have to be true. I don't know if these are true or not. The defendant has not admitted to them, and their truthfulness has not been tested in the crucible of a trial. Therefore, I am not willing to consider them.

(Sentencing Tr. at 886).

Although the trial court admitted two letters that allegedly described uncharged criminal acts, it is clear from the trial court's subsequent statements that it did not consider the letters to be relevant in sentencing Chenoweth. Furthermore, "[t]he assumption is that the trial court, as factfinder, correctly applies and follows the law." *Bordenkecher v. State*, 562 N.E.2d 49, 51 (Ind. Ct. App. 1990).

The trial court did not abuse its discretion in sentencing Chenoweth.

B. APPROPRIATENESS OF SENTENCE

Chenoweth contends the forty-year concurrent sentences are inappropriate. A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied.* The "nature of the offense" portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court's sentence review. *Anglemyer, clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007). The "character of the offender" portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

The nature of the offense in the present case supports imposition of a sentence exceeding the advisory sentence. As the trial court noted, the offense involved a person of trust preying upon a child of tender years. The character of the offender, in conjunction with the nature of the offense, also supports imposition of a sentence exceeding the advisory. Chenoweth repeatedly showed his disregard of the law by violating probation. Furthermore, Chenoweth can cite to no factors often used to explain

molestation offenses, such as being under the influence of an illegal substance, being victimized himself, or growing up with a poor family life. Indeed, Chenoweth specifically articulated that he enjoys strong family support, and the trial court noted that despite the support, Chenoweth chose to molest a four-year-old child.

Affirmed.

CRONE, J., and BROWN, J., concur.