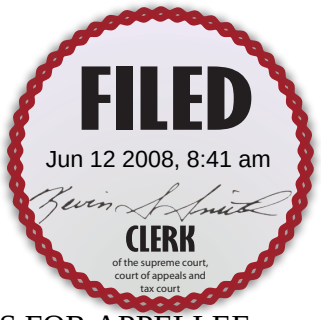

ATTORNEY FOR APPELLANT:

MARK A. BATES
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SHELLEY M. JOHNSON
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ENRIQUE MARCELINO ORTIZ-TORRES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0712-CR-591
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0604-FA-23

June 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Enrique Marcelino Ortiz-Torres appeals the sentence imposed

after he pleaded guilty to Burglary,[1] a class C felony. Specifically, Ortiz-Torres argues that (1) the trial court abused its discretion by finding his prior juvenile adjudications and position of trust with the victim to be aggravating factors, (2) the trial court abused its discretion by failing to find the hardship imprisonment would impose on his young child to be a mitigating factor, and (3) his sentence is inappropriate in light of the nature of this offense and his character. Finding no error, we affirm.

FACTS

On April 19, 2006, the State charged Ortiz-Torres with two counts of child molesting—one as a class A felony and one as a class C felony. On August 24, 2007, the State amended the charging information and added a count of class C felony burglary. The same day, Ortiz-Torres entered into a plea agreement with the State. On October 11, 2007, the trial court accepted Ortiz-Torres's guilty plea to class C felony burglary and dismissed the remaining charges. The same day, the trial court held a sentencing hearing and found Ortiz-Torres's prior criminal history and position of trust with the victim to be aggravating factors, his guilty plea to be a mitigating factor, and sentenced him to six years imprisonment. Ortiz-Torres now appeals.

DISCUSSION AND DECISION

I. Aggravating and Mitigating Factors

Ortiz-Torres argues that the trial court abused its discretion by finding his position of trust with the victim and prior juvenile adjudications to be aggravating factors. Additionally,

[1] Ind. Code § 35-43-2-1.

he argues that the trial court abused its discretion by not finding the hardship incarceration would impose on his child to be a mitigating factor.

In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007), our Supreme Court held that trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 868 N.E.2d at 490. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. We review sentencing decisions for an abuse of discretion. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

Ortiz-Torres argues that the trial court erred by relying on his prior criminal history as an aggravating factor because it consists of five juvenile adjudications that occurred between 1998 and 2001. Specifically, Ortiz-Torres was adjudged delinquent by the State of Texas for committing burglary of a vehicle, criminal trespass, "terroristic threat," assault, and evading arrest. Appellant's App. p. 51-52.

It is well settled that "criminal behavior reflected in delinquent adjudications can serve as the basis for enhancing an adult criminal sentence." Ryle v. State, 842 N.E.2d 320, 321 (Ind. 2005). At the sentencing hearing, the trial court found Ortiz-Torres's juvenile

adjudications to be an aggravating factor because

> I think that in taking them as a group, not individually, it shows a pattern of criminal behavior on your part. You are not an old man. You're still a rather young man. But—so these offenses are not that far in your past. That's an aggravating factor.

Sent. Tr. p. 13. Based on the evidence in the record and the trial court's rationale, we do not find that the trial court abused its discretion by considering Ortiz-Torres's juvenile adjudications to be an aggravating factor.

Ortiz-Torres also contends that the trial court erred by finding his position of trust with the victim to be an aggravating factor. Trial courts frequently find a defendant's position of trust with a victim to be an aggravator where an adult has committed an offense against a minor and there is at least an inference of the adult's authority over the minor. Rodriguez v. State, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007). "Generally, cohabitation arrangements of nearly any character between adults do in fact, and should, establish a position or trust between the adults and minors living or staying together." Id.

Ortiz-Torres frequently stayed at his victim's parents' house. On the night he committed the offense, Ortiz-Torres entered the child's bedroom with the intent to commit felony sexual misconduct. Guilty Plea Tr. p. 9. Because Ortiz-Torres was cohabiting with the victim's family at the time he committed the offense, id., the trial court did not abuse its discretion by finding his position of trust with the victim to be an aggravating factor.

Finally, Ortiz-Torres argues that the trial court abused its discretion by not finding the hardship incarceration would impose on his child to be a mitigating factor. A trial court is not obligated to find a circumstance to be mitigating merely because the defendant advances

it. Felder v. State, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007). In particular, a trial court is not required to find that a defendant's incarceration would result in undue hardship on his dependents. Roney v. State, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007), trans. denied. Many persons convicted of crimes have children and, absent special circumstances showing that the hardship to the children is "undue," a trial court does not abuse its discretion by not finding this to be a mitigating factor. Id.

At the sentencing hearing, Ortiz-Torres asserted that "[s]ince the initiation of this particular prosecution, he's become a father. The child that he has is a toddler or perhaps younger than that. . . . He lives with the child's mother and he's got an obligation to this child as well to maintain a healthy lifestyle . . . ." Sent. Tr. p. 6. Because Ortiz-Torres did not show that his incarceration would cause undue hardship on the child, we conclude that the trial court did not abuse its discretion by failing to find the proffered mitigator.

II. Appropriateness

Ortiz-Torres argues that his six-year sentence is inappropriate in light of the nature of his offense and his character. When reviewing a sentence imposed by the trial court, we "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." Ind. Appellate Rule 7(B). In conducting an appropriateness review, we must examine both the nature of the offense and the defendant's character. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004). We may look to any factors appearing in the record. Roney, 872 N.E.2d at 206.

We recognize that the advisory sentence for an offense "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). A person who commits a class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentencing being four years.[2] Ind. Code § 35-50-2-6.

Regarding the nature of the offense, Ortiz-Torres broke into a fourteen-year-old girl's bedroom with the intent to have sex with her. Guilty Plea Tr. p. 9-10. The victim's parents had allowed Ortiz-Torres to stay at their home numerous times, including the night he committed the offense. Id. We do not find the nature of the offense to aid Ortiz-Torres's inappropriateness argument.

Turning to his character, Ortiz-Torres abused his position of trust with the victim to commit the crime. And, as the trial court noted, his juvenile adjudications "show[] a pattern of criminal behavior" for a twenty-two-year-old man. Sent. Tr. p. 13. Although Ortiz-Torres was sentenced to probation for those offenses, he violated probation three times. Appellant's App. p. 52-53. Giving the nature of the offense and the character of the offender, we do not find his six-year sentence to be inappropriate.

The judgment of the trial court is affirmed.

[2] We pause to note that the difference between class B and class C felony burglary hinges, in relevant part, upon whether the defendant breaks and enters a structure or a dwelling. In reaching the plea agreement, "the parties agree[d] that under the current state of the law in Indiana, an inner door within a larger building still constitutes a structure for purposes of the crime of burglary." Guilty Plea Tr. p. 10. Because the parties agreed that Ortiz-Torres broke into a child's "structure" when he entered the bedroom, id., it charged him with committing class C felony burglary. Using this logic in conjunction with the facts, the victim's bedroom could have been considered a dwelling and Ortiz-Torres could have been charged with committing class B felony burglary, which has a sentencing range of six to twenty years and an advisory sentence of ten years. I.C. § 35-50-2-5.

KIRSCH, J., and BAILEY, J., concur.