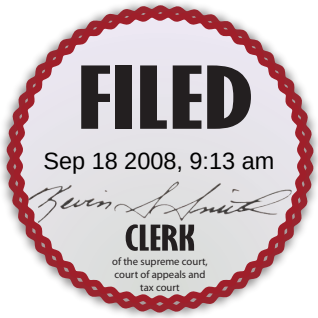

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IN THE
COURT OF APPEALS OF INDIANA

CLAUDE F. WIXSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0804-CR-158
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No.20D03-0706-FA-36

September 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Claude Wixson appeals his sentence for two counts of child molesting, one as a Class A felony and one as a Class C felony. On appeal, Wixson raises one issue, which we restate as whether Wixson's sentence is inappropriate in light of the nature of the offenses and his character. Concluding Wixson's sentence is not inappropriate, we affirm.

Facts and Procedural History

In October 2006, fifty-year-old Wixson relocated from New Jersey to Nappanee, Indiana, to live with his half-brother, Charles Apple; Charles's wife, Janelle; and their three children, ten-year-old A.A., seven-year-old J.A., and five-year-old K.A. On June 16, 2007, Janelle contacted the Nappanee Police Department to report that Wixson had molested A.A. several days previously. Specifically, Janelle reported A.A. told her that Wixson "pulled her pants down and he touched her top . . . and then he licked [her vagina] and kissed it." Appellant's Appendix at 47. Wixson agreed to an interview with Sergeant Terry Chanley of the Nappanee Police Department on the same day, and admitted during the interview that approximately one week previously he touched and licked A.A.'s vagina. Wixson also admitted this was not the first time he had molested A.A.:

> [Sergeant Chanley]: Okay you indicated to me that there was [sic] multiple other occurrences of this over the last . . .
> [Wixson]: . . . yeah she came in from time to time, one day it was just like . . . I felt her in the front, grabbed her butt and that was it. Did a little kissing here and there.
> [Sergeant Chanley]: [D]id this occur like once a week for the last two months?
> [Wixson]: Once every two weeks[.]

> [Sergeant Chanley]: About once every two weeks so . . .
> [Wixson]: Yeah, something like that yeah[.]
> [Sergeant Chanley]: Over the last . . .
> [Wixson]: . . . not that often, not that often.
> [Sergeant Chanley]: About once every two weeks she would come in . . .
> [Wixson]: . . . yeah[.]
> [Sergeant Chanley]: And describe what would happen then, would you voluntarily . . .
> [Wixson]: . . . she would come in, she would walk up to me and she would look at me and just like you know, give me a hug, this and that. And she would put her head on top of my forehead, and she would start kissing me.
> [Sergeant Chanley]: Where was she kissing you at?
> [Wixson]: On the lips[.]
> [Sergeant Chanley]: Okay[.]
> [Wixson]: Then after that I just like grabbed her butt for a little bit that was it, and then I would tell her we've got to quite [sic] doing this, you're going to get me in trouble, and everybody else in trouble, you don't need to do this? And she said okay, and that was it. I mean this is how it would go from like time to time.
> [Sergeant Chanley]: Okay but are you saying during these there was also where you touched her vaginal area again?
> [Wixson]: Yeah, not often but once in a while here and there she would walk right up to me, and she'll just sit there and kiss me, and I'll like have my hands on her hips and I [would] just like stroke it once or twice, and that's it.

Id. at 60-61.

On June 19, 2007, the State charged Wixson with two counts of child molesting, one as a Class A felony and one as a Class C felony. On October 3, 2007, the parties entered into a plea agreement under which Wixson agreed to plead guilty to both counts, and the State agreed to "waive[] prosecution of all other charges which could have been brought as a result of this specific incident as alleged in the charging documents, or as reflected in the police reports in the aforementioned case number." Id. at 18. The plea agreement also stated that the sentences would be served concurrent with each other and that the executed portion of Wixson's sentence could not exceed forty years. On October

4, 2007, the trial court conducted a guilty plea hearing, at which it conditionally accepted Wixson's plea, ordered a pre-sentence investigation report (the "PSI") and a psychosexual evaluation, and scheduled a sentencing hearing for December 6, 2007.

The sentencing hearing was continued until January 17, 2008. On that date, the trial court accepted Wixson's plea and heard evidence and argument on sentencing. On the same day, the trial court entered an order finding that Wixson's abuse of a position of trust, "multiple acts of molestation," "state of cognitive denial," and high risk of re-offending were aggravating circumstances and that Wixson's guilty plea, statement of remorse, honorable discharge from the Army, and minimal criminal history were mitigating circumstances. Id. at 25. The trial court also found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Wixson to forty years executed on count one to be served concurrent with six years executed on count two. Wixson now appeals.

Discussion and Decision

I. Standard of Review

This court has authority to revise a sentence "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). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize that the advisory sentence "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). In determining whether a sentence is

inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record, Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied, starting with "the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate," Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006), but recognizing that "inappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court," McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006). We also recognize that it is the defendant's burden to "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).

II. Appropriateness of Sentence

The trial court sentenced Wixson to forty years executed. Thus, Wixson received a sentence that is halfway between the advisory and the maximum sentence for a Class A felony. See Ind. Code § 35-50-2-4 ("A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.").

A. Nature of the Offense

Wixson argues the nature of the offenses are less egregious than is typical because they did not result in physical injury to A.A. To support this argument, Wixson cites Buchanan v. State, 767 N.E.2d 967 (Ind. 2002), and Walker v. State, 747 N.E.2d 536

(Ind. 2001). In Buchanan, our supreme court concluded that the defendant's statutory maximum sentence of fifty years for a Class A felony conviction of child molesting was manifestly unreasonable[1] in part because the offense "was committed without excessive physical brutality, the use of a weapon, or resulting physical injury." 767 N.E.2d at 973. In making this observation, however, the court was careful to note that the absence of physical injury does not necessarily warrant revision of an enhanced sentence, see id. at 973 n.4 ("Nor do we suggest that the absence of collateral brutality prevents the imposition of an enhanced sentence."), and actually revised the sentence to forty years – the same enhanced sentence Wixson received. Similarly, in Walker, our supreme court concluded that the defendant's consecutive sentences of forty years each for two Class A felony convictions of child molesting was manifestly unreasonable in part because "there was no physical injury," 747 N.E.2d at 538, but revised the sentences to a concurrent sentence of forty years.

Because Buchanan and Walker resulted in sentence revisions to forty years – the same amount Wixson received – we fail to see how these cases support his argument that the absence of physical injury to A.A. necessarily renders his offenses less egregious than is typical. If anything, Buchanan and Walker recognize that an enhanced sentence may be warranted despite the absence of physical injury to the victim if additional circumstances render the offense more egregious than is typical. Additional circumstances are present here. Putting to the side the trial court's findings that Wixson's

[1] Under former Indiana Appellate Rule 17(B), Indiana appellate courts were authorized to revise a sentence if the sentence was manifestly unreasonable. This court has suggested that the current standard of inappropriateness review appears to afford less deference to the trial court's sentencing decision. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007); Sloan v. State, 794 N.E.2d 1128, 1135 n.9 (Ind. Ct. App. 2003), trans. denied.

abuse of a position of trust and "multiple acts of molestation" were aggravating circumstances, appellant's app. at 25, we note the record indicates Wixson attempted to cover up his crimes by offering A.A. money to keep quiet. See id. at 41 (police report stating A.A. reported that "Wixson offered money to [A.A.] for her to keep quiet"); id. at 47, 51 (Janelle stating during a police interview that A.A. told her Wixson "promised to give her ten dollars" and "[o]ffered her money to be quiet"). Attempting to cover up a crime renders an offense more egregious than is typical, see Flammer v. State, 786 N.E.2d 293, 300 (Ind. Ct. App. 2003) (concluding the nature of the offense did not render the trial court's statutory maximum sentence of fifty years for voluntary manslaughter inappropriate in part because the defendant "intimidated his children into lying to the Sheriff's Department when being interviewed about [the victim's] whereabouts"), trans. denied, and we therefore conclude that Wixson has failed to establish that his sentence is inappropriate based on the nature of the offenses.

B. Character of the Offender

Regarding Wixson's character, we note, as the trial court did, that Wixson pled guilty, received an honorable discharge from the Army, and has a minimal criminal history consisting of a conviction in 2000 for driving while intoxicated. We also note that Wixson was employed when he committed his crimes. However, none of these circumstances are entitled to significant mitigating weight. A guilty plea generally comments favorably on a defendant's character, see Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995), but this court has noted an exception "where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the

decision to plead guilty is merely a pragmatic one," Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Here, in exchange for Wixson's plea, the State agreed to waive prosecution for other crimes Wixson may have committed against A.A. As his police interview with Sergeant Chanley indicates, Wixson admitted he touched A.A. inappropriately on several occasions in the two months preceding the instant offenses. Although we hesitate to say with certainty that these admissions would have resulted in convictions, they are nevertheless strong indicators that his decision to plead guilty was a pragmatic one. Similarly, although Wixson's minimal criminal history comments somewhat favorably on his character, see Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999) (explaining that the mitigating weight assigned to a defendant's prior criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense"), the weight of that mitigating circumstance is offset by the fact that Wixson was in possession of child pornography at the time of his arrest, which indicates he was not leading a law-abiding life, see Drakulich v. State, 877 N.E.2d 525, 536 (Ind. Ct. App. 2007) (noting that the defendant's "lack of criminal history is tempered by the fact that he was clearly not living a law-abiding life for a period of time"), trans. denied. Finally, we agree with the trial court that neither Wixson's honorable discharge from the Army nor his employment are entitled to significant mitigating weight. See Hayden v. State, 830 N.E.2d 923, 930 (Ind. Ct. App. 2005) (concluding that although military service deserves some mitigating weight, "an honorable military service record does not excuse a sex crime" (quoting Bluck v. State, 716 N.E.2d 507, 515 (Ind. Ct. App. 1999)), trans. denied); McKinney v. State, 873

N.E.2d 630, 646 (Ind. Ct. App. 2007) (recognizing that employment "is not necessarily a significant mitigating factor"), trans. denied.

Against this relatively minor favorable commentary are two points of evidence that comment very negatively on Wixson's character. First, the report from Wixson's psychosexual evaluation states that although Wixson "does not appear to be a predatory individual and is probably not at risk to seek unknown victims from society at large," he is "strongly subject to pedophilic arousal" and "[g]iven the opportunity, Mr. Wixson certainly should be considered at risk to repeat this type of behavior." Appellant's App. at 90. Second, the record indicates that Wixson repeatedly attempted to minimize his behavior and, during the psychosexual evaluation and contrary to his prior admissions, stated that the instant offenses were "the only two" times he had acted inappropriately toward A.A. Id. at 87. Indeed, Wixson's attempts to minimize his behavior were so severe that the doctor who conducted the psychosexual evaluation remarked, "What is worse is that Mr. Wixson is putting all of the blame on the victim, making her the initiator and the aggressor. From the way he described it, the examiner had to keep reminding himself that he was talking about a nine or 10-year-old girl." Id. at 89. Thus, we conclude Wixson's character does not render his sentence inappropriate.

The burden was on Wixson to demonstrate that his sentence is inappropriate in light of the nature of the offenses and his character. After due consideration of the trial court's sentencing decision and of the record, we are not convinced Wixson has carried this burden. Thus, we conclude Wixson's sentence is not inappropriate.

Conclusion

Wixson's sentence is not inappropriate in light of the nature of the offenses and his character.

Affirmed.

NAJAM, J., and MAY, J., concur.