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# IN THE
# COURT OF APPEALS OF INDIANA

EDDIE J. RICHARDSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 41A04-0903-CR-116

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 41C01-0706-FA-5

**November 5, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Following a bench trial, Eddie J. Richardson was convicted of three counts of Class A felony child molesting.[1] The trial court sentenced Richardson to the advisory sentence of thirty years for each conviction, but suspended five years of each sentence to probation. The court specified that the sentences for two of the convictions would be served concurrently, while the sentence for the third conviction would be served consecutive to the other two convictions. Richardson raises two issues on appeal, which we restate as follows:

I. Whether the trial court abused its discretion in sentencing Richardson by relying upon improper aggravating circumstances; and

II. Whether the trial court properly imposed consecutive sentences.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On May 30, 2007, the State charged Richardson with four counts of Class A felony child molesting. Each of the four counts alleged that Richardson, a person over the age of twenty-one, had performed deviate sexual conduct with a twelve-year-old girl named C.C. Count 1 allegedly occurred in October 2006, Count 2 between November 10 and 11, 2006, Count 3 on December 1, 2006, and Count 4 on April 11, 2007. On April 14, 2008, the trial court granted the State's motion to dismiss Count 1.

A bench trial began on September 8, 2008. Testimony during trial established that C.C.'s birth date was February 7, 1994, making her either twelve or thirteen years old at the time of the alleged molestations. C.C.'s mother, V.C., testified that her family had

[1] *See* Ind. Code § 35-42-4-3(a)(1).

met Richardson's family at church, and C.C. testified that the individuals who attended her church were a tight knit community that tended to socialize together. V.C. stated that her family had been good friends with the Richardsons for eight years and that C.C. spent a good deal of time at Richardson's home. C.C. testified that she was friends with Richardson's children, had spent the night at Richardson's home, and had babysat for the Richardsons.

During her testimony, C.C. related three separate occasions when she had been molested by Richardson. The first incident occurred in November 2006. C.C. had gone to Richardson's home to help his oldest daughter babysit her four younger siblings while Richardson's wife was out of town. After his children were all asleep, Richardson asked C.C. to come into the bedroom with him. Once she entered the bedroom, Richardson kissed C.C. on the mouth, removed her clothing, kissed her breasts, and kissed and licked her vagina. The following night, Richardson again asked C.C. to come into his bedroom. When C.C. told him that she had started her period, Richardson responded that "he liked the taste of blood." *Tr*. at 30. Richardson then kissed C.C. and exposed his penis to her.

The next incident occurred on December 1, 2006. C.C. had gone to Richardson's home to babysit his children while he and his wife attended a choir party at church. During the party, Richardson arranged to have a friend call him and say that he had a flat tire. Using this as an excuse, Richardson left the choir party and returned home where he had C.C. meet him in a camper parked on his property. Upon entering the camper, Richardson kissed C.C. and undressed her. He then kissed C.C.'s breasts and vagina. At one point, Richardson was on top of C.C. and had his penis on her vagina. He told C.C.,

'"I can put it in. I could go in right now and no one would ever know."' *Id.* at 36. C.C. told Richardson not to do this. Also during this incident, Richardson placed his finger in C.C.'s anus. At the conclusion of the incident, Richardson was masturbating and asked C.C. if she would help him, but she refused.

The final incident occurred on April 11, 2007. Richardson and his family had been out of town and had recently returned home. C.C. went to Richardson's home to see his eldest daughter. At one point, C.C. was sitting on the couch with a blanket covering her. Richardson put his hand underneath the blanket and inserted his finger into C.C.'s vagina.

At the conclusion of the trial, the trial court found Richardson guilty of all three counts of Class A felony child molesting. A sentencing hearing was held on January 26, 2009. At the conclusion of the hearing, the trial court entered a sentencing statement in which it found the following aggravating circumstances: (1) that Richardson needs correctional or rehabilitative treatment that can best be provided at a penal facility; (2) imposition of a reduced or suspended sentence would depreciate the seriousness of the crime; (3) that Richardson was in a position of trust with respect to C.C.; (4) due to the nature of the crime, there was a risk of transmission of disease to the victim; and (5) the crime was repetitious in nature. As mitigators, the trial court found that Richardson had no criminal history and was likely to respond affirmatively to probation. The trial court sentenced Richardson to the advisory sentence of thirty years for each conviction, but suspended five years of each sentence to probation. The trial court specified that the sentences for Counts 2 and 4 would be served concurrently and that the sentence for

Count 3 would be served consecutive to the sentences for Counts 2 and 4. Richardson now appeals.

## DISCUSSION AND DECISION

### I. Abuse of Discretion

Richardson first argues that the trial court abused its discretion in sentencing him by relying upon improper aggravators. In reviewing a sentence imposed under the current advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement that included "reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). The reasons or omission of reasons given for choosing a sentence are subject to review on appeal for an abuse of discretion. *Id.* An abuse of discretion occurs if the sentence imposed by the trial court 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.* at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). A trial court abuses its discretion if it: (1) fails to enter a sentencing statement; (2) enters a sentencing statement that includes reasons for imposing a particular sentence, including the finding of aggravating and mitigating circumstances, that the record does not support; (3) enters a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) enters a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91. Generally, if the trial court has abused its discretion, we will remand for re-sentencing "if

we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491.

Initially, we note that Richardson does not challenge the trial court's finding that the repetitive nature of his offenses was an aggravating circumstance. We have previously concluded that the repetitious or serial nature of the offenses is a valid aggravating circumstance. *Brown v. State*, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002), *trans. denied*. The record supports the trial court's finding that this was a proper aggravating factor in that between November 2006 and April 2007, Richardson molested C.C. at least three times.

We also note that Richardson contends that the trial court found as an aggravating factor that his offenses constituted a continuing harm. While making its sentencing statement, the trial court did discuss the impact Richardson's offenses had and would have on C.C. However, we agree with the State that the trial court did not specifically find this to be an aggravating factor. Instead, the trial court indicated that the continuing harm Richardson's offenses had on C.C. supported its finding that a reduced or suspended sentence would depreciate the seriousness of the crime.

Richardson argues that it was improper for the trial court to find as an aggravating circumstance that he was in need of correctional or rehabilitative treatment that could best be provided at a penal facility. He contends that there is no evidence in the record to support this finding and that the trial court did not provide a statement as to why he requires treatment at a correctional facility.

With regard to this particular aggravating factor, this court has stated that "[a]s long as the trial court explains why a defendant requires rehabilitation in a correctional facility for a period in excess of the presumptive [now advisory] sentence, this finding may constitute a proper aggravating circumstance." *Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), *trans. denied*. Here, the trial court provided an explanation as to why Richardson requires treatment at a correctional facility. The court specifically stated:

> First of all, to some degree I would suggest that you are an individual that may be in need or is likely in need of correctional treatment or rehabilitative treatment that can best start with a penal facility. My two (2) points in that regard is that at this point in time I do not have any, if you will, in depth psychological information that would assist me in knowing exactly why this occurred and, therefore, why it's not likely to occur again in the future. Absent that information, it is difficult for this Court to propose that this is not likely to happen again. I just don't have enough information as to why it occurred to comfortably find based upon the evidence that it is not going to reoccur. Therefore, the approach I take is fairly standard. One of the components that I do know that has proven to be historically over my years on this Bench most appropriate is the tool of incarceration. One, I know that you are not committing crimes while you are incarcerated. Two, I certainly know that when I bring you out on rehabilitative course that it assists greatly in maximizing those rehabilitative efforts. Because no matter how hard you try there are going to be days that you are better equipped to struggle through whatever you need to struggle through to maintain control over your behavior and to rehabilitate yourself. And I think it is very helpful to draw upon your experiences. That is I know what the alternative[s] are and it's going back to jail. And if you've never been to jail it is hard for you to draw upon those.

*Tr.* at 245-47. Because the trial court provided a satisfactory explanation as to why Richardson was in need of treatment best provided by a penal facility, we conclude that

the trial court did not abuse its discretion in finding that this was a valid aggravating circumstance.

Next, Richardson argues that the trial court's finding that imposition of a reduced or suspended sentence would depreciate the seriousness of the crime was an improper aggravating factor. Generally, finding that a reduced sentence would depreciate the seriousness of the crime "serves only to support a refusal to impose less than the presumptive [now advisory] sentence and does not serve as a valid aggravating factor supporting an enhanced sentence." *Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005). Consideration of this circumstance is improper where there is nothing in the record to indicate that the trial court was considering less than the advisory sentence. *See id.*

In discussing this aggravating factor, the trial court stated:

> Imposition of a reduced sentence[] or suspension of sentence could depreciate the seriousness of the crime. In this particular circumstance there [are] not that many aggravating circumstances and there [are] some mitigators I'm going to point out. This one is vastly overused and overstated in the State of Indiana, uh, but certainly in this particular case based upon the evaluation that the Court would go through it is applicable. Certainly we have a circumstance under which you were required to confront the victim face to face in perpetration of the events. You were, if you will, in a position of trust and confidence with a child based upon your family circumstances, your church connection and otherwise. She felt, if you will, that you were the adult. You certainly were. And based upon that you utilized that position of trust and confidence for your own deviant, if you will, sexual needs. Because of that and because of the continuing harm that is certainly done with regard to victims of sex related crimes long into the future, I think that it is an easily recognized circumstance that this would[,] that as a reduced sentence could result in depreciating the serious[ness] and gravity of your (INAUDIBLE) in these particular circumstances.

*Tr.* at 247-48. The trial court's statement that there are "not that many aggravating circumstances" and some mitigators suggests that it was considering whether a reduced or suspended sentence was appropriate. *Id.* at 247. Additionally, the trial court's statement, "I think that it is an easily recognized circumstance that this would[,] that as a reduced sentence could result in depreciating the serious[ness] and gravity of your (INAUDIBLE) in these particular circumstances," *Id.* at 248, suggests that the trial court was considering imposing a sentence less than the advisory sentence. *See Davidson v. State*, 849 N.E.2d 591, 594 (Ind. 2006) (concluding that it was apparent from the record that trial court did consider a reduced sentence based on its statement "that for the Court to consider a reduced sentence would depreciate the value or depreciate the seriousness of the crime, so I find that aggravating factor."). Because the trial court was considering a reduced or suspended sentence that would have been less than the advisory sentence, the trial court did not abuse its discretion in finding that imposition of a reduced or suspended sentence would depreciate the seriousness of the crime was a valid aggravating factor.

Richardson contends that the trial court erred in finding that he was in a position of trust with respect to C.C. and that this constituted an aggravating circumstance. He asserts that there is no evidence in the record before us suggesting that there existed a trust relationship between himself and C.C. First, we note that a defendant's "position of trust" relationship with the victim is a statutorily identified aggravating circumstance. *See* Ind. Code § 35-38-1-7.1(a)(8). This aggravator generally applies 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).

The record reveals that Richardson's and C.C.'s families met at church and that the church community was tight knit and tended to socialize together. At the time of the molestations, the two families had been good friends for eight years. C.C. spent a good deal of time at Richardson's home and spent the night there on several occasions, including the nights in November 2006 when she was molested by Richardson. C.C. often babysat for the Richardsons and was in fact babysitting for the Richardsons on December 1, 2006, when Richardson molested her in the camper parked on his property. C.C. was also friends with Richardson's children and was visiting his eldest daughter when Richardson molested her on April 11, 2007. This evidence was sufficient to permit the trial court to find that Richardson was in a position of trust with respect to C.C. *See Edrington v. State*, 909 N.E.2d 1093, 1099-1100 (Ind. Ct. App. 2009) (defendant in position of trust with child-victim where defendant lived in same neighborhood, victim's father had known defendant for multiple years and trusted him to watch his daughter); *Rodriquez*, 868 N.E.2d at 555 (defendant in position of trust with child-victim where defendant co-habited with victim's mother and victim spent significant amount of time visiting defendant's home); *Hines v. State*, 856 N.E.2d 1275, 1280-81 (Ind. Ct. App. 2006) (consideration of position of trust aggravator was appropriate where child molest victim was spending the night with defendant's daughter at defendant's residence), *trans. denied*. Therefore, the trial court did not abuse its discretion in finding this to be an aggravating circumstance.

Richardson also challenges the trial court's finding as an aggravating factor that there was a risk of transmission of disease to the victim. Richardson contends that there is no evidence in the record to support this finding, and we agree. In *Brown*, we held that the fact that the defendant had infected his child molestation victim with gonorrhea when he molested her was a valid aggravating circumstance. 760 N.E.2d at 246. Here, there is no evidence that Richardson had any sort of infectious or sexually transmitted disease or that he infected C.C. with such a disease. Absent such evidence, we cannot say that this was a proper aggravating circumstance.

In sum, we conclude that four of the five aggravating factors found by the trial court were proper. Although the trial court's finding that there was a risk of transmission of disease to C.C. was an improper aggravator, we can say with confidence that the trial court would have imposed the same sentence had it relied solely upon the four valid aggravating circumstances. *See Anglemyer*, 868 N.E.2d at 491. Therefore, we conclude that the trial court did not abuse its discretion in sentencing Richardson.[2]

## II. Consecutive Sentence

Richardson argues that the trial court erred in ordering that his sentence for Count 3 be served consecutive to his sentences for Counts 2 and 4 because there were no valid

[2] The State asserts that Richardson challenges the appropriateness of his sentence. We disagree. Richardson never specifically argues that his sentence was inappropriate in light of the nature of his offenses and his character. He does not cite Indiana Appellate Rule 7(B), nor does he state the applicable standard of review for an inappropriate sentence claim as required by Indiana Appellate Rule 46(A)(8)(b). To the extent that Richardson does challenge the appropriateness of his sentence, he has not supported his position with cogent argument or citation to authority as required by Indiana Appellate Rule 46(A)(8)(a). Therefore, this argument is waived. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (observing that failure to present cogent argument or citation to authority constitutes waiver of issue for appellate review), *trans. denied.*

aggravating circumstances found by the trial court that would justify imposition of a consecutive sentence. However, we note that a single aggravating circumstance may support the imposition of consecutive sentences. *Lavoie v. State*, 903 N.E.2d 135, 140 (Ind. Ct. App. 2009). Here, the trial court found four valid aggravating circumstances. Although the trial court's finding that a reduced or suspended sentence would depreciate the seriousness of the crime could not be relied upon to impose consecutive sentences, *see Mathews v. State*, 849 N.E.2d 578, 589 (Ind. 2006), the trial court could have properly relied upon the three remaining aggravating factors to impose consecutive sentences. Therefore, the trial court did not abuse its discretion by ordering that Richardson's sentence for Count 3 be served consecutive to his sentences for Counts 2 and 4.

Affirmed.

NAJAM, J., and BARNES, J., concur.