ATTORNEY FOR APPELLANT:

MICHAEL E. CAUDILL
Caudill & Associates
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WESLEY RAMIREZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0804-CR-255
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0708-FA-170321

November 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Wesley Ramirez appeals his conviction and sentence for class C felony child molesting. We affirm.

Issues

I. Did the trial court abuse its discretion by admitting the videotaped statement of Ramirez's victim?

II. Is his sentence inappropriate in light of the nature of the crime and his character?

Facts and Procedural History

During the summer of 2007, four-year-old N.B.'s mother regularly left her and her younger sister at the home of babysitter Tawanna Ramirez. On or about August 9, 2007, N.B. told her mother that Wesley Ramirez, Tawanna's husband, had "peed in [her] mouth" and had touched her "down there." Tr. at 49. N.B.'s mother called the police. On August 14, 2007, Diane Bowers, a forensic child interviewer with the Marion County Prosecutor's Office, conducted a videotaped interview of N.B. ("the Interview"). During the Interview, N.B. told Bowers that Ramirez "had peed in her mouth, that it was white … [and] that she spit it out on the couch." *Id*. at 91. She also told Bowers that Ramirez had touched her "pee-pee" and that it hurt. *Id*. at 91-92.

On August 21, 2007, the State charged Ramirez with two counts of class A felony child molesting. On October 1, 2007, the charging information was amended to add one count of class C felony child molesting. On November 7, 2007, the State filed a notice of intent to introduce the Interview, and on December 14, 2007, the trial court held a hearing on the issue. On December 14, 2007, the court ruled that the Interview was admissible. On

March 13 and 14, 2007, the trial court conducted a bench trial. At the conclusion of the State's case, the trial court granted Ramirez's motion for judgment on the evidence as to one of the charges of class A felony child molesting. At the end of the trial, the court acquitted Ramirez of the remaining class A felony child molesting count and found him guilty of class C felony child molesting.

On March 28, 2008, the trial court conducted a sentencing hearing. It sentenced Ramirez to eight years with three years suspended to sex offender probation. Ramirez now appeals.

Discussion and Decision

I. Admission of N.B.'s Videotaped Statement

Ramirez contends that the trial court erred by admitting into evidence the Interview. Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. Even if the trial court abused its discretion in admitting the challenged evidence, we will reverse for that error only if "the error is inconsistent with substantial justice" or if "a substantial right of the party is affected." *Id*. (quoting *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004)).

The State moved to admit the Interview pursuant to Indiana Code Section 35-37-4-6, which grants the trial court discretion in certain types of cases, including those involving sex crimes, to admit the statement of an alleged victim who is less than fourteen years of age at the time of trial, if that statement concerns an act that is a material element of the offense and

is not otherwise admissible in evidence. Before deeming the statement admissible, the trial court must conduct a hearing outside the presence of the jury and attended by the declarant. Ind. Code § 35-37-4-6(e). The trial court must determine that "the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability." *Id.* Appropriate considerations in determining reliability include whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, the use of age-appropriate terminology, and spontaneity and repetition. *M.T. v. State*, 787 N.E.2d 509, 512 (Ind. Ct. App. 2003).

In the trial court's order finding the Interview admissible, it stated in pertinent part that "[t]he time, content, and circumstances of the video tape show that the statement is reliable." Trial Court Order, December 19, 2007 (submitted to this Court with Appellant's Motion to Amend Record on September 3, 2008). Ramirez challenges this conclusion because the trial court did not enter specific findings to support it. Ramirez contends that in fact there are several indicators that the statement is not reliable, including "[N.B.'s] delay in giving it, the poor, sometimes inappropriate, and sometimes outright incorrect interview techniques used, as well as N.B.'s own contradictory statements within the taped statement itself and between the taped statement and her testimony at the Child Hearsay Hearing and the Trial[.]" Appellant's Br. at 8.

Ramirez refers to what he considers "substantial inconsistencies" between the Interview and N.B.'s testimony. *Id*. at 9. For example, he notes that her accounts differ as to several details, including where Ramirez's hands were during the assault (on her back versus under her clothes), what he said to her (saying "shhh" versus telling her to stop talking), in

which room the incident occurred (kitchen versus living room), and what position she was in (sitting versus standing). Also, Ramirez challenges the forensic interviewer's techniques, accusing her of asking leading questions and multiple questions at one time.

Whether or not the trial court erred in admitting the Interview, Ramirez seems to himself concede that any error was harmless:

> [T]he record as a whole clearly demonstrates that the taped statement lacked the required reliability, and should not have been admitted.
>
> In fact, the Trial Court itself tacitly acknowledges this by granting Defendant's Motion for Judgment on the Evidence on one A Felony Child Molest, and then finding Defendant not guilty on the second. Both of these charges required penetration of N.B. by the Defendant in order to be proven. If N.B.'s taped testimony of penetration, either vaginally or orally was credible to the Court, a legitimate basis for conviction under these charges would have existed.

Id. at 16. Indeed, the trial court stated, "Based on the totality of the circumstances, and the very young age of the child, and the variances in her testimony in court, from what she said in court opposed to what she said in the statement [sic]. The court does have some reasonable doubt with respect to count one. So I'm going to acquit him on count one." Tr. at 192-193.

The trial court found Ramirez guilty of the lesser class C felony count, which required that the State prove Ramirez "did perform or submit to touching or fondling with N.B. … with the intent to arouse or to satisfy the sexual desires of N.B. or Wesley Ramirez[.]" Appellant's App. at 36 (charging information). N.B.'s trial testimony was sufficient to support this conviction, and the Interview was merely cumulative of that evidence. Therefore, we must conclude that even if the trial court did abuse its discretion by admitting the statement, any error did not affect Ramirez's substantial rights and was thus harmless.

II. Appropriateness of Sentence

Ramirez also asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B) which states that this Court "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." Ramirez bears the burden of persuading us that his sentence is inappropriate. *See Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. Ct. App. 2006).

A person who commits a Class C felony shall be imprisoned for between two and eight years, with the advisory sentence being four years. Because Ramirez's sentence is within the statutory range, it is subject to review only for abuse of discretion. *See Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). Ramirez argues that his criminal history is not particularly significant because it does not include any other crimes against children. He also contends that although his past is "checkered," he is not one of the worst offenders and thus deserves a lesser sentence. Appellant's Br. at 18.

In considering Ramirez's character, we note several things from our review of the record. Ramirez was expelled from high school in the ninth grade because of his involvement in a gang, and in the many years since, he has failed to resume his education. Ramirez's criminal history includes four prior misdemeanor convictions and two prior felony convictions. He has several drug-related convictions and one involving a dangerous weapon. He has served very little jail time because his sentences have often been suspended to

probation.[1] Clearly, this approach has been ineffective in rehabilitating Ramirez. It appears that he has violated probation orders at least twice and has an outstanding warrant in South Carolina. He has taken no actions toward continuing his education, something which might lead him on the path toward a crime-free life. As for the nature of Ramirez's crime in this case, he victimized a four-year-old girl while she was left in the care of his wife at their home. To this point, N.B. has seen a counselor and a physician, and she has had to testify in court about her ordeal. The emotional damage to N.B. may not be fully known for years, and its significance cannot be diminished.

Despite Ramirez's claims, we simply cannot conclude that the trial court abused its discretion in ordering him to serve an eight-year sentence with three years suspended to sex offender probation. In light of the above, we think that sentence is appropriate.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.

[1] For example, in 1996, Ramirez was sentenced to twenty-four months with all but ten days suspended to probation. In 2001, he was ordered to serve only seventy-five days of a five-year-sentence for burglary and malicious injury to personal property. Presentence Investigation Report at 3-4.