

George Feltner, Jr. appeals his conviction of Child Molesting,¹ a class A felony, and the sentence imposed thereon. Feltner presents the following restated issues for review:

1. Did the trial court err in refusing to read a reasonable doubt instruction tendered by Feltner?
2. Is the trial court's sentencing statement detailed enough to permit this court to review Feltner's sentence?
3. Was Feltner's sentence inappropriate?

We affirm.

The facts favorable to the conviction are that on the evening of May 26, 2009, Feltner was sitting outside the home of six-year-old EJR and EJR's mother (Mother) and father. Mother told EJR to go inside and get ready for bed and EJR complied. Several minutes later, Feltner went inside, ostensibly to use the bathroom. Once inside, however, he went into EJR's bedroom, where EJR had put on her nightgown. Feltner told her he wanted to see her vagina. With EJR sitting on the bed, Feltner then proceeded to lick her genital area. Meanwhile, Mother went inside to check on EJR. When she entered the home, she saw Feltner come out of EJR's room and quickly enter the bathroom. She went to EJR's room and discovered EJR standing with no clothes on. Mother asked whether Feltner had touched EJR and EJR told Mother he had touched her vagina. Later, EJR clarified that Feltner had licked her vagina. Subsequent forensic testing was conducted on EJR's external genitalia and underwear, where various genetic materials were found. Feltner could not be excluded as a contributor of those materials.

Feltner was charged with three counts of child molesting, one as a class A felony and

¹ Ind. Code Ann. § 35-43-4-3(a)(1) (West, Westlaw through 2010 2nd Regular Sess.).

the other two as class C felonies. The latter charges concerned prior fondling molestations alleged to have occurred earlier that day and on a previous occasion. The matter was tried by jury on March 31 and April 1, 2010. At the conclusion of the evidence, the State moved to dismiss the two class C felony charges because EJR did not testify about them during her trial testimony. The jury returned a guilty verdict on the remaining count, as set out above. The trial court sentenced Feltner to thirty years imprisonment.

1.

Feltner contends the trial court erred in refusing to read his tendered reasonable doubt instruction. The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003), *cert. denied*, 540 U.S. 1150 (2004). Instruction of the jury is reviewed for an abuse of discretion. *Id.* A trial court abuses its discretion by refusing to give a tendered instruction if: (1) the tendered instruction correctly sets out the law; (2) evidence supports the tendered instruction; and (3) the substance of the tendered instruction is not covered by other instructions. *Id.* “We consider jury instructions as a whole and in reference to each other and do not reverse the trial court for an abuse of that discretion unless the instructions as a whole mislead the jury as to the law in the case.” *Lyles v. State*, 834 N.E.2d 1035, 1048 (Ind. Ct. App. 2005) (internal quotes and citations omitted), *trans. denied*.

Feltner tendered the following jury instruction:

If the evidence in this case is susceptible of two (2) constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the Accused, and the other to his innocence, it is

your duty, under the law, to adopt that interpretation which is consistent with the Accused's innocence, and reject that which points to his guilt.

Appellant's Appendix at 91. The trial court refused this instruction and instead read the following instruction to the jury:

The burden is upon the State to prove beyond a reasonable doubt that the Defendant is guilty of the crimes charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the Defendant's guilt but it does not mean that a Defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the Defendant's guilt after you have weighed and considered all the evidence. A Defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt. The State must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find that there is reasonable doubt that the Defendant is guilty of the crimes, you must give the Defendant the benefit of the doubt and find the Defendant not guilty of the crimes under consideration.

Id. at 119-120.

The preferred practice is to use pattern jury instructions. *Buckner v. State*, 857 N.E.2d 1011 (Ind. Ct. App. 2006). The reasonable-doubt instruction read to the jury in this case was taken almost word-for-word from Indiana Pattern Jury Instruction 1.15. Feltner notes, however, that in *Robey v. State*, 454 N.E.2d 1221 (Ind. 1983), our Supreme Court discussed an instruction similar to the one he tendered. That instruction stated:

The law presumes the defendant to be innocent of the crime charged, and this presumption continues in his favor throughout the trial of this cause. It is your duty, if it can be reasonably and conscientiously done to reconcile the evidence upon the theory that the defendant is innocent, and you cannot find the defendant guilty of the crime charged in the information unless the evidence

satisfies you beyond a reasonable doubt of his guilt.

Id. at 1222. Referring to this instruction, the *Robey* Court stated that “[a]n instruction of this character which advises the jury that the presumption of innocence prevails until the close of trial, and that it is the duty of the jury to reconcile the evidence upon the theory of the defendant’s innocence if they could do so, must be given if requested.” *Id.*

This court recently determined that this aspect of the *Robey* holding “simply required an instruction that the jury should fit the evidence to the presumption that a defendant is innocent[.]” *Simpson v. State*, 915 N.E.2d 511, 520 (Ind. Ct. App. 2009), *trans. denied*. The instruction read by the court in the instant case clearly did that. It informed the jury that a person charged with a crime is to be presumed innocent and to overcome this presumption of innocence, the State was required to prove Feltner guilty of each element of the offense beyond a reasonable doubt. The trial court also instructed the jury on the definition of reasonable doubt and informed the jury that if there was a reasonable doubt that Feltner was guilty, then they should give him the benefit of that doubt and find him not guilty of the crime. The trial court did not err in instructing the jury.

2.

Feltner contends that the trial court’s sentencing statement is not adequate to permit this court to review Feltner’s sentence. Under Indiana’s statutory regime, trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. The trial court’s sentencing statement must give a “reasonably detailed” explanation of the reasons or circumstances for imposing a particular sentence. *Id.* at 491. Sentencing

statements serve two primary purposes: (1) they guard against arbitrary and capricious sentencing, and (2) they provide an adequate basis for appellate review. *Anglemyer v. State*, 868 N.E.2d 482. A trial court may abuse its discretion by failing to enter a sentencing statement. *Id.*

In sentencing Feltner, the trial court stated, in relevant part:

Well, first of all, I wanta [sic] note that child molesting, at least as charged in this case, is a class A felony. The most serious charge under, under the laws of the State of Indiana except for murder, which is in its own separate class. And certainly, one can tell just by listening to [Mother] why it is treated so seriously. Why this particular crime is a class A felony. Because the tragedy goes on for a long time if, if not forever for [EJR]. Now with regards to the mitigating and aggravating circumstances, which have been argued by the attorneys. In terms of criminal convictions it is true that Mr. Feltner has a minor, very minor criminal history. He has a public intoxication conviction from about twenty years ago, and that's it. Uh, the law allows the Court to consider other bad acts and not give them the same weight that it would give a criminal conviction. But can be considered. And based on everything that I've heard today, I believe that the presumptive sentence for a class A felony, thirty years is the appropriate sentence in this case.

Transcript at 421-22. In this statement, the trial court did not identify any aggravating or mitigating circumstances. This does not necessarily constitute error. In *Anglemyer*, the Court indicated that the trial court's sentencing statement must include a reasonably detailed explanation of its reasons for imposing a particular sentence. The Court further held: "If the recitation includes a 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." *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). The presence of the subordinate conjunction "if" at the beginning of this sentence indicates that the finding of aggravating and mitigating

circumstances is not mandatory.

Although the trial court mentioned Feltner's minor criminal history and noted that it was entitled to consider "other bad acts" committed by Feltner, the court did not proceed to find them, or indeed anything else, as aggravators. *Transcript* at 422. Feltner does not argue that the court overlooked any mitigators. In view of this, and in view of the fact that the trial court imposed the advisory thirty-year sentence, the sentencing statement was adequate to permit appellate review of the sentence.

3.

Feltner contends his sentence is inappropriate. The trial court imposed a thirty-year sentence for Feltner's child molesting conviction. This is the advisory sentence for a conviction of this classification. The advisory sentence is the starting point the General Assembly has selected as an appropriate sentence for the crime committed. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

Article 7, section 4 of the Indiana Constitution grants our Supreme Court the power to review and revise criminal sentences. Pursuant to Ind. Appellate Rule 7, the Supreme Court authorized this court to perform the same task. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008). Per App. R. 7(B), we may 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." *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009), *cert. denied*, 2010 WL 2469998 (2010). "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d at 1223. Feltner bears the burden on appeal of persuading us that his

sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073.

Regarding the nature of the offense committed by Feltner, he followed the six-year-old victim into her bedroom and coerced her into sitting on her bed and submitting to him while he licked her genital area. We note especially the victim's tender years.² Concerning his character, as the trial court noted, Feltner has a minor criminal history. We note however, that there was testimony that Feltner had molested EJR's step-father when he (EJR's step-father) was young and had, in the words of the trial court, "wormed his way into the family again ... by promising [EJR's] mom he would never do to [EJR] what he had done to her stepfather[.]" *Transcript* at 419.

As indicated earlier, the advisory sentence is the starting point our Legislature has selected as an appropriate sentence for the crime committed, and we exercise restraint in revising the trial court's sentence. *See Cardwell v. State*, 895 N.E.2d 1219. Based on the foregoing, we cannot conclude that Feltner carried his burden of establishing, in light of the nature of his offense or his character, that the advisory sentence is inappropriate and should be reduced. *Childress v. State*, 848 N.E.2d 1073.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.

² I.C. § 35-42-4-3 provides that child molesting is a crime involving "a child under fourteen (14) years of age[.]" EJR was considerably younger than fourteen when Feltner molested her. *See Sullivan v. State*, 836 N.E.2d 1031 (Ind. Ct. App. 2005) (the use of child victim's age as aggravating circumstance was justified under general state sentencing law where, although victim's age, which was eight at time of offense, was an element of child molesting, the fact that the victim was significantly less than fourteen made the crime more heinous).