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IN THE
COURT OF APPEALS OF INDIANA

LEON R. WEST,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A03-0607-CR-336
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0602-FA-29

December 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Leon R. West appeals his twenty-year sentence for Child Molesting,[1] as a class B felony. West presents the following consolidated and restated issue for review: Is the maximum sentence imposed by the trial court inappropriate in light of the nature of the offense and West's character?

We affirm.

In December 2005, thirty-three-year-old West placed his mouth on his four-year-old daughter's vagina and then attempted to have sexual intercourse with her while she was visiting for the weekend. According to West's own admissions, he had been molesting K.W. for several months. He began by touching her inappropriately in July[2] and performed oral sex on her three or four times beginning in August. West first attempted to have vaginal intercourse with the four-year-old in November or December, but he stopped when she said it hurt. At the end of December, West committed the acts that form the basis of the instant conviction. After touching K.W. and putting his mouth on her vagina, West once again attempted to have intercourse with his daughter. She told him it was hurting, and he stopped.

On February 10, 2006, the State charged West with child molesting, as a class A felony. The alleged victim was his seven-year-old sister-in-law, D.D.[3] Thereafter, on

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[1] Ind. Code Ann. § 35-42-4-3 (West 2004).

[2] J.W. turned four on July 29, 2001.

[3] The investigation of West began upon reported sexual abuse of D.D. While being interviewed by police, West admitted that he began touching D.D. inappropriately as early as August 2004 while he was living with her family. He admitted several instances of oral sex and indicated that the last time he had sexual contact with D.D. was in December 2005. During this interview, West also proceeded to admit

February 17, the State amended the charging information to specify K.W. as the alleged victim, rather than D.D. West entered into a plea agreement with the State on May 25, 2006, which the trial court accepted. In exchange for his guilty plea, the State agreed to permit West to plead guilty to child molesting as a class B felony, a lesser-included offense. Sentencing was left to the trial court's discretion.

On June 22, 2006, the trial court sentenced West to the maximum sentence of twenty years in prison. As aggravating, the trial court noted that K.W. was less than twelve years of age and that West was in a position of trust with the victim, who was his own daughter. In addition to the mitigating factor noted in the presentence investigation report (that is, West's lack of criminal history), the trial court commented on the fact that West pleaded guilty. The court concluded, however, that West had received a substantial benefit from the State by being permitted to plead guilty to a class B felony as opposed to the class A felony as charged. After weighing the mitigating and aggravating factors, the trial court imposed the maximum sentence. West now appeals.

On appeal, West initially asserts that one of the aggravating factors cited by the trial court was "inappropriate". *Appellant's Brief* at 5. He further argues that his sentence is "unreasonable" and "excessive" because he is a first-time offender and not the worst of the worst. *Id*. at 5, 9. While West ultimately invites us to exercise our authority pursuant to Ind. Appellate Rule 7(B) and revise his sentence, he does not address, much

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that he had inappropriately touched his daughters, K.W. and her five-year-old sister, S.W. With respect to K.W., he provided the details set forth above.

less apply, the standard set forth in the rule. Possible waiver notwithstanding, we will address the appropriateness of West's sentence under App. R. 7(B).[4]

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. App. R. 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

With respect to the nature of the offense, we agree with the trial court that West's molestation of his four-year-old daughter was particularly reprehensible.[5] As we have previously observed, abusing a position of trust is, by itself, a valid aggravator that may support a maximum sentence. *See Hart v. State*, 829 N.E.2d 541 (Ind. Ct. App. 2005). "There is no greater position of trust than that of a parent to his own young child." *Id*. at 544. And, here, West's daughter was only four years old. *See Sullivan v. State*, 836

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[4] To the extent West contends the trial court abused its discretion by considering a specific aggravating circumstance, we observe that under our amended sentencing statutes, which are applicable here, a trial court may now impose any sentence that is authorized by statute and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code Ann. § 35-38-1-7.1 (West, PREMISE through 2006 2nd Regular Sess.). Therefore, while the trial court may have improperly cited the victim's age as an aggravating circumstance without noting the obvious fact that she was of a particularly tender age, any error is harmless. *See Creekmore v. State*, 853 N.E.2d 523, 531 (Ind. Ct. App. 2006) (trial court's failure to identify a substantial mitigating factor was harmless error because "the new statutory scheme does not require the finding and balancing of aggravating and mitigating circumstances").

[5] The trial court stated in this regard: "The Court is particularly repulsed, if you will, by virtue of that relationship. No child molest case is at all pleasant, but it seems a bit, quite a bit more tragic, awful, if you will, when the child involved is your own child." *Transcript* at 18-19.

N.E.2d 1031 (Ind. Ct. App. 2005) (fact that defendant's eight-year-old daughter was significantly less than fourteen made the crime more heinous); *see also Ray v. State*, 838 N.E.2d 480 (Ind. Ct. App. 2005), *trans. denied*. In fact, West began molesting K.W. when she was three years old and continued to molest her over the next several months. *See Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996) ("[u]ncharged misconduct is a valid sentence aggravator"). The incidents began with inappropriate touching and then progressed to oral sex. Finally, the six-foot, two-inch man attempted to have sexual intercourse with his four-year-old daughter on two occasions. Contrary to his assertions on appeal, West's crime can be fairly characterized as more heinous than the typical crime of child molesting.

Turning to West's character, we agree with the trial court's determination regarding West's guilty plea. West clearly received a substantial benefit in return for his guilty plea and, therefore, it is not entitled to substantial weight.[6] *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation 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"), *trans. denied*. Moreover, the record shows that West is a serial molester who, by his own admission, has sexually abused multiple children. Throughout the

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[6] We note that, as charged, the only difference between the class B felony offense of child molesting and the class A felony is the age of the perpetrator. That is, the offense becomes a class A felony if the perpetrator is at least twenty-one years of age. I.C. § 35-42-4-3(a)(1). Here, the record reveals that West was thirty-three years old at the time he molested his daughter. Therefore, West's claim that there may have been an impediment to conviction of the more serious charge, as opposed to the lesser-included offense, is without merit.

record, West offers a variety of reasons for his behavior, such as low self-esteem and loneliness due to his separation from his wife. The presentence investigation report (PSI) reveals that West has gone so far as to imply that D.D. and K.W. enjoyed his attention and may have pursued him. With respect to D.D., who was six years old when the molestations began, West stated in part:

> I was worried that [D.D.] may have asked some other adult to touch her and felt she needed some sort of talking to that I never had a chance to try to tell her and try to put right. I was just around that time starting to feel better and have at least a small amount of confidence…. I had such low self esteem and felt very lonely at the time my wife ignored me and I found out [D.D.] loved to be tickled [–] begging for me to tickle her and wanting to listen to her laugh. When my wife left me it seems I should have left too. [D.D.] was getting too attached to me and at first I loved every minute of it. When things went too far and she begged me to touch her again between her legs I didn't have the self-confidence to tell her no or rather keep saying no. I felt terrible to have gone as far as I did.

PSI at 1-2. West also made the following statement with regard to his daughter, K.W.:

> In my confession I tried to mention how living in a tiny apartment when I was attempting to stay away from [D.D.] ultimately ended up in clinging to my kids. While my wife was doing what she could to get custody of my kids I was constantly worried about losing them. What lead to my touching of [K.W.] is her getting a yeast infection and I did my best to try to help her—put diaper rash crème on. Also—my wife was trying to get her out of diapers and I ended up with wet bed sheets and sometimes I had left the kids other clothes in the house. I had no other bed except for a big pad to sleep on with my kids. Once I moved I tried to get my kids to sleep separately from me but it didn't work because [K.W.] would say "I want to sleep with you" and I'd give in. Then one thing would lead to the next. What I said about pushing on her needs to be explained. It wasn't right but the only reaction from her was "It's starting to hurt." And I stopped immediately. After one week after [sic] I found a woman to date and spend time with. By then I had no desire to continue what I had done.

Id. at 2. West's own words starkly reveal his character. While he does not have a prior criminal history, we find his character particularly disturbing and indicative of someone

likely to reoffend. In light of the nature of the offense and West's character, we conclude that the maximum sentence of twenty years imposed by the trial court is appropriate.

Judgment affirmed.

KIRSCH, C.J., and RILEY, J., concur.