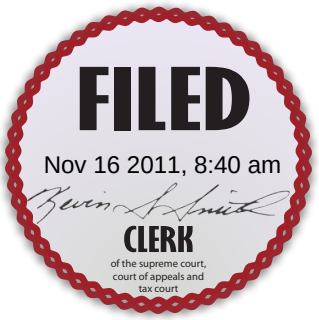

ATTORNEY FOR APPELLANT:

BENJAMEN W. MURPHY
Law Office of Ben Murphy
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

JOSEPH D. MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-1105-CR-204
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0907-FA-7815

November 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Joseph D. Miller appeals his conviction and sentence for child molesting as a class A felony.[1]

We affirm.

ISSUES

1. Whether the trial court abused its discretion in admitting evidence.

2. Whether the prosecutor committed misconduct.

3. Whether the trial court erred in sentencing Miller.

FACTS[2]

In July of 2009, then-nine-year-old M.S. traveled to Porter to visit her father, S.S., for the month. As she had during previous visits, M.S. also liked to visit with Miller, her paternal uncle. On July 26, 2009, M.S. spent the night at Miller's house after spending the day with Miller and his family. While several family members slept in other rooms, M.S. and Miller watched television in the living room, where a bed had been made for M.S. At some point, Miller "started rubbing" M.S. "[d]own there." (Tr. 31). Miller then told M.S. to "l[ie] down and take off [her] shorts and underwear." (Tr. 31). Feeling "[r]eally scared," M.S. did as she was told. (Tr. 31). Miller then "put his thing in [M.S.'s.]," but she did not know how far inside he placed his penis. (Tr. 32). He also

[1] Ind. Code § 35-42-4-3.

[2] We remind Miller's appellate counsel that pursuant to Rule 50(A)(2)(a) of the Indiana Rules of Appellate Procedure, the appellant's appendix shall contain a copy of the trial court's chronological case summary.

licked her "down there" and had her touch his penis. (Tr. 33). Miller then asked M.S. to go into the bathroom with him, but she refused.

The next morning, M.S. reported the incident to A.P., her father's girlfriend's daughter, who later reported it to her mother, Natalie Hardesty. That evening, Hardesty reported M.S.'s account to S.S., who took M.S. to Porter Hospital. Janice Ault, an emergency room nurse and Sexual Assault Nurse Examiner, examined M.S. (Tr. 63). Ault found "perihymenal redness," or redness around the hymen, which is a "normal finding in children." (Tr. 78). She also found "a small, circular red area on the hymen," (tr. 79), which she considered normal and not necessarily an injury as "redness can be a normal finding." (Tr. 80).

After the police conducted an interview with M.S., the State charged Miller with Count 1, class A felony child molesting, alleging that Miller "knowingly or intentionally perform[ed] or submit[ted] to sexual intercourse" with M.S.; and Count 2, class A felony child molesting, alleging that Miller "knowingly or intentionally perform[ed] or submit[ted] to deviate sexual conduct" with M.S. (App. 2). On February 1, 2010, Miller filed a motion in limine, seeking to exclude "[a]ny comments or statements regarding [his] choice to exercise his right to remain silent, both prior to and post arrest." (App. 48). The trial court denied the motion "as to the fact of [Miller] being invited to speak to the police and declining" but granted it "as to any argument using that," ordering the State not to "ask the jury to draw any inference from that fact . . . ." (Tr. 7).

The trial court commenced a jury trial on March 7, 2011. During the trial, Miller's parents and wife testified that they did not see or hear anything unusual the night M.S. spent the night. The jury found Miller guilty on Count 2.

The trial court ordered a pre-sentencing investigation report ("PSI") and held a sentencing hearing on April 25, 2011. According to the PSI, Miller had been adjudicated a juvenile delinquent in 1992 for having committed what would constitute battery if committed by an adult and had been convicted of class C misdemeanor consumption of alcohol by a minor. The PSI also reflected that Miller had been accused of child molesting on three other occasions with separate children; prosecution was "declined" in two matters and was "put 'on hold' pending the outcome" of the instant matter in the third matter. (PSI 4).

The trial court found Miller's position of trust to be an aggravating circumstance and Miller's lack of "charged" prior criminal history to be a mitigating circumstance. (Sent. Tr. 38). Finding the aggravator and mitigator to be equal in weight, the trial court sentenced Miller to the advisory sentence of thirty years.

Additional facts will be provided as necessary.

DECISION

1. Admission of Evidence

Miller asserts that the trial court abused its discretion in admitting the medical records from M.S.'s hospital visit. Miller seems to make two separate arguments regarding the admission of the evidence: a confrontation argument and an expert witness

argument. Specifically, he argues both that Ault was not qualified to diagnose M.S. and that the purported diagnosis contained in the medical records was not subject to confrontation "because a qualified doctor was not called to testify." Miller's Br. at 13.

> [T]he admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (internal citations omitted), *reh'g denied*.

During Ault's testimony, the State sought to admit nineteen pages of M.S.'s medical records into evidence, including the sixteenth page, which appears to be a standard form listing discharge instructions. That form read: "The following Diagnosis(es) have been made: Pediatric Sexual Assault." (State's Ex. 2). Ault, however, hand wrote "Reported child sexual assault" above the diagnosis. *Id*.

Miller's counsel objected to the medical records in the entirety, stating:

> While I have no objection to the results of the medical report being entered, the document as a whole I would object to. It contains numerous amounts of hearsay from [M.S.], none of which she testified to here. The [S]tate did not question her as to what she said to the nurse, and I can't now cross-examine the document. If the [S]tate wanted to put this in, then perhaps they should have questioned her as to what she told the nurse. This

> is hearsay and it's, I believe, the [S]tate's way of trying to put the accusation in writing.
>
> Again, I have no objection to the results of the exam, which I intend to enter myself, but I would object to the hearsay and the testimony which I can't now cross-examine.

(Tr. 66-67).

It is clear from the record that Miller's counsel based his objection to the admission of M.S.'s medical records on hearsay grounds.[3] It is well settled that a party "may not object to the admission of evidence on one ground at trial and seek reversal on appeal based on a different ground." *Boetner v. State*, 934 N.E.2d 184, 187 (Ind. Ct. App. 2010) (citing *Malone v. State*, 700 N.E.2d 780, 784 (Ind. 1998)). Miller's claim is therefore waived.

Moreover, Miller's counsel stated during trial that he had "no objection to the results of the medical record being entered," (tr. 66), and "no objection to the results of the exam, which [he] intend[ed] to enter [him]self[.]" (Tr. 66-67). Having invited any

---

[3] We note that an exception to the hearsay rule applies to

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Evid. R. 803(4).

Hearsay is admitted under this exception because the reliability of the out-of-court statement is assured based upon the belief that a declarant's self-interest in seeking medical treatment renders it unlikely the declarant will mislead the person that she wants to treat her. *Nash v. State*, 754 N.E.2d 1021, 1023 (Ind. Ct. App. 2001), *trans. denied*. If the declarant's statements are made to advance a medical diagnosis or treatment, Evidence Rule 803(4) encompasses statements made to non-physicians. *See In re Paternity of H.R.M.*, 864 N.E.2d 442, 446 (Ind. Ct. App. 2007) (finding that the rule applied to statements made to a clinical social worker specializing in working with abused children).

error in admitting the medical records into evidence, Miller cannot now argue that the error, if any, supports reversal. *See Gamble v. State*, 831 N.E.2d 178, 187 (Ind. Ct. App. 2005) ("Error invited by the complaining party is not reversible error."), *trans. denied*.[4]

2. Prosecutorial Misconduct

Miller asserts that the prosecutor committed misconduct. Specifically, he maintains that the prosecutor improperly referred to Miller's refusal to testify when, during his closing argument, he argued as follows:

> [M.S.]'s testimony is actually uncontroverted. She's testified to what happened to her . Everything else is peripheral. . . . [Miller's counsel] says . . . that there were six people in the house that didn't hear or see anything. And he said—well, you heard from four of them that didn't hear or see anything. That's true. . . . . But what he doesn't argue to you is that there are two people, two people in the house that saw and heard what happened, [M.S.] and [Miller], because he did these things to her.

(Tr. 307).

> When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for mistrial results in waiver. Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Fundamental error is an extremely narrow exception

[4] Waiver and invited error notwithstanding, we would find any error in the admission of the medical records to be harmless. Ault testified that, as a nurse, she does not diagnose patients, and Miller extensively cross-examined Ault regarding her physical examination of M.S. Miller also had the opportunity, and in fact did, cross-examine M.S. regarding her allegations. Furthermore, we cannot say that the probable impact of the notation at issue affected Miller's substantial rights or prejudiced him where it was one note on page sixteen of nineteen pages of medical records; it appeared to be a standard form; and Ault had clearly written "Reported child sexual assault" on the form. (State's Ex. 2) (emphasis added).

> that allows a defendant to avoid waiver of an issue. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm."

Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

Miller did not object to the statements or seek an admonishment that the jury disregard the prosecutor's reference to M.S.'s uncontroverted testimony or that the jury "heard from four" people. (Tr. 307). Accordingly, he must establish not only the grounds for prosecutorial misconduct but also the grounds for fundamental error. *See Cooper*, 854 N.E.2d at 835; *Booher v. State*, 773 N.E.2d 814, 818 (Ind. 2002).

The United States Supreme Court has interpreted the Fifth Amendment as barring prosecutorial comment on a defendant's silence. *Jenkins v. State*, 725 N.E.2d 66, 69 (Ind. 2000). "[A] Fifth Amendment violation occurs 'when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence.'" *Id*. (quoting *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996), *reh'g denied*). However, "if in its totality the prosecutor's comment is addressed to other evidence rather than the defendant's failure to testify, it is not grounds for reversal." *Hancock v. State*, 737 N.E.2d 791, 798 (Ind. Ct. App. 2000).

The prosecutor has the right to comment on the facts and the evidence, and in this case, the prosecutor made no direct reference to Miller's failure to testify. Rather, he merely commented that M.S.'s testimony was credible and was not refuted by any witness. We do not believe that the prosecutor's comments were subject to a reasonable

interpretation by the jury as inviting an adverse inference from Miller's silence. We therefore find no fundamental error.

3. Sentencing

Miller asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to enter an adequate sentencing statement; that the aggravator cited by the trial court is improper; and that his sentence is inappropriate.

a. *Sentencing statement*

Sentences are within the trial court's discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Thus, we review a sentence for abuse of that discretion. *Id.* "One way in which a trial court may abuse its discretion is failing to enter a sentencing statement . . . ." *Id.* In *Anglemyer*, Indiana's Supreme Court explained that

> Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. In order to facilitate its underlying goals, the statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 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.

Id. (internal citations omitted).

We acknowledge that the trial court's sentencing statement could have been more detailed. However, the trial court did identify one aggravating circumstance and one

mitigating circumstance in sentencing Miller. We therefore find that the sentencing statement is adequate.

b. *Aggravating circumstance*

Miller also contends that the trial court abused its discretion in finding him to be in a position of trust. A trial court abuses its discretion if the sentencing statement "explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, . . . or the reasons given are improper as a matter of law." *Id.* at 490-91.

Here, the record reveals that M.S. is Miller's niece. M.S. testified that she had stayed with Miller "many times before" July of 2009. (Tr. 44). Prior to the offense, M.S. had spent the day with Miller and was spending the night at Miller's house when the offense occurred. The evidence clearly supports the trial court's finding that Miller violated a position of trust. *See Rivers v. State*, 915 N.E.2d 141, 143-44 (Ind. 2009) (finding that the victim's uncle, with whom the victim had had a healthy relationship prior to the offense, violated his position of trust when he molested his niece); *see also Hines v. State*, 856 N.E.2d 1275, 1280-81 (Ind. Ct. App. 2006) (finding that a defendant is in a position of trust as to a child spending the night as a guest in the home of the defendant), *trans. denied*.

c. *Inappropriate sentence*

Miller argues that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494.

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). The advisory sentence for a class A felony is thirty years, with a potential maximum of fifty years. I.C. § 35-50-2-4. Miller received the advisory sentence.

As to the nature of Miller's offense, he molested his nine-year-old niece. As to his character, Miller advances several reasons to support his argument that it renders the sentence inappropriate: 1) he had maintained steady employment; 2) he lacked a substantial criminal history; 3) he has family support; and 4) he had a difficult childhood.

We recognize that these points may reflect favorably on Miller's character. We note, however, that Miller also had been accused of molesting three other children. Though uncharged conduct, we consider these incidents as a reflection of Miller's character. *Cf. Washington v. State*, 902 N.E.2d 280, 291 (Ind. Ct. App. 2009) (stating that uncharged illegal conduct may be considered in sentencing), *trans. denied*.

Accordingly, we do not find that Miller's sentence is inappropriate, particularly where he received the advisory sentence.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.