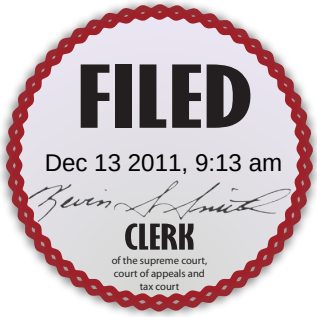

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IN THE
COURT OF APPEALS OF INDIANA

DONALD HURM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-1101-CR-21
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
The Honorable Kelli E. Fink, Magistrate
Cause No. 82C01-0909-FA-1036

December 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Donald Hurm appeals his convictions and sentences for two counts of child molesting as class A felonies[1] and one count of child molesting as a class C felony.[2] Hurm raises three issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion in admitting into evidence Hurm's statement to police; and

II. Whether Hurm's sentence is inappropriate.

We affirm in part, reverse in part, and remand.

The relevant facts follow. In early 2007, Robert Hess ("Robert") and his daughter V.H., who was born on August 23, 2001, lived with Hurm and Norman Hess ("Norman"), who was not Robert's biological father although Robert called Norman "Dad," in a house on Adams Street in Evansville, Indiana. See Transcript at 331. Carol Rogers ("Carol"), V.H.'s mother, lived in another house on Adams Street and maintained standard visitation with V.H.

At some point while living in the house on Adams Street, V.H. was left alone with Hurm, and Hurm carried V.H. into his room, put "green stuff" on her vagina, and inserted his penis into V.H.'s vagina. Id. at 496. Hurm told V.H. not to tell anybody. V.H. told Norman "about what [Hurm] did," and Norman "said don't worry about it." Id. at 497-498.

In the summer of 2008, Robert, Norman, Hurm, and V.H. moved to Chandler, Indiana. In September 2008, Norman and Hurm took V.H. to the hospital where Norman indicated to the emergency room physician that V.H. was having some pelvic or genital

[1] Ind. Code § 35-42-4-3(a) (Supp. 2007).

[2] Ind. Code § 35-42-4-3(b) (Supp. 2007).

pain. Based upon "the presence of the group vesicles," the emergency room physician "was positive" that V.H. had genital herpes. Id. at 117.

In December 2008, the Warrick County Department of Child Services ("DCS") received "a report that voiced concern about [V.H.] not having any stability, inappropriate discipline, different people picking her up from school, [and] the school not knowing where she was staying." Id. at 248. DCS obtained information that at some point Robert and Norman had an argument and Robert had moved out of the residence. During the investigation, DCS obtained information that Norman and Hurm had moved back to Evansville and that Norman, Hurm, and V.H. were living at the Esquire Motel.

At some point while living at the motel, Norman went to a McDonald's to get something to eat and left V.H. alone with Hurm. While V.H. was on the floor on a blanket, Hurm pulled V.H.'s underwear down, put gel on her vagina with his hands, and inserted his penis into her vagina.

On January 13, 2009, Carol was granted custody of V.H., and Carol worked with DCS and obtained parent aid. After V.H. went to live with Carol, V.H. told her that she had been molested. Carol and V.H. then met with Detective Brian Turpin of the Evansville Police Department at an advocacy center for victims of intimate crimes where V.H. was interviewed by a forensic interviewer.

On June 24, 2009, Detective Turpin went to the residence of Norman and Hurm and asked them to come to the police station so that he could interview Hurm**.** Norman and Hurm did not agree to go to the police station but agreed to speak with Detective Turpin in the living room with a digital recorder present. Detective Turpin placed a

digital recorder on a coffee table in the living room.[3] Detective Turpin stated to Hurm that he was not under arrest, that he was free to leave, and that he was free to ask Detective Turpin to leave. Detective Turpin then stated: "I'll go ahead and read your Miranda, but like I said, you're not under arrest, . . . I'm going to be leaving here today, you're not going to be leaving with me, unless you want to go somewhere with me." Id. at 554. Detective Turpin advised Hurm of his Miranda rights, and Hurm stated that he understood them. Hurm stated that Norman was his guardian and had power of attorney. At one point during the interview, Norman made a statement regarding a lawyer.[4]

In September 2009, the State charged Hurm with three counts of child molesting, each as class A felonies.[5] At the request of his counsel, Hurm was administered an intelligence exam in May 2010 by clinical psychologist David Cerling, Ph.D., SHPP, and the results of the testing indicated that Hurm had an overall score of seventy-one on the Wechsler Adult Intelligence Scale which is "referred to as the borderline intellectually impaired range." Id. at 468-469. On August 19, 2010, Hurm filed a motion to suppress evidence which argued that Hurm's recorded statement to Detective Turpin was coerced and not voluntary because Hurm is "feeble-minded" and that Hurm had invoked his right to counsel. Appellant's Appendix at 60(c). Following a hearing, the trial court denied Hurm's motion. On November 9, 2010, the State filed an information charging Hurm, in

[3] During the interview, the digital recorder stopped working due to a problem with the battery, and as a result the end of the interview was not recorded.

[4] Norman stated: "Okay, (inaudible) have a lawyer, I don't know what's going on myself (inaudible)." Transcript at 580.

[5] Count I alleged that Hurm performed sexual intercourse with V.H. between December 30, 2008 and March 14, 2009, and Counts II and III alleged that he performed sexual intercourse with V.H. between February 2, 2007 and December 4, 2008.

addition to the other counts, with Count IV for child molesting as a class C felony.[6] At Hurm's jury trial, over his objection the State introduced the testimony of Detective Turpin regarding Hurm's June 24, 2009 statement and played the recording of the interview for the jury. Evidence presented at trial indicated that V.H. and Hurm had genital herpes, which is transmitted solely by direct contact. At the conclusion of the evidence, the State dismissed Count III. The jury found Hurm guilty of two counts of child molesting as class A felonies and child molesting as a class C felony.

At sentencing, the court found as aggravating circumstances that the injury to V.H. was greater than the elements of the offense because V.H. contracted genital herpes due to Hurm's conduct, that V.H. was six and seven years old at the time of the offenses, and that Hurm voluntarily helped care for and had control of V.H. at the time of the offenses. The court found as mitigating circumstances the facts that Hurm had no criminal history and has a documented mental illness. The court also noted that Hurm had previously been diagnosed with borderline intellectual functioning. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Hurm to forty-eight years for each of his molesting convictions as class A felonies and six years for his molesting conviction as a class C felony, with the three sentences to be served concurrently with each other.

I.

The first issue is whether the trial court abused its discretion in admitting into evidence Hurm's statement to Detective Turpin. The admission and exclusion of

[6] Count IV alleged that Hurm performed fondling or touching with V.H. between December 1, 2008 and January 15, 2009.

evidence is a matter within the sound discretion of the trial court, and we will review only for an abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). "An abuse of discretion occurs when the trial court's ruling is clearly against the logic, facts, and circumstances presented." Oatts v. State, 899 N.E.2d 714, 719 (Ind. Ct. App. 2009). "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995) (citations omitted).

Hurm essentially argues that the court abused its discretion in admitting his statement to Detective Turpin because: (A) the statement was not voluntarily given; and (B) he was denied his right to counsel.

A. Voluntariness of Statement

Hurm first argues that his statement to Detective Turpin was not voluntary because "psychological testing indicated that [his] IQ was 72, indicating that he is borderline mentally handicapped" and because Detective Turpin used deception and promises of lenity to extract a pretrial statement. Appellant's Brief at 11. The State argues that Hurm's limited intellectual ability did not affect the voluntariness of his statement and that the record is absent of police coercion during Hurm's statement.

In addition to the required Miranda advisement, a defendant's self-incriminating statement must also be voluntarily given. Crain v. State, 736 N.E.2d 1223, 1230 (Ind. 2000). To be voluntary, a defendant's statements must not have been induced by violence, threats, promises, or other improper influence. Faris v. State, 901 N.E.2d 1123, 1127 (Ind. Ct. App. 2009), trans. denied. A defendant's mental state is not enough to

render a confession inadmissible in the absence of coercive police activity. Id. (citing Smith v. State, 689 N.E.2d 1238, 1248 (Ind. 1997)). "In evaluating a claim that a statement was not given voluntarily, the trial court is to consider the totality of the circumstances, including: the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." Pruitt v. State, 834 N.E.2d 90, 115 (Ind. 2005) (citations and internal quotation marks omitted), reh'g denied, cert. denied, 548 U.S. 910, 126 S. Ct. 2936 (2006). On appeal, we do not reweigh the evidence but instead examine the record for substantial, probative evidence of voluntariness. Id. We examine the evidence most favorable to the State, together with the reasonable inferences that can be drawn therefrom. Id. If there is substantial evidence to support the trial court's conclusion, it will not be set aside. Id. A defendant must show specific instances where his impaired abilities have an effect on voluntariness in order for a defendant to prevail on a claim that his mental condition prevented him from knowingly waiving his Miranda rights. Id. (citations omitted). Although a person's mental condition is relevant to the issue of susceptibility to police coercion, where the person voluntarily makes a confession without police coercion the confession may be considered in spite of the mental condition. Pettiford v. State, 619 N.E.2d 925, 928 (Ind. 1993).

Here, the evidence most favorable to the State reveals that Cerling, the clinical psychologist, testified that Hurm was administered an intelligence exam in May 2010 and that the results indicated that Hurm had an overall score of seventy-one on the Wechsler Adult Intelligence Scale which is "referred to as the borderline intellectually impaired

range." See Transcript at 468-469. When asked if "a person who tests in the borderline range knows the difference between right and wrong," Cerling testified that "that is a different kind of question" and that "typically the difference between right and wrong . . . a score in that borderline range, that wouldn't typically interfere with their ability to perceive right and wrong, typically . . . ." Id. at 477. The evidence shows that Hurm had given Norman a durable power of attorney. However, Norman indicated on cross-examination that no court had ever appointed him to be Hurm's guardian.

The record further reveals that on June 24, 2009, Detective Turpin initially asked Norman and Hurm to come to the police station so that he could interview Hurm. Norman and Hurm declined to go but agreed to speak with Detective Turpin at their residence. Detective Turpin placed a digital recorder on a coffee table in the living room and started to interview Hurm. Detective Turpin stated that Hurm was "not under arrest here" and then that "you're not under arrest, . . . you are free to, free to leave, free to ask me to leave, whatever you want to do, your cooperation means a lot." Id. at 553-554. Detective Turpin then stated that he would read Hurm's Miranda rights and stated that "like I said, you're not under arrest, . . . I'm going to be leaving here today, you're not going to be leaving with me, unless you want to go somewhere with me." Id. at 554. Detective Turpin read Hurm's Miranda rights, and Hurm stated that he understood them.

During the interview, Detective Turpin stated that both V.H. and Hurm had genital herpes and that V.H.'s "mom, her dad and [Norman] all tested negative for any kind of herpes, you have the exact same kind as her." Id. at 558. Hurm stated that he "was never by [himself] with [V.H.] and she told the hospital that her mommy and her mommy's

boyfriend done it to her." Id. Hurm stated that he "had been molested before" and "that's why I wouldn't do it to no other kid because I know how it feels." Id. at 559-560. Throughout the interview, Hurm repeatedly denied molesting V.H. or others, stating "I couldn't have done it," "I don't do that to kids," "I know I didn't do it," "But how can I do it if I was with [Norman] at all times," "I'm in [Norman's] supervision though," "I'm telling the truth, I did not do nothin' to her," "All I do is just when she's around me she gives me a hug and gives me a kiss and that's all we do." See id. at 564-568. Hurm stated that he "wiped [V.H.'s] vaginal area after she had gone to the bathroom," and, after Detective Turpin explained "that it was sexual contact that had caused [V.H.] to have herpes," Hurm stated that he "spit on [his] hand and then [] rubbed [V.H.'s] vaginal area . . . ." Id. at 586-587. Detective Turpin testified that during the long pauses in the recorded interview played for the jury Hurm had left the room to talk in private with Norman. When asked if Hurm "appear[ed] to be able to follow what [he was] saying," Detective Turpin testified "[o]h, completely, yea, he was able to, to give responses that I'm used to in cases where I'm accusing somebody of molesting a child." Id. at 588.

Under the totality of the circumstances, we conclude based upon the record that Hurm has failed to demonstrate that his statement was induced by violence, threats, or other improper influences that overcame his free will. See Crain, 736 N.E.2d at 1231 (finding no evidence of violence, threats, promises, or improper influence regarding the defendant's confession); Faris, 901 N.E.2d at 1127 (holding that the defendant's statement was voluntarily given regardless of his mental disability under the

circumstances including the length of the interrogation and the officers' testimony regarding the defendant's demeanor and manner of speaking).

B. Right to Counsel

Hurm next argues that his Fifth Amendment right to counsel was violated during his interview with Detective Turpin. Specifically, Hurm asserts that he was in custody when interrogated and that he requested an attorney through Norman. The State argues that the trial court properly found that Hurm was not in custody during his statement and never invoked his right to counsel. The State also argues that only Hurm could have invoked his right to counsel and that, even if Norman could have spoken on behalf of Hurm, the statement was not an unequivocal invocation of Hurm's right.

In Miranda v. Arizona, the United States Supreme Court held that when law enforcement officers question a person who has been "taken into custody or otherwise deprived of his freedom of action in any significant way," the person must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). "The purpose underlying Miranda warnings is to protect an individual's Fifth Amendment privilege against self-incrimination by placing reasonable limitations on police interrogations." Sauerheber v. State, 698 N.E.2d 796, 801 (Ind. 1998).

When determining whether a person was in custody or deprived of his freedom, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Luna v. State, 788 N.E.2d

832, 833 (Ind. 2003) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520 (1983)). This is determined by examining whether a reasonable person in similar circumstances would believe he is not free to leave. Id. (citing Cliver v. State, 666 N.E.2d 59, 66 (Ind. 1996), reh'g denied). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. (citing Florida v. Bostick, 501 U.S. 429, 433-434, 111 S. Ct. 2382, 2386 (1991)). The Miranda safeguards do not attach unless "there has been such a restriction on a person's freedom as to render him in custody." Loving v. State, 647 N.E.2d 1123, 1125 (Ind. 1995). A person is not in custody where he is "unrestrained and ha[s] no reason to believe he could not leave." Kubsch v. State, 784 N.E.2d 905, 917 (Ind. 2003) (citation omitted).

Here, despite Hurm's assertions, the record does not disclose evidence establishing that he was in custody when Detective Turpin initiated the interview. The record reveals that Detective Turpin informed Hurm that he was free to leave and free to ask Detective Turpin to leave. Detective Turpin further informed Hurm that he was not under arrest and that he would be leaving the residence without Hurm that day. We conclude under the circumstances that Hurm was not in custody during his interview with Detective Turpin.

Further, even if Hurm was in custody at the time he was interviewed by Detective Turpin, the record does not show that Hurm invoked his right to counsel. "Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." Taylor v.

State, 689 N.E.2d 699, 703 (Ind. 1997) (quoting Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994) (internal quotation marks and citation omitted)). "The level of clarity required to meet the reasonableness standard is sufficient clarity such that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id. (citation and internal quotation marks omitted). "It is not enough that the defendant might be invoking his rights; the request must be unambiguous." Id.

In Davis, the defendant's statement "maybe I should talk to a lawyer" was held not to be a request for counsel. 512 U.S. at 462, 114 S. Ct. at 2357. Consequently, police officers had no duty to stop questioning Davis, and any statements he subsequently made were admissible. See Taylor, 689 N.E.2d at 703. Davis established as a matter of Fifth Amendment law that police have no duty to cease questioning when an equivocal request for counsel is made. Id. Nor are they required to ask clarifying questions to determine whether the suspect actually wants a lawyer. Id.

In this case, at one point during the interview, the following exchange occurred:

[Hurm]:	Well, let Pop say what he has no [sic] his mind first.
[Norman]:	Okay, (inaudible) have a lawyer, I don't know what's going on myself (inaudible)
[Detective Turpin]:	Well, I mean if that's, if that's your call, that's fine, I mean we're at that time, I mean if you all decided you want a lawyer, then, you know, I'll go ahead and do my own thing and, you know I mean I'm going to put this together and we'll deal with it.
[Norman]:	Cause, like I told him, if you can't get help he's going to end up in jail.

[Detective Turpin]: Well, I, well, all I'm here for is the truth, that's it.

Transcript at 580.

Based upon the record, we conclude that the court did not err in finding that Hurm did not unequivocally and unambiguously assert or invoke his right to counsel. See Taylor, 689 N.E.2d at 703 (noting that the defendant stated "I guess I really want a lawyer, but, I mean, I've never done this before so I don't know" and holding that a reasonable police officer in the circumstances would not understand that the defendant was unambiguously asserting his right to have counsel present).

Based upon our review of the record and the police interview, we cannot say that the trial court abused its discretion in admitting into evidence Hurm's statements during the June 24, 2009 interview with Detective Turpin.

II.

The next issue is whether Hurm's sentence is inappropriate. Indiana Appellate Rule 7(B) provides that this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate.[7] Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

[7] We observe that Hurm also argues that the trial court abused its discretion in sentencing him. However, we need not address this issue because we elect to exercise our option to review Hurm's sentence under Ind. Appellate Rule 7(B). See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding that where the court on appeal finds that a trial court abused its discretion in sentencing the defendant, the court may either remand for resentencing or exercise the appellate court's authority to review the sentence under Ind. Appellate Rule 7(B)), reh'g denied.

Hurm argues that he "did not brutalize the victim except as is inherent in the nature of the offense." Appellant's Brief at 28. Hurm argues that "the offenses in this case involve isolated acts of molestation on one victim, factors [sic] taken into consideration by this Court and our Supreme Court when revising a defendant's sentence for child molestation." Id. at 29. Hurm further argues that he "had no felony or misdemeanor arrests or convictions and no juvenile arrests or adjudications" and that "[t]he record also discloses that [he] is 'borderline mentally handicapped.'" Id. (citation omitted). Hurm asserts that "[t]he trial court's imposition of the near maximum sentence in this case was even in excess of the probation department's recommendation, which was for an aggregate sentence of forty (40) years." Id. at 29-30. Hurm requests that his sentence be revised to a term of thirty years.

The State argues that Hurm "infected his victim with genital herpes," that Hurm "held a caretaking function with respect to V.H.," and that V.H. "was a mere six and seven years old at the time of the offenses." Appellee's Brief at 24. The State argues that it "disagrees with [Hurm] that he did not 'brutalize' V.H. or cause her trauma beyond the crime" and that "[t]he fact that V.H. has to physically suffer from genital herpes for the rest of her entire life certainly satisfies both criteria." Id. at 24 n.4. The State asserts that "[t]o be sure, [Hurm's] lack of criminal history reflects positively on his character" and that Hurm's "'borderline' intellectual ability, however, neither works in favor nor against his character" and that Hurm's "score did not mean that he had an inability to function on his own and understand right from wrong." Id. at 25.

Our review of the nature of the offense reveals that Hurm had sexual intercourse with V.H. on two occasions, that he fondled or touched V.H. on one occasion, and that V.H. contracted herpes. V.H. was six and seven years old and lived at the same residence as Hurm at the time of the offenses. Our review of the character of the offender reveals that Hurm has no previous criminal history. The record further reveals that Hurm is in the borderline intellectually impaired range. Hurm stated that he was molested as a child. In addition, Hurm considered Norman to be a father figure and executed a durable power of attorney which granted Norman authority with respect to Hurm's financial and health care decisions, and Hurm lived with Norman for an extended period of time including when V.H. resided with them.

After due consideration and under the circumstances, we conclude that the imposition of the forty-eight year aggregate sentence is inappropriate. Accordingly, we reverse and remand with instructions to impose a sentence of thirty-eight years for each of Hurm's class A felony convictions and six years for his class C conviction, each to run concurrent with each other, for an aggregate sentence of thirty-eight years. See Laster v. State, 918 N.E.2d 428, 436 (Ind. Ct. App. 2009) (revising a defendant's aggregate sentence for two convictions for child molesting as class A felonies and four convictions for child molesting as class C felonies from sixty-four years to thirty-six years based upon the fact that the defendant had no criminal history and the fact that there was one victim and no uncharged sexual misconduct).

For the foregoing reasons, we affirm Hurm's convictions for two counts of child molesting as class A felonies and child molesting as a class C felony and remand with

instructions to revise Hurm's aggregate sentence to thirty-eight years in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

BAKER, J., concurs.

KIRSCH, J., concurs and dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

DONALD HURM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-1101-CR-21
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

KIRSCH, Judge, concurring in part and dissenting in part.

I fully concur in the decision of my colleagues affirming the defendant's convictions, but I respectfully dissent from their decision to reduce his sentence. I would affirm the trial court in all particulars.