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**IN THE
COURT OF APPEALS OF INDIANA**

RONNIE HARNESS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 82A04-1012-CR-770

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-1002-FA-170

September 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ronnie Harness appeals his convictions and sentences for child molesting as a class A felony and child molesting as a class C felony.¹

We affirm.

ISSUE

1. Whether fundamental error occurred during the child molest victim's testimony.
2. Whether the trial court abused its discretion by denying Harness's motion for mistrial.
3. Whether Harness's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

In February 2010, then-fifty-nine-year-old Harness lived in Owensboro, Kentucky near then-thirteen-year-old A.K. and her father. At times, A.K. went with her father to visit Harness at his apartment.

Approximately one week before February 12, 2010, Harness told A.K., who was going to be having her fourteenth birthday on February 17, that he would take her shopping in Evansville, Indiana. Harness knew that A.K. was thirteen years old at the time of the incident. A.K. and Harness decided not to tell A.K.'s parents that she was planning to go to Evansville with Harness; instead, A.K. told them that she was going to Evansville to stay at a friend's house.

¹ Ind. Code § 35-42-4-3.

On February 12, at around 5:00 or 6:00 p.m., Harness and A.K. left Kentucky in his truck. When they got to Evansville, Harness told A.K. that they needed to go to a hotel because he was tired and having back pain, and he informed her that they could go to the mall the following day. Harness drove to the Aztar Casino and then got a hotel room while A.K. waited in the truck.

After Harness and A.K. got into the room, A.K. went into the bathroom, removed her clothes, and got into the jacuzzi tub. Shortly thereafter, Harness came into the bathroom, and A.K. asked him to leave. Harness took off his clothes and got into the tub. A.K. again asked Harness to leave, but he refused. Harness attempted to put A.K. on top of him, but she managed to stay to the side of him. Harness then told A.K. he wanted her to give him a “hand job[.]” (Tr. 64). When she refused, Harness grabbed her by the wrist, put her hand on his penis, and “made [her] hand give him a hand job[.]” (Tr. 64).

After Harness got out of the tub, A.K. took a shower, got dressed, unsuccessfully looked for her phone, and then laid down in the bed to try and sleep. Harness, who had been in the living room area, walked naked into the bedroom and laid on the bed next to A.K. Harness took off A.K.’s shorts and underwear, placed his head between her legs, and performed oral sex on her as she tried to get him to stop. After A.K. “finally kicked him off” of her, Harness then “tried” to have sexual intercourse with her. (Tr. 71). A.K. again kicked Harness off of her and then went to sleep.

The following morning, Harness and A.K. ate breakfast in the hotel and then went to Harness’s truck so they could go shopping. Upon discovering that Harness’s truck would not start, A.K. waited in the lobby while Harness went into the casino to look for

someone to help him with his truck. A casino security guard saw A.K. sitting alone in the lobby and asked her where parents were. After hotel security eventually learned that A.K. had spent the night with Harness, they sealed off their hotel room and called the Evansville Police Department. A.K. was interviewed by police at Holly's House and eventually released to her mother. Harness agreed to let the police search his truck, and police found a tube of KY Jelly and another lubricating jelly, some condoms, and a prescription bottle that listed Harness's name and that contained Viagra. The police conducted a videotaped interview of Harness at police headquarters. During that interview, Harness admitted that he had taken a Viagra tablet and acknowledged that he had engaged in oral sex with A.K. and that she had masturbated him in the tub.

The State charged Harness with Count I, child molesting as a class A felony; Count II, child molesting as a class A felony; and Count III, child molesting as a class C felony. A jury trial was held on November 4-5, 2010. Prior to trial, Harness filed a motion in limine, requesting the trial court to keep out any 404(b) evidence as well as evidence of "[a]ny alleged sexual activity between the defendant and the alleged victim in this cause occurring other than on the date specified and charged in the Information in this cause[.]" (App. 78).² The trial court granted Harness's motion. The State also filed a motion in limine to exclude any evidence of A.K.'s past sexual conduct pursuant to the Rape Shield Law, and the trial court granted the motion.

² Harness filed a one-volume Appendix and included all items—both confidential and non-confidential—on green paper. While we appreciate Harness's counsel's effort to file confidential material on green paper and in compliance with Administrative Rule 9, we remind counsel that items not deemed confidential under Rule 9 should be filed on white paper in a separate Appendix volume.

During the trial, A.K. testified—without objection—that she lived in Kentucky in a facility that provided treatment for victims of sexual abuse. Prior to cross-examining A.K., Harness’s counsel pointed out to the trial court that A.K. had testified that she was living in a sexual abuse treatment facility and then informed the court that Harness wanted to question A.K. about past sexual abuse and sexual activity. Counsel argued that her testimony had “open[ed] the door” to the fact that she had been sexually abused by another person and that she had been having sexual intercourse with her boyfriend. (Tr. 84). Counsel asserted that the failure to question A.K. would be prejudicial and lead the jury to believe that Harness had caused her to go into treatment for sexual abuse. The trial court granted Harness’s request, in part, and allowed his counsel to ask A.K. whether she had previously been sexually abused by another adult. Harness’s counsel then cross-examined A.K. and established that she had been sexually abused by someone other than Harness.

During direct examination of A.K., the prosecutor questioned her about how and when she met Harness and then asked her whether she had “done anything with him in Kentucky as far as just doing stuff[.]” (Tr. 27). When A.K. responded that she had given him a “hand job[.]” (tr. 27), Harness’s counsel approached the bench and moved for a mistrial, arguing that the testimony violated the motion in limine. After the trial court removed the jury from the courtroom, Harness’s counsel argued that an admonishment would not be sufficient and that a mistrial was the only remedy. The prosecutor indicated that she had informed A.K. of the motion in limine and had instructed her not to discuss any sexual activities that happened in Kentucky. The trial

court individually questioned each of the jurors regarding whether he or she had heard the prosecutor's last question and A.K.'s last answer. Half of the jurors heard A.K.'s response, while the other half did not. The trial court instructed all jurors to disregard A.K.'s response and explained that they were not to consider it as evidence when determining whether or not Harness was guilty of the acts alleged at the casino and that they were not to discuss it with the other jurors. In response to the trial court's admonition, the jurors assured the trial court that they would base their verdict only on the evidence admitted during the trial. The trial court denied Harness's motion for mistrial, stating:

Show the Court will now deny the motion for mistrial. The Court finds that the statement made by a 14 year old child who was – who is or appears to be extremely nervous was not the result of an evidentiary harpoon by the State. I'm satisfied that half of the jurors did not even hear the offensive material and so it will be no part of the process of their consideration in the case. The Court is satisfied that the remaining seven jurors, one of who is an alternate, will – first of all unequivocally assure[d] the Court that they will put it aside and not consider it and follow the Court's instructions to, to do so and not to discuss it with the other jurors and that they will base their decision in this case solely on the proper evidence admitted relative to what happened at the Casino Aztar that night and make their decision based solely on that basis. So the Court does not feel an extreme remedy like a mistrial is appropriate. If there had been any hesitation or reluctance on the part of any of the jurors who had heard it to follow the Court's instruction or to set aside that might have been a different matter but there was none so the motion for mistrial is denied.

(Tr. 53-54).

Harness moved for mistrial again after the State had played a redacted version of Harness's videotaped interview with police. Harness's counsel asserted that, on the video, the detective questioning Harness makes a reference to “[t]his weekend and that

time.”³ (Tr. 195). Counsel acknowledged that the “that time” reference was “nebulous”, (tr. 194), but nevertheless argued that the reference put Harness in “grave jeopardy” because the jury could infer that it was related to the hand job in Kentucky testimony that the trial court had admonished the jury not to consider. (Tr. 197). The prosecutor commented that the statement was “so difficult to hear” and “practically inaudible” and argued that even if the jury heard the comment, they would not “put any importance on it because it doesn’t have any context.” (Tr. 196). The trial court denied Harness’s motion and offered to admonish the jury, but Harness declined the admonishment.

The jury found Harness guilty of child molesting under Counts II and III. The jury was unable to reach a verdict on Count I,⁴ and the trial court declared a hung jury on that count. At sentencing, the trial court determined there were neither aggravating nor mitigating circumstances. The trial court sentenced Harness to the advisory term of thirty years on his class A felony conviction and four years on his class C felony conviction, and it ordered that the sentences be served concurrently. Thus, the trial court sentenced Harness to an aggregate term of thirty years.

DECISION

1. Fundamental Error

Harness first challenges A.K.’s testimony that she lived in a facility that provided treatment for sexual abuse victims as fundamental error. At trial, the following exchange occurred between the prosecutor and A.K.:

³ When the court reporter transcribed the detective’s statement, she indicated that the tape was “inaudible” on the word “time.” (Tr. 195).

⁴ Count I was based on the allegation of sexual intercourse.

Q Where are you living now?

A Radcliff, Kentucky at Lincoln Trail Behavior Health System.

Q Okay. So that's a – like a facility for girls or is it girls and boys?

A It's girls and boys. I'm in a treatment – treatment thing where – to do my sexual abuse.

(Tr. 25).

Harness—acknowledging that his failure to object to A.K.'s testimony results in waiver of the issue on appeal—argues A.K.'s testimony constituted fundamental error. “The fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006) (internal quotation marks omitted). In order to qualify as fundamental error, the “error must be so prejudicial to the defendant’s rights as to make a fair trial impossible.” *Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011).

Although Harness acknowledged his lack of objection, he utterly fails to acknowledge the fact that he cross-examined A.K. regarding her testimony and established that she had previously been sexually abused by someone other than Harness.⁵ Given the fact he was able to allay any potential for harm with his cross examination, Harness has failed to show how A.K.'s testimony was so prejudicial as to

⁵ The State's Brief also did not mention Harness's cross-examination of A.K. regarding her testimony.

make a fair trial impossible. Accordingly, he has failed to demonstrate fundamental error.

2. Mistrial

Harness argues that the trial court abused its discretion by denying his motion for mistrial that was based on A.K.'s testimony being in violation of a motion in limine.

The State contends that Harness has waived this issue on appeal because he refused to have the trial court admonish the jury. Our supreme court has explained that the “refusal of an offer to admonish the jury constitutes a waiver of any error in the denial of the [mistrial] motion.” *Randolph v. State*, 755 N.E.2d 572, 575 (Ind. 2001). Despite the waiver, the *Randolph* court reviewed the merits of the defendant’s mistrial claim. *Id.* at 575. In that same vein, our court has explained that it may be “particularly prudent” to address the merits of a defendant’s claim in cases where, as here, trial counsel declined an offer to admonish the jury due to being placed in “the unsavory position of choosing between emphasizing inappropriate testimony to the jury and waiving appellate review of the trial court’s denial of a motion for mistrial.” *Smith v. State*, 872 N.E.2d 169, 174–75 (Ind. Ct. App. 2007), *trans. denied*. Accordingly, notwithstanding Harness’s waiver, we will review the merits of his mistrial argument.

The decision to grant or deny a motion for mistrial lies within the discretion of the trial court. *Mikens v. State*, 742 N.E.2d 927, 929 (Ind. 2001). A mistrial is an “extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error.” *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). “On appeal, the trial

judge's discretion in determining whether to grant a mistrial is afforded great deference[] because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury." *Mikens*, 742 N.E.2d at 929. "When determining whether a mistrial is warranted, we consider whether the defendant was placed in a position of grave peril to which he should not have been subjected; the gravity of the peril is determined by the probable persuasive effect on the jury's decision." *James v. State*, 613 N.E.2d 15, 22 (Ind. 1993).

A timely and accurate admonition is presumed to cure any error in the admission of evidence. *Owens v. State*, 937 N.E.2d 880, 895 (Ind. Ct. App. 2010), *reh'g denied, trans. denied*. "Moreover, reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings." *Warren v. State*, 757 N.E.2d 995, 999 (Ind. 2001) (quoting *Bradley v. State*, 649 N.E.2d 100, 108 (Ind. 1995), *reh'g denied*). We presume the jury follows the trial court's admonishment and that the excluded testimony plays no part in the jury's deliberation. *Francis*, 758 N.E.2d at 532.

During direct examination of A.K., the prosecutor generally questioned A.K. about how and when she met Harness and whether he knew A.K.'s age and then asked the following:

Q You and Mr. Harness then – had you done anything with him in Kentucky as far as just doing stuff?

A Yes ma'am.

Q Like what?

A I'd gave [sic] him a hand job ma'am.

(Tr. 27). Harness objected, and the jury was removed from the courtroom. The trial court then individually brought each juror back in the courtroom to question whether he or she had heard A.K.'s response. Half the jurors did not hear her response, while the other half did. Nevertheless, the trial court admonished all jurors to disregard A.K.'s last response and instructed them that they were not to consider it as evidence when determining whether or not Harness was guilty of the acts alleged. Thereafter, each juror assured the trial court that he or she would base the verdict only on the evidence admitted during the trial.

Harness has not demonstrated that the trial court's admonishment was inadequate and that he was placed in a grave peril as a result of A.K.'s statement. The trial court's admonition, coupled with the strong presumptions that a jury follows a trial court's instructions and that an admonition cures any error, cuts against Harness's claim of error. *See Lucio v. State*, 907 N.E.2d 1008, 1011 (Ind. 2009). Although A.K.'s response was in violation of the motion in limine, we cannot conclude that the trial court abused its discretion by denying Harness's motion for mistrial. "Innocent violation of a motion in limine does not automatically warrant a mistrial." *Pittman v. State*, 885 N.E.2d 1246, 1255 (Ind. 2008). Furthermore, "[o]n appeal, where the jury's verdict is supported by independent evidence of guilt such that we are satisfied that there was no substantial likelihood that the evidence in question played a part in the defendant's conviction, any error in admission of prior criminal history may be harmless." *James*, 613 N.E.2d at 22.

Here, A.K. testified that Harness grabbed her by the wrist, put her hand on his penis, and “made [her] hand give him a hand job[,]” (tr. 64), and she testified that he performed oral sex on her. Furthermore, during a videotaped interview, he admitted to police that he had done these acts with A.K. Considering the probable persuasive effect of the stricken testimony on the jury’s decision in light of the trial court’s admonition and the other evidence of guilt presented, we are not persuaded that A.K.’s stricken testimony that was not even initially heard by all jurors was so prejudicial and inflammatory as to place Harness in a position of grave peril. Accordingly, we conclude that the trial court did not abuse its discretion in denying Harness’s motions for mistrial. *See, e.g., Lucio*, 907 N.E.2d at 1011 (holding that denial of mistrial was not abuse of discretion where statement that defendant had previously been in jail was fleeting, inadvertent, and only a minor part of evidence against defendant and trial court admonished jury to disregard statement); *James*, 613 N.E.2d at 22-23 (affirming trial court’s denial of defendant’s mistrial motions that followed two instances of the State introducing evidence of defendant’s criminal history because defendant’s verdict was supported by independent evidence of guilt and any prejudice was cured by trial court’s admonishments); *Underwood v. State*, 644 N.E.2d 108, 111 (Ind. 1994) (holding admonishment, not mistrial, appropriate where police officer made statement in violation of ruling on motion in limine).

3. Sentencing

Lastly, Harness argues that the trial court erred in sentencing him. Specifically, Harness contends that: (a) the trial court failed to consider mitigators; (b) the trial court failed to give a detailed sentencing statement; and (c) his sentence is inappropriate.

a. *Mitigators*

Harness argues that the trial court should have considered the following as mitigators: his limited criminal record; the age of the victim; and his own age.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490–91. However, a trial court is not obligated to accept a defendant’s claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). A claim that the trial court failed to find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493.

Harness first contends that the trial court should have considered his limited criminal history to be a mitigating circumstance. “Although a lack of criminal history may be considered a mitigating circumstance, *see* Ind. Code § 35–38–1–7.1(b)(6), ‘[t]rial courts are not required to give significant weight to a defendant’s lack of criminal history,’ especially ‘when a defendant’s record, while felony-free, is blemished.’”

Townsend v. State, 860 N.E.2d 1268, 1272 (Ind. Ct. App. 2007) (quoting *Stout v. State*, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005), *trans. denied*), *trans. denied*.

Here, Harness's criminal history consisted of two misdemeanor convictions for driving under the influence, one from 1995 and the other from 2003. Until he was convicted at trial of class A felony and class C felony child molesting, he did not have any felony convictions. Harness, nevertheless, had a criminal history. Accordingly, we cannot say that the trial court erred by failing to find a mitigator in the fact that he had a criminal history. *See, e.g., Robinson v. State*, 775 N.E.2d 316, 321 (Ind. 2002) (trial court properly attached no mitigating weight to defendant's criminal history consisting of one misdemeanor possession of marijuana conviction and some traffic infractions).

Harness also argues that the trial court erred by failing to consider A.K.'s age as a mitigating factor when sentencing him. Harness points out the child molesting statute, Indiana Code section 35-42-4-3, requires that the victim be under the age of fourteen, and he contends that the trial court should have mitigated his sentence because he would have been charged with a lesser offense if he would have committed the same crimes after A.K. had turned fourteen. Harness, however, knew that A.K. was thirteen years old when he took her across state lines and molested her. We cannot conclude that the trial court erred by not assigning mitigating weight to the fact that Harness molested an almost fourteen year old.

Harness further argues that the trial court should have found his age of sixty to be a mitigating circumstance because his thirty year sentence "was a life sentence." Harness's Br. at 18. "Age is neither a statutory nor a per se mitigating factor." *Sensback*

v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). Arguendo, if Harness’s age, which was forty-six years older than A.K., was to be considered during sentencing, it could very well have been considered as an aggravating circumstance. *See Gellenbeck v. State*, 918 N.E.2d 706, 712 (Ind. Ct. App. 2009) (affirming the trial court’s use of the twenty-six year disparity of the ages of defendant and victim when sentencing defendant on child seduction convictions). We find no abuse of discretion in the trial court’s refusal to consider Harness’s age to be a mitigating factor.

b. *Sentencing statement*

Harness suggests that the trial court “failed to state in detail the reasons for the sentence it chose to impose[.]” Harness’s Br. at 18. When sentencing a defendant, a trial court is required to “enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.” *Anglemyer*, 868 N.E.2d at 491. Here, when sentencing Harness to advisory terms on each of his convictions, the trial court stated that it found neither aggravating nor mitigating circumstances. The trial court further explained that it was ordering the sentences to be served concurrently because it considered Harness crimes to be “essentially . . . one episode of sexual misconduct, one transaction and not an ongoing sexual impropriety” (Tr. 253). We conclude that the trial court entered a sentencing statement that includes a reasonably detailed recitation of the trial court’s reasons for imposing the advisory sentences.⁶

⁶ Even if we were to find that the trial court abused its discretion by not issuing a reasonably detailed sentencing statement, we could choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. *See Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007), *reh’g denied*.

c. Inappropriate

Harness contends that his aggregate thirty-year 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). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

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*, 848 N.E.2d at 1081. The advisory sentence for a class A felony is thirty years. Ind. Code § 35-50-2-4. The potential maximum sentence is fifty years. *Id.* The advisory sentence for a class C felony is four years, with the potential maximum sentence set at eight years. I.C. § 35-50-2-6. The trial court sentenced Harness to the advisory term of thirty years for his class A felony child molesting conviction and the advisory term of four years for his class C felony child molesting conviction and ordered that they be served concurrently.

Regarding Harness’s offenses, the record reveals that then fifty-nine-year old Harness took his friend’s thirteen-year-old daughter across state lines to Indiana—without her parents’ permission—on the premise that he was taking her shopping. Instead of going to the mall, Harness took A.K. to a casino hotel, telling her that he needed to lie down because he was tired and had back pain. Harness, who had packed a bag containing Viagra, condoms, and lubricating jelly, took a Viagra pill and took A.K. to the hotel room. Once there, Harness got into the jacuzzi tub with A.K. despite her

protests that he leave. When he was unable to put A.K. on top of him, he told A.K. he wanted her to give him a “hand job[.]” (Tr. 64). She refused, but Harness grabbed her by the wrist, put her hand on his penis, and forced her to help him masturbate. Once A.K. was able to get him to stop, he left the bathroom but did not leave her alone. As A.K. was trying to sleep in the bedroom, Harness, who had been in the living room area, walked naked into the bedroom and laid on the bed next to A.K. Harness took off A.K.’s shorts and underwear, placed his head between her legs, and performed oral sex on her as she tried to get him to stop. After A.K. was able to kick Harness off of her, he attempted to have sexual intercourse with her.

As to Harness’s character, he has a minor criminal history, consisting of two misdemeanors for driving under the influence. Harness claims that his crimes were merely an “aberration.” Harness’s Br. at 18. While this may have been Harness’s first sex crime, it reveals much about his poor character, where he evidently put much forethought and planning into how he was going to take sexual advantage of a young girl. Furthermore, his aberration argument is undercut by the record that reveals that Harness had apparently engaged in sexual acts with thirteen-year-old A.K. while they were in Kentucky.

In light of the nature of the offenses and Harness’s character, we cannot say that a thirty-year aggregate sentence for his convictions of a class A felony child molesting and class C felony child molesting is inappropriate.

Affirmed.

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