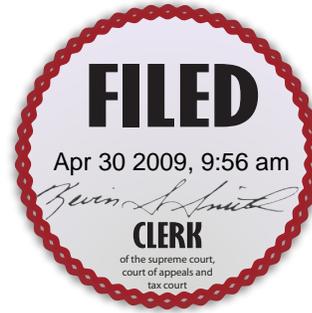


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

ELIZABETH A. GABIG
Marion County Public Defender Agency
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

MATTHEW WHITMIRE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

VERN ROOT,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A04-0809-CR-566
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0612-FB-250869

April 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Vern Root appeals his conviction and sentencing, after a jury trial, of one count of rape, as a class B felony; two counts of criminal deviate conduct, as class B felonies; and one count of sexual battery, as a class D felony.

We affirm.

ISSUES

1. Whether the trial court committed reversible error when, after conducting a hearing, it found that the pretrial statements of the protected person were reliable and admissible into evidence.
2. Whether the sentence is inappropriate.

FACTS

As a child, C.M. was diagnosed as mildly mentally retarded. Now age 44,¹ C.M.'s I.Q. has been reported as 63, and she has been found to have “significantly below average” adaptive skills, and to “function . . . commensurate with . . . a child 11 years old.” (Tr. 335, 336). C.M. has resided in assisted living programs since the 1980s.

Root, born September 28, 1932, worked as a caregiver with disabled adults for decades. In the mid-1990s, C.M. was a resident in a New Hope group home where Root worked as a “skills trainer,” or “support staff.”² (Tr. 223).

¹ C.M. was born November 19, 1964.

² Personnel who “help[ed] [residents] with laundry, . . . their money, their budgeting, . . . fix meals, . . . take care of their room. . . . normal tasks that we do, our [residents] need help doing those.” (Tr. 23).

In 2005, C.M. shared a condominium unit with two other residents, with each having their separate bedroom. Root was one of the skills trainers for the residents and worked the eight-hour evening shift.

In early October of 2006, C.M. traveled to Pittsburgh to visit with her sister, Lisa Goodpaster. A week after C.M.'s arrival, Goodpaster noticed that C.M. was unusually anxious. When they were alone, she questioned C.M. – who revealed that Root had sexually abused her at the group home and at the condominium. C.M. said that he had rubbed her breasts and vaginal area when she was unclothed; had her touch his penis; and he had put his penis in her vagina. Goodpaster informed New Hope, who contacted the authorities.

On December 1, 2006, Jessica Irish, a specialist trained in conducting fact-finding interviews with children and people with disabilities, conducted a videotaped interview with C.M. C.M. told Irish that Root had worked at the group home and the condominium; and, at both places, he had put his penis in her vagina many times. In the group home, the acts occurred at night on a big blue couch, when the others were in bed. C.M. said that on many occasions at the condominium, Root had her touch his penis with her hand; put his penis in her mouth; put his finger in her vagina; and he rubbed her breasts.

On December 29, 2006, Root spoke with Detective Derek Cress. Root admitted that he worked with C.M. when she was at the group home and condominium. Root initially described himself as a surrogate father to C.M., but eventually admitted that once “she” put his penis in her mouth; that he had “let” her take his penis in her hand; that he

had inserted his finger in her vagina “once or twice a week”; and that he had once “tried” to insert his penis in her vagina, but “it didn’t go in.” (Ex. 6).

On January 2, 2007, the State charged Root with rape, as a class B felony; two counts of criminal deviate conduct, as class B felonies; and sexual battery, as a class D felony.³ The State filed notice of its intent to introduce evidence pursuant to Indiana Code section 35-37-4-6, providing for the admissibility of an out-of-court statement by a “protected person” – one who is mentally disabled with “a disability attributable to an impairment of general intellectual functioning or adaptive behavior.” *Id.*(b). The trial court conducted a hearing in the matter on June 26-27, 2007. Goodpaster, Irish, Dr. Patrick Wagner (a psychologist who had worked with C.M.), and C.M. testified. On August 3, 2007, the trial court issued its order, with extensive findings wherein it held that C.M.’s out-of-court statements to Goodpaster and Irish were reliable based upon the time, content and circumstances, and admissible into evidence at trial.

A jury trial was held March 31–April 1, 2007. C.M. testified that Root “had sex with [her]” at the group home and at the condominium; that the sex took place in the living room and her bedroom. (Tr. 143). C.M. testified that “sex” meant “when a man puts his penis in a woman’s vagina.” (Tr. 144). She further testified that Root had her touch his penis with her hand, and he put his finger in her vagina – hurting her. Two psychologists, C.M.’s case manager since 2003, and a New Hope skills trainer who had worked with C.M. in the condominium testified about C.M.’s physical needs.

³ The charging information alleged that Root had committed the offenses between March 1, 2005 and October 1, 2006, and that C.M. “was so mentally disabled or deficient that consent” to the intercourse or sexual conduct “could not be given.” (App. 31, 32).

Goodpaster testified concerning what C.M. told her on October 8, 2006, regarding Root's sexual abuse. Irish testified, and the videotape of C.M.'s interview was played for the jury. Cress testified, and the videotape of his interview of Root was played for the jury. Finally, Root testified that C.M. had displayed affection toward him; that he had attempted to insert his penis in her vagina, but was unable to do so; but he had "stimulated her sexually with [his] finger" because he "believe[d] she wanted this to happen" and that "she understood and could consent." (Tr. 386, 387).

The jury found Root guilty as charged. On May 23, 2008, the trial court held the sentencing hearing. It found that Root's lack of any criminal history, his age, and his health⁴ were "big mitigating factors," and that Root's position of trust and the "duration and number of offenses" were "big aggravating factors"; and found "that the aggravating and mitigating factors balance[d]." (Tr. 526). It imposed "the advisory sentence of ten years" on each of the three class B felonies; one and one-half years on the class D felony offense; "all sentences concurrent"; with four years suspended to probation. (Tr. 529, 533).

DECISION

1. Admission of Evidence

The trial court has inherent discretionary power in the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court's decision regarding the admissibility of evidence is reviewed only for an abuse of that

⁴ Root had testified that he had a heart attack in 2000, which limited his physical activity.

discretion. *Id.* An abuse of discretion occurs when the trial court’s decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (citing *Carpenter v. State*, 786 N.E.2d 696, 702-03 (Ind. 2003)).

In cases involving crimes against children under the age of fourteen and the mentally disabled, who are defined as “protected persons,” special procedures have been created for introducing evidence that is not otherwise admissible. *M.T. v. State*, 787 N.E.2d 509, 511 (Ind. Ct. App. 2003). Pursuant to Indiana Code section 35-37-4-6, a statement or videotape that is made by someone who at the time of trial fits into one of these categories, concerns an act that is a material element of the charged offense, and is not otherwise admissible may become admissible if the court finds that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability, and the “protected person” either testifies at the trial or is found to be unavailable. *Id.* at 512. Considerations evaluated by the trial court in making the statutory reliability determination include: (1) the time taken and circumstances of the statement; (2) whether there was significant opportunity for coaching; (3) the nature of the questioning; (4) whether there was a motive to fabricate; (5) use of age-appropriate terminology; and (6) the spontaneity of the statement. *Id.* (citing *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997)).

Here, the trial court’s analysis considered each of these factors. The trial court also noted that C.M. had been subject to cross-examination at the pre-trial evidentiary hearing, and was found to be a competent witness.

As to C.M.'s statements to Goodpaster, the trial court summarized it as follows:

Ms. Goodpaster asked [C.M.] who her favorite staff people were, and [C.M.] responded by naming the Defendant (Mr. Vern Root), Chris Canton (spelling unknown), and a lady named "Anna". Ms. Goodpaster asked [C.M.] if anyone had been mean to her, and she said no. Ms. Goodpaster asked [C.M.] if a staff member had ever made her feel uncomfortable, and [C.M.] did not answer. She made no eye contact. Ms. Goodpaster then asked [C.M.] if a staff member had ever touched her in a way that made her feel uncomfortable, and [C.M.] said no. Ms. Goodpaster asked [C.M.] if anyone had ever touched her private parts, and [C.M.] gestured to her breasts and genital area and said yes. Ms. Goodpaster asked "Where were you touched and who touched you?" [C.M.] replied, "Vern." Ms. Goodpaster then asked, "What would Vern do?" [C.M.] answered that Mr. Root would rub lotion on her arms and legs. Ms. Goodpaster asked [C.M.] how he could do this if she was dressed, and [C.M.] explained that she had no clothes on. Ms. Goodpaster asked her sister how he could do this with [C.M.]'s roommates around, and [C.M.] said that they were in their own rooms.

Ms. Goodpaster asked her [C.M.], "Did he ever have sex with you?" [C.M.] did not respond. Ms. Goodpaster asked if Vern ever had her touch him, and [C.M.] said yes. [C.M.] said this happened in both a group home in Noblesville (which Ms. Goodpaster believes would have been between 1985 and 1992) and also at [C.M.]'s condo. Ms. Goodpaster asked [C.M.] if Vern had his clothes off, and [C.M.] said no, that he had his pants pulled down. Ms. Goodpaster asked [C.M.] if it hurt, and [C.M.] answered sometimes. Ms. Goodpaster asked [C.M.] why she did not tell someone, and [C.M.] said she did not know. Ms. Goodpaster asked [C.M.] how often this happened, and [C.M.] said every time he worked.

(App. 17-18). The trial court then considered various other factors, finding "no evidence in the record that would indicate that [C.M.] was coached by anyone, including her sister, to give the answers she did to the questions her sister asked"; that Goodpaster "did not ask her [C.M.] any leading questions, in the sense that she did not suggest the answers" but "asked [C.M.] simple, yes-or-no questions in a logical, sequential order"; no evidence that C.M. "ha[d] a motive to fabricate these allegations against [Root]"; that Goodpaster used anatomically correct terminology which C.M. "appeared to comprehend"; and that

the “spontaneity” factor was less significant in “an alleged sexual relationship with a caregiver occurring over a period of years.” (App. 18).

Root’s brief rhetorical arguments challenged the foregoing findings by the trial court as to each factor. However, the trial court’s analysis is clearly supported by the evidence presented at the hearing. Therefore, we conclude that the trial court did not abuse its discretion when it admitted Goodpaster’s testimony concerning C.M.’s statements to her.

As to C.M.’s videotaped interview with Irish, the trial court found no evidence which indicated that C.M. had been “coached by anyone, including the interviewer, to give the answers she did to the questions Ms. Irish asked her”; that Irish “used open-ended, non-leading, non-suggestive questions when she interviewed [C.M.]”; no evidence that C.M. had a motive to fabricate allegations against Root; and that Irish had confirmed C.M.’s understanding of “what a penis and a vagina were.” (App. 21).

Root argues that Goodpaster’s inappropriate questioning of C.M. “functioned . . . as a coaching session for C.M.,” thereby “color[ing] the interview with Irish” so as to “render[] the information offered there . . . unreliable.” Root’s Br. at 9. We cannot agree. The trial court found no evidence that C.M.’s statements to Goodpaster were a product of coaching, and we have already concluded that the evidence supports that finding. Therefore, Root’s argument must fail.

Root appears to also argue that we should find the trial court’s admission of C.M.’s out-of-court statements to be error because “C.M. provided no testimony in court in support of” the criminal deviate conduct charge that alleged an act involving Root’s

penis and C.M.'s mouth, leaving "the hearsay evidence as the only evidence the State presented in support of that charge." *Id.* This argument also fails, inasmuch as in his taped interview by Cress, Root admitted that his penis had been placed in C.M.'s mouth.⁵

2. Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer v. State*, 868 N.E.2d, 482, 491, *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The Rule provides that a court "may revise a sentence authorized by statute 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." *Id.* (quoting Ind. Appellate Rule 7(B)). "The burden is on the defendant to persuade" the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

Root argues that "an examination of [his] character and the nature of the offense indicates a ten (10) year sentence is not appropriate here." Root's Br. at 10. We are not persuaded.

His argument as to the nature of the offense appears to seek our reweighing of his testimony in which he testified that he believed that C.M. was capable of consenting to a sexual relationship. However, Root's own testimony reveals that he worked as a

⁵ Subsequent to our initial consideration of this appeal, our Supreme Court decided *Tyler v. Indiana*, No. 69S04-0801-CR-3 (March 31, 2009). Therein, it held that "a party may not introduce testimony via the Protected Person Statute if the same person testifies in open court as to the same matters." *Id.* at *1. However, the trial court here did not have the benefit of *Tyler's* guidance. More importantly, the evidence presented included Root's admissions that the various sexual acts did occur. Therefore, we do not find that *Tyler* mandates a different result.

caregiver to disabled individuals for approximately twenty-five years, and that he had been involved in C.M.'s care since the early 1990's. Further, the record clearly establishes that Root was aware that C.M. required assistance in everyday activities, such as taking her medication, dressing appropriately, transportation for grocery shopping and social outings, preparing her meals, doing her laundry, and her banking. Despite having been entrusted with and financially compensated for providing necessary care and assistance that C.M. desperately needed, the evidence established that Root, who described himself as a surrogate father to C.M., sexually abused her over a period of years.

Root also reminds us that he had no criminal history whatsoever; that, at the time of sentencing, he was a seventy-five year-old man with health problems; and that he had expressed his remorse to C.M. and her family. However, each sentence imposed is the advisory sentence and, despite having been convicted of four separate sexual offenses against a protected person in his care, the sentence for each offense was ordered to be served concurrently; with a portion of the sentence suspended to probation.

As a result, we do not find the sentence imposed by the trial court inappropriate in light of the nature of Root's four offenses and his character.

Affirmed.

VAIDIK, J. concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

**IN THE
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VERN ROOT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A04-0809-CR-566
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

Judge, Riley, concurring in part and dissenting in part with opinion.

I respectfully concur in part and dissent in part. I agree that the admission of the pretrial statements of the protected person were admissible into evidence. I dissent, however, to the sentence and find it to be inappropriate under Indiana Appellate Rule 7(B).

At trial, Root testified that he had never seen C.M.’s medical records, nor did he know her IQ, and believed that C.M. was capable of consent. Although this evidence was not sufficient as a defense to Root’s actions, it is relevant in examining the appropriateness of his sentence.

C.M.'s legal status was that of an emancipated adult and she was able to make her own decisions regarding relationships. She was employed and had a previous romantic relationship with a boyfriend who lived in a group home. This evidence is indicative, to me, that the nature of the offense was not violent nor was it meant to harm C.M.

But, the most important factor in reviewing the character of Root is the fact that he is seventy-five years old and has no criminal history. He worked and supported a large family and also has two bachelor's degrees, one in theology and one in religion.

He expressed his remorse to C.M. and her family and stressed that he never meant to cause her any distress. Root also agreed not to contact her and to move to Michigan where one of his daughters reside. Root had a heart attack in 2002 and has high blood pressure and arthritis.

The trial court's imposition of a ten (10) year sentence is not appropriate in light of the nature of the offense and character of the offender. I find that the mitigating circumstances far outweigh the aggravating circumstances and would impose a six (6) year sentence with four (4) years suspended to probation. A condition of probation, of course, would include a no contact order.