ATTORNEY FOR APPELLANT:

MATTHEW JON McGOVERN
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM C. DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0607-CR-289
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D02-0411-FA-911

July 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

William C. Davis challenges his convictions and sentence for three counts of class A felony molesting and two counts of class C felony child molesting, as well as his repeat sexual offender determination and sentence enhancement. We affirm.

Issues

We restate Davis's issues as follows:

I. Whether Davis has preserved any claim of error regarding the trial court's admission of a recording of voicemail messages; and

II. Whether the trial court properly sentenced Davis.

Facts and Procedural History[1]

The facts most favorable to the jury's verdict indicate that in February 2004, while working as a volunteer on a crisis line, Davis became acquainted with fellow volunteer Machelle Yott. Yott had four children, the oldest of which was twelve-year-old J.C. J.C. has Tourette's syndrome, learning disabilities, attention-deficit hyperactivity disorder, and attends special needs classes. Davis visited Yott's house in Evansville frequently and spent the night there several times. Davis took J.C. fishing, swimming, and biking and took J.C. to his home for several overnight visits.

Davis molested J.C. during at least one overnight stay at Yott's house. After Yott and her family changed residences, David took J.C. to Yott's largely vacant former residence and molested him further. Davis fondled J.C.'s penis on more than one occasion, performed oral

[1] We remind Davis's counsel that an appellant's statement of facts "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed" and "shall be in narrative form and shall not be a witness by witness summary of the testimony." Ind. Appellate Rule 46(A)(6).

sex on J.C., and performed anal sex on J.C. "plenty of times." Tr. at 84. Davis also had J.C. fondle his penis and perform oral sex on him. In late July 2004, J.C. told Yott about the molestations. Yott called the police.

On July 29, 2004, Evansville Police Detective Jim Harpenau interviewed J.C. The next day, Detective Harpenau called Davis, told him that a young child had made an allegation against him, and said that he wanted to talk with Davis about the allegation. That same day, Davis called Yott and left a voicemail message stating, "Machelle please please talk to me about this. Please call me. Please." State's Exh. 17. Yott played this message and two previous messages from Davis for Detective Harpenau, who recorded them from his phone.

Davis fled to Fargo, North Dakota, where he obtained a driver's license using his brother's name to avoid detection. Tests confirmed the presence of Davis's sperm and genetic material consistent with J.C.'s DNA on a sweater found in a bedroom in Yott's former residence. A warrant was issued for Davis's arrest. On October 6, 2005, FBI Special Agent Matt Mohr received a tip that Davis was living in Fargo under his brother's name. Agent Mohr obtained a copy of the photo from Davis's North Dakota driver's license and went with two other agents to the address provided by the tipster. The agents knocked on the door. Davis did not respond. Agent Mohr asked another tenant of the building to call Davis and tell him that there were three men downstairs who wanted to purchase the residence. Several minutes later, Davis came downstairs with a half-shaven head and was placed under

arrest. Davis claimed to be his brother. The agents told Davis that they would fingerprint him to confirm his identity, but that it would be easier if he told them the truth. Davis stated, "[A]lright, I'm Bill, my life is over." *Id*. at 225.

The State charged Davis with three counts of class A felony child molesting, two counts of class C felony child molesting, and with being a repeat sexual offender. On April 20, 2006, a jury found Davis guilty on all child molesting counts, and Davis admitted to being a repeat sexual offender. On June 14, 2006, the trial court sentenced Davis to eight-year terms on each of the class C felony convictions, to be served consecutive to concurrent fifty-year terms on each of the class A felony convictions. The court enhanced Davis's sentence by ten years for being a repeat sexual offender, resulting in an aggregate sentence of sixty-eight years. The court ordered the sentence to be served consecutive to a fifty-two-year sentence that Davis was already serving for child molesting convictions in Posey County. This appeal ensued.

Discussion and Decision

I. Admission of Voicemail Message Recording

At trial, Yott testified regarding the voicemail messages she received from Davis that were recorded by Detective Harpenau. Yott acknowledged that although there were only three messages on the recording, she had received messages from other callers in between the messages from Davis. The State offered the recording into evidence. Davis objected as follows:

> There's been no foundation laid as to how that tape got the voicemails or where they come from. The authentic, whether they are authentic or not is a very big question because there's other voicemails in between. We're not

> going to be able to see the other voicemails in between. There's just no foundation whatsoever laid to introduce that.

Id. at 166. The trial court admitted the recording over Davis's objection, and the State played the recording for the jury.

On appeal, Davis contends that the trial court should have excluded the recording because the State failed to establish that Davis's voicemail message "was freely and voluntarily made, without any kind of duress[.]" Appellant's Br. at 9 (citing *Lamar v. State*, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972)). We agree with the State that Davis has waived this argument "because it was not the argument presented to the trial court." Appellee's Br. at 8. "Grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal. The objection must be sufficiently specific to alert the trial judge fully of the legal issue. The complaining party may not object in general terms but must state the objection with specificity." *Espinoza v. State*, 859 N.E.2d 375, 384 (Ind. Ct. App. 2006) (citations, quotation marks, and brackets omitted); *see also White v. State*, 772 N.E.2d 408, 411 (Ind. 2002) ("A party may not object on one ground at trial and raise a different ground on appeal."). Contrary to Davis's claim in his reply brief, his general objection regarding authenticity was insufficiently specific to alert the trial court to the issue of voluntariness. As such, Davis's argument is waived.

Waiver notwithstanding, Davis's argument fails. In *Lamar*, our supreme court was asked to determine the admissibility of a tape recording of the defendant's "in-custody interrogation by police officers[,]" to which the defendant had objected on foundational grounds. 258 Ind. at 505, 282 N.E.2d at 796. In outlining the foundational requirements for

audio recordings, the court relied on a Georgia civil case cited by the defendant. *Id*. at 507, 282 N.E.2d at 797 (citing *Solomon v. Edgar*, 88 S.E.2d 167 (Ga. App. 1955)). Among the requirements the *Lamar* court adopted from *Solomon* was "a showing that the testimony elicited was freely and voluntarily made, without any kind of duress," to which the court added "the requirement that it be shown that any waiver of the declarant's constitutional rights was voluntarily, knowingly, and intelligently made." *Id*. at 508-09, 282 N.E.2d at 798 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

Our supreme court subsequently clarified that these two requirements apply only to the admissibility of a recording made in a custodial setting. *See Bryan v. State*, 450 N.E.2d 53, 58-59 (Ind. 1983) (addressing admissibility of tape-recorded telephone conversations between defendant and police: "As to [these two requirements], it is clear these apply only when the tape recording is of a statement by the accused made during a custodial interrogation such that the requirements of [*Miranda*] and its progeny apply to the admission of the statement itself. Here, … the taped conversation was not in any sense a part of a custodial interrogation, and thus no warnings were required.") (citation omitted); *McCollum v. State*, 582 N.E.2d 804, 811-12 (Ind. 1991) (addressing admissibility of tape-recorded telephone conversation between defendant and drug dealer: "The foundational requirements for admission of a tape recording made in a non-custodial setting are: 1) that the recording is authentic and correct, 2) that it does not contain evidence otherwise inadmissible, and 3) that it be of such clarity as to be intelligible and enlightening to the jury."); *Kidd v. State*, 738 N.E.2d 1039, 1042 (Ind. 2000) (listing same foundational requirements in addressing admissibility of audio recording of drug transaction between defendant and confidential

informant) (citing *McCollum*); *see also Apter v. Ross*, 781 N.E.2d 744, 752 (Ind. Ct. App. 2003) (recognizing such clarification), *trans. denied*.[2] Here, neither Davis's voice mail message nor Detective Harpenau's recording of the message was made in a custodial setting; consequently, no showing of voluntariness was required prior to the admission of the recording.

II. Sentencing

The trial court sentenced Davis as follows:

> [T]he Court has reviewed the Pre-Sentence Investigation Report and Mr. Davis has had an opportunity to review that report and provide input and corrections to the report. And the Court, after having heard evidence by the Defendant, arguments of counsel, and after having reviewed the sentencing memorandums filed by both the Defendant and the State, the Court now makes the following findings. First, the Court notes and finds that Mr. Davis was placed in a position of trust with regard to the care and welfare of the victim in this matter and that that position of trust was violated. The Court further notes and finds that the victim in this case is mentally challenged and was mentally challenged at the time of the offense. The Court further finds and notes that the Defendant fled the jurisdiction of this Court knowing that a warrant had been issued or was to be issued in this matter. The Court notes and finds that Mr. Davis was previously charged and convicted in Posey County of Child Molesting, convicted in January of 1992, and sentenced to a term of ten years, four years executed and four years probation. The Court further notes and finds that the Defendant was convicted in the Posey Superior Court of Child Molesting, a Class A felony, on March 16, of [20]06, which acts after review of the information filed in Posey County were committed prior to the acts committed in Counts I thru V in this matter. The Court also finds and notes that at the time of Mr. Davis's arrest that materials concerning pedophilia were found in Defendant's automobile in North Dakota. Court also finds and believes Mr. Davis, that you are a fixated [pedophile] and that you have been given previous opportunities to seek treatment and help and that there exists no evidence that you can or will be rehabilitated and that you pose and represent a

[2] *But see Knotts v. Knotts*, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998) (stating that husband in custody proceeding had burden of establishing that minister's statement to wife in voice mail recording "was made freely, voluntarily and without duress"), *trans. denied*; *id*. at n.3 ("We acknowledge that, absent testimony from the individual whose statements were recorded, the proponent will rarely satisfy this burden. As a result, it is appropriate for our Supreme Court to re-examine, and perhaps clarify, this test.").

> continued danger to this Community. Finally, the Court finds that the crimes committed in Counts I thru V are crimes of violence pursuant to Indiana Code 35-50-1-2. And, finally, that Counts I thru V are not episodes of conduct as defined by statute nor are Counts I thru V episodes of conduct as they relate to the Posey County conviction, notably, Cause No. 65D01-0409-FA-0042. [The court then imposed concurrent eight-year maximum sentences on the class C felony counts, to be served consecutive to concurrent fifty-year maximum sentences on the class A felony counts.]
>
> …. Court finds that the notations and findings previously enumerated constitute aggravating circumstances. With regard to Count VI [the repeat sexual offender count], the Court makes the same findings concerning the Court's notations and findings as being aggravating circumstances. [The court imposed the ten-year maximum enhancement on this count, to be served consecutive to the sentences on the remaining counts.] Finally, the Court finds that the findings and notations enumerated previously also constitute aggravating circumstances warranting the sentence imposed in this cause to be run consecutive to #442 in Posey County.

Tr. at 608-11.

Davis challenges his sentence on several grounds. We first address his contention that the trial court imposed consecutive enhanced sentences in violation of Indiana Code Section 35-50-2-1.3, which provides,

> (a) For purposes of sections 3 through 7 of this chapter [which enumerate the sentencing terms for felonies], "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
>
> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
>
> (c) In imposing:
>
> (1) consecutive sentences in accordance with IC 35-50-1-2;
>
> (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
>
> (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Davis contends that "the plain language of this statute limits the authority of the trial court to impose consecutive *advisory* sentences. In this case, the trial court [exceeded] its authority by imposing consecutive *enhanced* sentences." Appellant's Br. at 18.

We disagree, for the reasons given in *Barber v. State*, 863 N.E.2d 1199 (Ind. Ct. App. 2007), *trans. pending*. Because Davis's arguments are practically identical to those addressed in *Barber*, and because we fully agree with *Barber*'s reasoning and result,[3] we quote from that opinion at length, substituting Davis's information for Barber's where appropriate:

> We first note that while [Davis] was sentenced in 2006, he committed his offenses [in July 2004], before Indiana Code § 35-50-2-1.3 came into effect on April 25, 2005. *See* P.L. 71-2005, § 5. Courts generally must sentence defendants under the sentencing statutes in effect at the time the defendant committed the offense. *Jacobs v. State*, 835 N.E.2d 485, 491 n.7 (Ind. 2005). However, an exception to the general rule exists. The doctrine of amelioration provides that "a defendant who is sentenced after the effective date of a statute providing for more lenient sentencing is entitled to be sentenced pursuant to that statute rather than the sentencing statute in effect at the time of the commission or conviction of the crime." *Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997) (quoting *Lunsford v. State*, 640 N.E.2d 59, 60 (Ind. Ct. App. 1994)). In order to determine whether Indiana Code § 35-50-2-1.3 applies to [Davis's] sentencing, we must first determine whether it is ameliorative.
>
> Two panels of this Court have addressed this issue and reached different results. In *White v. State*, 849 N.E.2d 735 (Ind. Ct. App. 2006), *reh'g denied*, *trans. denied*, the defendant was convicted of murder and attempted murder, and the trial court sentenced him to consecutive maximum terms of sixty-five years for murder and fifty years for attempted murder. On appeal, the defendant argued that under Indiana Code § 35-50-2-1.3, the trial court was required to use advisory sentences in imposing consecutive sentences. This Court held:
>
> > Indiana Code § 35-50-2-1.3 instructs: "In imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]" We conclude that when the General

[3] The author of this opinion was a member of the unanimous panel that decided *Barber*.

> Assembly wrote "appropriate advisory sentence," it was referring to the total penalty for "an episode of criminal conduct," which, except for crimes of violence, is not to exceed "the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." *See* Ind. Code § 35-50-1-2(c).[4] In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the "appropriate advisory sentence" for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose consecutive sentences, and therefore, is not ameliorative.

849 N.E.2d 735, 743 (Ind. Ct. App. 2006). White, like [Davis], committed his offenses before the effective date of Indiana Code § 35-50-2-1.3 but was sentenced after. Because we concluded that the statute is not ameliorative, it did not apply to White's sentencing.

Recently, another panel of this Court expressly disagreed with *White* in *Robertson v. State*, 860 N.E.2d 621 (Ind. Ct. App. 2007), *trans. pending*.[5] In *Robertson*, the defendant was convicted of Class D felony theft, and the trial court imposed a sentence of two years. The trial court ordered the sentence "to be served consecutive to Robertson's sentence in Hendricks County for possession of methamphetamine." *Id*. at 622. Robertson appealed, arguing that Indiana Code § 35-50-2-1.3 "requires the trial court to impose the advisory sentence for [his] consecutive sentence." *Id*. at 623-24. This Court stated:

> Our concern with the analysis in *White* is that (1) it renders the language in IC 35-50-2-1.3 surplusage since the consecutive sentencing statute, IC 35-50-1-2, clearly limits the total of the consecutive sentences for non-violent offenses to the advisory sentence for the next highest class of felony; and (2) nothing in the advisory sentencing statute, , limits its application to non-violent offenses. Although the *White* decision argues that the legislature could not have intended the results the statute is capable of generating, the argument is moot "'[w]hen the language of the statute is clear and unambiguous.'" *White*, 849

[4] As the trial court observed in its sentencing statement, child molesting is a crime of violence pursuant to Indiana Code Section 35-50-1-2(a)(10).

[5] Our supreme court granted the State's petition for transfer in *Robertson* on April 17, 2007.

> N.E.2d at 742-43 (quoting *Woodward v. State*, 798 N.E.2d 260, 262 (Ind. Ct. App. 2003)), *trans. denied*. We hold that the advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and imposes a separate and distinct limitation on a trial court's ability to deviate from the advisory sentence for any sentence running consecutively. We further hold that the ameliorative nature of the statute must be extended to those individuals who committed an offense before the statute was in effect and were sentenced thereafter. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997). IC 35-50-2-1.3IC 35-50-2-1.3

Id. at 624-25. The Court remanded the case to the trial court with instructions to impose the advisory sentence of one-and-a-half years for Robertson's Class D felony theft conviction. *Id*. at 625. The State has petitioned for transfer in *Robertson*.

We will adhere to the *White* panel's interpretation of Indiana Code § 35-50-2-1.3. We write here to add two observations that support that interpretation.

First, we do not agree with the *Robertson* panel that the *White* panel's interpretation of Indiana Code § 35-50-2-1.3 renders the language of that statute "surplusage." *Id*. at 624. The *White* panel *did* hold that Indiana Code § 35-50-2-1.3 "imposes no additional restrictions on the ability of trial courts to impose consecutive sentences" beyond those restrictions imposed by Indiana Code § 35-50-1-2. 849 N.E.2d at 743. However, Indiana Code § 35-50-2-1.3 serves another very important purpose.

In the wake of *Blakely v. Washington*, 542 U.S. 296 (2004), and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied*, 126 S. Ct. 525 (2005), our legislature transformed Indiana's sentencing scheme from a presumptive scheme to an advisory scheme. *See McMahon v. State*, 856 N.E.2d 743, 747 (Ind. Ct. App. 2006). Under the former presumptive scheme, a trial court was required to impose the "presumptive" sentence for a felony conviction unless the court found aggravating circumstances to enhance the sentence or mitigating circumstances to reduce the sentence. *See id*. at 746. Under the new advisory scheme, trial courts are generally *not* required to use an advisory sentence. *See* I.C. § 35-50-2-1.3 ("Except as provided in subsection (c), a court is not required to use an advisory sentence."). Because an advisory sentence is in most cases exactly that—advisory—the legislature included subsection (c) of Indiana Code § 35-50-2-1.3 to remind Indiana's trial courts of those statutory provisions that *do* require the "use" of an advisory sentence: (1) in imposing consecutive sentences in accordance with Indiana Code § 35-50-1-2; (2) in imposing an additional fixed term to an habitual offender under Indiana Code § 35-50-2-8; and (3) in imposing an additional fixed term to a repeat sexual offender under Indiana Code § 35-50-2-14.

We acknowledge that nothing in Indiana Code § 35-50-2-1.3(c) limits its application to any specific subsections of Indiana Code §§ 35-50-1-2, 35-50-2-8, and 35-50-2-14, but each of those statutes only includes one subsection that refers to advisory sentences. Indiana Code § 35-50-2-8(h) provides:

> The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

Indiana Code § 35-50-2-14(e) provides: "The court may sentence a person found to be a repeat sexual offender to an additional fixed term that is the advisory sentence for the underlying offense. However, the additional sentence may not exceed ten (10) years." Likewise, Indiana Code § 35-50-1-2(c) provides, in pertinent part:

> [E]xcept for crimes of violence, the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

We cannot ignore the message the legislature sent when it wrote Indiana Code § 35-50-2-1.3: trial courts are required to use advisory sentences only in those situations where another statute specifically requires it. Only Indiana Code §§ 35-50-1-2(c), 35-50-2-8(h), and 35-50-2-14(e) require the use of advisory sentences.

We make another observation regarding the *Robertson* panel's interpretation of Indiana Code § 35-50-2-1.3. The Court stated that "the trial court was not restricted from deviating from the advisory on the underlying offense, namely, [Robertson's] prior conviction in Hendricks County for possession of methamphetamine. *See* IC 35-50-2-1.3(c)(1)." 860 N.E.2d at 625. This proposition is based on the last sentence of Indiana Code § 35-50-2-1.3(c), which provides, "[T]he court is not required to use the advisory sentence in imposing the sentence for the underlying offense." The *White* panel had a different view of the meaning of that language:

> The last sentence of Indiana Code § 35-50-2-1.3(c), i.e., "the court is not required to use the advisory sentence in imposing the sentence for the underlying offense," is confusing. "Underlying offense" is a legal term of art that only applies to repeat offender sentencing enhancements, such as subsections (c)(2) and (c)(3), which deal with habitual offenders and repeat sexual offenders, respectively. When dealing strictly with consecutive sentences for distinct criminal violations, as under

> subsection (c)(1), there is no "underlying offense." Therefore, the last sentence of the statute can only apply to subsections (c)(2) and (c)(3).
>
> 849 N.E.2d at 741 n.5. Applying the *Robertson* Court's interpretation of the term "underlying offense" presents a difficult conceptual problem when applied to [Davis's] case. Which of [Davis's five child molesting] convictions is the "underlying offense"? The problem becomes more evident when applied to the facts of *White*. White was convicted of murder and attempted murder in the same cause. Under *Robertson*, how would the trial court have decided which offense was the "underlying offense"? Because we follow *White*, we need not worry about this question.

Id. at 1209-12 (footnotes omitted) (some alterations in *Barber*). In sum, we conclude that Davis is not entitled to retroactive application of Indiana Code Section 35-50-2-1.3 and that the trial court did not exceed its statutory authority in imposing consecutive enhanced sentences pursuant to Indiana Code Section 35-50-1-2.

Davis also contends that his enhanced sentences violate his Sixth Amendment rights as defined in *Blakely v. Washington*, 542 U.S. 296 (2004). Pursuant to *Blakely*, a trial court in a determinate sentencing system, such as the one in effect when Davis committed his crimes, "may enhance a sentence based only on those facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; [or] 3) when admitted by a defendant[.]" *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005).[6]

As indicated *supra*, the trial court enhanced Davis's sentences based on the following aggravating factors: (1) Davis was previously convicted of child molesting in January 1992

[6] At the time Davis committed his crimes, Indiana Code Section 35-50-2-4 stated in pertinent part, "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances." Indiana Code Section 35-50-2-6 stated in pertinent part, "A person who commits a Class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances."

and March 2006; (2) Davis violated a position of trust with the victim, J.C.; (3) J.C. is mentally challenged; (4) Davis fled the jurisdiction knowing that a warrant had been or was to be issued in this case; (5) Davis possessed materials regarding pedophilia when he was arrested in North Dakota; (6) Davis is a "fixated" pedophile who had "been given previous opportunities to seek treatment" and was unable to be rehabilitated; and (7) Davis poses a continued danger to the community. Tr. at 608-09.

Clearly, Davis's prior convictions for child molesting do not violate *Blakely* and thus are a valid aggravator. Davis says that he never admitted that he was in a position of trust with J.C. Nevertheless, as the State points out, Davis testified that he was good friends with Yott, J.C.'s mother; that he visited their home approximately thirty times and spent the night approximately a dozen times; that J.C. spent the night at his home approximately seven or eight times; and that he took J.C. on errands and helped him fix his bike and do other odd jobs. *Id*. at 366-78. We conclude that these facts are sufficient to support the trial court's determination that Davis was in a position of trust with J.C. and therefore that this aggravator does not violate *Blakely*. *See Trusley*, 829 N.E.2d at 927 (upholding trial court's finding of position of trust aggravator based on defendant daycare provider's admissions: "This was an appropriate legal observation about properly established facts and constituted a legitimate aggravating circumstance.").

Davis notes that he did not admit that J.C. is mentally challenged. Davis did admit, however, that he absconded after receiving a call from Detective Harpenau. Davis claimed that he initially believed that Yott had accused him of rape, but he acknowledged that he later called his mother, who told him that the police wanted to talk with him about J.C.'s

molestation allegations. Davis also admitted that he fled to North Dakota and got a driver's license in his brother's name because he wanted to avoid detection. Although Davis did not specifically admit to being aware that a warrant had been issued, we believe that the trial court properly enhanced Davis's sentence based on his admissions regarding his flight during the investigation of this case.

Davis admitted to possessing materials on pedophilia, which apparently related to the addictive nature of the disorder. Tr. at 394. Davis claims that the trial court misconstrued this evidence and self-servingly claims that "[i]f anything, this evidence would tend to shed positive light on [Davis], as it evidenced his attempt to control his impulses." Appellant's Br. at 26. We agree with the State that "[i]f anything, the fact that [Davis] was trying to 'self-treat' his pedophilia rather than seeking professional help is aggravating in nature because it shows that [Davis] was refusing to fully address his problem[.]" Appellee's Br. at 20 n.3.

Finally, Davis correctly observes that he never admitted that he had previous opportunities to reform, is unable to be rehabilitated, and is a danger to the community. We believe that while the trial court's comments are legitimate observations about Davis's demonstrated proclivity for child molesting, they cannot serve as separate aggravating circumstances. *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005).

Given that four aggravating factors are valid pursuant to *Blakely*[7] and that the trial court found no mitigating factors, we find no grounds for overturning the sixty-eight-year sentence that Davis received for five counts of child molesting and for being a repeat sexual offender. We therefore affirm.[8]

Affirmed.

SULLIVAN, J., concurs with separate opinion.

SHARPNACK, J., concurs as to Issue I, and concurs in result as to Issue II.

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM C. DAVIS,)

[7] In light of this determination, we need not address the State's argument that "[t]he existence of any one factor that is valid under *Blakely* removes any Sixth Amendment issue that might otherwise exist." Appellee's Br. at 15 (citing, *inter alia*, *Cleveland v. Alaska*, 143 P.3d 977 (Alaska Ct. App. 2006)).

[8] Davis claims that he received a 120-year sentence "in this cause" and characterizes it as inappropriate pursuant to Indiana Appellate Rule 7(B). Appellant's Br. at 15; *see* Ind. Appellate 7(B) ("The 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."). We reject Davis's claim that he received a 120-year sentence. The trial court in this cause imposed a sentence of sixty-eight years, to be served consecutive to a fifty-two-year sentence imposed in another cause. Davis's appropriateness argument is based solely on his contention that he received the "maximum possible sentence[.]" Appellant's Br. at 16. Davis is mistaken, in that he could have been sentenced to a maximum of 176 years for three class A felonies, two class C felonies, and a repeat sexual offender determination. *See* Ind. Code § 35-50-1-2 (defining child molesting as crime of violence with no restriction on consecutive sentences); Ind. Code § 35-50-2-4 (fifty-year maximum for class A felony); Ind. Code § 35-50-2-6 (eight-year maximum for class C felony); Ind. Code § 35-50-2-14 (ten-year maximum for repeat sexual offender enhancement). Consequently, we do not address Davis's appropriateness argument, except to say that his past child molesting convictions alone justify a lengthy sentence in this case.

Appellant-Defendant,	)	
vs.	)	No. 82A01-0607-CR-289
STATE OF INDIANA,	)	
Appellee.	)	

SULLIVAN, Judge, concurring

I fully concur as to Part I. In doing so I necessarily retreat from the position taken in Knotts v. Knotts, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998), trans. denied. In that opinion I erred in assuming that the requirement that the recorded statement be made freely, voluntarily and without duress was applicable to non-custodial statements as well as to custodial statements. In this regard I am persuaded by the cases cited herein, and more particularly McCollum v. State, 582 N.E.2d 804, 811 (Ind. 1991).

I also fully concur as to Part II.