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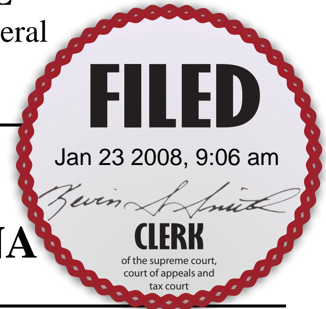

IN THE COURT OF APPEALS OF INDIANA

TIMOTHY L. GARLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 42A04-0707-CR-384
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry L. Biddinger Gregg, Judge
Cause No. 42C01-0502-FB-35

January 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Timothy L. Garland appeals his conviction and sentence for class B felony attempted vicarious sexual gratification. We affirm in part and remand in part.

Issues

Garland raises five issues, which we restate as follows:

I. Whether he waived review of the trial court's denial of his motion for discharge;

II. Whether the trial court abused its discretion by admitting his statement to police;

III. Whether the trial court abused its discretion by rejecting his proposed final jury instruction defining "attempt";

IV. Whether the evidence was sufficient to support his conviction; and

V. Whether his twenty-year sentence is appropriate in light of the nature of the offense and his character.

Facts and Procedural History

In June 2004, forty-nine-year-old Garland lived in a house on 3rd Street in Vincennes, Indiana. James Ransom III, his girlfriend, and his three young children lived with Garland at the time. On June 20, 2004, Ransom arrived home from work earlier than usual because he wanted to celebrate Father's Day with his family. Ransom entered the back door quietly because he wanted to surprise his children. He heard his five-year-old son laughing. He heard Garland instructing the child to "be still … so she can do it." Tr. Vol. 9 at 30. Ransom then looked into the living room and saw Garland holding Ransom's son by the arm and Ransom's six-year-old daughter by the hand. His son's pants were pulled down and his penis was exposed. Ransom believed that Garland was "trying to make [his daughter] have oral

sex with [his son].” *Id*. at 31.

Ransom grabbed Garland and asked him what was going on. Garland stated that he was keeping the children from jumping between the couches. Ransom repeatedly punched Garland until Ransom’s girlfriend arrived. Then Ransom called the police.

The two children were interviewed by Indiana State Police Detective William George and a caseworker from the Indiana Department of Family and Children. According to Detective George, Ransom’s daughter stated that her brother “had his pants down and that she was going to put her mouth on her little brother[’]s penis.” *Id*. at 72. Ransom’s son made a similar statement to police. Detective George also took a statement from Garland several days after the alleged incident. Detective George had met with Garland twice before but had determined on those occasions that Garland was too intoxicated to provide a voluntary statement. Detective George instructed Garland to be sober for their third meeting, scheduled for June 30, 2004.

On that date, Detective George interviewed Garland in a police car outside Garland’s residence. Officer Charles Finnerty was also present during the interview. Garland smelled of stale smoke and alcohol but did not appear to be intoxicated. He denied drinking that morning. Officer Finnerty informed Garland of his Miranda rights prior to his audiotaped statement. During the statement, Garland acknowledged receiving Miranda warnings. The officers stopped the tape twice during the interview and did not re-Mirandize Garland when they resumed taping each time.

On February 15, 2005, the State charged Garland with class B felony attempted vicarious sexual gratification and class D felony child solicitation. The trial court set the

matter for trial on August 16, 2005. On July 6, 2006, Garland filed a motion for discharge, alleging that the State had violated his constitutional right to a speedy trial. On August 15, 2006, the trial court held a hearing on Garland's motion and then denied it.

On November 3, 2006, Garland filed a motion to suppress his taped statement to police. He alleged that the police failed to properly advise him of his Miranda rights and that he did not knowingly and voluntarily waive those rights. After hearing evidence on this issue, the trial court denied Garland's motion because "there is no question that [Garland] was properly [M]irandized before he was interviewed by police officers" and "he did not appear to be in an intoxicated state at the time of the interview." Tr. Vol. 6 at 40. The court also noted that the police were not required to restate the Miranda advisement following each break in the interview.

On November 15, 2006, the jury found Garland guilty as charged. At the sentencing hearing, the trial court vacated Garland's child solicitation conviction to avoid double jeopardy. The court noted Garland's lengthy criminal history as a significant aggravating factor and Garland's health problems as a mitigator. The court sentenced Garland to twenty years, the maximum statutory sentence for the class B felony of attempted vicarious sexual gratification.[1] Garland now appeals.

Discussion and Decision

I. Motion for Discharge

First, Garland argues that the trial court erred when it denied his motion for discharge

pursuant to Indiana Criminal Rule 4(C), which states in relevant part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar[.]

Although the State has an affirmative duty to bring the defendant to trial within one year, the time for trial is extended for delays caused by the defendant's own act or continuances had on the defendant's own motions. *Edwards v. State*, 854 N.E.2d 42, 49 (Ind. Ct. App. 2006). We review a trial court's ruling on a Rule 4 motion for discharge for an abuse of discretion.

Garland has waived this argument for our review. At the hearing on June 8, 2006, the trial court set the trial date for November 14, 2006, and Garland failed to object. When the trial court sets a trial date outside the one-year period contemplated in Criminal Rule 4(C), the defendant must alert the court and file a timely objection to avoid waiving his right to discharge. *Wheeler v. State*, 662 N.E.2d 192, 194 (Ind. Ct. App. 1996). He cannot "sit back and wait for the deadline to pass," as Garland clearly did here, having filed his motion for discharge two days after he claimed that the one-year period had expired. *Id.*

Waiver notwithstanding, Garland's argument would fail. This Court has held that as a general rule, "the determination of whether a delay caused by a defendant's evidence request is chargeable to the defendant for speedy trial purposes turns on whether the State was negligent or less than diligent in complying with the defendant's request." *C.L.Y. v. State*,

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[1] Pursuant to Indiana Code Section 35-50-2-5, "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten

816 N.E.2d 894, 902 (Ind. Ct. App. 2004). Garland notes that he sought three continuances in this case, two of which he claims were necessitated by the State's failure to respond in a timely manner to discovery requests.[2] Therefore, he contends, these periods of delay should be chargeable to the State for purposes of Indiana Criminal Rule 4(C). The State counters that because Garland requested the continuances, the resulting delays should be charged against him. We note that Garland failed to produce any evidence that the State was negligent or less than diligent in producing the requested information. Moreover, Garland did not seek to compel discovery at any time. Therefore, the trial court did not abuse its discretion in denying Garland's motion for discharge.

As for Garland's federal constitutional claim, the U.S. Supreme Court set out four factors to be evaluated in speedy trial cases. We must consider (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) the prejudice suffered by the defendant as a result of the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). As discussed above, the delays in this case were chargeable to Garland because he requested all four continuances and because there is no evidence that the State was negligent in failing to comply with his discovery requests. Also, Garland has failed to demonstrate prejudice as a result of the delay. For all the aforementioned reasons, we find no abuse of discretion in the trial court's denial of Garland's motion for discharge.

II. Motion to Suppress

Next, Garland contends that the trial court violated his Fifth Amendment rights by

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(10) years."

[2] Garland concedes that one continuance period of 133 days is chargeable to him.

admitting his statement to police.[3]

> [T]he Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no person shall be compelled in any criminal case to be a witness against himself. To protect this privilege against self-incrimination, the *Miranda* Court[4] held that a person who has been taken into custody or otherwise deprived of his freedom of action in any significant way must before being subjected to interrogation by law enforcement officers, be advised of his rights to remain silent, to have an attorney present during questioning, and be warned that any statement made may be used as evidence against him. Statements elicited in violation of this rule of law are generally inadmissible in the defendant's criminal trial. Waiver of the defendant's Miranda rights occurs when the defendant, after being advised of those rights and acknowledging an understanding of them, proceeds to make a statement without taking advantage of those rights. In addition to the required Miranda advisement, the defendant's self-incriminating statement must also be voluntarily given. In judging the voluntariness of the defendant's waiver of rights, we look to the totality of the circumstances to ensure that the defendant's self-incriminating statement was not induced by violence, threats, or other improper influences that overcame her free will. The State bears the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived her rights, and that the defendant's confession was voluntarily given.

Cox v. State, 854 N.E.2d 1187, 1193-94 (Ind. Ct. App. 2006) (citations omitted). On appeal, we will affirm a trial court's determination of voluntariness if there is substantial probative evidence to support the finding. *Griffith v. State*, 788 N.E.2d 835, 841 (Ind. 2003). We will not weigh the evidence. *Id*. We review a trial court's admission of evidence for an abuse of discretion. We do not reweigh the evidence, and we consider the uncontested evidence favorable to the defendant. *Widduck v. State*, 861 N.E.2d 1267, 1268 (Ind. Ct. App. 2007).

Garland alleges that he did not voluntarily waive his Miranda rights because he was

[3] Garland states that he is appealing the trial court's denial of his motion to suppress his statement to police. However, because this is not an interlocutory appeal, the issue is more appropriately framed as whether the trial court abused its discretion by admitting his statement to police. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003).

intoxicated when he made his statement to police. Although intoxication may be a factor in determining voluntariness, it is only when an accused is so intoxicated that he is unconscious as to what he is saying that his confession is inadmissible. *Carter v. State*, 490 N.E.2d 288, 291 (Ind. 1986). We note that Detective George testified that he had decided not to take Garland's statement on two prior occasions because he believed Garland to be intoxicated. Detective George stated that on June 30, 2004, he went forward with the interview because "it didn't appear [that Garland] had been drinking." Tr. Vol. 9 at 76. Garland answered Detective George's questions clearly and correctly and did not appear to be impaired in any way. *Id*. For these reasons, it was within the trial court's discretion to determine that Garland's statement was voluntary.

Garland also claims that his statement is inadmissible because police failed to repeat the Miranda warnings following each interruption in the taping. In a case with similar facts, our supreme court found that readvisements were unnecessary. *See Ogle v. State*, 698 N.E.2d 1146, 1148-49 (Ind. 1998). In that case, the defendant was brought to the police station for questioning. Prior to beginning the interview, the police advised the defendant of his Miranda rights and obtained a signed waiver. After some questioning, the police stopped the interrogation to investigate part of the defendant's story. Less than an hour later, the questioning resumed, and police did not readvise the defendant of his Miranda rights. Our supreme court stated,

> Here it is clear that police acted in accordance with the dictates of *Miranda v. Arizona*…. Although it might be the better practice to reiterate such warnings after an interruption of questioning, a readvisement is only

[4] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

> necessary when the interruption deprived the suspect of an opportunity to make an informed and intelligent assessment of his interests. If the interruption is part of a continual effort to investigate the suspect, then the suspect's interests remain fairly clear.

Id. at 1149 (citations omitted).

Similarly in the instant case, the breaks were not lengthy, as the entire interview took place in less than one hour inside Detective George's police car. The officers testified that they did not threaten or coerce Garland during these breaks. Garland claims that the fact that he made "increasingly incriminating statements" after each break in the interview proves that the interruptions deprived him of an opportunity to make an informed and intelligent assessment of his interests. Appellant's Br. at 30. We disagree. It is often the case that an interviewee initially denies involvement in a crime; then, as police challenge the accuracy or consistency of his statement, he reveals more and more information and may actually confess. The mere fact that Garland went from denying involvement to confessing during the course of the fifty-minute interview does not, in and of itself, prove that his Miranda rights were violated. The trial court did not abuse its discretion by admitting Garland's statement to police.

III. Final Jury Instructions

Garland also contends that the trial court erred by rejecting his proposed final jury instruction regarding attempt.

> The trial court has broad discretion in the manner of instructing the jury and we review its decision thereon only for an abuse of that discretion. We review the refusal of a tendered instruction by examining whether the tendered instruction correctly states the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the tendered instruction is covered by other given instructions.

Snell v. State, 866 N.E.2d 392, 395-96 (Ind. Ct. App. 2007) (citations omitted).

Garland's proposed instruction stated as follows:

> The law provides that it is no defense that, because of misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.
>
> However, the mere intention to commit a specific crime does not amount to an attempt. In order to convict the Accused of an attempt, you must find beyond a reasonable doubt that the Accused intended to commit the crime charged, and that he took some action which was a substantial step toward the commission of that crime.
>
> Mere preparation does not constitute a "substantial step" toward committing a crime. The substantial step element of attempt requires proof of an overt act beyond mere preparation, and in furtherance of the intent to commit the crime.
>
> What constitutes a substantial step is to be determined from all the circumstances of the case, but the conduct must strongly corroborate the firmness of the accused's criminal intent. Whether a substantial step toward commission of the crime has been taken is a question of fact to be decided by you, the jury, and must be proven beyond a reasonable doubt by the state.

Appellant's App. at 139.

The trial court rejected Garland's proposed instruction and provided the following instruction on attempt:

> Attempt is defined by law as follows:
>
> I.C. 35-41-5-1 ATTEMPT: A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted.
>
> ….
>
> Before you may convict the defendant, the State must have proved each of the following:
>
> The defendant:
> 1. knowingly or intentionally
> 2. took a substantial step toward

> 3. directing, aiding, inducing, or causing
> 4. a child under fourteen (14) years of age
> 5. to engage in deviate sexual conduct with another person
> 6. with the intent to arouse or satisfy the sexual desires of a child or the older person
> 7. the defendant being eighteen (18) years of age or older.
>
> If the state failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of Attempted Vicarious Sexual Gratification.
>
> If the State did prove each of these elements beyond a reasonable doubt, you must find the defendant guilty of Attempted Vicarious Sexual Gratification, a Class B felony.

Id. at 151-52.

The trial court's instruction correctly restates the elements of attempt as set forth in Indiana Code Section 35-41-5-1(a). Garland's proposed instruction includes language from subsection (b) of that statute, which states that impossibility is not a valid defense to an attempt charge. In this case, there was no evidence to support an instruction on impossibility. Further, Garland's proposed instruction includes the statements that "the mere intention to commit a specific crime does not amount to an attempt[,]" that "mere preparation does not constitute a 'substantial step' toward committing a crime[,]" and that the defendant's substantial step must "strongly corroborate the firmness of the accused's criminal intent." *Id*. at 139. Again, the evidence in this case does not support giving an instruction regarding the concepts of mere intention and mere preparation, considering that Garland, in his statement to police, admitted to actually directing the young girl to place her mouth on her brother's penis. For these reasons, the trial court did not abuse its discretion in rejecting Garland's proposed instruction.

IV. Sufficiency of the Evidence

Garland also claims that the State's evidence is insufficient to sustain his conviction. Our standard of review for sufficiency of the evidence is well settled. "Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects the jury's exclusive province to weigh conflicting evidence." *McHenry v. State*, 820 N.E.2d 124, 125 (Ind. 2005) (citation and quotation marks omitted). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

The gist of Garland's argument is that Ransom's testimony is unreliable because it conflicted in parts with his daughter's testimony and because Garland's prior attempts to have Ransom's family removed from the home provided Ransom "a major motivation for seeing Garland go to jail." Appellant's Br. at 33. Clearly, Garland is asking us to reweigh the evidence and judge the credibility of witnesses, which we simply cannot do. We note also that his sufficiency claim is dependent upon his prior argument that his statement to police is inadmissible, an argument that we rejected above. Considering only the evidence most favorable to the verdict, we conclude that there is substantial evidence of probative value to support Garland's conviction.

V. Appropriateness of Sentence

Garland asks us to review his sentence pursuant to Indiana Appellate Rule 7(B), which provides that we "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 must exercise deference with regard to a trial court's sentencing decision, and the defendant bears the burden of persuading us that his sentence is inappropriate. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007) (clarifying that appellate courts' review of sentences need not exercise "great restraint" nor be "*very* deferential" to the trial court, as often stated in earlier cases).

As noted by the trial court at sentencing, Garland does have a lengthy criminal history dating back more than thirty years. According to his presentence investigation report, most of his known convictions—including approximately nine felonies—are for property crimes, such as theft or criminal conversion, or alcohol-related crimes. It appears that in 1979, he was convicted of child molestation as a class C felony, a crime for which he served two years. This lengthy history also includes many arrests which occurred while Garland was on probation or while other cases were pending against him. Clearly, he demonstrates a lack of respect for the law as well as a resistance to rehabilitation.

As for the nature of Garland's crime, however, we must agree with him that the evidence does not support the trial court's imposition of the maximum twenty-year sentence. Our supreme court has noted that "the maximum possible sentences are generally most appropriate for the worst offenders." *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002). As the court explained,

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id. (citations omitted).

Unfortunately, we are frequently called upon to review the convictions of those who commit sex crimes against children. While we recognize the seriousness of Garland's crime, we cannot say that it falls within the class of the worst offenses of this type. *Cf. Haddock v. State*, 800 N.E.2d 242 (Ind. Ct. App. 2003) (affirming defendant's sentence of 326 years, including two consecutive twenty-year terms for two class B felony counts of vicarious sexual gratification, where defendant committed "atrocities" of "horrific" sexual abuse upon two small children over a period of years). There was no evidence that Garland threatened or used violence against his young victims. Moreover, this was a single incident that lasted a matter of seconds. Again, we do not intend to diminish the importance of this incident to the victims and their family, but we cannot categorize this offense as one of the worst of its type. Therefore, we hereby reduce Garland's sentence to sixteen years, with fourteen years executed in the Indiana Department of Correction and two years suspended to probation. We remand this case to the trial court with instructions to enter this revised sentence.

Affirmed in part and remanded in part.

DARDEN, J., concurs.

MAY, J., concurs in part and dissents in part.

IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY L. GARLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 42A04-0707-CR-384
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

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

I fully concur with the majority as to issues I, II, III and IV, but respectfully disagree that Garland's sentence should be reduced from twenty years to sixteen. Imposition of the maximum sentence was well within the trial court's broad discretion, in light of Garland's lengthy record of felony convictions, his commission of crimes while on probation, and what the majority aptly characterizes as Garland's "resistance to rehabilitation."[1] Garland's character and the nature of his offense provide ample support for his twenty-year sentence.

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[1] Some twenty-five years ago, Garland's criminal record was already so substantial that our Supreme Court upheld the determination he was an habitual offender:

> This Court has long recognized that the purpose of the habitual offender statute is to more severely penalize those persons whom prior sanctions have failed to deter from committing additional felonies. [Garland] was previously convicted of arson and child molesting. Given the purpose of our habitual offender statute we do not find that the penalty imposed is so grossly disproportionate to the offense committed as to constitute cruel and unusual punishment.

Garland v. State, 444 N.E.2d 1180, 1184 (Ind. 1983).