MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert A. Kissinger,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 24, 2023

Court of Appeals Case No.
22A-CR-2647

Appeal from the
DeKalb Circuit Court

The Honorable
Kurt B. Grimm, Judge

Trial Court Cause No.
17C01-2002-F1-1

Memorandum Decision by Judge Vaidik
Judges Tavitas and Foley concur.

Vaidik, Judge.

Case Summary

[1] Robert A. Kissinger appeals his conviction and thirty-year sentence for Level 1 felony child molesting. We affirm.

Facts and Procedural History

[2] In January 2017, Kissinger and his wife moved from Ohio to a farmhouse in DeKalb County, Indiana. At the Indiana house, Kissinger's wife had parenting time with her daughter from a prior marriage, K.C. In October 2018, K.C. reported that Kissinger had molested her numerous times since the move, while she was twelve and thirteen years old. The State charged Kissinger with Level 1 felony child molesting, alleging that he knowingly or intentionally performed or submitted to sexual intercourse or "other sexual conduct" ("an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object," Ind. Code § 35-31.5-2-221.5) with K.C. between February 1, 2017, and October 31, 2018.

[3] A jury trial was held in July 2022. K.C. testified that on several occasions after the move from Ohio to Indiana, Kissinger, whom she calls "Bert," "fingered" her and had her "suck" his penis. Tr. Vol. II pp. 188-209. K.C. said Kissinger told her not to tell anybody about the molestation because he would "go to jail for a long time[.]" *Id.* at 209. She also testified, without objection by Kissinger, that Kissinger started molesting her in Ohio, before the move. *Id.* at 195-96.

[4] Sara Coburn, a sexual-assault nurse examiner, testified about her examination of K.C. in October 2018. The State moved to admit Nurse Coburn's written report into evidence. Kissinger objected, arguing that the report contained hearsay and "vouching testimony" and that it was more prejudicial than probative under Evidence Rule 403. Tr. Vol. III p. 10. The trial court overruled Kissinger's objection and admitted the report.

[5] The jury found Kissinger guilty, and the trial court sentenced him to thirty years in the Department of Correction (DOC).

[6] Kissinger now appeals.

Discussion and Decision

I. Admission of Evidence

[7] Kissinger first contends the trial court erred by admitting Nurse Coburn's report. We review the admission of evidence for abuse of discretion affecting the defendant's substantial rights. *Zanders v. State*, 118 N.E.3d 736, 741 (Ind. 2019).

[8] Kissinger notes that Nurse Coburn's report includes the following statements by K.C.: "I was in the Ohio house when it started and then it continued when we moved to [Indiana]" and "It was going on for about 5 years." Ex. 4. Kissinger argues that these statements made the report inadmissible under Evidence Rules 404(b) and 403. Rule 404(b) provides, in relevant part, that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in

order to show that on a particular occasion the person acted in accordance with the character." Rule 403 provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

[9] At trial, Kissinger objected to the report based on Rule 403 but not 404(b). Therefore, he waived any 404(b) argument for appeal. *See Halliburton v. State*, 1 N.E.3d 670, 683 (Ind. 2013) (holding that 404(b) argument was waived where trial objection was limited to Rule 403). A defendant who fails to object to evidence at trial can argue on appeal that the admission of the evidence constituted fundamental error, *id.* at 678, but Kissinger has not made such an argument.

[10] Regarding Rule 403, Kissinger contends "the probative value of a report containing uncharged allegations of molestation that occurred in a separate state before the charged crimes are alleged to have occurred is substantially outweighed by unfair prejudice to Kissinger." Appellant's Br. p. 14. But he doesn't explain why. We believe the danger of unfair prejudice was minimal. K.C. had already testified that Kissinger molested her for multiple years in Indiana, and the report doesn't include any specific allegations of what molestation occurred in Ohio.

[11] Moreover, even if the trial court erred by admitting the report, the error was harmless. Before the report was admitted, K.C. testified—without objection by

Kissinger—that the molestation started in Ohio. Tr. Vol. II pp. 195-96. Therefore, the challenged statements from Nurse Coburn's report were cumulative of K.C.'s own trial testimony. "The improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before the trier of fact." *Hunter v. State*, 72 N.E.3d 928, 932 (Ind. Ct. App. 2017), *trans. denied*. In addition, the State didn't question Nurse Coburn about the challenged part of the report, and it didn't mention any Ohio molestation in its closing argument.

[12] Kissinger has not shown that the trial court abused its discretion by admitting Nurse Coburn's report, and even if it did, the error was harmless.

II. Sufficiency of Evidence

[13] Next, Kissinger argues the evidence is insufficient to support his conviction. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We will only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[14] Kissinger first notes that (1) K.C. didn't disclose the molestation while it was occurring, (2) there is no "forensic evidence" of molestation (e.g., DNA or genital injuries), (3) other people were home when the molestation allegedly

occurred, "making it unlikely that Kissinger would have committed the acts," and (4) "there is only one event where K.C. could remotely put a date on when it occurred." Appellant's Br. pp. 17-18. But these are just requests for us to reweigh the evidence and judge witness credibility, which we do not do. *See Willis*, 27 N.E.3d at 1066. Also, it is well established that "[t]he testimony of a sole child witness is sufficient to sustain a conviction for molestation." *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012), *reh'g denied*.

[15] Kissinger also argues that "the State failed to present sufficient evidence that Kissinger is the person who had other sexual conduct with K.C." Appellant's Br. p. 18. Specifically, he asserts:

> The prosecutor asked K.C. at the trial if the person she called Bert while testifying was present in the courtroom. K.C. said "yes" and when asked to identify him, she said "there." The prosecutor asked no further questions and even said "I don't have any further questions." The record is absolutely silent as to who was identified by K.C. At least twenty other people, if not more, were likely present at the time K.C. said "there." Based off the record, K.C. could have identified Kissinger's attorney, members of the gallery, members of the jury, or even court staff.

Id. at 18-19 (citations omitted). But the transcript doesn't just indicate that K.C.'s answer was "there." The transcript includes a parenthetical after K.C.'s answer, as follows: "There. (She points and identifies)." Tr. Vol. II p. 222. We are confident the court reporter's intention was to indicate that K.C. pointed at and identified Kissinger. More importantly, K.C. was clear throughout her testimony that it was "Bert"—her mother's husband—who molested her, *id.* at

188-222, and Kissinger doesn't dispute that he is married to K.C.'s mother or that K.C. calls him "Bert." The evidence is sufficient to identify Kissinger as the perpetrator and to support his conviction.

III. Sentence

[16] Finally, Kissinger asserts his sentence is inappropriate and asks us to reduce it. Indiana Appellate Rule 7(B) provides that an appellate 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." The court's role under Rule 7(B) is to "leaven the outliers," and "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019). "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[17] The trial court sentenced Kissinger to thirty years in the DOC, the advisory sentence for Level 1 felony child molesting. *See* I.C. § 35-50-2-4. A defendant claiming an advisory sentence is inappropriate "bears a particularly heavy burden," since the advisory sentence "is the starting point our General

Assembly has selected as an appropriate sentence for the crime committed[.]" *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*; *see also Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013) ("We are unlikely to consider an advisory sentence inappropriate."), *trans. denied*. Kissinger has not carried that "particularly heavy burden."

[18] Kissinger's argument focuses primarily on his character. He notes that he has no criminal history, he had a full-time job until he was incarcerated, he financially supports a young son, and he has the support of some of his family. But those positive facts must be balanced against the nature of Kissinger's offense. K.C. testified that Kissinger molested her not just once but numerous times over nearly two years. K.C. also said Kissinger pressured her not to tell anybody about the molestation. And Kissinger violated a position of trust. K.C. testified that Kissinger was "like a father" to her, that her relationship with him was better than her relationship with her biological parents, and that she "thought he was going to be there to protect" her. Tr. Vol. II p. 189. Given this evidence, we cannot say Kissinger's advisory sentence is an outlier.

[19] Affirmed.

Tavitas, J., and Foley, J., concur.