## MEMORANDUM DECISION




ATTORNEY FOR APPELLANT

R. Patrick Magrath
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Everett James McGill,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

April 29, 2022

Court of Appeals Case No. 21A-CR-1062

Appeal from the Jefferson Circuit Court

The Honorable Donald J. Mote, Judge

Trial Court Cause No. 39C01-2009-F4-1082

**Pyle, Judge.**

## Statement of the Case

[1] Everett James McGill ("McGill") appeals, following a jury trial, his conviction for Level 4 felony attempted sexual misconduct with a minor[1] and the trial court's imposed sentence. McGill argues that: (1) the trial court abused its discretion when it admitted evidence; (2) there was insufficient evidence to support his conviction; and (3) his sentence is inappropriate. Concluding that the trial court did not abuse its discretion when it admitted evidence, that the evidence is sufficient to support McGill's conviction, and that the sentence is not inappropriate, we affirm the trial court's judgment.

[2] We affirm.

## Issues

1. Whether the trial court abused its discretion when it admitted evidence.

2. Whether there is sufficient evidence to support McGill's conviction.

3. Whether McGill's sentence is inappropriate.

[1] IND. CODE § 35-42-4-9; I.C. § 35-41-5-1.

## Facts

[3] In September 2020, the Madison Police Department created an online social media account for a fictitious fourteen-year-old girl named Emily Wyatt ("Wyatt"). Madison Police Department Detective Kyle Cutshaw ("Detective Cutshaw") operated the Wyatt profile. McGill, while operating a social media account under the name Unk Aaron, began messaging Wyatt on September 3, 2020. McGill continued messaging Wyatt from September 3 to September 11. McGill mentioned that he lived in Seymour, Indiana with his mother.

[4] McGill repeatedly referred to Wyatt as kid, kiddo, babe, and baby. At one point, McGill referred to Wyatt as a young, attractive schoolgirl. McGill also asked Wyatt sexual questions. On September 10, about a week after McGill had begun messaging Wyatt, McGill asked Wyatt about her sexual experiences with boys and girls. McGill also asked if Wyatt had "explored any sexual positions or with oral sex." (Tr. Vol. 2 at 165). After Wyatt responded that she had not had oral sex, McGill responded that he "could maybe arrange that." (Tr. Vol. 2 at 165). Wyatt mentioned that she was fourteen years old at least twice during these conversations.

[5] The following day, McGill asked Wyatt to talk with him on the phone before making arrangements to meet. Detective Cutshaw, the operator of the Wyatt profile, asked Madison Police Department Officer Nichole Midgett ("Officer Midgett") to pretend to be the fictitious Wyatt and phone McGill from the Wyatt profile. During McGill and Officer Midgett's phone conversation, McGill told Officer Midgett, "no offense, but I'm not going to prison for you or any other girl."

(Tr. Vol. 2 at 178). Officer Midgett and McGill planned to meet at a gas station in Madison later that night. McGill told Officer Midgett to wear a black dress and put a flower in her hair so that he could identify her. He also asked Officer Midgett to purchase a candy bar at the gas station. McGill told Officer Midgett that he would send a thumbs up emoji when he was leaving for Madison and another thumbs up emoji when he arrived at the gas station.

[6] Madison police officers began investigating McGill's Unk Aaron profile as soon as McGill had begun messaging Wyatt. Officers were able to match the profile photo of Unk Aaron to a photograph of McGill. Officers then drove to McGill's home in Seymour, Indiana and made note of a maroon Chevy minivan parked outside the house.

[7] On the night of September 11, McGill sent a thumbs up emoji to Wyatt, signaling that he had left for Madison. A couple hours later, McGill sent a subsequent thumbs up emoji to indicate that he had arrived at the gas station. After receiving the second thumbs up emoji, Detective Cutshaw, Madison Police Department Detective Ricky Harris ("Detective Harris"), and a few other officers arrived at the gas station in Madison to arrest McGill. Officers, who observed McGill while standing across the street, watched McGill walk to the gas station. Officers observed that McGill walked to the gas station without any unusual behavior. Detective Harris, after removing his gun, badge, and radio, followed McGill into the gas station. Detective Harris informed the other officers that he would remove his hat if he confirmed that McGill was the man whom they believed operated the Unk Aaron profile. While in the gas station, Detective Harris watched McGill

make a purchase at the counter before leaving. McGill then walked back to the passenger side of his maroon Chevy minivan. Detective Harris removed his hat, and officers arrested McGill. At no point prior to McGill's arrest did McGill appear to be incoherent.

[8] Officers handcuffed McGill and sat him on the curb next to his vehicle. McGill then slumped over, started slurring his speech, and went limp. Detective Cutshaw immediately read McGill his *Miranda* rights. Detective Cutshaw asked McGill if he understood his rights, and McGill nodded in the affirmative. Detective Cutshaw asked McGill if he went by Unk Aaron on social media, and McGill responded that his sister had set up the account for him. Detective Cutshaw also asked McGill if he knew Emily Wyatt, and McGill responded that he was "just chatting with some girl." (Tr. Vol. 2 at 161). McGill denied coming to Madison to meet with Wyatt. Officers removed McGill's cellphone from his person and placed it on his vehicle. When officers phoned the Unk Aaron profile, McGill's cellphone began to ring. Additionally, officers found a box of condoms on McGill's person.

[9] Officers searched McGill's minivan after his arrest. They found a recliner in the back of the vehicle instead of a row of seats. Officers also found a cooler with food and drinks as well as a large knife in the vehicle. The maroon minivan had a license plate from Seymour, Indiana, and it was registered to McGill's mother, whom he lived with. Officers also located a temporary identification card that listed McGill's name and address in Seymour, Indiana.

[10] The State charged McGill with Level 4 felony attempted sexual misconduct with a minor and Level 4 felony child solicitation. The State also alleged that McGill was an habitual offender. McGill filed a motion to suppress, seeking to suppress McGill's post-arrest statements, which were captured by officer's bodycam footage. Specifically, McGill argued that he had been incapable of voluntarily, knowingly, and intelligently waiving his *Miranda* rights "[d]ue to [his] physical, physiological, mental, emotional, educational and/or psychological state, capacity, and condition[.]" (App. Vol. 2 at 66). Thus, according to McGill, his post-arrest statements should be excluded from evidence. The trial court held a hearing and denied McGill's motion to suppress.

[11] The trial court held a jury trial in March 2021. At the jury trial, officers testified to facts as set forth above. When the State moved to admit the bodycam footage of McGill's post-arrest statements, McGill stated, "I renew my previous objection." (Tr. Vol. 2 at 161). The trial court admitted the bodycam footage of McGill's post-arrest statements over his objection. Detective Cutshaw testified to the statements McGill had made after being arrested, and McGill did not object to Detective Cutshaw's testimony. Additionally, Officer Midgett testified that the voice she heard on the audio call with the Unk Aaron profile matched McGill's voice. Madison Police Department Detective Shawn Scudder ("Detective Scudder") testified that the maroon minivan at the gas station matched the description of the maroon minivan seen by police at McGill's home in Seymour. Both Detective Scudder and Detective Harris testified that McGill matched the photo on the Unk

Aaron profile. At the conclusion of the jury trial, the jury found McGill guilty as charged. Thereafter, McGill admitted to being an habitual offender.

[12] At the sentencing hearing, the trial court found as an aggravating factor McGill's extensive criminal history. Specifically, McGill had a criminal history spanning thirty-eight years, including convictions for sex offenses, battery, theft, and involuntary manslaughter. Most recently, McGill had been convicted of Class C felony child molesting in 2014. The trial court noted that McGill "pose[d] a significant threat [of] continuous criminal endeavors if [McGill was] not incarcerated." (Tr. Vol. 3 at 5). The trial court also found as an aggravating circumstance that McGill had violated pre-trial release in another case at the time of this offense. Additionally, the trial court found as an aggravating circumstance McGill's lack of remorse. However, the trial court found McGill's cooperation in the habitual offender phase of the trial to be a slight mitigating circumstance. Ultimately, the trial court sentenced McGill to ten (10) years to be served in the Indiana Department of Correction ("the DOC") for his Level 4 felony attempted sexual misconduct with a minor conviction. The trial court vacated the Level 4 felony child solicitation conviction due to double jeopardy concerns. In addition, the trial court enhanced McGill's sentence by an additional eighteen (18) years for being an habitual offender. In total, the trial court sentenced McGill to the DOC for twenty-eight (28) years, none of which was suspended.

[13] McGill now appeals.

# Decision

[14] McGill argues that: (1) the trial court abused its discretion when it admitted evidence; (2) there is insufficient evidence to support his conviction; and (3) his sentence is inappropriate. We address each of his arguments in turn.

### 1. Admission of Evidence

[15] McGill first argues that the trial court abused its discretion when it admitted into evidence police bodycam footage of his post-arrest statements. Specifically, McGill argues that his statements made to the police were inadmissible because he had not made a knowing and voluntary waiver of his *Miranda* rights. The Fifth Amendment's privilege against self-incrimination applies to the states through the Fourteenth Amendment.[2] *Withrow v. Williams*, 507 U.S. 680, 689 (1993). When a defendant challenges the voluntariness of a statement under the United States Constitution, the State must prove by a preponderance of the evidence that the statement was voluntarily given. *Pruitt v. State*, 834 N.E.2d 90, 114 (Ind. 2005).

[16] When reviewing a challenge to the trial court's decision to admit the defendant's statements or confessions, we do not reweigh the evidence. *Moore v. State*, 143 N.E.3d 334, 340 (Ind. Ct. App. 2020). Rather, we examine the record for substantial probative evidence of voluntariness. *Id.* We examine the evidence

---

[2] McGill does not specify whether he argues voluntariness under the federal or state constitution. In the absence of a separate Indiana constitutional analysis, a defendant waives an Indiana Constitution claim. *Haviland v. State*, 677 N.E.2d 509, 514 n.2 (Ind. 1997) (finding Article 1, Section 14 claim waived for making no separate argument under that section). Thus, we only examine waiver under the federal constitution standard.

most favorable to the State, together with the reasonable inferences that can be drawn therefrom. *Malloch v. State*, 980 N.E.2d 887, 901 (Ind. Ct. App. 2012), *trans. denied*. If there is substantial evidence to support the trial court's conclusion, we will not set it aside. *Id.*

[17] The voluntariness of a defendant's statement is determined by examining the totality of the circumstances. *Luckhart v. State*, 736 N.E.2d 227, 229 (Ind. 2000). Factors to be considered are "'any element of police coercion; the length, location, and continuity of the interrogation; and the maturity, education, physical condition, and mental health of the defendant.'" *Weisheit v. State*, 26 N.E.3d 3, 18 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 680 (Ind. 2009)). "The critical inquiry is whether the defendant's statements were induced by violence, threats, promises or other improper influence." *Ringo v. State*, 736 N.E.2d 1209, 1212-13 (Ind. 2000).

[18] Here, our review of the totality of the circumstances reveals that officers testified that McGill appeared to be coherent at all times before the arrest. Upon hearing that he was being arrested, McGill slumped down and slurred his speech. After officers placed McGill on the curb, Detective Cutshaw immediately gave McGill his *Miranda* rights. Detective Cutshaw asked McGill if he understood his rights, and McGill nodded in the affirmative. Afterward, Detective Cutshaw briefly asked McGill a few questions, which McGill answered, before he was taken from the scene. Our review of the record reveals no use of violence, threats, promises, or improper influence to induce McGill's statements. Based on our analysis of the relevant factors, we conclude that the State proved by a

preponderance of the evidence that the statements McGill gave to police at the time of his arrest were voluntarily given.

[19] We further note that even if the trial court had abused its discretion in admitting into evidence the bodycam footage of McGill's post-arrest statements, any error was harmless. Statements obtained in violation of the United States Constitution and erroneously admitted are subject to harmless error analysis. *Anderson v.* State, 961 N.E.2d 19, 28 (Ind. Ct. App. 2012), *trans. denied*. We review a federal constitutional error de novo, and the error must be harmless beyond a reasonable doubt. *Id.* Any error caused by the admission of evidence is harmless if the evidence was cumulative of other, appropriately admitted, evidence. *Allen v. State*, 994 N.E.2d 316, 319 (Ind. Ct. App. 2013).

[20] McGill argues that his post-arrest statements in the bodycam footage is inadmissible. However, these same statements were properly admitted at trial through Detective Cutshaw's testimony. Specifically, Detective Cutshaw testified that he had asked McGill if he used the name Unk Aaron on social media, and McGill responded that his sister had set up the account for him. Detective Cutshaw also testified that he had asked McGill if he knew Emily Wyatt, and McGill responded that he was "just chatting with some girl." (Tr. Vol. 2 at 161). McGill did not object to Detective Cutshaw's testimony at trial nor does he argue on appeal that these statements are inadmissible. Thus, the officer's bodycam footage of McGill's post-arrest statements is merely cumulative of other properly admitted evidence.

**2. Sufficiency of the Evidence**

[21] McGill next argues that the evidence is insufficient to support his conviction. Specifically, McGill argues that there is insufficient evidence of identity. Our standard of review for sufficiency of the evidence claims is well settled. We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147. Identity testimony need not necessarily be unequivocal to sustain a conviction. *Heeter v. State*, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996).

[22] Our review of the record reveals that there is ample evidence of McGill's identity as the person who operated the Unk Aaron profile from which he sent messages to and arranged to meet with Wyatt, whom he believed to be a fourteen-year-old girl. The Unk Aaron profile photo matched McGill. The conversations McGill had with Wyatt included plans to meet at the Madison gas station at the time that McGill had arrived. Also, Unk Aaron mentioned to Wyatt that he lived in Seymour, Indiana, which is where McGill lived. Also, when officers made a call to the Unk Aaron profile, the phone McGill had on his person began to ring. Finally, Officer Midgett testified that the voice of Unk Aaron matched the voice of McGill. *See Jackson v. State*, 758 N.E. 2d 1030, 1036 (Ind. Ct. App. 2001), (holding that testimony of voice identification of the defendant, along with circumstantial

evidence of guilt, is sufficient evidence), *trans. denied*. The evidence of identity is sufficient to support McGill's conviction.

### 3. Inappropriate Sentence

[23] Finally, McGill contends that his twenty-eight-year sentence is inappropriate. He asks for a revision of his sentence that is more similar to the advisory sentence.

[24] 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). The principal role of a Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived correct result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008) (internal quotation marks omitted). 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." *Id.* at 1224. "Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation marks and citation omitted), *reh'g denied*.

[25] When determining whether a sentence is inappropriate, we acknowledge that 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.

McGill was convicted of Level 4 felony attempted sexual misconduct with a minor and his sentence was enhanced because he was found to be an habitual offender. A person who commits a Level 4 felony "shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years." I.C. § 35-50-2-5.5. A person found to be an habitual offender who is convicted of a Level 4 felony shall be sentenced to an additional fixed term of between "six (6) years and twenty (20) years[.]" I.C. § 35-50-2-8(i)(1). Here, the trial court imposed a sentence of ten years at the DOC for McGill's Level 4 felony attempted sexual misconduct with a minor and eighteen years for his habitual offender enhancement. The trial court sentenced McGill to a total of twenty-eight years at the DOC, which is below the maximum sentence.

[26] Turning first to the nature of the offense, we note that the nature of this crime is sinister. McGill, using a social media profile with a fake name, attempted to groom a person whom he believed to be a fourteen-year-old girl to engage in sexual acts with him. Specifically, McGill messaged Wyatt, steered the conversation towards sex, lavished compliments on her, and attempted to meet with Wyatt at a gas station in Madison. In preparation, McGill had purchased condoms, placed a recliner in his vehicle, collected food and water, a large knife, and a temporary identification card to drive the vehicle to Madison to meet with Wyatt. We agree with the trial court when it stated that "McGill's behavior makes this Court afraid for our community." (Tr. Vol. 3 at 6). The nature of the offense in no way merits a reduction of McGill's sentence.

[27] Turning to McGill's character, we note his criminal history to be troubling. McGill has a criminal history extending back thirty years, including convictions for sexual offenses, battery, and involuntary manslaughter. Most relevant to this offense, McGill has a 2014 conviction for child molesting. Furthermore, McGill violated the terms of his pre-trial release in another case at the time of this offense. Given the extensive list of previous criminal offenses, McGill has shown a failure to respond to previous attempts at rehabilitation.

[28] McGill has not convinced us that his twenty-eight-year sentence for his Level 4 felony attempted sexual misconduct with a minor conviction and habitual offender enhancement is inappropriate. Therefore, we affirm the sentence imposed by the trial court.

[29] Affirmed.

May, J., and Brown, J., concur.