MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Daniel Morgan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 26, 2023

Court of Appeals Case No. 23A-CR-260

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

The Honorable Barbara L. Crawford, Senior Judge

Trial Court Cause No. 49D30-2109-F1-29681

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Daniel Morgan was convicted of three counts of child molesting, one as a Level 1 felony and two as Level 4 felonies, and one count of child exploitation, a Level 5 felony. Morgan appeals and argues: (1) the trial court abused its discretion by admitting testimony regarding the transmission of the case from the investigating detective to the prosecutor's office; (2) the discrepancy between the trial court's oral sentencing statement and written sentencing order requires that we remand for correction of Morgan's sentence; and (3) Morgan's sentence is inappropriate.

[2] We agree that the discrepancy between the trial court's oral sentencing statement and written sentencing order requires that we remand for correction of Morgan's sentence; however, we find Morgan's remaining arguments without merit. Accordingly, we affirm and remand.

Issues

[3] Morgan raises three issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by admitting testimony regarding the transmission of the case from the investigating detective to the prosecutor's office.

II. Whether the discrepancy between the trial court's oral sentencing statement and written sentencing order requires that we remand for correction of Morgan's sentence.

III. Whether Morgan's sentence is inappropriate.

Facts

[4] A.C. was born in 2011. Morgan is A.C.'s paternal great uncle, whom she referred to as "Uncle Dan." Tr. Vol. II p. 189. Mary Kay Morgan ("Mary Kay") is Morgan's wife and A.C.'s great aunt. Morgan and Mary Kay often took A.C. and her brother to sports games, hiking trips, and other activities, and the children would spend the night at the Morgans' house in an upstairs bedroom.

[5] At bedtime, Morgan and Mary Kay gave the children "back massages" before the children fell asleep. *Id*. at 191. When A.C. was six or seven years old, Morgan began to inappropriately touch A.C. while giving her back massages. Morgan would start by rubbing A.C.'s back, then "go down and touch [her] butt" over and under her pajamas. *Id*. at 196. Morgan would then "go back up and [] put his hand under [A.C.] and touch [her] chest and breasts." *Id*. at 197. After that, Morgan would have A.C. lay on her back, and Morgan would touch her breasts and "rub[]" her vagina over and under her pajamas with his fingers. *Id*. at 199. A.C. would cross her arms over herself, but Morgan would move her arms aside.

[6] Morgan inappropriately touched A.C. "every time she spent the night." *Id*. at 179. A.C. specifically recalled that Morgan touched "all of [her] privates" when she spent the night on New Year's Eve in 2020. *Id*. at 213. Morgan told A.C. not to tell anyone about the inappropriate touching because "no one

would [] believe [her]." Tr. Vol. II p. 201. A.C. believed Morgan and did not immediately report the abuse. *Id.*

[7] Most of the time, Morgan's fingers stayed "on top of the line" of A.C.'s vagina. *Id.* at 200. On at least one occasion, however, Morgan's fingers "went inside the line" of A.C.'s vagina, which hurt A.C. *Id.* The next day, A.C. told her mother about the pain, and A.C.'s mother noticed "irritation on the inside" of A.C.'s vagina. Tr. Vol. III pp. 119, 121.

[8] Morgan engaged in additional inappropriate behavior with A.C. A.C. recalled that, one time at a museum, Morgan told A.C. that her "butt looked as nice as [her] face." *Id.* at 202. A.C. felt "weirded out" and went to find her brother and Mary Kay because she did not want to be around Morgan. *Id.* at 203.

[9] Additionally, one morning after A.C. spent the night at the Morgans' house, A.C. was changing out of her pajamas, and as she put her pants on, Morgan came into the room and "asked if he could take pictures" of A.C. *Id.* at 205. A.C. initially refused, and Morgan said, "Please." *Id.* A.C. complied because she was "scared" that if she refused, she would "get in trouble or hurt." *Id.* Morgan had A.C. lay on her back, told her to "open [her] legs," and took photographs of A.C.'s vagina with a black camera. *Id.* A.C. was age six or seven at the time. *Id.* at 228.

[10] In August 2021, when A.C. was nine years old, she told her teacher, "My Uncle Dan touches me." *Id.* at 208. A.C. then reported the abuse to her school guidance counselor, who contacted the Department of Child Services and

A.C.'s mother. Several days later, A.C. participated in a forensic interview and described the abuse. In particular, A.C. reported that "the tip of [Morgan's] finger went in" her vagina. Tr. Vol. III p. 22.

[11] Law enforcement executed a search warrant and located a black camera in Morgan's house. On the camera, law enforcement recovered a deleted photograph of "a small child lying on her back with her legs spread and vagina exposed." *Id.* at 89.

[12] On September 24, 2021, the State charged Morgan with four counts: Count I, child molesting, a Level 1 felony; Counts II and III, child molesting, Level 4 felonies; and Count IV, child exploitation, a Level 5 felony.

[13] The trial court held a jury trial in November 2022. A.C. testified regarding the abuse, as did A.C.'s mother, teacher, guidance counselor, and forensic interviewer. A.C. further testified that she recognized the room in the photograph recovered from Morgan's camera as the bedroom where she slept in the Morgans' house.

[14] Additionally, Indianapolis Metropolitan Police Department Detective Daniel Henson testified that, after his investigation, he concluded that he had "probable cause" and "submitted the case for screening" at the prosecutor's office so the prosecutor could "make a decision" regarding whether to file charges. Tr. Vol. III p. 37. Morgan objected to this testimony, which the trial court overruled. Detective Henson then testified that he was not involved in the decision regarding whether to file charges.

[15] The jury found Morgan guilty of all four counts. The trial court held a sentencing hearing on January 20, 2023. Morgan took responsibility for his offenses and expressed remorse for the harm that he caused. In its oral sentencing statement, the trial court sentenced Morgan to concurrent sentences of: thirty years with five years suspended on Count I; seven years with three years suspended on Counts II and III; and six years on Count IV, for an aggregate sentence of thirty years with five years suspended. The trial court's written sentencing order reflects the same sentences; however, it identifies thirty-five years as Morgan's sentence on Count I. Morgan now appeals.

Discussion and Decision

I. Abuse of Discretion—Admission of Evidence

[16] Morgan first argues that the trial court abused its discretion by admitting Detective Henson's testimony regarding his submission of the case to the prosecutor's office for the prosecutor to determine whether to file charges. Morgan argues that this testimony is irrelevant and constitutes improper vouching. We find that any error in admitting this testimony, which we do not decide, would be harmless.

[17] We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Combs v. State*, 168 N.E.3d 985, 990 (Ind. 2021), *cert. denied*. We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Clark v. State*, 994 N.E.2d 252, 259-60 (Ind. 2013). "The effect of an error on a

party's substantial rights turns on the probable impact of the impermissible evidence upon the jury in light of all the other evidence at trial." *Gonzales v. State*, 929 N.E.2d 699, 702 (Ind. 2010). Thus, even when evidence was improperly admitted at trial, the improper admission "is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019), *trans. denied*.

[18] Morgan argues that Detective Hensen's testimony was irrelevant to the charges against him. He further argues that the testimony constituted improper vouching for A.C. because "[t]he only purpose of admitting this testimony was to suggest that there were several layers of government officials, including both police officers and prosecutors, that believed Morgan molested A.C. and that her allegations were true." [1] Appellant's Br. p. 23.

[19] We do not decide whether the trial court abused its discretion by admitting Detective Henson's testimony because any error would be harmless in light of the overwhelming evidence against Morgan. A.C. testified to the following: beginning when she was six or seven years old, Morgan inappropriately touched her on numerous occasions when she spent the night at the Morgans'

[1] Morgan grounds his improper vouching argument on Evidence Rule 704(b), which provides, "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

house. When Morgan gave her back massages before bed, Morgan touched her butt and breasts and rubbed her vagina, all both over and underneath her pajamas. On at least one occasion, Morgan inserted his fingers "inside the line" of A.C.'s vagina. Tr. Vol. II p. 200. Morgan told A.C. not to tell anyone because no one would believe her. On another occasion, Morgan told A.C. that her "butt looked as nice as [her] face." *Id*. at 202. Additionally, A.C. testified that when she was six or seven years old, Morgan took a photograph of her vagina. *Id*. Law enforcement later recovered a photograph of A.C. lying on her back and "exposed" on Morgan's camera. Tr. Vol. III p. 89.

[20] We are not persuaded that the challenged testimony impacted the jury's decision in light of the overwhelming independent evidence against Morgan. *Cf. Coleman v. State*, 750 N.E.2d 370, 373-74 (Ind. 2001) (admission of evidence was harmless based on "overwhelming independent evidence" of defendant's guilt); *Corbally v. State*, 5 N.E.3d 463, 471 (Ind. Ct. App. 2014) (admission of evidence that might have "bolster[ed]" rape victim's credibility was harmless based on "substantial independent evidence" of defendant's guilt, including victim's own testimony). Accordingly, any error in the admission of the challenged testimony was harmless.

II. Sentencing Statements

[21] Morgan next argues that the discrepancy between the trial court's oral sentencing statement and written sentencing order requires that we remand for correction of the sentencing order. The State agrees, and so do we.

[22] As our Indiana Supreme Court has explained:

> The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court. Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. This is different from pronouncing a bright line rule that an oral sentencing statement trumps a written one.

McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) (internal citations omitted). Upon examination of the trial court's written and oral statements, when the trial court's intent is "unambiguous," we may "remand the case" to correct the written order to reflect the trial court's intent. *See Vaughn v. State*, 13 N.E.3d 873, 890 (Ind. Ct. App. 2014) (citing *Walker v. State*, 932 N.E.2d 733, 738 (Ind. Ct. App. 2010)), *trans. denied*; *accord Willey v. State*, 712 N.E.2d 434, 445 n.8 (Ind. 1999).

[23] Here, the trial court's oral sentencing statement reflects a thirty-year sentence on Count I; however, the trial court's written sentencing order reflects a sentence of thirty-five years on Count I. Despite this discrepancy, we find that the trial court unambiguously intended to sentence Morgan to thirty years on Count I.

[24] In its oral sentencing statement, the trial court sentenced Morgan to "a period of 30 years" on Count I. Tr. Vol. III p. 205. That is the same term of years that

the State argued Morgan should serve on that count. Additionally, the trial court stated that the mitigating factors Morgan proffered in favor of a reduced sentence "d[id] not rise to the level that they would reduce the sentence below the presumptive sentence." *Id*. As a Level 1 felony, the presumptive (advisory) sentence for Count I is thirty years. Ind. Code § 35-50-2-4. It is clear that the trial court intended Morgan to serve a thirty-year sentence with five years suspended on Count I. Accordingly, we remand with instructions that the trial court correct the written sentencing order to reflect a sentence of thirty years with five years suspended on Count I.

III. Inappropriate Sentence

[25] Lastly, Morgan argues that his thirty-year sentence is inappropriate based on the nature of the offense and his character. We disagree.[2]

[26] The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense

[2] Because we find it unambiguous that the trial court intended to sentence Morgan to concurrent sentencing totaling thirty years, Morgan's challenge to the appropriateness of his sentence is ripe for our review. *Cf. McElroy*, 865 N.E.2d at 592 (reaching defendant's inappropriate-sentence argument despite discrepancy between oral sentencing statement and abstract of judgment).

and the character of the offender."[3] Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[27] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id*. "Whether a sentence should be deemed inappropriate 'turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.'" *Id*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's

[3] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Ind. Ct. App. 2021) (Tavitas, J., concurring in result).

character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[28] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). "A defendant who receives an advisory sentence has a particularly heavy burden to prove it inappropriate under Appellate Rule 7(B)." *Kincaid v. State*, 171 N.E.3d 1036, 1042 (Ind. Ct. App. 2021) (citing *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*), *trans. denied*. Level 1 felonies carry a sentencing range of twenty to fifty years, with the advisory sentence set at thirty years, Ind. Code § 35-50-2-4; Level 4 felonies carry a sentencing range of two to twelve years, with the advisory sentence set at six years, Ind. Code § 35-50-2-5.5; and Level 5 felonies carry a sentencing range of two to eight years, with the advisory sentence set at four years, Ind. Code § 35-50-2-6. In the case at bar, Morgan was sentenced to concurrent sentences of: thirty years with five years suspended on Count I, child molesting, a Level 1 felony; seven years with three years suspended each on Counts II and III, child molesting, Level 4 felonies; and six years on Count IV, child exploitation, a Level 5 felony. Morgan's aggregate sentence, thus, was thirty years, the advisory sentence for his Level 1 felony conviction, with five years suspended.

A. Nature of the Offense

[29] Our analysis of the "nature of the offense" requires us to look at the nature, extent, heinousness, and brutality of the offense. *See Brown v. State*, 10 N.E.3d

1, 5 (Ind. 2014). We may also consider whether the offender "was in a position of trust" with the victim. *Pierce v. State*, 949 N.E.2d 349, 352 (Ind. 2011).

[30] Morgan argues that his sentence is inappropriate in light of the nature of the offense because his offenses were not "more egregious" than other child molestations. Appellant's Br. p. 16. Morgan emphasizes that "[t]his case involved one victim, did not involve vaginal or oral sex, and Morgan did not threaten A.C. with violence or threats of force." *Id*. Morgan, however, serially molested A.C. over several years beginning when she was six or seven years old. He violated A.C.'s entire body under the guise of giving bedtime massages. He overpowered A.C. when she tried to resist. He told A.C. that no one would believe her if she reported the abuse, and A.C. suffered in silence for years.

[31] Moreover, when A.C. was still six or seven years old, Morgan took a photograph of her exposed vagina. A.C. complied because she felt scared that she would "get in trouble or hurt" if she refused. Tr. Vol. II p. 205. Morgan heinously abused his position of trust over A.C., and we cannot say that his advisory sentence is inappropriate in light of the nature of the offense.

B. Character of the Offender

[32] Our analysis of the character of the offender involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See Harris v. State*, 165 N.E.3d 91, 100 (Ind. 2021); *McCain*, 148 N.E.3d at 985. The significance of a

criminal history in assessing a defendant's character and an appropriate sentence vary based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense. *Pierce*, 949 N.E.2d at 352-53; *see also Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*.

[33] Morgan argues that his sentence is inappropriate based on his advanced age[4], status as a veteran, community and church involvement, expression of remorse, and absence of criminal history. Morgan, however, repeatedly invited his young and vulnerable great niece to spend the night so that he could molest and exploit her. He told her that no one would believe her if she reported his abuse. Indeed, the trial court found as a "huge aggravator" the fact that Morgan "use[d] the fact that you're this good guy to manipulate this small child into thinking she didn't have any worth 'cause nobody would believe anything she said." Tr. Vol. III p. 205. We cannot say that Morgan's positive character traits render his advisory sentence inappropriate.

Conclusion

[34] The written sentencing order does not reflect the trial court's intended sentence on Count I, and we remand with instructions that the trial court correct that order to reflect a sentence of thirty years with five years suspended on Count I. Any error in admitting testimony regarding the investigating detective's

[4] Morgan was sixty-nine years old at the time he was sentenced.

transmission of the case to the prosecutor's office, however, was harmless, and Morgan's sentence is not inappropriate. Accordingly, we affirm and remand.

[35] Affirmed and remanded.

Bailey, J., and Kenworthy, J., concur.