MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James Braden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 29, 2021

Court of Appeals Case No. 19A-CR-2935

Appeal from the Porter Superior Court

The Honorable Mary R. Harper, Judge

Trial Court Cause No. 64D05-1704-F1-3272

Pyle, Judge.

Statement of the Case

[1] James Braden ("Braden") appeals, following a jury trial, his conviction for Level 1 felony rape[1] and his thirty-eight-year sentence. Braden argues that: (1) the trial court abused its discretion in its admission of evidence; (2) the trial court abused its discretion when sentencing him; and (3) his sentence is inappropriate. Concluding that there was no abuse of discretion and that Braden's sentence is not inappropriate, we affirm Braden's conviction and sentence.

[2] We affirm.

Issues

1. Whether the trial court abused its discretion in its admission of evidence.
2. Whether the trial court abused its discretion when sentencing Braden.
3. Whether Braden's sentence is inappropriate.

Facts

[3] The relevant facts most favorable to the verdict follow.[2] In March 2017, Braden's wife took his gun, which was a .25 Bryco Arms handgun ("Bryco

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[1] IND. CODE § 35-42-4-1.

[2] We note that Braden's Statement of Facts presents the facts according to Braden's trial testimony. We remind Braden's counsel that, pursuant to Indiana Appellate Rule 46(A)(6), an appellant's Statement of Facts

handgun"), from him and hid it at their house. Braden then went to a friend's house and took a .45 caliber Taurus handgun ("Taurus handgun") from his friend's gun vault without telling his friend.

[4] On April 1, 2017, a little before noon, Braden drove his black SUV to a park in Porter County, Indiana ("the park"). Braden had the Taurus handgun with him that day. He approached a woman, Jennifer Cox ("Cox"), who was at the park with her dog and standing near her car. Braden drove up to Cox and asked her for directions. Cox found it "odd" that a "young" person of Braden's age, which was thirty-six, did not have Google maps or a phone to get directions. (Tr. Vol. 1 at 27). Braden drove away but then returned to Cox's car and parked behind it. As Cox was putting her dog in her car, Braden asked her what kind of dog she had and whether the dog bites. Cox told Braden that the dog would bite "[i]f she need[ed] to" and then got into her car and drove away "as quickly as [she] could." (Tr. Vol. 1 at 29, 30).

[5] Thereafter, Braden approached another woman, Randi Riley ("Riley"), who was at the park with her five-year-old daughter. Riley's daughter was riding her bike in the parking lot. At that time, no other people were in the parking lot, but there were some people at a nearby playground. Braden asked Riley if she could jump his car, and she agreed. When Riley said that she could have her husband bring some jumper cables, Braden told her that he had some. Braden

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"shall describe the facts relevant to the issues presented for review" and "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed."

"started fishing" in his car for jumper cables and "took a good amount of time to where [Riley] [became] a little bit intimidated." (Tr. Vol. 2 at 50). Braden eventually retrieved some cables, which he attached to the two cars. He started his car, but it then died. Braden, who did not have a phone with him, then lied and told Riley that he had gotten a text from his wife and that she would be bringing a battery to the park, and he asked Riley to watch out for his wife's car. Thereafter, when a man pulled into the parking lot, Braden was "very curious about the guy" and asked Riley "why is he here." (Tr. Vol. 2 at 55). The man then got out of the car with a "little boy" who then started riding a tricycle. (Tr. Vol. 2 at 55).

[6] That same day, around 12:30 p.m., R.H. and her fiancé ("fiancé") took R.H.'s six-year-old daughter and four-year-old son and her fiancé's five-year-old daughter to the park, and they parked near the playground. When they arrived at the park, R.H. had to use the restroom, so she walked to the porta-potties that were located "850 feet" from the playground parking lot. (Tr. Vol. 2 at 10). R.H. went into a porta-potty, locked the door, and urinated. As she was pulling up her pants, "[t]he door of the porta-potty . . . was ripped open." (Tr. Vol. 1 at 76). R.H. screamed and saw a man, who was later identified as Braden. Braden shut the door and apologized. After R.H. had pulled up her pants, Braden again opened the porta-potty door and then walked inside. R.H. said "no" and put her hands onto Braden's chest, trying to push him back. (Tr. Vol. 1 at 78). Braden, who had "crazy eyes" and very constricted pupils, closed the door and told R.H. to "[s]hut up[.]" (Tr. Vol. 1 at 91, 78). Braden also told

R.H. that he had a gun and that the safety was off. Braden, with a gun in his hand, blocked the door and locked it. R.H. pleaded for Braden not to hurt her and told him that her kids were playing at the park. Braden threatened to shoot R.H. if she screamed.

[7] Braden then "motioned with the gun" and directed R.H. to pull her pants down. (Tr. Vol. 1 at 80). R.H. said "please, don't do this[,]" and "he told [her] to shut the fuck up and turn around." (Tr. Vol. 1 at 80). R.H. pulled her pants and underwear halfway down her thighs, and Braden pointed his gun at her head. Braden stood behind R.H. and started to stroke his penis. He then put his finger in R.H.'s vagina. R.H. told Braden to stop and that he was hurting her. Braden refused and told R.H., "Tell me that's what you like." (Tr. Vol. 2 at 83).

[8] Braden then tried to put his flaccid penis into R.H.'s vagina and said, "Tell me this is what you want." (Tr. Vol. 1 at 83). R.H. told Braden that he was "soft," he told her to "shut up" and tried to "cram" his non-erect penis into R.H.'s vagina. (Tr. Vol. 1 at 84). When R.H. again told Braden that his penis was "soft," he told her to turn around and "suck it like [she] like[d] it." (Tr. Vol. 1 at 84). Braden had his gun at the side of R.H.'s head and directed her down to his penis. When R.H. delayed putting Braden's penis into her mouth, Braden "clunked" the gun against her head and again told her to "suck it like [she] like[d] it." (Tr. Vol. 1 at 85).

[9] After a few seconds of having Braden's limp penis in her mouth, R.H. again told Braden that he was "soft." (Tr. Vol. 1 at 85). Braden responded, "I know, I know." (Tr. Vol. 1 at 85). Braden, still armed with his gun, then sat on the toilet, spit in his other hand, started to stroke his penis, and told R.H. to sit on it. R.H., acting as if she was going to sit on Braden, moved near the door and opened the porta-potty door to escape. Braden grabbed the back of R.H.'s sweater and threatened to shoot her. R.H., who still had her pants and underwear down, ran from the porta-potty as fast as she could and screamed for help. R.H.'s fiancé heard R.H. screaming and saw her—with her pants and underwear down—running away from the porta-potty. As R.H. ran toward the playground, she yelled to her fiancé to "get the kids" and that Braden had a gun. (Tr. Vol. 1 at 88). R.H., her fiancé, and the three children ran to their car. Once inside the car, R.H. called the police. R.H.'s fiancé observed that R.H. was "frantic[,]" "visibly distraught[,]" and crying. (Tr. Vol. 1 at 52). Her fiancé saw a male, who was later identified as Braden, walk out of a porta-potty and walk toward a black SUV.

[10] Riley, who was about to leave the park, also saw Braden walking to his black SUV. Additionally, Riley and her daughter saw R.H.—with her pants and underwear down—when she had escaped from the porta-potty. Riley saw R.H. "looking back and in a hurry to get away." (Tr. Vol. 2 at 57). As Riley watched Braden go to his car, she wondered if something had happened and made sure that she "got a description of him." (Tr. Vol. 2 at 58). Riley drove away from the park but then saw "four or five squad cars flying down the road"

to the park. (Tr. Vol. 2 at 59). Riley then drove back to the park, talked to police, and gave them information about Braden and his car.

[11] When the responding Portage Police Department officers arrived at the park, one officer, Officer Anthony Dandurand ("Officer Dandurand") observed that R.H. was crying and "hyperventilating at times[,]" and she "appeared very distraught." (Tr. Vol. 1 at 43). Detective Kurt Biggs ("Detective Biggs") interviewed R.H. that day. R.H. then went to the hospital, where a nurse performed a sexual assault examination.

[12] The police posted information on the police department's Facebook page, seeking to get information from anyone who may have seen anything at the park. Specifically, the police stated that they were looking for "a black Mitsubishi Outlander, a white male subject between the ages of . . . 25 to 35, approximately . . . 5'6" to 5'7", a couple tattoos on his arms, wearing a skull ring, and also . . . a Harley Davidson plate on the front of the vehicle." (Tr. Vol. 2 at 12). The police received tips from four people, including Cox, and the tips led to the identification of Braden as a suspect.

[13] On April 3, 2017, R.H. went to the police station where Detective Biggs again interviewed her. During the interview, which was videotaped, R.H. identified Braden in a photo array. Thereafter, the police obtained a warrant for Braden's arrest. The police later recovered the Taurus handgun from the bottom of the porta-potty.

[14] The State charged Braden with Level 1 felony rape while armed with a deadly weapon. The rape charge was based on Braden's act of forcing R.H. to perform oral sex and his act of forcing R.H. to submit to digital penetration.

[15] The trial court held a three-day jury trial in October 2019. Identification was not an issue at trial. Instead, Braden's defense, as explained in his opening statement, was that the acts were consensual and part of a "trade for a product for services." (Tr. Vol. 1 at 21). Specifically, Braden's defense was that he had gone to the porta-potty to sell cocaine and that he had "proposition[ed] [R.H.] for oral sex in exchange for the drugs." (Tr. Vol. 1 at 17).

[16] The State presented multiple witnesses who testified to the facts as set forth above. One of the early witnesses was Officer Dandurand, who testified about his personal observation of R.H.'s demeanor when he had been dispatched to the park. After both R.H. and Cox had testified and had already identified Braden at trial, Detective Biggs testified about when R.H. had identified Braden in a photo array during her April 3, 2017 interview. Specifically, the State asked Detective Biggs what happened during the interview, and Detective Biggs responded, "I'd have to watch the interview again to -- I want to say that the picture was the fourth or fifth one down. But as soon as she got to [Braden's] picture[,] she stopped and picked him out and said I think that's him." (Tr. Vol. 1 at 122-23). Braden objected to the testimony as hearsay. The State pointed out that R.H. had already identified Braden at trial and argued that the testimony was not offered for the proof of the matter asserted. The trial court overruled the objection and allowed the testimony.

[17] Immediately thereafter, the State asked Detective Biggs what R.H. had said when she looked at the fourth or fifth photographs, and Detective Biggs answered as follows:

> She said I think it's him. And then she proceeded to check the other two. And kind of put his aside. And then looked back at his. And as I was -- she was just sitting there thinking. And I could see her hands start to shake. And I think that she put her hand like over her mouth, and she was thinking more about it. And then she said yeah, I'm . . . 98 percent sure it's him.

(Tr. Vol. 1 at 123). Braden objected and asked to make his objection outside the presence of the jury.

[18] Thereafter, Braden objected to Detective Biggs' testimony based on vouching and hearsay. Braden argued that Detective Biggs' testimony that R.H.'s "hand was shaking" and his observations of R.H.'s "physical characteristics" during the April 3 interview constituted vouching because Officer Dandurand had testified about R.H.'s appearance and emotional state on the day of the crime on April 1. The trial court rejected Braden's argument, explaining that each officer could testify regarding what each had observed.

[19] Braden argued that the testimony constituted hearsay because it was being offered for the truth of the matter asserted. The State again pointed out that R.H. had already identified Braden in court and argued that the testimony was not offered for the proof of the matter asserted and was, instead, offered to show the course of the investigation and how R.H.'s interview had led to the

next step of the investigation, which was Detective Biggs obtaining an arrest warrant.

[20] Braden then argued that even if the testimony was not hearsay, then it was cumulative and prejudicial because R.H. had already identified him. The trial court pointed out that Braden's identity was not at issue and asked Braden's counsel how it was prejudicial because counsel had already admitted during opening statements that Braden was the person in the porta-potty with R.H. The trial court ruled that, "[f]or the purposes of the continuity of the investigation[,]" it would allow the testimony "one time, and then . . . move on." (Tr. Vol. 1 at 125).

[21] The jury then returned to the courtroom, and Detective Biggs finished his testimony about R.H.'s identification of Braden in the photo array. Specifically, he testified that after R.H. had identified Braden, she had "an emotional reaction to it." (Tr. Vol. 1 at 126). Detective Biggs testified that R.H.'s hands shook and that she put her hand up to her mouth. Additionally, the detective testified that R.H. had written down that she was "99 percent sure that it was him." (Tr. Vol. 1 at 126).

[22] The State later recalled Detective Biggs as a witness. During his testimony, the State introduced State's Exhibit 21, which was the videotape of Detective Biggs' April 3 interview with R.H. when she had identified Braden in the photo array. The State informed the trial court that it wanted to offer "just a portion" of the interview to be played for the jury and that the State had an agreement with

Braden about the portion to be played. (Tr. Vol. 2 at 14). Braden's counsel confirmed that the parties had an agreement and stated that Braden had "[n]o objection to the admission" of the exhibit. (Tr. Vol. 2 at 14). The State then showed the jury six minutes of the April 3 interview.

[23] After the State had completed its' presentation of evidence, Braden testified at trial and stated that he was a drug user and drug dealer. He testified that he had been selling drugs since 2015 and that he sold cocaine, morphine, Vicodin, Oxycontin, and Xanax. Braden also testified that he had gone to the park because a fellow drug dealer, who had arranged a drug deal at the park but was "out of drugs[,]" had asked Braden to make the deal instead. (Tr. Vol. 2 at 92). Specifically, Braden testified that he had gone to the park to sell cocaine to an unknown woman who had red hair and a red SUV. Braden testified that he had believed that R.H. was the intended drug buyer. He acknowledged that R.H. did not know him, but he testified that she had motioned for him to go to the porta-potty. Braden testified that he had offered R.H. the drugs in exchange for "sexual favors" and that she had agreed. (Tr. Vol. 2 at 104). Braden acknowledged that he had put his fingers into R.H.'s vagina. He also testified that R.H. had "willingly g[i]ve[n] [him] oral [sex] for a couple seconds" but that he had been unable to get an erection, which he blamed on his drug use. (Tr. Vol. 2 at 134). Additionally, Braden acknowledged that he had the Taurus handgun when he went into the porta-potty, but he denied that he had held the gun on R.H. and testified that he had kept his gun in his hoodie pocket.

[24] The jury found Braden guilty as charged. During Braden's sentencing hearing, R.H. gave a detailed victim impact statement and explained how she had been suffering from post-traumatic stress and anxiety since the offense and how the offense had affected her everyday life. She stated that the offense had also affected her children because they still "talk about the day that the man that hurt mommy in the park" and "talk about being scared that someone is going to kill [her.]" (Sent. Tr. 7-8).

[25] When the trial court addressed aggravating circumstances, it found that Braden's criminal history, which included two misdemeanor convictions for operating a vehicle while intoxicated, to be an aggravating circumstance. The trial court stated that Braden's criminal history was a minor aggravating circumstance because his prior convictions were remote in time, but the trial court noted that Braden was admittedly a "prolific drug dealer." (Sent. Tr. 15). The trial court also discussed the nature and circumstances of the offense as follows:

> [Braden] committed a crime of violence, and knowingly committed the offense in the presence or within hearing of an individual who was less than 18 years of age at the time the person committed the offense, and the minor was not a victim of the offense. This took place at a public park. There were children in the lot nearby. Parking lot of the public park nearby. The act was premeditated in that after having had his gun taken away from him by his wife, he then obtained another gun, which was used in commission of this offense. And it is true there were two acts of prohibited sexual conduct, including the digital penetration and the oral sex.

(Sent. Tr. 15-16).

[26] When discussing mitigating circumstances, the trial court noted that Braden, who had not been employed at the time of the offense, had provided limited information regarding his support of his son; nevertheless, the trial court found "to some extent" that "the loss of a parent to incarceration would be a hardship to the child." (Sent. Tr. 16). Additionally, the trial court found that the remote nature of Braden's criminal history was a mitigating circumstance.

[27] The trial court imposed a thirty-eight (38) year sentence. Braden now appeals.

Decision

[28] Braden argues that: (1) the trial court abused its discretion in its admission of evidence; (2) the trial court abused its discretion when sentencing him; and (3) his sentence is inappropriate. We will review each issue in turn.

1. Admission of Evidence

[29] Braden first argues that the trial court abused its discretion by admitting Detective Biggs' testimony regarding the April 3 interview. Specifically, he contends that Detective Biggs' testimony that R.H. identified Braden from a photo array was hearsay and improper course-of-investigation testimony. Additionally, Braden contends that Detective Biggs' testimony regarding his personal observations of R.H.'s behavior when choosing Braden's photo constituted vouching.

[30] The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. *Wilson v. State*, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012), *reh'g denied*.[3]

[31] We need not, however, determine whether the trial court abused its discretion by admitting Detective Biggs' testimony into evidence because even if it was erroneous to admit the testimony, any error was harmless. "The improper admission of evidence is harmless error when the conviction is supported by 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." *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000), *reh'g denied*. *See also Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014) ("If we are satisfied the conviction is supported by independent evidence of guilt such that there is little

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[3] We reject Braden's freestanding argument that we should alter our standard of review and apply a prima facie error standard of review to his admission of evidence argument. Braden bases his argument on the one-month law license suspension of former Indiana Attorney General Curtis Hill ("Former AG Hill"). Our supreme court "suspend[ed] [Former AG Hill] from the practice of law . . . for a period of 30 days, beginning May 18, 2020" and ordered that, at the conclusion of the suspension period, Former AG Hill would be "automatically reinstated to the practice of law[.]" *Matter of Hill*, 144 N.E.3d 184, 197 (Ind. 2020). Braden filed his Appellant Brief just after Former AG Hill's suspension period had begun and argued that the suspension created a "vacancy" in the Office of the Attorney General, making any Appellee Brief filed by the State during the suspension period to be "unauthorized[.]" (Braden's Br. 8). Braden then requested that this Court "disregard" any brief filed by the State during the suspension period and to apply the prima facie error standard of review. (Braden's Br. 8). The State, however, filed its Appellee Brief after Former AG Hill's one-month suspension period had ended. Thus, we will not further address Braden's argument and decline his request to apply a prima facie error standard of review.

likelihood the challenged evidence contributed to the verdict, the error is harmless."). Additionally, "[t]he 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*.

[32] Here, Detective Biggs' testimony that R.H. had identified Braden from a photo array was harmless because it was cumulative identification testimony. R.H. had already identified Braden at trial before Detective Biggs testified. Furthermore, Braden had already told the jury during opening statements that identification was not at issue and that he "d[id] not deny he was there." (Tr. Vol. 1 at 20). Moreover, Braden cannot show that he was prejudiced by the detective's personal observations of R.H.'s behavior during the interview. While Braden attempts to challenge the admission of Detective Biggs' testimony about his observations of R.H. during the April 3 interview, he fails to acknowledge that he had no objection to the State's admission of the video recording of that same April 3 interview. Indeed, Braden had an agreement with the State about playing part of that interview. Our supreme court has explained that "'[a]ny error in the admission of evidence is not prejudicial, and [is] therefore harmless, if the same or similar evidence has been admitted without objection or contradiction.'" *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012) (quoting *McCovens v. State*, 539 N.E.2d 26, 30 (Ind. 1989)), *reh'g denied*.

[33] Based on our review of the record and the evidence supporting Braden's conviction, we are satisfied that there is no substantial likelihood that the challenged evidence contributed to jury's verdict and, therefore, conclude that the admission of the evidence was harmless error.

2. Sentencing

[34] Braden argues that the trial court abused its discretion when sentencing him. Specifically, he contends that the trial court abused its discretion in its determination of aggravating circumstances.

[35] We first address Braden's challenge to the trial court's determination of aggravating circumstances. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91.

[36] Braden first contends that the trial court considered his use of a gun during the commission of the crime as a separate aggravating circumstance and that it was improper because it was an element of his offense. We agree "a trial court may not use a material element of the offense as an aggravating circumstance." *See Lemos v. State,* 746 N.E.2d 972, 975 (Ind. 2001). "However, the trial court may find the nature and circumstances of the offense to be an aggravating circumstance." *Id.*

[37] Here, the trial court mentioned Braden's gun when discussing the nature and circumstances of Braden's offense. Specifically, the trial court pointed out that Braden's offense was "premeditated" because "after having had his gun taken away from him by his wife, he then obtained another gun[.]" (Sent. Tr. 16). We conclude that the trial court did not abuse its discretion when finding this nature and circumstance aggravating circumstance. *See, e.g.*, *Shane v. State*, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002) (explaining that the trial court's consideration of the planning involved in the defendant's crime reflected the nature and circumstances of the crime and was properly considered as an aggravating circumstance).

[38] Braden also argues that the trial court abused its discretion in its consideration of aggravating circumstances when it found that he had committed the crime in the presence or within the hearing of a child less than eighteen years old. We disagree.

[39] "A trial court may consider the fact that the defendant committed a crime of violence—including rape—in the presence or within hearing of a child under the age of eighteen as an aggravating factor." *Abrajan v. State*, 917 N.E.2d 709, 712 (Ind. Ct. App. 2009). INDIANA CODE § 35-38-1-7.1(4) provides that a trial court may consider the following as an aggravating circumstance when sentencing a defendant:

> The person:
>
> > (A) committed a crime of violence (IC 35-50-1-2); and
> >
> > (B) knowingly committed the offense in the presence or within hearing of an individual who:
> >
> > > (i) was less than eighteen (18) years of age at the time the person committed the offense; and
> > >
> > > (ii) is not the victim of the offense.

"[I]it is well established that this aggravator 'does not require that a child under eighteen actually see or hear the offense taking place . . . .'" *Abrajan*, 917 N.E.2d at 712 (quoting *Firestone v. State*, 838 N.E.2d 468, 474 (Ind. Ct. App. 2005)).

[40] At Braden's sentencing hearing, the trial court found that:

> [Braden] committed a crime of violence, and knowingly committed the offense in the presence or within hearing of an individual who was less than 18 years of age at the time the person committed the offense, and the minor was not a victim of the offense. This took place at a public park. There were children in the lot nearby. Parking lot of the public park nearby.

(Sent. Tr. 15-16). Our review of the record reveals the trial court's consideration of this aggravating circumstance was supported by the evidence. Multiple witnesses testified that young children were present at the park. For example, R.H. testified that she told Braden that her children were playing at the park when she pleaded with him not to hurt her. Additionally, Riley testified that her five-year-old daughter was riding a bike when Braden first approached Riley to ask her to jump-start his car. Riley also testified that while she was talking with Braden, a man pulled into the parking lot and got out with a little boy who rode a tricycle. Additionally, Riley testified that she and her five-year-old daughter saw R.H.—with her pants and underwear down—when she had escaped from the porta-potty. Given the evidence presented at trial, we conclude that the trial court did not abuse its discretion by considering as an aggravating circumstance that the crime was committed in the presence or hearing of a child under eighteen. *See, e.g.*, *Abrajan*, 917 N.E.2d at 712; *Firestone*, 838 N.E.2d at 474.

3. Inappropriate Sentence

[41] Lastly, we turn to Braden's argument that his thirty-eight-year sentence for Level 1 felony rape is inappropriate. 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). "Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate." *Conley*, 972 N.E.2d at 876 (Ind. 2012) (internal quotation marks and citation omitted).

[42] 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. Here, Braden was convicted of Level 1 felony rape. A person who commits a Level 1 felony "shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years." I.C. § 35-50-2-4. The trial court imposed a thirty-eight-year sentence.

[43] Turning to the nature of Braden's offense, we note that Braden, armed with a gun, committed the crime of rape in the middle of the day at a public park. After approaching two other women under seemingly suspicious pretenses, Braden followed R.H. to the porta-potty where she went to urinate before playing with her young children at the playground. Braden forced open the porta-potty door and told R.H. that he had a gun and that the safety was off. After Braden locked the door, R.H. pleaded for Braden not to hurt her and told him that her kids were playing at the park. Braden then threatened to shoot R.H. if she screamed. Braden pointed his gun at R.H.'s head and put his finger into R.H.'s vagina. When R.H. told Braden to stop and that he was hurting

her, Braden refused and told R.H., "Tell me that's what you like." (Tr. Vol. 2 at 83). Braden was unable to get an erection, and, while pointing his gun at R.H.'s head, he commanded R.H. to "suck [his flaccid penis] like [she] like[d] it." (Tr. Vol. 1 at 84). When Braden's penis remained limp after a few seconds inside R.H.'s mouth, Braden, stilled armed with his gun, then sat on the toilet, spit in his other hand, started to stroke his penis, and told R.H. to sit on it. At that point, R.H. opened the porta-potty door to escape, and Braden grabbed the back of R.H.'s sweater and threatened to shoot her. R.H., who still had her pants and underwear down, ran from the porta-potty as fast as she could and screamed for help. At Braden's sentencing hearing, R.H. explained that she had been suffering from post-traumatic stress and anxiety since the offense and that it affected her everyday life.

[44] Turning to Braden's character, we recognize that he has limited prior criminal history consisting of two misdemeanor convictions for operating a vehicle while intoxicated. Indeed, the trial court found that the remote nature of Braden's criminal history was a mitigating circumstance when imposing the sentence in this case. However, as the trial court noted, Braden was admittedly a "prolific drug dealer." (Sent. Tr. 15). At trial, he admitted that he was a drug user and drug dealer. He testified that he had been selling drugs since 2015 and that he sold cocaine, morphine, Vicodin, Oxycontin, and Xanax.

[45] Braden has not persuaded us that his thirty-eight-year sentence for Level 1 felony rape is inappropriate. Therefore, we affirm the sentence imposed by the trial court.

[46] Affirmed.

Kirsch, J., and Tavitas, J., concur.