

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Erick Adolfo Rivera,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

December 27, 2023

Court of Appeals Case No.  
23A-CR-1724

Appeal from the Tippecanoe  
Superior Court

The Honorable Steven P. Meyer,  
Judge

Trial Court Cause No.  
79D02-2003-F1-6

**Memorandum Decision by Judge Bailey**  
Judges May and Felix concur.

**Bailey, Judge.**

## Case Summary

- [1] Following a bench trial, Erick Rivera appeals his conviction of child molesting, as a Level 4 felony,<sup>1</sup> and his aggregate sentence. We affirm.

## Issues

- [2] Rivera raises two issues on review:
- I. Whether the State provided sufficient evidence to support his conviction on Count III, child molesting, as a Level 4 felony.
  - II. Whether his aggregate sentence is inappropriate in light of the nature of the offenses and his character.

## Facts and Procedural History

- [3] From the time J.W. was nine years old until she was thirteen, she lived with her mother and her mother's boyfriend, Rivera. During that time, Rivera acted as a "father figure" to J.W., yet he also engaged J.W. in multiple acts of sexual intercourse and inappropriate touching. Tr. v. II at 39. The first time Rivera engaged in sexual behavior with J.W. was when he, J.W., J.W.'s mother, and J.W.'s siblings lived in a house on Hartford Street. The encounter occurred early on a school day, while J.W.'s mother was sleeping and J.W.'s siblings

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<sup>1</sup> Ind. Code § 35-42-4-3(b).

were either sleeping or getting ready for school. While alone in the living room, Rivera asked J.W. to lie on the couch with him. While on the couch, Rivera pulled down J.W.'s pants, placed his penis in her vagina, and made a "back-and-forth" motion. *Id.* at 25. This caused J.W. pain. Similar incidents occurred between J.W. and Rivera "a lot of times," but in different places, including the couch, J.W.'s room, and in the house to which J.W. later moved on Greenbush Street. *Id.* at 26. Throughout these interactions, there were times when J.W. was able to avoid Rivera's attempts at sexual intercourse either by pushing him away or because Rivera's penis "wouldn't fit" into J.W.'s vagina. *Id.* at 37.

[4] The final time Rivera had sexual intercourse with J.W. was in March 2019, when J.W. was thirteen years old and in the eighth grade. During that encounter, J.W. was upstairs cleaning and Rivera asked her to come downstairs. While sitting on the couch, Rivera pulled down his clothes, pulled down the clothes and underwear of J.W., and asked J.W. to sit on his penis. While J.W. was sitting on top of Rivera, facing away from him, Rivera placed his penis inside of J.W.'s vagina and had J.W. move around on top of him. Rivera told J.W. not to tell anyone about what happened and that if she did, he would "make [her] life miserable." *Id.* at 31.

[5] Once Rivera began touching J.W., he began buying her things she wanted. A couple of months after the first sexual incident, J.W. told Rivera's daughter, A.R., about Rivera's inappropriate conduct. Initially, J.W. told no one else about it. However, after the final incident in March 2019, J.W. told her

mother, her aunt, and Dawn Gross at The Hartford House about Rivera's actions. In speaking with Gross, J.W. relayed that A.R. told her Rivera was doing similar things to A.R., "like grinding on her." *Id.* at 37.

[6] During the time that Rivera was molesting J.W., he was also inappropriately touching his own daughter, A.R. Rivera began touching A.R. inappropriately when she was nine years old. A.R. testified that this meant Rivera touched "[her] butt and [her] private area" and that, by "private area[.]" she meant the area from which she "pee[s.]" *Id.* at 63. The first time the inappropriate touching occurred was at the Hartford Street house, which A.R. would visit during the time Rivera lived there with J.W.'s family. On the day of the first incident, J.W.'s mother was out of the house, and the other children were in their rooms. Rivera and A.R. were in Rivera's bedroom when he told A.R. to lie with him on the bed, with the two of them clothed and facing the same direction. While under the bedcovers, A.R. lay next to Rivera, with her back toward him, while he pushed the front of his torso up against her and placed his hands around her stomach. As they were lying in this position, A.R. felt Rivera's penis "poking [her] in [her] back" and described it as having "felt like hard and stiff." *Id.* at 66. Rivera then "made [A.R.] turn around and face him." *Id.* Once A.R. did so, Rivera pushed himself up against her. A.R. knew Rivera was awake during this time because he looked into her eyes, and she saw his "eyes wide open." *Id.* at 73. A.R. eventually left the room and went to the room where J.W. was sleeping.

[7] Over the course of time, Rivera continued to engage in the same conduct with A.R. “over and over again on multiple days.” *Id.* at 67. The final time Rivera engaged in this conduct was at the end of A.R.’s fourth grade year, when A.R. was ten years old. In that instance, A.R. and Rivera were staying at A.R.’s aunt’s house. Because there was nowhere else for A.R. to sleep, she slept in Rivera’s bed, at which point Rivera did “the same thing” to A.R. that he had done during the previous incidents of sexual conduct. *Id.*

[8] A.R. told an older cousin and J.W. about Rivera’s conduct. During A.R.’s conversations with J.W., she told J.W. about what Rivera had done to her and how it made her feel uncomfortable and unsafe. At some point during the summer, A.R. found herself in a conversation with her aunt and sister about situations similar to the one she had experienced with Rivera. A.R. told her aunt and sister, “you don’t know what I’ve been through.” *Id.* at 69. A.R. then told her mother and J.W.’s mother about Rivera touching her and J.W. inappropriately. A.R. did not tell anyone about what happened until then because Rivera was her primary caretaker, she was afraid she would lose that care, and she was also scared of Rivera because he “is ... a big man, and [she] was a little girl.” *Id.*

[9] The State charged Rivera with Count I, child molesting, as a Level 1 felony;<sup>2</sup> Count II, attempted child molesting, as a Level 1 felony;<sup>3</sup> Count III, child molesting, as a Level 4 felony; and Count IV, child molesting, as a Level 4 felony.<sup>4</sup> Following the bench trial, the court found Rivera guilty as charged but entered judgment of conviction only on the first three counts. In preparation for the sentencing hearing, a presentence investigation was done, but it was incomplete as Rivera refused to cooperate in the process.

[10] During the sentencing hearing, A.R. gave a victim impact statement in which she discussed the depression, sleeplessness, addiction to self-harm, and decline in schooling that she experienced as a result of her father's molestation of her. J.W.'s mother also gave a statement in which she explained that, as a result of Rivera's conduct, J.W. became suicidal and spent a brief time in a mental institution. J.W.'s mother also provided examples of Rivera's "violent" character, including kicking in her door and smashing her property. Tr. at 132. During his statement of allocution, Rivera stated, "I feel for whatever the, the people have been through. I feel bad, but it's not anything I did." *Id.* at 133.

[11] In sentencing Rivera, the trial court stated that it considered Rivera's criminal history to be an aggravator. That history began as a juvenile in 1997 when Rivera was adjudicated delinquent for misdemeanor criminal mischief,

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<sup>2</sup> I.C. § 35-42-4-3(a)(1).

<sup>3</sup> I.C. § 35-42-4-3(a)(1); I.C. § 35-41-5-1.

<sup>4</sup> I.C. § 35-42-4-3(b).

burglary, theft, and auto theft. Shortly thereafter, Rivera was twice adjudicated as a runaway and subsequently adjudicated for misdemeanor battery.

Throughout his juvenile adjudications, Rivera was court-ordered to participate in the following programs: Villages Family Partners Program, Choose to Change Program, Carry at Home, FOCUS program, Teen Choices program, and the JEDI Out of School Suspension program. Rivera was also placed on probation approximately three times before being committed to the Department of Correction Boys' School.

[12] Rivera also has an extensive criminal record as an adult. In January 2007, he was charged with criminal recklessness, resisting law enforcement, and offenses related to the failure to stop after an accident, and Rivera failed to appear four times in that case. While that case was pending, Rivera was charged federally with making official false statements, communicating threats, assault, and absence without leave (AWOL), was court martialled, and was sentenced to sixteen months of confinement. Subsequently, Rivera was convicted of his prior charges of criminal recklessness and resisting law enforcement and sentenced to probation, which was eventually revoked. After that, Rivera also was convicted of felony fraud and sentenced to a combination of jail and probation. A few years later, Rivera was convicted of felony domestic battery and sentenced to two years in the DOC and one year on probation.

[13] In 2010, Rivera was again charged federally and convicted of aiding, inducing, or causing the sale, distribution, or dispensation of cocaine, for which he was sentenced to twenty-four months in the Federal Bureau of Prisons and three

years of supervised release. Rivera was thereafter charged with the present offenses, but not before being convicted twice more of operating a motor vehicle without ever receiving a license. Throughout the course of the proceedings in all of these cases, Rivera has failed to appear at least eleven times since 2006.

[14] During sentencing, the trial court also found the following in aggravation: that the harm, injury, or loss suffered by the victims was more than necessary to prove the elements of the offenses; Rivera refused to cooperate with probation in this matter; Rivera is unlikely to respond to probation; one of the victims was under the age of twelve when the offenses started; the offenses were committed in the presence of other children under the age of eighteen; and Rivera was in a position of care, custody and control of the victims. The court found as a mitigator that Rivera had “family support.” Appealed Order at 2. The court found the aggravators outweighed the mitigators. The court sentenced Rivera to thirty-five years on each of Counts I and II, to run concurrently, and ten years on Count III, to run consecutively to Counts I and II, for an aggregate forty-five-year sentence. This appeal ensued.

## Discussion and Decision

### Sufficiency of the Evidence

[15] Rivera challenges the sufficiency of the evidence to support his conviction of child molesting, as a Level 4 felony, under Count III, which relates to his actions regarding his daughter, A.R.



When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt.

*Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009) (internal citations omitted).

Moreover, we note 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).

[16] To convict Rivera of child molesting, as a Level 4 felony, the State was required to prove beyond a reasonable doubt that (1) Rivera, (2) performed or submitted to fondling or touching (3) of a child under fourteen years of age (4) with the intent to arouse or satisfy the sexual desires of Rivera or the child. *See* Ind. Code § 35-42-4-3(b). “The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor’s conduct and the natural and usual consequence to which such conduct usually points.” *Carter v. State*, 31 N.E.3d 17, 30 (Ind. Ct. App. 2015) (citation omitted), *trans. denied*.

[17] Here, Rivera does not dispute that he touched A.R. when she was less than fourteen years old; rather, he asserts there was insufficient evidence that, by doing so, he intended to arouse A.R.’s or his own sexual desires. However, the evidence—specifically, A.R.’s and J.W.’s testimonies—established that Rivera

repeatedly touched A.R.'s buttocks and "private" area, meaning the area from which she "pee[s.]" Tr. at 63. Rivera touched A.R.'s back with his erect penis and "ground" against the front part of her body with his erect penis. *Id.* at 37. A.R.'s and J.W.'s testimonies as to those facts provided sufficient evidence of probative value from which the trial court could infer that Rivera touched A.R. with the intent to arouse his own sexual desires, as charged in Count III.

## Appellate Rule 7(B)

[18] Rivera contends that his sentence is inappropriate in light of the nature of the offenses and his character. Article 7, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration in original). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

[19] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate at the

end of the day 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.* at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

Deference to the trial court “prevail[s] 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 character (such as substantial virtuous traits or persistent examples of good character).” *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[20] In determining whether a sentence is appropriate, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). For each of Rivera’s Level 1 felony convictions, the sentencing range is twenty to fifty years with a thirty-year advisory sentence. I.C. § 35-50-2-4(c); I.C. § 34-42-4-3(a)(1), (3). For his Level 4 felony conviction, the sentencing range is two to twelve years with a six-year advisory sentence. I.C. § 35-50-2-5.5. Thus, while Rivera’s sentences are above the advisory sentences, they are well within the sentencing ranges. Moreover, the trial court ordered two of the sentences to run concurrently.

[21] When considering the nature of the offense, we look at the defendant’s actions in comparison to the elements of the offense. *Cannon v. State*, 99 N.E.3d 274, 280 (Ind. Ct. App. 2018), *trans. denied*. Regarding the nature of Rivera’s

offenses, they are obviously heinous; he used his position as a father-figure and actual father to engage in a years-long pattern of molesting young girls, one of whom was his own daughter. The violation of a position of trust that arises from a particularly close relationship between the defendant and the victim supports a harsher sentence. *See Hamilton v. State*, 955 N.E.2d 723, 727 (Ind. 2011). And the girls were both younger than was required for Rivera’s conduct to be illegal; J.W. and A.R. were both only nine years old when the molestation began. The young age of the girls also supports a harsher sentence. *See id.* (“[T]he victim’s [young] age also suggests a sliding scale in sentencing, as younger ages of victims tend to support harsher sentences.”). Furthermore, we note that Rivera threatened to make J.W.’s “life miserable” if she disclosed the abuse to anyone. Tr. at 31. Thus, Rivera showed no “restraint” in the commission of his crimes. *Stephenson*, 29 N.E.3d at 122. In short, there is nothing about the nature of the offenses that merits a reduction of Rivera’s sentence.

[22] Nor does Rivera’s character warrant a sentence reduction. He has an extensive criminal history that includes acts of violence. In addition, he showed no remorse and took no responsibility for his actions. While he certainly has the right to maintain his innocence, “a defendant’s lack of remorse can serve as an aggravator.” *Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006). Furthermore, there was no evidence that Rivera has “substantial virtuous traits or persistent examples of good character.” *Stephenson*, 29 N.E.3d at 122. Rivera has failed to demonstrate that his sentence is inappropriate in light of his character.

## Conclusion

- [23] The State provided sufficient evidence to support Rivera's conviction of child molesting, as a Level 4 felony. And Rivera has failed to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character.
- [24] Affirmed.

May, J., and Felix, J., concur.