MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

William Dean Robinson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 21, 2022

Court of Appeals Case No. 21A-CR-1819

Appeal from the Warren Circuit Court

The Honorable Hunter J. Reece, Judge

Trial Court Cause No. 86C01-1902-F3-15

Tavitas, Judge.

Case Summary

[1] William Dean Robinson contests both his convictions and sentence for rape and sexual battery. Twin sisters A.M. and B.M. were both awoken at an after-party by Robinson, who touched their genitalia. Robinson was convicted of two counts of rape and one count of sexual battery and sentenced to an aggregate total of eighteen years. Robinson now contends that there was insufficient evidence to sustain his convictions and that his sentence is inappropriate in light of the nature of his offenses and his character. We disagree and affirm.

Issues

[2] Robinson raises two issues for our review, which we restate here:

I. Whether sufficient evidence was introduced to sustain Robinson's convictions for rape and sexual battery.

II. Whether Robinson's sentence was inappropriate in light of the nature of his offenses and his character.

Facts

[3] On February 2, 2019, twins A.M. and B.M. went to a bar in West Pendleton. After the bar closed, both went to the nearby home of a friend for an after-party. Robinson was also at the bar and attended the after-party. B.M. fell asleep in an upstairs bedroom, as did A.M. in a different bedroom. Cassie Barnhart, the owner of the home, went upstairs and discovered Robinson moving around in A.M.'s bed. Barnhart ordered Robinson out of the room, and he complied.

[4] At approximately 9:30 a.m., A.M. woke to the feeling of being hugged and then felt fingers on her breasts and in her vagina. She was unable to escape, but eventually her captor released her, and she saw that it was Robinson. A.M. grabbed her clothes and left.

[5] Shortly thereafter, B.M. awoke to the feeling of hands on her body. Her leg was propped up against Robinson's shoulder, and Robinson's fingers were inside her vagina. B.M. immediately rebuffed Robinson, and her statements woke her bedmate, who observed Robinson next to the bed.

[6] A.M. and B.M. subsequently went to the Sheriff's department, where they reported Robinson's actions. The State charged Robinson with two counts of rape, Level 3 felonies, and one count of sexual battery, a Level 6 felony, for touching A.M.'s breast.

[7] At trial, A.M. testified:

> A. I remember waking up, [ ] I was kind of groggy and I remember waking up because my skin, I felt like my skin was being squeezed.
>
> * * * * *
>
> Q. And as you awoke what were you sensing?
>
> A. [ ] I felt like somebody was like bear hugging me, but squeezing my skin and then I felt [ ] hands on my breasts and then I felt [ ] fingers on my vagina and then I felt those fingers go inside of my vagina.

Q. And what period of time if you can say do you think you were experiencing this sensation before you woke up?

A. Not very long, maybe, maybe a couple of minutes of like I don't know, I'm not sure.

Tr. Vol. II p. 130.

[8] B.M. testified as follows:

Q. So tell us about [ ] when you woke up? How did that occur?

A. [W]hen I started to wake up I had not opened my eyes yet. [ ] felt more than two (2) hands which is odd because I only went to bed with one (1) person. [ ] I woke up to [ ] my leg being propped up and Mr. Robinson was, he was touching [ ] my vagina. I didn't even know he was upstairs.

* * * * *

Q. And you described that your leg was up in the air. Which leg are you talking about?

A. My left leg.

Q. When you, I think you said propped up. Can you describe how that [sic]?

A. [M]y right leg was still on the bed and my foot was, my left foot was on the bed and my knee was propped up either on his shoulder or on his head.

Q. So your left leg is, the knee is in the air and the foot is on the bed?

A. Yes.

Q. And you indicated the Defendant was touching you?

A. Yes.

Q. Were his fingers inside you?

A. At one point yes.

Id. at 146-48.

[9] A jury found Robinson guilty of all three charges. The trial court found two aggravators: (1) Robinson's criminal history; and (2) the fact that Robinson was on pre-trial release at the time of the offenses. The trial court imposed the advisory nine-year-sentence for each of the rape convictions, to be served consecutively, as well as a one-year-sentence for the sexual battery conviction, to be served concurrently for an aggregate sentence of eighteen years. Robinson now appeals.

Analysis

I. Sufficiency of Evidence

[10] Robinson contends that insufficient evidence was introduced to sustain his rape and sexual battery convictions. Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge

witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id*. (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id*. We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is, therefore, not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007), *trans. denied*).

A. Sex Crimes Generally

[11] Sexual battery is defined by Indiana Code Section 35-42-4-8, which reads:

> (a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person:
>
> (1) touches another person when that person is:
>
> (A) compelled to submit to the touching by force or the imminent threat of force; or
>
> (B) so mentally disabled or deficient that consent to the touching cannot be given; or

> (2) touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring;
>
> commits sexual battery, a Level 6 felony.

[12] Rape is defined by Indiana Code Section 35-42-4-1, which reads:

> (a) Except as provided in subsection (b), a person who knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct (as defined in IC 35-31.5-2-221.5) when:
>
> (1) the other person is compelled by force or imminent threat of force;
>
> (2) the other person is unaware that the sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) is occurring; or
>
> (3) the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) cannot be given;
>
> commits rape, a Level 3 felony.

[13] Both sex crimes involve sex acts without the consent of the victims. In this case Robinson was charged, in part, based on the fact that both victims were asleep when Robinson climbed into their beds. Sleeping victims are—obviously—unable to consent to sexual activity.

B. Sexual Battery

[14] Robinson was specifically charged with sexual battery under Indiana Code Section 35-42-4-8(a), which provides, in relevant part: "A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person . . . (2) touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring[.]" The State charged Robinson with touching "A.M's breast when A.M. was unaware that the touching was occurring" with the intent to arouse or satisfy Robinson's sexual desires. Appellant's App. Vol. II p. 18.

[15] Although Robinson mentions the sexual battery conviction and details of the evidence in his argument section, Robinson makes no specific argument regarding this conviction. He has failed to present a cogent argument, and we, therefore, deem it waived. *See* Ind. Appellate Rule 46(A)(8)(a); *Clark Cnty. Drainage Bd. v. Isgrigg*, 963 N.E.2d 9, 18 (Ind. Ct. App. 2012), *adhered to on reh'g*, 966 N.E.2d 678 (Ind. Ct. App. 2012) (citing *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1027-28 (Ind. Ct. App. 2005), *trans. denied*) ("'When parties fail to provide argument and citations, we find their arguments are waived for appellate review.'"). "'We will not become an advocate for a party or address arguments that are inappropriate or too poorly developed or expressed to be understood.'" *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018) (quoting *Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016)), *trans. denied*.

[16] Waiver notwithstanding, Robinson argues that the State failed to prove that "A.M. and B.M. were unaware that the sexual conduct was occuring [sic]." Appellant's Br. p. 15. With respect to A.M., Robinson concedes that: "A.M. admits that she woke up when Robinson grabbed her breasts and was awake when Robinson inserted his fingers into her vagina," *id*. at 15, yet Robinson claims that no evidence was presented that A.M. was unaware that the sexual conduct was occurring. Robinson's bald assertion with respect to A.M. is plainly at odds with the statute, which requires merely that the State establish beyond a reasonable doubt that the defendant "touche[d] another person's genitals, pubic area, buttocks, *or female breast* when that person is unaware that the touching is occurring." Ind. Code § 35-42-4-8 (emphasis added). If the touching of her breast is what woke A.M. up, then she could not have been aware of the touching at the moment of its initiation. We conclude that a reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt.

C. Rape

[17] Robinson was charged with rape specifically under Indiana Code Section 35-42-4-1(a), which provides in relevant part: "[A] person who . . . knowingly or intentionally causes another person to perform or submit to other sexual conduct (as defined in IC 35-31.5-2-221.5) when: . . . (2) the other person is unaware that the . . . other sexual conduct (as defined in IC 35-31.5-2-221.5) is occurring; . . . commits rape, a Level 3 felony." The term "[o]ther sexual conduct" means "an act involving . . . (2) the penetration of the sex organ or

anus of a person by an object." Ind. Code § 35-31.5-2-221.5. Proof of the "slightest penetration" of the female sex organ by a finger is sufficient to demonstrate "other sexual conduct." *Boggs v. State*, 104 N.E.3d 1287, 1288 (Ind. 2018) (quoting *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996)).

[18] We first note that the gravamen of the crime of rape is a lack of consent on the part of the victim. This axiom is long past dispute. *See, e.g., Tyson v. Trigg,* 50 F.3d 436, 444 (7th Cir. 1995) ("Lack of consent is part of the definition of rape and must therefore be proved by the state beyond a reasonable doubt.") (citing I.C. § 35-42-4-1(a)), *cert. denied*; *Warren v. State*, 470 N.E.2d 342, 344 (Ind. 1984)); *Burke v. State,* 250 Ind. 568, 580, 238 N.E.2d 1, 8 (1968); *Parrett v. State*, 1928, 159 N.E. 755, 200 Ind. 7. The record leaves no doubt that neither victim consented, and Robinson does not contest that obvious fact.

[19] Rather, for both rape convictions, Robinson's argument is, essentially, that both A.M. and B.M. were awake by the time he digitally penetrated their vaginas; therefore, the State failed to establish that the sexual conduct occurred when the victims were "unaware that the sexual intercourse or other sexual conduct . . . is occurring." I.C. § 35-42-4-1. B.M. testified that she: ". . . woke up to my leg being propped up and Mr. Robinson was, he was touching my, he was touching my vagina." Tr. Vol. II pp. 146-47. A.M. testified that, as she awoke, she "felt like somebody was like bear hugging me, but squeezing my skin and then I felt [ ], you know hands on my breasts and then I felt [ ], fingers on my vagina and then I felt those fingers go inside of my vagina." *Id*. at 130.

[20] Robinson makes the mistake of equating "unaware" with "unconscious." Such a false equivalence has long since been rejected by Indiana courts. *See, e.g., Filice v. State,* 886 N.E.2d 24, 33 (Ind. Ct. App. 2008) ("[T]he legislature's decision to use the word 'unaware' in the second subsection instead of using the word 'unconscious' is telling and leads us to conclude that the term includes, but is not limited to, unconsciousness."), *trans. denied*. We have previously found that a victim who wakes up during the attempted sexual conduct, but prior to penetration, is "unaware" within the meaning of the statute. *Birari v. State*, 968 N.E.2d 827, 835 (Ind. Ct. App. 2012) (evidence was sufficient to sustain rape conviction based on fact that: "A.J. was asleep during the time that Birari removed his clothes and her sweatpants and only woke up when Birari was on top of her and attempting to insert his erect penis in her vagina."), *trans. denied*.

[21] According to B.M.'s testimony, Robinson was already touching her vagina at the moment she awoke. Tr. Vol. II pp. 146-47. This is certainly sexual conduct as defined by Indiana Code Section 35-31.5-2-221.5. B.M. did not consent to this touching. With respect to A.M., we reject Robinson's hyper technical interpretation of the word "unaware" in Indiana Code Section 35-42-4-1. To do otherwise would be to accept that the legislature intended to draw a bright line at the moment of the victim's awakening, and that any sexual conduct occurring after that precise moment cannot constitute rape under Indiana Code Section 35-42-4-1(a)(2).

> We have construed "unaware" in Indiana's rape statute and the now-repealed criminal deviate conduct statute as "not aware: lacking knowledge or acquaintance; unconscious." Because statutes concerning the same subject matter should be read together to "harmonize," we agree that the legislature intended the meaning of "unaware" to be consistent across these three statutes.

Gliva v. State, 178 N.E.3d 321, 324 (Ind. Ct. App. 2021) (internal citations omitted).

[22] In *Nolan v. State*, 863 N.E.2d 398 (Ind. Ct. App. 2007), *trans. denied*, we interpreted the term "unaware" in the context of the now defunct Indiana Code Section 35-42-4-2(a)(2). The *Nolan* Court rejected the idea that a person who is halfway-asleep cannot be found to be unaware and emphasized that unconsciousness is not a pre-requisite for establishing unawareness. A close reading of A.M.'s testimony suggests that she was groggy and became aware of the sexual contact prior to fully waking up. A.M. did not consent to any sexual contact. We conclude that the evidence was sufficient to sustain Robinson's convictions.

II. Propriety of Sentence

[23] Next, Robinson contends that his sentence is inappropriate in light of the nature of his offenses and his character.[1] The Indiana Constitution authorizes

[1] We agree with the State that Robinson's argument with respect to whether the trial court improperly found no mitigating factors is waived. Such an argument is appropriate only in the context of a contention that the

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 and the character of the offender." 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) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[24] "'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

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trial court's sentence constituted an abuse of discretion. It is not an appropriate argument in the context of Appellate Rule 7(B).

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

[25] 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). In the case at bar, Robinson was convicted of two Level 3 felonies. "A person who commits a Level 3 felony . . . shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with the advisory sentence being nine (9) years." I.C. § 35-50-2-5(b). The trial court imposed the advisory sentence for both of Robinson's rape convictions. Robinson was also convicted of sexual battery, which is a Level 6 felony. "A person who commits a Level 6 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between six (6) months and two and one-half (2 ½) years, with the advisory sentence being one (1) year." I.C. § 35-50-2-7(b). The trial court sentenced Robinson to the advisory sentence for the Level 6 felony and ordered the sentence to run concurrently for an aggregate sentence of eighteen years.

[26] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Here, Robinson sexually assaulted two women while they were sleeping. The record reflects that Robinson had multiple

opportunities to curb his conduct, having been warned that his behavior was unacceptable and told to go to bed. He failed to do so. The trial court emphasized Robinson's recalcitrance during sentencing:

> What is particularly troublesome to the Court with this case Mr. Robinson is that there was definitely a cooling off period in between these events when you had time for reflection, when you had time based on the evidence to think about what had occurred. So often the Court is confronted with Defendant's [sic] in your position who act on impulse and do not have an opportunity to hear their [conscience] speak to them. But three (3) times your [conscience] spoke through third parties. First, when an individual walked into the room when you were in there with [A.M.] and ushered you out of the room. That should have been your [conscience] speaking to you, that you were doing things that you should not be doing. You reflected on that and took a second effort. Then when you were, when she awoke and you scared her and she yelled at you, your [conscience] should have spoke[n] to you and you should have stopped but you went downstairs, you thought about it, you reflected, you cooled off and you perpetrated your offense again.

Tr. Vol. III pp. 37-38.

[27] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). We further note that, "[t]he significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current

offense." *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*. "Even a minor criminal history is a poor reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*). Robinson's criminal history consists of five misdemeanors, two of which were batteries. Robinson, however, argues that he has family support, mental health issues, a dependent child, good employment history, and responds well to short-term probation or incarceration.[2]

[28] Given the nature of the offenses and the defendant's criminal history, we cannot say that the advisory sentences imposed were inappropriate, and we decline to revise said sentences.

Conclusion

[29] The State introduced sufficient evidence to sustain Robinson's convictions for rape and sexual battery. Robinson's sentence is not inappropriate in light of the nature of the crimes and his character. We affirm.

[30] Affirmed.

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[2] We agree with the State that Robinson's argument regarding the absence of mitigating factors and existence of two aggravating factors is not properly before us. The State points out—correctly—that such an argument is proper in the context of challenging a criminal sentence for an abuse of discretion, but Robinson makes no such challenge here. Appellee's Br. p. 18. The gravamen of our analysis is the propriety of the sentence in the context of the nature of the offenses and the defendant's character.

Bradford, C.J., and Crone, J., concur.