MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Thomas A. Hatcher,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 16, 2021

Court of Appeals Case No. 20A-CR-2240

Appeal from the Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause No. 28C01-2003-F4-5

Weissmann, Judge.

[1] Thomas Hatcher was convicted of two counts of Level 4 felony child molesting and one count of Level 5 felony possession of child pornography. He then admitted to being a habitual offender and a repeat sex offender. The trial court sentenced Hatcher to enhanced, consecutive prison terms of 28 and 12 years on his child molesting convictions and a concurrent term of 5 years on his possession of pornography conviction.

[2] Hatcher challenges his child molesting convictions on appeal, claiming the trial court erred by admitting into evidence a video recording of his victim's pre-trial forensic interview. Hatcher also argues that his consecutive child molesting sentences, which total 40 years imprisonment, are inappropriate in light of the nature of the offenses and his character. We affirm.

Facts

[3] In March 2020, Hatcher's girlfriend found "inappropriate" photographs of Hatcher's nine-year-old stepdaughter, D.B., on Hatcher's cell phone. Tr. Vol. II, p. 176. The photographs had been added to Hatcher's phone in October 2019, and at least one depicted D.B. exhibiting her vagina. Hatcher's girlfriend immediately showed the photographs to D.B.'s mother, who reported Hatcher to the police.[1]

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[1] D.B.'s mother was married to, living with, but separated from Hatcher at all times relevant to this appeal.

[4] The next day, D.B. underwent a forensic interview, during which she confirmed that Hatcher had photographed her "private parts" on more than one occasion. Ex. 12. D.B. also recounted that Hatcher had used his hand to rub her vagina in both the "toy room" and the living room of Hatcher's home. Ex. 12. According to D.B., she was seven or eight years old when Hatcher first touched her in this manner. Ex. 12. And he did so on more than one occasion in each of the two rooms. Ex. 12.[2]

[5] Police questioned Hatcher later that day. After being read his *Miranda* rights, Hatcher admitted to taking five or six photographs of D.B.'s vagina, including the one found on his phone. Ex. 13. He also admitted to rubbing D.B.'s vagina on two separate occasions. Ex. 13.

[6] The State charged Hatcher with two counts of Level 4 felony child molesting and five counts of Level 5 felony possession of child pornography. The State also alleged that Hatcher was a repeat sex offender and a habitual offender based on his prior convictions for Class B felony child molesting, Class C felony forgery, and Class C felony failing to register as a sex offender. The trial court eventually dismissed four counts of possession of child pornography at the State's request, and Hatcher was tried by a jury on the three remaining charges.

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[2] Hatcher misleadingly states in his Appellant's Brief: "[D.B.] told the interviewer the details of how and when Thomas touched her—*once* in the toy room and *once* in the living room." Appellant's Br. p. 8 (emphasis added).

[7] At trial, D.B. identified the photograph of her exhibiting her vagina as one Hatcher had taken. Tr. Vol. II, pp. 235-37; Tr. Vol. III, pp. 55-56. D.B. also testified that Hatcher had "give[n] her a bad touch," but she did not remember how or when he touched her or how many times it had happened. Tr. Vol. II, pp. 233-34. D.B. went on to testify that when she gave her forensic interview six months prior, she had a better memory of what Hatcher had done to her. Tr. Vol. II, p. 237. Over Hatcher's objection, the State then played a video recording of D.B.'s forensic interview.

[8] A jury convicted Hatcher on two counts of Level 4 felony child molesting and one count of Level 5 felony possession of child pornography. Hatcher then admitted to being a habitual offender and a repeat sex offender. The trial court sentenced Hatcher to 10 years for one child molesting conviction, enhanced by 18 years for being a habitual offender; 10 years for the other child molesting conviction, enhanced by 2 years for being a repeat sex offender[3]; and 5 years for the possession of child pornography conviction. The trial court further ordered Hatcher to serve his two child molesting sentences consecutively to each other but concurrently to his possession of child pornography sentence, yielding an aggregate sentence of 40 years imprisonment. Hatcher now appeals.

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[3] Hatcher agreed to this this 2-year enhancement, but he did not enter into an agreement regarding any other aspect of his sentence.

Discussion and Decision

[9] Hatcher does not challenge his conviction or sentence for possession of child pornography. Instead, he seeks reversal of his two child molesting convictions, claiming the trial court erred by admitting into evidence the video recording of D.B.'s forensic interview. Hatcher also argues that his consecutive child molesting sentences, which total 40 years imprisonment, are inappropriate in light of the nature of the offenses and his character.

I. Admissibility of Forensic Interview

[10] We review a trial court's evidentiary rulings for an abuse of discretion. *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or when the court misinterprets the law. *Carpenter v. State*, 786 N.E.2d 696, 703 (Ind. 2003).

[11] Here, the trial court admitted D.B.'s forensic interview into evidence under Indiana's Protected Person Statute (PPS), Ind. Code § 35-37-4-6. As it relates to this case, the PPS allows for the admission of otherwise inadmissible hearsay evidence relating to sex crimes against a victim under 14 years of age. *Id.* §§ 35-37-4-6(a)(1), -(c)(1), -(d). The victim, however, must testify at trial or be found unavailable as a witness. *Id.* § 35-37-4-6(e)(2).

[12] Statutes like the PPS "are generally described as efforts to spare children the trauma of testifying in open court against an alleged sexual predator." *Tyler v. State*, 903 N.E.2d 463, 466 (Ind. 2009). Because D.B. testified at trial, Hatcher

claims her forensic interview was not admissible under the PPS. He specifically points to *Tyler*, where our Supreme Court noted: "[I]f the person testifies live, admitting the additional earlier statement does not serve the statutory purpose of protecting the child from the burden of testifying." *Id.* at 467. But Hatcher takes this quote out of context.

[13] As indicated above, the PPS generally requires victims to testify at trial before their out of court statement is admissible. Ind. Code § 35-37-4-6(e)(2)(A). Our Supreme Court acknowledged this requirement in *Tyler* when it observed "two problems" with the statute:

> First, admitting both a child's live testimony and consistent videotaped statements is cumulative evidence, and can be unfairly prejudicial. Second, if a child or other protected person is sufficiently mature and reliable to testify in open court without serious emotional distress, resort to the PPS is unnecessary. And if the person testifies live, admitting the additional earlier statement does not serve the statutory purpose of protecting the child from the burden of testifying.

[14] 903 N.E.2d at 466-67. To address these issues, the Court exercised its supervisory powers and held, "if the statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both except as authorized under the Rules of Evidence." *Id.* at 467.

[15] D.B.'s forensic interview was neither consistent with nor cumulative of her live testimony. At trial, D.B. testified that she did not remember how or when

Hatcher touched her or how many times it had happened. The State then played D.B.'s forensic interview, during which she recalled that Hatcher had used his hand to rub her vagina on at least four occasions, beginning when she was seven or eight years old.

[16] Hatcher rightfully does not contend that D.B.'s forensic interview and live testimony were consistent or cumulative. Instead, he complains that "the State made minimal efforts to question D.B. about the events[,] creating a situation where the recorded interview was not entirely consistent cumulative evidence . . . ." Appellant's Br. p. 14. Though not directly applied by Hatcher in his brief, we presume this Court's opinion in *Cox v. State*, 937 N.E.2d 874 (Ind. Ct. App. 2010), supplies the basis for Hatcher's argument. *See* Appellant's Br. p. 13.

[17] In *Cox*, this Court held that a child molesting victim's forensic interview was not admissible under the PPS when, at trial, the State asked only whether the victim understood the difference between the truth and a lie. 937 N.E.2d at 879. Because there was no testimony about the charged crimes, consistent or otherwise, we concluded that admitting the forensic interview into evidence violated the "spirit" and "general principles" of *Tyler*, regardless of whether the admission directly violated the opinion's technical requirements. *Id.* at 878.

[18] Unlike the questioning in *Cox*, however, the State asked D.B. about how and when Hatcher touched her and how many times it had happened. D.B.'s inability to recall these details at trial does not negate the fact that she testified, as required by the PPS. *Compare Cox*, 937 N.E.2d at 878-79, *with Williams v.*

State, No. 20A-CR-865, 2021 WL 937512, at *4 (Ind. Ct. App. Mar. 12, 2021) (affirming admission of victim's forensic interview under PPS where victim testified at trial but refused to talk about molestation), *and A.R.M. v. State*, 968 N.E.2d 820, 826 (Ind. Ct. App. 2012) (affirming same where victim testified that they did not remember anything about being molested). The protective purpose of the PPS is served by allowing the State to forego further questioning of a victim in such circumstances. *See Williams*, 2021 WL 937512, at *4.

[19] We conclude the trial court did not abuse its discretion by admitting into evidence the video recording of D.B.'s forensic interview.

II. Appropriateness of Sentence[4]

[20] Indiana Appellate Rule 7(B) permits an appellate court to revise a sentence if, "after due consideration of the trial court's decision, the sentence is found to be inappropriate in light of the nature of the offense and the character of the offender." In reviewing the appropriateness of a sentence, our principal role is to attempt to leaven the outliers, not to achieve a perceived "correct" sentence. Knapp v. State, 9 N.E.3d 1274, 1292 (Ind. 2014). Accordingly, we give "substantial deference" to the trial court's sentencing decision. Id.

[4] Hatcher refers to his sentence as both "inappropriate" and "manifestly unreasonable." Appellant's Br. pp. 9, 12. But when Indiana Appellate Rule 7(B) was revised in 2002 (effective January 1, 2003), the "manifestly unreasonable" standard for reviewing sentences was replaced with the "inappropriate" standard. *See* App. R. 7(B) (2001) (formerly App. R. 17(B)). Accordingly, we do not address Hatcher's argument that his sentence is manifestly unreasonable.

[21] Hatcher does not challenge the length of his enhanced child molesting sentences; he claims only that their consecutive nature is inappropriate. Specifically, Hatcher emphasizes that the offenses "occurred over a few months, involved the same victim, and occurred in the same manner." Appellant's Br. p. 8.

[22] "Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences," but "additional criminal activity directed to the same victim should not be free of consequences." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Thus, consecutive sentences are not rendered inappropriate simply because the offenses involve the same victim. *See Ludack v. State*, 967 N.E.2d 41, 49 (Ind. Ct. App. 2012) (upholding enhanced, consecutive sentences, totaling 130 years, for two child molesting convictions, "even though the charges involve[d] the same victim").

[23] Hatcher likens his case to others where our Supreme Court revised consecutive child molesting sentences to concurrent sentences. *See* Appellant's Br. p. 10-11. But the cases on which Hatcher relies are easily distinguishable because the defendants therein had limited criminal histories, which compelled sentencing relief. *See Pierce v. State*, 949 N.E.2d 349, 352-53 (Ind. 2011) (revising aggregate sentence of 134 years to 80 years where defendant's only prior conviction was for Class C felony child molesting eight years before instant offense); *Harris v. State*, 897 N.E.2d 927, 930 (Ind. 2008) (revising two consecutive 50-year sentences to concurrent sentences where defendant's criminal history consisted of numerous traffic violations but only two Class D felonies involving theft);

Smith v. State, 889 N.E.2d 261, 263-64 (Ind. 2008) (revising two of four consecutive 30-year sentences to concurrent sentences where defendant's criminal history was assigned low aggravating weight due to lack of proximity in time between prior offenses and instant offenses); *Monroe v. State*, 886 N.E.2d 578, 580-81 (Ind. 2008) (revising five consecutive 22-year sentences to 50-year concurrent sentences where defendant's criminal history of six misdemeanor driving-related convictions was assigned little aggravating weight); *Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001) (revising two consecutive 40-year sentences to concurrent sentences where defendant did not have a history of criminal behavior).

[24] Hatcher's criminal history far exceeds that of the defendants in the above-listed cases. Setting aside the three felony convictions supporting Hatcher's repeat sex offender and habitual offender enhancements, Hatcher's 20-year criminal history includes convictions for Class C felony forgery, Class D felony failing to register as a sex offender, Level 6 felony domestic battery, and Level 6 felony battery against a public safety official. He also has six misdemeanor convictions, including Class A resisting law enforcement, Class A criminal trespass, and Class B disorderly conduct. Against this backdrop, Hatcher has not convinced us that the who, when, and how of his two child molesting offenses compel concurrent sentences. *See Ludack*, 967 N.E.2d at 49.

[25] Hatcher also has not shown that his 40-year sentence is inappropriate in general. As to the nature of his offense, the trial court gave "very heavy weight" to the fact that Hatcher molested D.B. while she was in his care, custody, and

control. App. Vol. II, p. 23. Specifically, Hatcher abused his position of trust as D.B.'s stepfather and the only "dad" she has ever known. Tr. Vol. II, p. 195. Our Supreme Court has observed that "[a] harsher sentence is . . . more appropriate when the defendant has violated a position of trust that arises from a particularly close relationship between the defendant and the victim, such as a parent-child or stepparent-child relationship." *Hamilton v. State*, 955 N.E.2d 723, 727 (Ind. 2011).

[26] As to Hatcher's character, the trial court deemed Hatcher's criminal history to be a "significant aggravator." App. Vol. II., p. 22. What's more, Hatcher has violated probation four times and was on parole when he molested D.B. He also has been charged with but not convicted of sixteen other offenses—both felony and misdemeanor—in the last 20 years. "[A]llegations of prior criminal activity need not be reduced to conviction before they may be properly considered as aggravating circumstances by a sentencing court." *Tunstill v. State*, 568 N.E.2d 539, 544-45 (Ind. 1991).

[27] Hatcher acknowledges his "significant criminal history" but highlights that he also has a significant history as a victim of "trauma and abuse," which is important to "understanding his character as an offender." Appellant's Br. 11. The trial court recognized Hatcher's childhood trauma as a mitigating circumstance but did not give it "significant weight" because Hatcher's criminal history has continued over a long period of time, despite his access to mental health services. App. Vol. II, p. 23. We defer to the trial court in this regard. *See* Knapp, 9 N.E.3d at 1292.

[28] We conclude Hatcher's consecutive child molesting sentences, totaling 40 years imprisonment, are not inappropriate in light of the nature of the offenses and his character.

[29] Affirmed.

Kirsch, J., and Altice, J., concur.