MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ronald J. Moore
The Moore Law Firm, LLC
Richmond, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Courtney Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Christopher Richardson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 21, 2023

Court of Appeals Case No.
22A-CR-2580

Appeal from the
Union Circuit Court

The Honorable
Matthew R. Cox, Judge

Trial Court Cause No.
81C01-1810-FA-215

Memorandum Decision by Judge Vaidik
Judges Tavitas and Foley concur.

Vaidik, Judge.

Case Summary

[1] Christopher Richardson was convicted of two counts of Class A felony child molesting for having vaginal and anal intercourse with his six-year-old daughter. The trial court sentenced him to the advisory term of thirty years on each count and ordered the sentences to be served consecutively. Richardson now appeals his sixty-year sentence, arguing the trial court erred in ordering the sentences to be served consecutively and that the sentence is inappropriate. We affirm.

Facts and Procedural History

[2] Richardson is the father of K.R., who was born in September 2007. In October 2018, the State charged Richardson with two counts of Class A felony child molesting and one count of Class C felony child molesting, alleging that he engaged in sexual intercourse, deviate sexual conduct, and fondling with K.R. between January 1 and May 1, 2014, when K.R. was six years old. A jury trial was held in June 2021. K.R. testified that there were two separate incidents. She testified that during the first incident, Richardson inserted his penis into her "vagina" and "butt." Trial Tr. Vol. III p. 58 (Case No. 21A-CR-1955). She testified that during the second incident, Richardson inserted his penis into her "vagina" and "anus." *Id.* at 63. The jury found Richardson guilty as charged. The trial court imposed consecutive, thirty-year advisory sentences on the Class

A felony convictions and a concurrent, four-year advisory sentence on the Class C felony conviction, for a total sentence of sixty years.

[3] Richardson appealed, arguing the trial court erred in imposing consecutive sentences because it did not identify any aggravators. We agreed with Richardson and remanded the case for resentencing. *Richardson v. State*, 189 N.E.3d 629 (Ind. Ct. App. 2022).

[4] On remand, the trial court held a hearing at which the parties presented argument only. The State asked for consecutive thirty-year sentences on the Class A felony convictions while Richardson asked for concurrent thirty-year sentences. The court found no mitigators and two aggravators and, as before, imposed consecutive thirty-year sentences on the Class A felony convictions. Specifically, the court found as an aggravator that Richardson has a criminal history, that is, a felony theft conviction from 2001 (after which he twice violated the "terms of community control supervision"). Appellant's App. Vol. II p. 247. But the court did not give his criminal history much weight because of "the amount of time that lapsed between his first conviction and the crimes committed under this cause number." *Id.* The court also found as an aggravator that Richardson was in a position of trust with K.R. and explained that this aggravator **alone** supported imposing consecutive sentences:

> The victim in this case, K.R., was the Defendant's [six[1]] year old biological daughter. While the victim's age is not considered an element of this particular factor, it does show that K.R. was at a vulnerable age in trusting her own father while in his care. The facts support that the crimes were committed when the Defendant was watching K.R. while K.R.'s mother (Defendant's ex-wife, K.M.) was at work. **The Court finds this single aggravating factor far exceeds and outweighs any mitigation the Court could have considered.**

Id. at 248 (emphasis added).

[5] Richardson once again appeals.

Discussion and Decision

I. Abuse of Discretion

[6] Richardson contends the trial court erred in imposing consecutive sentences on his Class A felony child-molesting convictions. He acknowledges that the court found more than one aggravator and that only one aggravator is needed to impose consecutive sentences. *See Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000) ("In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance."), *reh'g denied*. However, he claims the court should have found mitigators and that had it done so, it might have determined that the mitigators and aggravators balanced, meaning that

[1] The trial court said K.R. was seven years old. However, based on K.R.'s date of birth and the time period alleged in the charging information, she would have been six years old.

consecutive sentences are not warranted. *See Gleaves v. State*, 859 N.E.2d 766, 771 (Ind. Ct. App. 2007) ("[I]n order to impose consecutive sentences, the trial court must find **both** at least one aggravating circumstance, and that the aggravators outweigh the mitigators.").

[7] Richardson argues the trial court should have found two mitigators. The finding of aggravators and mitigators rests within the sound discretion of the trial court, and we review such decisions only for an abuse of that discretion. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied.* One way a trial court abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Id.*

[8] Richardson first asserts the trial court should have found as a mitigator "the undue hardship a life sentence would impose" on his wife and stepdaughter. Appellant's Br. p. 11. But many people convicted of serious crimes have family members they provide for, and, absent special circumstances, trial courts need not find that imprisonment will result in an undue hardship. *Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002); *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). On appeal, Richardson identifies no special circumstances. The court did not abuse its discretion in not finding this mitigator.

[9] Richardson also asserts the trial court should have found as a mitigator that he had only one prior conviction from 2001. At the resentencing hearing, defense counsel explained that he "had offered [Richardson's criminal history] as a mitigator back in the original sentencing" given the time that had elapsed

between the convictions. Tr. p. 6. But defense counsel finished his argument by asking the court to (1) find Richardson's "criminal history" was not an aggravator **or** (2) give it "minimal aggravating weight." *Id.* The court chose option two, finding that Richardson's prior conviction was an aggravator but that it was entitled to "minimal weight" given the time that had elapsed between the convictions. The court did not abuse its discretion in finding Richardson's felony conviction to be an aggravator (with minimal weight) instead of a mitigator.

[10] Having found two aggravators and no mitigators, the trial court did not abuse its discretion in imposing consecutive sentences.

II. Inappropriate Sentence

[11] Richardson next contends his sixty-year sentence is inappropriate and asks us to order the two thirty-year terms to run concurrently. Indiana Appellate Rule 7(B) provides that an appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The court's role under Rule 7(B) is to "leaven the outliers," and "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019). "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing

Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008)). Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[12] The sentencing range for a Class A felony is twenty to fifty years, with an advisory sentence of thirty years. Ind. Code. § 35-50-2-4(a). The trial court imposed the advisory term for each count but ordered them to be served consecutively, for a total sentence of sixty years. As Richardson acknowledges, he faced up to 100 years for the two counts.

[13] Richardson concedes that the nature of the offenses is "very serious." Appellant's Br. p. 17. He twice had vaginal and anal intercourse with his six-year-old daughter, with whom he occupied the ultimate position of trust. He was charged with two Class A felonies—one for vaginal intercourse and one for anal intercourse (deviate sexual conduct). However, Richardson could have been charged with four Class A felonies, as there were two incidents, and each incident involved vaginal and anal intercourse.[2] As for Richardson's character, we acknowledge that he has only one prior conviction and that it occurred more than a decade before these crimes. But it is still a felony conviction, and he twice violated the terms of his community-control supervision for this

[2] Richardson doesn't dispute that there were two incidents and that each incident involved vaginal and anal intercourse. Indeed, Richardson's brief in the first appeal says just that. *See* Appellant's Br. p. 7, No. 21A-CR-1955 (Jan. 25, 2022).

conviction. On appeal, Richardson does not point to any other redeeming aspects of his character.

[14] Nevertheless, Richardson asserts that this case is on "near precise parallel" with *Rivers v. State*, 915 N.E.2d 141 (Ind. 2009). Appellant's Br. p. 17. There, the defendant was convicted of two counts of Class A felony child molesting and one count of Class C felony child molesting for molesting his seven or eight-year-old niece on two occasions. On the first occasion, the defendant performed oral sex on the victim. On the second occasion, the defendant "tried to enter [the victim] from behind" and then made her stroke his penis until he ejaculated. *Rivers*, 915 N.E.2d at 142. The trial court imposed consecutive, thirty-year advisory sentences on the Class A felony convictions and a concurrent, four-year advisory sentence on the Class C felony conviction, for a total sentence of sixty years. The Indiana Supreme Court concluded that consecutive sentences were inappropriate and remanded with instructions for the trial court to impose concurrent sentences. In examining the defendant's character, the Court noted that he had no criminal history, maintained steady employment, and had a "good" relationship with the victim before committing the crimes. *Id.* at 143. As for the nature of the offenses, the Court noted that "[t]he record does not indicate his crimes occurred over a long period of time" or "that there was any other sexual misconduct on [his] part." *Id.* at 144. "Rather, the record indicates [the defendant] molested [the victim] on two occasions (charged as three) in a relatively short period of time, then stopped on

his own accord, and did not commit any other offenses in the seven years that passed until he was charged." *Id.*

[15] Although there are no doubt similarities between the cases, there are also important differences. First, Richardson is K.R.'s father, not her uncle. Second, Richardson was charged with two Class A felonies (one count for vaginal intercourse and one count for anal intercourse), but he could have been charged with four Class A felonies (two counts for vaginal intercourse and two counts for anal intercourse), thus facing even more time. In contrast to Richardson, the defendant in *Rivers* committed only one Class A felony each incident (oral sex on the first incident and deviate sexual conduct on the second). Third, Richardson has a prior felony conviction and twice violated the terms of his community-control supervision. Given these differences, *Rivers* does not support ordering Richardson's thirty-year sentences to run concurrently.

[16] Affirmed.

Tavitas, J., and Foley, J., concur.