MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

David T.A. Mattingly
Mattingly Law, LLC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Jayme L. Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 26, 2021

Court of Appeals Case No. 20A-CR-1392

Appeal from the Benton Circuit Court

The Honorable Rex W. Kepner, Judge

Trial Court Cause No. 04C01-1705-F4-96

Crone, Judge.

Case Summary

[1] Jayme L. Smith appeals his conviction, following a jury trial, for level 4 felony child molesting. Smith challenges the sufficiency of the evidence to support his conviction and also contends that the twelve-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. Finding the evidence sufficient and that Smith has not met his burden to prove that his sentence is inappropriate, we affirm.

Facts and Procedural History

[2] The facts most favorable to the verdict are as follows. M.E. was born in December 2008. In January 2017, M.E. was eight years old and Smith was thirty-seven years old. Smith is M.E.'s mother's cousin and was over at M.E.'s house "all of the time" and "helped out around the house." Tr. Vol. 2 at 209. M.E.'s mother considered Smith to be one of her "best friends," and he had a "close" relationship with the whole family. *Id.*

[3] On January 8, 2017, M.E. and her brother were in M.E.'s bedroom playing video games on her bed. Smith came into the bedroom and sat down on the bed. He told M.E. to come and sit next to him because he wanted to watch her play. M.E. moved next to Smith, who had a blanket on top of him, which he used to also partially cover M.E. Smith then "put his hands on the inside" of M.E.'s jeans on top of her underwear, with his fingers being "about an inch and one-half" from her vagina for approximately ten seconds. *Id.* at 177-78. M.E. did not say anything to Smith because she was "scared." *Id.* at 178. At some

point, M.E.'s mother walked by the bedroom door and saw Smith quickly "jerk his hand out from under the blanket." *Id.* at 202. M.E.'s mother was "dumfounded and shock[ed]" and thought that "something weird was going on." *Id*. at 203. After Smith left the bedroom, M.E. went into the living room and told her mother what happened. M.E.'s mother told Smith to leave, and he became angry, "started cussing," and called M.E. a "f**king little b word." *Id*. at 205. M.E.'s mother contacted the police later that evening.

[4] The State subsequently charged Smith with level 4 felony child molesting and level 5 felony child solicitation. Following a trial, the jury found Smith guilty of child molesting but not guilty of child solicitation. The trial court imposed a twelve-year sentence, with ten years executed in the Indiana Department of Correction and two years suspended to home detention. This appeal ensued.

Discussion and Decision

Section 1 – Sufficient evidence supports Smith's conviction.

[5] Smith first challenges the sufficiency of the evidence to support his level 4 felony child molesting conviction. In reviewing a challenge to the sufficiency of evidence, we neither reweigh evidence nor judge witness credibility. *Moore v. State*, 27 N.E.3d 749, 754 (Ind. 2015). The evidence need not "overcome every reasonable hypothesis of innocence." *Dalton v. State*, 56 N.E.3d 644, 647 (Ind. Ct. App. 2016) (quoting *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007)), *trans. denied*.

[6] To convict Smith of level 4 felony child molesting, the State was required to prove that Smith fondled or touched M.E., a child under fourteen years of age, with "intent to arouse or to satisfy the sexual desires of either the child or the older person." Ind. Code § 35-42-4-3(b). Smith asserts that the State failed to establish that he touched M.E. with the intent to arouse or satisfy his or her sexual desires.

[7] 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 sequence to which such conduct usually points. *Bowles v. State,* 737 N.E.2d 1150, 1152 (Ind. 2000). Further, the "intent to gratify required by the statute must coincide with the conduct; it is the purpose or motivation for the conduct." *T.G. v. State*, 3 N.E.3d 19, 23 (Ind. Ct. App. 2014) (quoting *DeBruhl v. State*, 544 N.E.2d 542, 546 (Ind. Ct. App.1989)).

[8] It is well established that the "[i]ntentional touching of the genital area can be circumstantial evidence of intent to arouse or satisfy sexual desires." *Sanchez v. State*, 675 N.E.2d 306, 311 (Ind. 1996). In *Nuerge v. State*, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997), *trans. denied*, we concluded that because an inner thigh is in close proximity to the genitals, an erogenous zone, it may itself be the source of sexual gratification. We have also held that a factfinder could reasonably infer that the touching of a child's bare bottom is close enough to the genitals as to constitute the source of sexual gratification. *Altes v. State*, 822 N.E.2d 1116, 1121-22 (Ind. Ct. App. 2005)*, trans. denied*.

[9] Here, the evidence indicates that Smith waited for the other adults to be absent before going into a bedroom where eight-year-old M.E. was playing video games and asking her to sit close to him. After ensuring that both their laps were concealed with a blanket, Smith "put his hands on the inside" of her jeans on top of her underwear, with his fingers remaining "about an inch and one-half" from her vagina for approximately ten seconds. Tr. Vol. 2 at 177-78. The natural and usual sequence to which Smith's behavior points, coupled with the fact that the area where Smith intentionally placed his hand was close to M.E.'s genitals, supports a reasonable inference that the purpose or motivation for Smith's touching was to arouse or satisfy his or M.E.'s sexual desires. Smith's assertions to the contrary are simply a request for this Court to reweigh the evidence, and we may not. The State presented sufficient evidence of Smith's intent to support his conviction for level 4 felony child molesting.

Section 2 – Smith has not met his burden to prove that his sentence is inappropriate.

[10] Smith also requests that we reduce his sentence pursuant to Indiana Appellate Rule 7(B), which states that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Sentence review under Appellate Rule 7(B) is very deferential to the trial court." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "[W]hen reviewing a sentence, our principal role is to 'leaven the outliers' rather than necessarily achieve what is perceived as the 'correct' result." *Id*.

(quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). "We do not look to determine if the sentence was appropriate; instead, we look to make sure the sentence was not inappropriate." *Id*. "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." *McFall v. State*, 71 N.E.3d 383, 390 (Ind. Ct. App. 2017). "In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge." *Id*. The burden is on the defendant to persuade us that his sentence is inappropriate. *Id*.

[11] Turning first to the nature of Smith's offense, the advisory sentence is the starting point the legislature has selected as an appropriate sentence. *Green v. State*, 65 N.E.3d 620, 637-38 (Ind. Ct. App. 2016), *trans. denied* (2017). The sentencing range for a level 4 felony is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The trial court here imposed a twelve-year sentence, with ten years executed and two years suspended to home detention. When determining the appropriateness of a sentence that deviates from an advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that "makes it different from the typical offense accounted for by the legislature when it set the advisory sentence." *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011). We do this while still giving "substantial

deference" and "due consideration" to the trial court's decision. *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014).

[12] Our review of Smith's offense indicates that it is indeed more egregious than the typical offense accounted for by the legislature. Specifically, Smith took advantage of his familial relationship and position of trust with M.E. in order to fulfill his sexual desires. M.E.'s family trusted Smith to come over to the home and to spend time alone with M.E. and her siblings. Smith waited until M.E.'s parents were not around, and then he lured M.E. to sit close to him on her bed under the guise of watching her play video games. He covered himself and M.E. with a blanket so he could surreptitiously put his hand inside her jeans and touch her body extremely close to her vagina. Eight-year-old M.E. "was scared." Tr. Vol. 2 at 178. M.E.'s mother testified that since this incident, M.E. has been afraid to go upstairs in the home by herself when it is dark. She has also started having nightmares and has become more withdrawn. There is nothing about the nature of this offense that warrants a sentence reduction.

[13] Smith fares even worse when we consider his character. We note that "[t]he character of the offender is found in what we learn of the offender's life and conduct." *Perry v.* State, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). The record indicates that immediately after committing his current crime, Smith allegedly threatened M.E.'s parents and fled the jurisdiction in order to avoid prosecution. He has also since battered a public safety officer while in jail. Obviously, this conduct reflects very negatively on his character. Moreover, the

trial court noted that the presentence investigation report indicates that Smith lacks remorse for his behavior and is at a high risk to reoffend.

[14] Significantly, when considering the character of the offender, another relevant fact we look at is the defendant's criminal history. *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017), *trans. denied.* Smith has a notable criminal history. Thirty-seven-year-old Smith was convicted of his first crime at age eighteen. Since then, he has amassed at least three misdemeanor and two felony convictions. One of Smith's prior felony convictions involved him displaying pornography to M.E.'s brother. At the time of sentencing, Smith had multiple pending charges, including two counts of failure to appear, two counts of intimidation involving M.E.'s parents, and one count of battery resulting in bodily injury to a public safety officer. Although Smith admits that his "character is somewhat lacking due to his prior criminal history," he claims that it still "does not paint a picture of a person who is the worst of the worst." Appellant's Br. at 20. Smith's argument is misplaced in that he did not receive the maximum allowable sentence, and we remind him that he could have received a fully executed twelve-year sentence. We are not persuaded that a

ten-year executed sentence and two years suspended to home detention is inappropriate in light of the foregoing.[1] Therefore, we affirm.

[15] Affirmed.

Najam, J., and Riley, J., concur.

[1] Smith directs us to *Murray v. State*, 74 N.E.3d 242, 245-46 (Ind. Ct. App. 2017), to support his argument that he should have received a lesser sentence for his level 4 felony child molesting conviction. Specifically, he asserts that because the panel in *Murray* affirmed executed sentences of nine years each for multiple counts of the same crime, with the trial court even suspending six years on one of those counts. Smith urges that "the more benign facts" of this case compared to those in *Murray* demonstrate that Smith's sentence is excessive. Appellant's Br. at 22. We must restate that it is not our function to decide if the sentence imposed was appropriate; we look to make sure the sentence imposed "was not inappropriate." *Conley*, 972 N.E.2d at 876. In other words, simply because the *Murray* panel determined that lesser individual executed sentences were not inappropriate under the specific circumstances presented, that does not mean that a longer executed term for the same crime, even presuming slightly less egregious facts, would also not be inappropriate. Moreover, this author specifically noted that he believed that the sentence imposed in *Murray* was too lenient and that had the State on appeal "asked us to impose a harsher sentence, [he] would have been inclined to grant that request." *Id.* (Crone, J., concurring in result). Smith's reliance on *Murray* is unpersuasive.