MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Mark K. Leeman
Leeman Law Office
Logansport, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

David J. Avalle,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 17, 2023

Court of Appeals Case No. 22A-CR-2819

Appeal from the Cass Superior Court

The Honorable Lisa L. Swaim, Judge

Trial Court Cause No. 09D02-2102-F1-1

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] David J. Avalle appeals his 131-year aggregate sentence following his guilty plea to nine offenses. The parties agree that the trial court made some errors in sentencing Avalle; the question in this appeal is whether those errors require Avalle to be resentenced. We conclude that they do not and, further, that his sentence is not inappropriate. We therefore affirm his sentence but remand to the trial court with instructions that it enter a corrected sentencing order and abstract of judgment in accordance with this decision.

Facts and Procedural History

[2] In 2020, Avalle lived with his girlfriend of several years, P.H., and her children, which included her eleven-year-old daughter B.H. P.H.'s children looked to Avalle as a "father figure" and their "stepfather." Tr. Vol. 2, p. 54.

[3] Between August 2020 and the end of January 2021, Avalle repeatedly molested B.H. Specifically, Avalle "place[d his] penis in [B.H.'s] vagina" on "an ongoing basis." *Id.* at 24. During that same time period, Avalle "on multiple occasions place[d his] mouth on her vagina." *Id.* at 25. He also "place[d his] penis in her mouth," and "on an ongoing basis and multiple times" he penetrated B.H.'s vagina "with an object." *Id.* He further "penetrated [B.H.'s] anus with a . . . sex toy," and he "attempted but w[as] unable to have anal sex" with her. *Id.* On at least one occasion, Avalle "created a digital video of [him]self putting [his] penis into [her] mouth." *Id.*

[4] When P.H. learned of Avalle's molestations of B.H., she contacted local law enforcement. In an ensuing investigation, officers discovered "a quantity of

methamphetamine" in Avalle's possession. *Id.* at 26. After Avalle's arrest and release on bond, Avalle then violated a no contact order by contacting B.H. over social media. Following Avalle's molestations of her, B.H. has attempted suicide on "[m]ultiple" occasions and been hospitalized at least three times. *Id.* at 53-54.

[5] In an amended information, the State charged Avalle with five counts of Level 1 felony child molesting; one count of Level 1 felony attempted child molesting; one count of Level 4 felony child exploitation; one count of Level 6 felony possession of methamphetamine; and one count of Class A misdemeanor invasion of privacy. In November 2022, Avalle pleaded guilty to each of those nine counts without a plea agreement.

[6] Following a sentencing hearing, the trial court accepted Avalle's guilty plea and found the following aggravating and mitigating circumstances:

> I think everyone is suffering in this case. There is no one, apart from [Avalle's] mitigation specialist, that has been on this stand today that I think did not suffer and has not suffered because of the actions of Mr. Avalle. Because of the choices that he's made. He's suffering from his own choices. . . . I do think that Mr. Avalle is remorseful[,] . . . and I'm going to give him that as a mitigator. I believe that he [pleaded] guilty to take responsibility for his actions and also to lessen the trauma that he would have caused [B.H.] if he had gone to trial. I believe that he, in his mind, has not intended to harm her, but in fact[] he has harmed her, and I think that he recognizes that. He has harmed her to a degree that she even now is still trying to harm herself. Trying to end her own pain. And I do believe that he is remorseful, and I believe he ple[aded] guilty . . . both because he wanted to lessen

> her pain[] and also . . . to take responsibility[,] and it is a mitigator . . . . He has no criminal history, and I am going to find that as a mitigator. He's spent . . . a good part of his life . . . not in . . . the criminal justice system. I'm not going to say he [ha]s completely led a law-abiding life . . . [.] [H]e has had a lengthy period of time where he has used drugs voluntarily[,] . . . whether it's cocaine or methamphetamine or marijuana. He's spent a large part of his life under the influence of drugs by his own hand and by his own decisions. . . . I also find as a . . . mitigator . . . that he has a history of being molested himself. And I think there's a saying that . . . sometimes criminals are not born, they're made. . . . But I do not believe that he is an entire victim in this case. His actions were his own. His decisions were his own. And his decisions were made day after day after day. . . . I am showing as an aggravator that there was an ongoing pattern of conduct that . . . [Avalle] could have changed and did not. [Avalle] was in a position of trust with [B.H.] like no other. . . . He was the one person that could . . . have drawn that line and that would have defined her idea of what men and good men would do for the rest of her life. And instead, [he] made the completely opposite decision and that will define her as well . . . . Also, [Avalle] violated the Protective . . . Order with the victim. The one thing that this Court ordered you to do when you were released. . . . And it showed . . . that[,] even with a court [o]rder, you were willing to do anything, whatever you wanted[,] when you had the freedom that you had . . . . And[,] because of that, I'm . . . highly concerned for [B.H.'s] safety . . . and her emotional and mental health.

Id. at 125-28.

[7] The court then sentenced Avalle as follows:

- Count 1, Level 1 felony child molesting: thirty years;
- Count 2, Level 1 felony child molesting: twenty years;

- Count 3, Level 1 felony child molesting: twenty years;
- Count 4, Level 1 felony child molesting: twenty years;
- Count 5, Level 1 felony child molesting: twenty years;
- Count 6, Level 1 felony attempted child molesting: twenty years;
- Count 7, Level 4 felony child exploitation: two years;
- Count 8, Level 6 felony possession of methamphetamine: two years;
- Count 9, Class A misdemeanor invasion of privacy: one year.

[8] The court ordered Avalle's sentences on Counts 1 through 7 to be executed in the Department of Correction. The court ordered his sentences on Counts 8 and 9 to be executed in the Cass County Jail. The court then allocated Avalle's credit time backwards through the counts, which resulted in Avalle's sentences for Counts 8 and 9 being completed and part of his sentence for Count 7 being completed. Finally, the court ordered Avalle's sentences on Counts 1 through 7 to run consecutive to one another and ordered his sentences on Counts 8 and 9 to run concurrently, but the court did not identify the counts to which Avalle's concurrent sentences were to attach, and the abstract of judgment simply says those sentences run concurrently with each other. *See* Appellant's App. Vol. 4, p. 114. All in all, Avalle's aggregate sentence is 131 years executed.

[9] This appeal ensued.

Discussion and Decision

[10] Avalle contends that the trial court abused its discretion when it sentenced him and that we should exercise our authority under Indiana Appellate Rule 7(B) to review and revise his sentence. We address the related arguments of the trial

court's sentencing discretion and our independent review of Avalle's sentence separately.

1. The trial court's sentencing errors do not require resentencing.

[11] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind.), *clarified on other grounds on reh'g*, 875 N.E.2d 218 (2007). An abuse of discretion occurs if a decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* (internal quotation omitted).

[12] Avalle pleaded guilty to six Level 1 felonies, one Level 4 felony, one Level 6 felony, and one Class A misdemeanor. Level 1 felonies typically carry a sentencing range of twenty to forty years, with an advisory term of thirty years; however, a credit-restricted Level 1 felony carries a maximum term of fifty years, and there is no dispute that Avalle's convictions for Counts 1 through 5 were credit restricted. Ind. Code §§ 35-31.5-2-72(1), 35-50-2-4 (2020). A Level 4 felony carries a sentencing range of two to twelve years, with an advisory term of six years. I.C. § 35-50-2-5.5. A Level 6 felony carries a sentencing range of six months to two-and-one-half years, with an advisory term of one year. I.C. § 35-50-2-7. And a Class A misdemeanor carries a possible maximum term of one year. I.C. § 35-50-3-2.

[13] Thus, Avalle faced a possible maximum sentence of 305.5 years. However, aside from his sentences on Counts 1, 8, and 9, the trial court ordered Avalle to serve the minimum sentence on each count. On Count 1, a credit-restricted Level 1 felony, the court ordered him to serve the advisory term of thirty years. On Count 8, the Level 6 felony conviction, the court ordered Avalle to serve an enhanced but concurrent term of two years. And on Count 9, the Class A misdemeanor conviction, the court ordered Avalle to serve one year. The court ordered that year to be served consecutive to Avalle's sentence on Count 1, which was required as a matter of law. *See* I.C. § 35-50-1-2(e) ("If, after being arrested for one (1) crime, a person commits another crime . . . while the person is released . . . on bond[,] the terms of imprisonment for the crimes shall be served consecutively . . . .").

[14] Avalle asserts that the trial court abused its sentencing discretion in several respects. First, he notes that, during a colloquy with counsel, the trial court erroneously referred to his conviction on Count 6—the Level 1 felony conviction for attempted child molesting—as a credit-restricted offense. Avalle is correct that a conviction for attempted child molesting is not a credit-restricted offense. I.C. § 35-31.5-2-72. However, the trial court sentenced Avalle to the minimum term of twenty years for this conviction; accordingly, we are confident that his sentence on this conviction would remain the same had the court properly recognized it as not being credit restricted, and we will not find an abuse of discretion in the court's mistaken description of this offense.

[15] Second, Avalle is correct that the trial court's sentencing order fails to identify him as a credit-restricted felon at all, and the court's abstract of judgment identifies him as a credit-restricted felon but does not identify the counts to which that status attaches. *See* Appellant's App. Vol. 4, pp. 107-08, 114-15. Avalle and the State agree that his convictions on Counts 1 through 5 were the credit-restricted offenses. They further agree, and so do we, that the trial court's sentencing order and abstract of judgment should be corrected to reflect as much.

[16] Third, Avalle asserts that the trial court erred in its allocation of his credit time. In particular, Avalle states that the court erroneously applied his credit time first to his Class A misdemeanor conviction for invasion of privacy, which offense he committed while out on bond; that the court improperly divided his credit time between two concurrent sentences rather than have the same amount of credit time apply to both; and that the court's allocation of credit time to his Level 6 felony conviction (for possession of methamphetamine) was erroneous based on the date the State amended the information to include that count.

[17] The State properly concedes all of those errors, and we accept the State's concessions. But we need not remand for resentencing on any of those errors. Avalle's credit time, in its entirety, should have been allocated to his sentence for Count 1. *See, e.g.*, *Paul v. State*, 177 N.E.3d 472, 476-77 (Ind. Ct. App. 2021). The trial court shall correct its sentencing order and abstract of judgment accordingly.

[18] Fourth, Avalle notes that the trial court failed to attach his concurrent sentences on Counts 7 and 8 to any other sentence. Again, Avalle is correct on this point, but remanding for resentencing is not required. Instead, the trial court shall correct its sentencing order and abstract of judgment to show that the sentences on Counts 7 and 8 are concurrent with each other and also concurrent with Avalle's sentence on Count 1.[1]

[19] Last, Avalle argues that the trial court abused its discretion when it both entered minimum sentences on individual counts and also ordered the sentences on those counts to be served consecutively. On this argument, we cannot agree. "The decision to impose consecutive sentences lies within the discretion of the trial court," and "[a] single aggravating circumstance may be sufficient to support the imposition of consecutive sentences." *Gober v. State*, 163 N.E.3d 347, 353 (Ind. Ct. App. 2021), *trans. denied*. Further, while a trial court is "required to state its reasons for imposing consecutive sentences[,]" no magic language need be used, and ultimately we will reverse the trial court's judgment only where it is clearly against the facts and circumstances before it or the court's judgment is contrary to law. *Id.*

[20] In support of this argument, Avalle relies on *Monroe v. State*, 886 N.E.2d 578, 580 (Ind. 2008), which was decided under our presumptive-sentencing statutes. In *Monroe*, the trial court found three aggravating circumstances and no

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[1] Attaching the concurrent sentences to Avalle's sentence on Count 1 is also the most favorable interpretation to Avalle of the trial court's intended sentence and results in the 131-year aggregate term.

mitigating circumstances before imposing below-presumptive sentences, which the court ordered to be served consecutively. However, in imposing that sentence, the trial court stated only that the aggravating circumstances were "substantial . . . for purposes of concurrent or consecutive" sentences. *Id.* at 579. On transfer, our Supreme Court held that the trial court's sentencing statement was insufficient to explain "why these circumstances justify consecutive sentences as opposed to enhanced concurrent sentences." *Id.* at 580. In lieu of remanding, however, our Supreme Court reviewed and revised the defendant's sentence under Appellate Rule 7(B). *Id.* at 580-81.

[21] But the trial court's sentencing statement here suffers from no such ambiguity. The trial court thoroughly explained the aggravating and mitigating circumstances it found to be significant, and it then articulated Avalle's sentences. At no point did the court suggest or leave open the possibility that it was considering concurrent sentences for the sentences at issue, as the trial court in *Monroe* did. We thus conclude that the court made its reasoning clear for Avalle's sentences, namely, that the aggravating factors of Avalle's pattern of conduct, his position of trust over B.H., and his violation of the no contact order while on bond justified the imposition of consecutive sentences, albeit of some minimum individual terms. Therefore, the trial court's sentencing statement is not insufficient and was not an abuse of the court's discretion.

2. Avalle's 131-year aggregate sentence is not inappropriate in light of the nature of the offenses or his character.

[22] We thus turn to Avalle's argument that we should review and revise his sentence under Indiana Appellate Rule 7(B). Under Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "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." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[23] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing "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).

[24] We initially conclude that *Faith v. State*, 131 N.E.3d 158 (Ind. 2019), and *Monroe*, on which Avalle relies, are inapposite to the circumstances presented here. In *Faith*, the trial court imposed three consecutive thirty-year terms, with

twenty years suspended. A panel of our Court revised the defendant's aggregate sentence to a total of thirty years. On transfer, our Supreme Court, after reciting some essential factual predicates for the offenses, summarily reinstated the defendant's original sentence but with thirty years suspended instead of twenty. *Faith*, 131 N.E.3d at 160. We find nothing controlling in that analysis. Similarly, Avalle's reliance on *Monroe*, where our Supreme Court reviewed and revised the defendant's sentence only after first holding that the trial court had abused its discretion in sentencing him, is not controlling here where the trial court's sentencing errors do not require resentencing in the first instance. *See* 886 N.E.2d at 580-81.

[25] We also recognize that Avalle's 131-year aggregate sentence for nine convictions, which include six Level 1 felony convictions, is not an outlier. *See, e.g.*, *Ludack v. State*, 967 N.E.2d 41, 49-50 (Ind. Ct. App. 2012) (refusing to revise a 130-year sentence on two Class A felony child molesting convictions of the same victim), *trans. denied*. Further, Avalle presents no affirmative and "compelling" evidence that portrays his offenses "in a positive light" or that examples "substantial virtuous traits" of his character. *See Stephenson*, 29 N.E.3d at 122. For these reasons alone, we are required to reject Avalle's request to revise his sentence under Rule 7(B). *See id.*

[26] Still, we are also not persuaded that Avalle's 131-year aggregate sentence is inappropriate. Regarding the nature of the offenses, over several months he repeatedly molested his girlfriend's eleven-year-old daughter, whom he had known since she was seven and over whom he held a strong position of trust.

His molestation of B.H. extended to the use of objects, oral sex, and attempted anal sex, and on at least one occasion he recorded a deviant act with her. B.H.'s mental health has suffered severely because of Avalle's conduct, and she has been hospitalized at least three times following multiple attempts at suicide. Yet, while on bond, Avalle attempted to contact her via social media.

[27] Neither does Avalle's character warrant revision of his sentence. We acknowledge that Avalle is also the victim of child molestation, that he suffers from mental health issues, and that he pleaded guilty as charged without a plea agreement. But he also repeatedly blamed B.H. and others for his decisions, which has carried into his appellate brief. He has a long history of drug abuse, despite not technically having a criminal history. And he used his release on bond to violate a no contact order.

[28] In short, Avalle's sentence is not an outlier, and nothing in this record persuades us that there is "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*, 29 N.E.3d at 122. Accordingly, Avalle's sentence is not inappropriate, and our deference to the trial court's sentence prevails.

Conclusion

[29] For all of these reasons, we affirm Avalle's 131-year aggregate sentence. However, we remand with instructions for the trial court to make the following

corrections to its sentencing order and abstract of judgment: Avalle's convictions on Counts 1 through 5 shall be identified as credit-restricted offenses; Avalle's credit time, in its entirety, shall be re-allocated to his sentence for Count 1; and Avalle's sentences on Counts 7 and 8 shall be shown to be concurrent with each other and also concurrent with Avalle's sentence on Count 1.

[30] Affirmed and remanded within instructions.

Vaidik, J., and Pyle, J., concur.