

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Brian A. Karle
Ball Eggleston, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jacob H. Warren,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 27, 2023

Court of Appeals Case No.
23A-CR-542

Appeal from the Tippecanoe
Superior Court

The Honorable Steven P.
Meyer, Judge

Trial Court Cause No.
79D02-2208-F4-41

Memorandum Decision by Judge Riley
Judges Bradford and Weissmann concur.

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, Jacob Warren (Warren), appeals his sentence for child molesting, a Level 4 felony, Ind. Code § 35-42-4-3(b).
- [2] We affirm.

ISSUES

- [3] Warren presents this court with two issues, which we restate as:
- (1) Whether the trial court abused its discretion by considering his contacts with the juvenile justice system which did not result in adjudications; and
 - (2) Whether his sentence for Level 4 felony child molesting is inappropriate given the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

- [4] In the summer of 2022, Dandelyon Moore (Moore) was living in an apartment in Lafayette, Indiana, with her boyfriend, Warren. Moore was friends with the mother of ten-year-old M.C. On August 5, 2022, after Moore checked with Warren to confirm that it was alright, M.C. was allowed to spend the night at Moore's and Warren's home. Also present were Moore's three-year-old daughter, P.M., and a third female child, eleven-year-old T.P. Warren spent the evening consuming alcohol, smoking marijuana, and building a fort in the living room with the three children.

[5] That night the children slept in the living room fort. At some point in the evening, Moore went to sleep in the bedroom she shared with Warren. Around 3:00 a.m. on August 6, 2022, Warren left to purchase more alcohol at the gas station. Upon his return around 4:00 a.m., M.C. was awake. M.C. asked if she could watch television, and Warren joined her in the living room. P.M. began to cry, so Warren put her in her bedroom and rejoined M.C. Warren smoked marijuana while sitting next to M.C., and he asked her if she wanted to smoke. As the two watched internet videos, Warren placed his hand under M.C.'s shirt and touched M.C.'s chest. After M.C. told Warren to stop, he used his hand to touch her genital area. M.C. again told Warren to stop, whereupon he touched his own penis and directed M.C. to watch. Warren told M.C. that she was his "favorite" and not to tell anyone what he had done. (Appellant's App. Vol. II, p. 59).

[6] Later in the day of August 6, 2022, M.C. went home and reported the offense to her mother, who contacted law enforcement. M.C. was taken for a sexual assault examination and reported to the nurse conducting the examination that Warren had touched her chest and genital area. Investigators learned that Warren had an active warrant for his arrest for a probation violation in a felony drug case in Oklahoma. That same day, officers went to Moore's and Warren's apartment and arrested Warren on the Oklahoma arrest warrant. At that time, Moore surrendered a quantity of marijuana that she reported belonged to Warren. After he was taken into custody, Warren consented to a DNA swab of his hands and his penis. However, as soon as Warren was left alone and before

he submitted to the swab, Warren was recorded on video wiping off his penis and the fingers of his right hand.

[7] On August 8, 2022, M.C. was forensically interviewed and reported acts consistent with the aforementioned facts. On August 9, 2022, an officer of the Lafayette Police Department interviewed Warren. Warren provided a detailed recitation of the events of the evening of August 5 to the morning of August 6, 2022, but stated he could not remember anything that occurred during the time M.C. had reported the molestation occurred. Eventually, Warren stated that he had been molested as a boy, and he admitted that he had touched M.C.'s breasts for sexual gratification.

[8] On August 11, 2022, the State filed an Information, charging Warren with Level 4 felony child molesting by fondling, Level 6 felony performing sexual conduct in the presence of a minor, Level 6 felony possession of marijuana, and Class B misdemeanor possession of marijuana. Pursuant to the State's request, the trial court entered a no-contact order against Warren as to M.C., M.C.'s mother, Moore, and T.P. After the entry of the no-contact order, Warren contacted Moore hundreds of times by telephone.

[9] On November 14, 2022, Warren entered into an agreement with the State whereby he would plead guilty to the Level 4 felony child molesting charge and the State agreed to dismiss the remaining charges. Warren's plea agreement did not contain any sentencing provision. On November 14, 2022, the trial court held Warren's guilty plea hearing. Upon questioning by the deputy prosecutor

to establish a factual basis for his plea, Warren initially would not admit that he had touched M.C.'s chest with an intent to arouse his or M.C.'s sexual desires. Only after extended questioning from the deputy prosecutor was Warren successful in establishing the factual basis for his guilty plea. The trial court accepted Warren's guilty plea and entered judgment of conviction for Level 4 felony child molesting.

[10] On January 10, 2023, the Tippecanoe County Probation Department filed Warren's presentence investigation report (PSI) report, which contained details about Warren's criminal history, substance abuse, and mental health, among other information. Warren's first contact with the juvenile justice system was in March 2013 when he was arrested for truancy when he was thirteen years old. In October 2013, Warren was adjudicated delinquent for an act of Class B misdemeanor battery. Warren was placed in his grandparents' home under formal probation and strict supervision, ordered to undergo a psychological evaluation, and directed to participate in therapy and follow-up treatment. Less than one week after being placed on home detention, the State moved to modify Warren's disposition in his battery case due to his arrest for battery and intimidation. That motion was granted, and Warren was placed in a secure facility, Wernle Youth Center, for evaluation. In December 2013, Warren was released back to his grandparents on informal house arrest and was ordered to participate in intensive services. In February 2014, the State again moved for dispositional modification in the 2013 battery adjudication based on allegations that Warren had violated the terms of his house arrest by impermissibly being

outside, damaging property at his grandparents' home, and fighting. On March 14, 2014, the juvenile court granted the State's request to modify Warren's disposition in the battery case and ordered Warren into residential treatment at White's Residential Services, where Warren stayed until December 2014. In February 2015, the State filed another motion to modify Warren's battery case disposition, alleging that he had committed acts of truancy and unauthorized possession of airsoft guns and that he had been removed from Opportunity School for his behavior. Warren was then placed at Carey House. On March 6, 2015, the State amended its last motion to modify disposition in the 2013 battery adjudication to add that Warren had been arrested for being a runaway. The juvenile court granted the amended motion and placed Warren at Lutheran Child and Family Services. Warren was subsequently moved to the Lutherwood Residential Treatment Facility, where he remained until December 2015. In February 2016, Warren was again placed in secure detention, and on February 25, 2016, the State moved to modify his disposition in the 2013 battery case, alleging that Warren had tested positive for THC and alcohol, he had incurred multiple unexcused absences from school, he had been reported a runaway, and he was suspected of vandalism. On March 10, 2016, the juvenile court granted the State's motion to modify disposition and placed Warren with the Department of Correction, where he remained for six months.

[11] As an adult, Warren was charged in 2019 with Class B misdemeanor possession of marijuana. Initially, the prosecution was withheld pending Warren's successful completion of a drug evaluation and completion of community

services, but Warren did not complete either and was convicted and sentenced to serve six days in jail. Warren also had misdemeanor convictions for minor consuming alcohol, driving while suspended, and carrying a handgun without a license. In the handgun case, Warren was initially ordered to execute sixty days with community corrections and 120 days suspended, but he was not compliant and was ordered to serve 120 days of work release. In 2021, Warren was convicted in Oklahoma on two felonies, unlawful possession of a controlled drug with intent to distribute and possession of a controlled dangerous substance without a tax stamp affixed. Warren was sentenced to five years in the Oklahoma Department of Corrections, all suspended to sixty-nine days of time served. In July 2022, the Oklahoma authorities filed a violation report alleging that Warren had failed to maintain contact with the probation department, had failed to report for multiple drug screens, and had tested positive for marijuana on two occasions. A warrant was issued for Warren's arrest in the Oklahoma felony case which was active when the instant offense came to light. At the time of his sentencing, Warren had pending misdemeanor charges for possession of marijuana, possession of paraphernalia, and reckless driving causing property damage. Warren was on pretrial release on these charges when he committed the instant offense.

[12] Warren's PSI detailed that Warren reported being raised by his maternal grandparents and a couple he had known at one of his out-of-home placements. Warren had been the subject of three separate CHINS proceedings. In March 2006, Warren was adjudicated a CHINS due to physical abuse by his mother

and her inability to care for him. Warren was placed in foster care with The Villages, and a guardianship was entered in April 2007. In June 2011, Warren was adjudicated a CHINS based on allegations that his grandmother provided him with Xanax two or three times a week to put him to sleep. Warren was also found to be a CHINS in June 2017 when his mother moved out of state and left him in Lafayette, Indiana, where he was living with friends.

[13] Warren reported to his PSI investigator that he has suffered chronic migraines since the age of eleven and that, as a juvenile, he had been diagnosed with ADHD, anxiety, and depression. Warren began consuming alcohol and drugs at the age of eleven. Warren consumed marijuana daily from the age of eighteen up to the day of the instant offense. Warren expressed remorse for the offense, said he felt he had “made the worst mistake of [his] life,” and blamed his actions on the alcohol he had consumed that day. (Appellant’s App. Vol. II, p. 115). Warren told the PSI investigator that he had “never lied or tried to cover up what [he] did.” (Appellant’s App. Vol. II, p. 116).

[14] On February 6, 2023, the trial court held Warren’s sentencing hearing. M.C. made a statement about how the offense has affected her, and her parents described the aftereffects of the offense on M.C. M.C. experiences nightmares and sleeping issues, fear of adults and men in particular, difficulty in controlling her emotions, and apathy. M.C.’s grades at school have suffered in the wake of the offense, something which upset her greatly, and she had to increase her current medications and begin new ones to cope with her trauma.

[15] During his allocution, Warren stated his remorse for the offense. Warren had admitted into evidence twenty-two certificates of completion from various programs he had finished while awaiting sentencing, programs whose titles indicated that they were geared towards enhancing life and job skills. The certificates were all dated between December 31, 2022, and January 9, 2023. No other evidence regarding these programs was admitted at Warren’s sentencing hearing apart from the certificates themselves.

[16] The trial court found as aggravating circumstances that Warren was in a position of care, custody, and control over M.C.; Warren had a criminal history “(including [a] juvenile record)”; Warren was on probation at the time of the offense; Warren had a pending petition to revoke his probation in the Oklahoma felony drug case; Warren committed the offense in the presence of another child; Warren had made efforts to thwart the investigation when he wiped his hands and genitals prior to the DNA swab; Warren had spoken to Moore in violation of the no-contact order; the offense was serious; and the harm to M.C. and her family was more than necessary to prove the elements of the offense. (Appellant’s App. Vol. II, p. 70). In discussing Warren’s criminal history, the trial court found as follows:

The criminal history includes a significant criminal history as a juvenile. Sometimes I don’t necessarily find a juvenile history that significant but given his age, he’s only twenty-two and as the State rightfully pointed out, just three years since he’s been released from juvenile detention or juvenile court he engages in a series of, of up to nine charges or offenses. So, I think that this

juvenile record we have to look at and be concerned and shows that there's a series of criminal activity that he engages in.

(Transcript pp. 51-52). As mitigating circumstances, the trial court found that Warren had pleaded guilty to the lead charged offense; Warren had experienced a difficult childhood which had included multiple foster home and facility placements; Warren had a history of substance abuse the significance for sentencing of which was “diminished by previous opportunities for treatment”; Warren had engaged in programs while awaiting sentencing; Warren had a good employment history; Warren was remorseful; and Warren had family support. (Appellant’s App. Vol. II, p. 71). The trial court found that the aggravators outweighed the mitigators and sentenced Warren to ten years, with eight years to be served in the Department of Correction and two years suspended to supervised probation.

[17] Warren now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Juvenile Record as Aggravating Circumstance

[18] Warren argues that the trial court erred when it considered his contacts with the juvenile justice system which did not result in adjudications as an aggravating circumstance. We review a trial court’s sentencing decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). An abuse of the trial court’s sentencing discretion occurs if its 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.* A trial court abuses its discretion when its stated reasons for imposing sentence are not supported by the record or its reasons for imposing sentence are improper as a matter of law. *Id.* at 490-91.

[19] Indiana courts have recognized that a sentencing court acts within its discretion when it considers a history of juvenile adjudications to enhance a sentence for adult criminal sentences. *See Mitchell v. State*, 844 N.E.2d 88, 91-92 (Ind. 2006) (restating that principle post *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). However, upon sentencing, a trial court may not consider any juvenile justice system contacts that did not result in an adjudication, because “[w]hen a juvenile proceeding ends without a disposition, the mere fact that a petition was filed alleging delinquency does not suffice as proof of a criminal history.” *Day v. State*, 560 N.E.2d 641, 643 (Ind. 1990) (reversing where the trial court considered Day’s juvenile record of purported crimes against women to enhance his adult criminal sentence because Day’s PSI revealed no juvenile adjudications or facts pertaining to the unadjudicated juvenile contacts).

[20] Here, Warren’s claim misses the mark because the trial court did not consider his many unadjudicated juvenile contacts upon sentencing. Warren cites the passage of the trial court’s oral sentencing statement set forth above and argues that “[t]he trial court’s reference to [a] ‘significant’ juvenile history and ‘a series of criminal activity’ makes clear that the trial court was improperly considering [a] juvenile history beyond Warren’s single adjudication.” (Appellant’s Br. p.

11). Warren does not dispute that he has a juvenile history consisting of one adjudication in 2013 for an act of Class B misdemeanor battery. In its oral sentencing statement, the trial court explained that it found Warren’s juvenile history to be significant as part of a pattern of criminal acts that started when he was a juvenile and, after Warren’s release from the juvenile justice system, culminated in “a series [of] up to nine charges or offenses.” (Tr. p. 51). Thus, contrary to Warren’s assertions on appeal, there is no indication the trial court considered his unadjudicated juvenile contacts as part of his criminal history, and *Day* is not implicated. Moreover, under our present advisory sentencing scheme, a defendant may no longer challenge the specific weight a trial court attributed to an aggravating circumstance. *See Anglemyer*, 868 N.E.2d at 491 (concluding that post *Blakely*, a trial court may no longer “be said to have abused its discretion in failing to ‘properly weigh’” mitigating and aggravating circumstances). Therefore, Warren’s challenge to the trial court’s finding that his 2013 adjudication for battery is significant for sentencing is no longer a cognizable claim. Accordingly, we find no abuse of the trial court’s discretion in considering Warren’s juvenile history as an aggravating circumstance.

[21] However, even if the trial court had abused its discretion in the manner Warren suggests, we would not remand for resentencing. A trial court’s improper consideration of unadjudicated juvenile contacts does not merit reversal where we are confident that the trial court would have reached the same sentence absent the improper consideration. *Morrell v. State*, 121 N.E.3d 577, 579 (Ind. Ct. App. 2019) (declining to remand for resentencing where other unchallenged

aggravating circumstances amply supported the sentence imposed, despite the trial court's consideration of Morrell's unadjudicated juvenile contacts), *trans. denied*.

[22] Here, in addition to Warren's juvenile history, the trial court found as aggravating circumstances that Warren was on probation at the time of the offense; he had a pending petition to revoke his probation in his Oklahoma felony case; the instant offense was committed in the presence of another child; Warren had attempted to thwart the investigation of the offense; Warren had violated the no-contact order; the instant offense was serious; and the harm to M.C. and her family was more than necessary to prove the elements of the offense. The existence of one proper aggravating circumstance may support an enhanced sentence. *Hayko v. State*, 211 N.E.3d 483, 487 n.1 (Ind. 2023). In light of these numerous and weighty aggravating circumstances, the validity of which Warren does not challenge, we are confident that the trial court would have entered the same ten-year sentence, even if it had not considered Warren's juvenile history.

II. *Appropriateness of Sentence*

[23] Warren argues that his sentence is overly severe, and he requests that we reduce it. "Appellate Rule 7(B) enables this [c]ourt to 'revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.'" *Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021). The principal role of such review is to attempt to leaven the outliers. *Cardwell v.*

State, 895 N.E.2d 1219, 1225 (Ind. 2008). We defer to the trial court’s sentencing discretion, and that deference will “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). The defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

[24] When assessing the nature of offenses, the advisory sentence is the starting point that the legislature selected as an appropriate sentence for the particular crimes committed. *Gibbs v. State*, 214 N.E.3d 351, 359 (Ind. Ct. App. 2023) (citing *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006)). Therefore, we first consider the advisory sentence for the particular offense in conducting our analysis. Warren pleaded guilty to one Level 4 felony, namely, child molesting by fondling. The sentencing range for a Level 4 felony is between two and twelve years, with an advisory sentence of six years. I.C. § 35-50-2-5.5. Therefore, Warren’s ten-year sentence, with two years suspended, is an enhanced, but non-maximum, sentence for the offense.

[25] Here, we find insufficient compelling evidence portraying the nature of Warren’s offense in such a positive light that we are convinced to override the trial court’s sentencing discretion. *Stephenson*, 29 N.E.3d at 122. Warren consumed alcohol and marijuana all evening while he was providing care for three children, including ten-year-old M.C. After Moore was in bed, Warren

had removed P.M. from the room, and T.P. had fallen asleep next to them in the living room, Warren offered M.C. marijuana and then fondled her chest. M.C. protested, but Warren did not stop the molestation. Rather, he also touched M.C.'s genital area, and he exhibited his penis to her. Warren told M.C. not to tell anyone what he had done, a command that, fortunately, M.C. ignored. The offense has affected M.C.'s school performance, her emotional well-being, and her ability to trust others. As M.C.'s mother stated at Warren's sentencing hearing, "[T]his has changed her. She will never be the same again. She will heal but she'll never forget." (Tr. p. 37). Given M.C.'s age, which was four years younger than necessary to prove the offense, Warren's taking advantage of a child left in his care, the presence of another child during the commission of the offense, the evidence of additional conduct beyond that necessary to prove the offense, and the lasting effect the offense had on M.C., we cannot credit Warren's assertion that his offense was "less egregious than many offenses that would fall under the same child molesting statute." (Appellant's Br. p. 13). In short, we see nothing inappropriate in Warren's eight-year initially executed sentence in light of the nature of his offense.

[26] Neither are we convinced that Warren has presented us with evidence of "substantial virtuous traits or persistent examples of good character" sufficient for us to revise his sentence. *Stephenson*, 29 N.E.3d at 122. We may consider a defendant's criminal record in assessing his character for purposes of a Rule 7(B) sentencing review. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). Warren has a juvenile adjudication for battery, and his disposition in

that matter was modified five times, ultimately resulting in his commitment to the Department of Correction Boys' School in 2016. As an adult, Warren accumulated two felony convictions, four misdemeanor convictions, and three separate misdemeanor cases pending against him. Warren has had the benefit of home detention, informal house arrest, multiple residential facility placements while he was a juvenile, the Indiana Boys' School, community service, delayed prosecution, suspended sentences, and community corrections. Warren was on probation in the Oklahoma felony case and on pretrial release in his pending Indiana misdemeanor cases when he committed the instant offense. We have held that even a minor criminal record reflects poorly on a defendant's character. *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*. Warren's criminal record does not persuade us that he is entitled to a sentencing revision.

[27] In addition to a defendant's criminal history, our assessment of a defendant's character also entails a broader consideration of the defendant's conduct, qualities, and life. *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). We also observe that Warren committed the instant offense after an evening of consuming drugs and alcohol, and that, at least initially, he blamed this offense on being intoxicated. However, Warren has failed to address his substance abuse, despite being in several residential treatment facilities as a juvenile and being previously ordered to complete substance abuse treatment. We also find it illustrative of Warren's character that he attempted to conceal his offense by directing M.C. not to tell anyone about it, he attempted to subvert law

enforcement's investigation by destroying evidence he thought might be on his hand and penis prior to a DNA swab, he had difficulty establishing a factual basis for his plea, and, by his own admission, he violated the trial court's no-contact order hundreds of times by speaking to Moore, a potential witness in his case, on the telephone. It is also troubling that Warren reported having been molested himself, yet he inflicted that same harm on a ten-year-old child.

[28] Warren argues that he pleaded guilty without a favorable sentencing recommendation, he is remorseful, he has unaddressed substance abuse and mental health issues, and that he had a difficult childhood. However, these factors were already taken into account by the trial court when fashioning Warren's sentence, a sentence which was not the maximum for the offense. Warren also draws our attention to the many programs he completed while awaiting sentencing, a factor which the trial court also already considered. We note that Warren was arrested in August 2022, and the chronological case summary does not reflect that he was released from custody at any time prior to sentencing. Warren pleaded guilty on November 14, 2022, and his sentencing hearing took place on February 6, 2023. All his certificates of program completion were dated from between December 31, 2022, and January 9, 2023, with nine of the certificates being issued on December 31, 2022. While we acknowledge that Warren made some efforts to improve himself while awaiting sentencing, without additional information concerning the length and substance of these programs, we are not inclined to revise his sentence on that basis. Accordingly, Warren has failed to meet his burden of persuasion on appeal, and

we do not disturb the trial court's sentencing order. *See Robinson*, 91 N.E.3d at 577.

CONCLUSION

[29] Based on the foregoing, we hold that the trial court did not abuse its discretion by considering Warren's juvenile history and that Warren's sentence is not inappropriate in light of the nature of his offense and his character.

[30] Affirmed.

[31] Bradford, J. and Weissmann, J. concur