

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James Robert Minor,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

November 17, 2022

Court of Appeals Case No.
22A-CR-287

Appeal from the Brown Circuit
Court

The Honorable Mary Wertz, Judge

Trial Court Cause No.
07C01-1907-F1-243

Crone Judge.

Case Summary

- [1] A jury convicted James Robert Minor of level 1 felony child molesting, level 4 felony child molesting, and level 6 felony dissemination of matter harmful to minors, and the trial court sentenced him to forty-one years. On appeal, Minor argues that the State failed to present sufficient evidence that he committed the offenses within the alleged time frame, that his child molesting convictions violate double jeopardy principles, and that the trial court erred in finding the victim's age as an aggravating circumstance at sentencing. We affirm.

Facts and Procedural History

- [2] Minor was born in 1965. In July 2019, the State charged Minor with committing offenses against his stepgranddaughter K.R., who was born in April 2010. The amended charging information alleged that Minor committed the following offenses between December 25, 2018, and June 16, 2019: level 1 felony child molesting by performing sexual intercourse or other sexual conduct¹ with a child under the age of fourteen years in violation of Indiana Code Section 35-42-4-3(a); level 4 felony child molesting by performing fondling or touching with a child under the age of fourteen years with the intent to arouse or satisfy K.R.'s or Minor's sexual desires in violation of Indiana Code Section 35-42-4-3(b); and level 6 felony dissemination of matter harmful

¹ “‘Sexual intercourse’ means an act that includes any penetration of the female sex organ by the male sex organ.” Ind. Code § 35-31.5-2-302. “‘Other sexual conduct’ means an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-31.5-2-221.5.

to minors² by knowingly or intentionally disseminating such material to K.R. in violation of Indiana Code Section 35-49-3-3.³

[3] A jury trial was held in December 2021. Of relevance here, K.R. testified that when she was seven or eight years old, she started spending the night at Minor's house during the summer and on weekends. Tr. Vol. 5 at 155. During the visits, Minor started showing her "inappropriate videos" on his phone of naked "girls getting on top of each other and boys." *Id.* at 169. Minor showed the videos to K.R. "[a] whole bunch" of times. *Id.* at 171. He then started touching her chest area with his mouth, her buttocks with his fingers and his penis, and both the inside and the outside of her genital area with his finger and his penis; each of the touchings occurred "[a] bunch, more than ten" times. *Id.* at 160-61. He would also "grab [K.R.'s] hand and [make her] touch his private area." *Id.* at 172. In addition, Minor masturbated and "squirt[ed] it onto a Kleenex or a paper towel" in K.R.'s presence "[a] bunch, more than ten [times]." *Id.* at 173. Minor told K.R. "not to tell about the bad touches[.]" *Id.* at 217. K.R. testified

² A matter is harmful to minors for purposes of Indiana Code Article 35-49 if

- (1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
- (2) considered as a whole, it appeals to the prurient interest in sex of minors;
- (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
- (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

Ind. Code § 35-49-2-2.

³ The information also alleged that Minor molested his stepgrandson, but he was found not guilty of this charge at trial.

that the “inappropriate” touchings were occurring around Christmas of 2018 and that they stopped after she told her family what Minor was doing to her, which happened on July 3, 2019. *Id.* at 169, 174, 167-68, 90. K.R. further testified that the last time that Minor showed her an “inappropriate video” was in 2019. *Id.* at 206.

[4] The jury found Minor guilty on all three counts. At sentencing, the trial court found several aggravating circumstances: that Minor “violated [his] position of trust” with K.R., that he committed multiple acts of molestation, that his “display of pornography” was indicative that “the molestations were more of a product of a plan and not the result of an impulse[,]” and that K.R.’s age at the time of the offenses was “well under” the “statutory limit” for child molesting. Tr. Vol. 8 at 63-64. The court imposed a thirty-five-year sentence on the level 1 felony count, with twenty-five years executed and ten years suspended to probation, a consecutive six-year executed sentence on the level 4 felony count, and a concurrent one-and-a-half-year executed sentence on the level 6 felony count, for an aggregate sentence of forty-one years. Minor now appeals.

Discussion and Decision

Section 1 – Time is not a material element of Minor’s offenses.

[5] Minor argues that “[t]he evidence is insufficient to sustain the verdicts because the State failed to prove beyond a reasonable doubt that any of the acts complained of were committed during the period specified in the information.”

Appellant's Br. at 24. We observe, however, that "[o]ur Supreme Court has recognized that time is not of the essence in the crime of child molesting." *Carter v. State*, 31 N.E.3d 17, 26 n.6 (Ind. Ct. App. 2015) (citing *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992)), *trans. denied*. "This is so because 'it is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases.'" *Id.* (quoting *Barger*, 587 N.E.2d at 1307). Generally, in cases involving child molesting or sexual misconduct with a minor, the exact date is important only "in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between [levels] of felonies[.]" *Cabrera v. State*, 178 N.E.3d 344, 346 (Ind. Ct. App. 2021), or at or near the dividing line between the defendant's conduct being criminal and not criminal.

[6] These concerns are irrelevant here because K.R. was no older than nine years of age when the offenses were committed. *See* Ind. Code § 35-42-4-3(a) (providing that child molesting involving sexual intercourse or other sexual conduct is a level 1 felony if committed by a person at least twenty-one-years of age and victim is under fourteen years of age); Ind. Code § 35-42-4-3(b) (providing that child molesting involving fondling or touching is a level 4 felony if victim is under fourteen years of age); Ind. Code §§ 35-49-3-3(a) and 35-49-1-4 (providing that dissemination of matter harmful to minors, i.e., persons under eighteen

years of age, is a level 6 felony). Consequently, we find no merit in Minor's argument.⁴

Section 2 – Minor's child molesting convictions do not violate double jeopardy principles.

[7] Minor also contends that his convictions for level 1 felony child molesting (for performing sexual intercourse or other sexual conduct with K.R.) and level 4 felony child molesting (for performing fondling or touching with K.R.) violate double jeopardy principles, claiming that the latter is an included offense of the former. We recently rejected a substantially similar argument in *Carranza v. State*, 184 N.E.3d 712, 716 (Ind. Ct. App. 2022), and we see no reason to reinvent the wheel here.⁵ Accordingly, we affirm Minor's convictions. *See id.* (noting that child molesting under Ind. Code § 35-42-4-3(a) is not established by proof of child molesting under Ind. Code § 35-42-4-3(b) and vice versa and that those subsections "differ in respects other than degree of harm or culpability" for purposes of Indiana's included-offense statute, Ind. Code § 35-31.5-2-168).

⁴ Minor also raises a confusing argument regarding the trial court's unanimity instruction that is premised on his "assum[ption]" that the instruction "was proper[.]" Appellant's Br. at 26, notwithstanding his complaint that the instruction "omits mention of finding that [he] committed the act or acts *within the time charged*." *Id.* at n.4. Because Minor did not object to the instruction at trial, any error relating to the instruction is waived. *Giden v. State*, 150 N.E.3d 654, 661 (Ind. Ct. App. 2020), *trans. denied*.

⁵ Minor also argues that the trial court erred in imposing consecutive sentences on his child molesting convictions, but this argument is based on the false premise that the jury did not find that he committed at least one level 1 felony offense and at least one level 4 felony offense.

Section 3 – Because Minor’s sentence is supported by multiple unchallenged aggravating circumstances, we affirm it.

[8] Finally, Minor asserts that the trial court erred in finding K.R.’s age as an aggravating circumstance at sentencing because the victim’s age is a material element of his offenses. “[S]entencing decisions rest within the sound discretion of the trial court, and we review such decisions for an abuse of discretion.”

Weaver v. State, 189 N.E.3d 1128, 1134 (Ind. Ct. App. 2022), *trans. denied*. “An abuse of discretion will be found where the 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.* (quoting *Hudson v. State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019)). A trial court may abuse its discretion by entering a sentencing statement that includes reasons for its sentence that are improper as a matter of law. *Id.*⁶

[9] Our supreme court has stated that “[w]hen the age of a victim constitutes a material element of the crime, then the victim’s age may not also constitute an aggravating circumstance to support an enhanced sentence.” *McCarthy v. State*,

⁶ Minor also claims to “seek[] review of the sentences imposed in this case pursuant to” Indiana Appellate Rule 7(B), Appellant’s Br. at 33, but he makes no further argument in this regard. Consequently, this claim is waived. *Perry v. State*, 921 N.E.2d 525, 528 (Ind. Ct. App. 2010). We remind Minor’s counsel that “a claim on appeal that a defendant’s sentence is inappropriate given the nature of the offense and the defendant’s character” under Appellate Rule 7(B) “is separate and distinct from a claim the trial court abused its discretion at sentencing, and the two issues should be analyzed separately.” *Richardson v. State*, 189 N.E.3d 629, 637 (Ind. Ct. App. 2022) (citing *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008)).

749 N.E.2d 528, 539 (Ind. 2001).⁷ “However, the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors.” *Id.* Here, the trial court noted that K.R.’s age at the time of the offenses was “a much younger age than the statutory limit.” Tr. Vol. 8 at 64. Minor asserts that this observation is insufficiently particular, citing *Edrington v. State*, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), *trans. denied*, which held that the trial court abused its discretion in finding “only that both [molestation] victims were under twelve” as an aggravating factor. Even if we were to find that the trial court abused its discretion in this regard, we would affirm Minor’s sentence based on the court’s finding of the additional unchallenged aggravators mentioned above. *See Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016) (noting that single aggravator may be sufficient to enhance a sentence and that it is proper to affirm sentence if we have confidence that trial court would have imposed same sentence regardless of consideration of improper aggravator), *trans. denied* (2017).

[10] Affirmed.

May, J., and Weissmann, J., concur.

⁷ The sentencing range for a level 1 felony is between twenty and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4. The trial court imposed a thirty-five-year sentence on Minor’s level 1 felony conviction and ordered it served consecutive to the advisory six-year sentence on his level 4 felony conviction. Ind. Code § 35-50-2-5.5.