MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Nicholas Wilkie-Carr,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 28, 2023

Court of Appeals Case No. 23A-CR-779

Appeal from the Morgan County Superior Court

The Honorable Sara Dungan, Judge

Trial Court Cause No. 55D03-2209-F5-001301

Memorandum Decision by Judge Felix
Judges Crone and Brown concur.

Felix, Judge.

Statement of the Case

[1] Nicholas Wilkie-Carr pled guilty to four Level 5 felony counts of possession of child pornography. The trial court sentenced Wilkie-Carr to a total of ten years, with five years executed, four years on probation, and one year suspended. Wilkie-Carr appeals his sentence and raises five issues for our review, which we restate as follows:

1. Whether Wilkie-Carr forfeited his right to challenge the amendment to the charging information when he pled guilty to all his pending charges;
2. Whether the trial court abused its discretion in admitting certain evidence at the sentencing hearing;
3. Whether the trial court issued an adequate sentencing statement under Indiana Code section 35-38-1-3;
4. Whether the trial court abused its discretion in identifying mitigating and aggravating factors; and
5. Whether Wilkie-Carr's sentence is inappropriate under Indiana Appellate Rule 7(B).

[2] We affirm.

Facts and Procedural History

[3] On August 30, 2022, Yahoo! Inc. submitted a complaint to the National Center for Missing and Exploited Children (NCMEC) concerning Wilkie-Carr's use of his Yahoo email account to view and download approximately 42 images of child pornography. On September 2, 2022, NCMEC sent this complaint to local law enforcement. Based on the information provided by NCMEC, Bloomington Police Department Detective Kevin Black determined that

Wilkie-Carr had viewed child pornography between July 6, 2022, and August 28, 2022, at both his residence in Morgan County and at his workplace in Monroe County.

[4] On September 16, 2022, Detective Black executed a search warrant for Wilkie-Carr's person and vehicle. The detective seized Wilkie-Carr's cell phone as part of his search. After the search warrant was executed, Detective Black interviewed Wilkie-Carr. Wilkie-Carr admitted to possessing child pornography and using both his cell phone and his home computer to view child pornography. Detective Black showed Wilkie-Carr three images that were included in the information NCMEC had provided, and Wilkie-Carr admitted to viewing and possessing those specific images.

[5] Thereafter, the State charged Wilkie-Carr in Morgan County with three counts of possession of child pornography as Level 5 felonies.[1] On November 23, 2022, Wilkie-Carr advised the trial court that he wanted to plead guilty to those three counts.

[6] Prior to Wilkie-Carr's guilty plea hearing, the Indiana State Police Cyber Crimes Division examined Wilkie-Carr's cell phone and discovered three images of child pornography that he had possessed on November 19, 2021. As a result, on November 29, 2022, the State filed a motion for leave to amend the charging information to add another count of possession of child pornography

[1] Ind. Code § 35-42-4-4(e)(1).

as a Level 5 felony.[2] The trial court granted the State's motion and set an initial hearing on the new count for December 1, 2022—the same day Wilkie-Carr was set to plead guilty to the original three counts.

[7] In preparation for sentencing, the trial court ordered that a presentence investigation report ("PSI") be completed. As part of the presentence investigation, Wilkie-Carr responded to a written questionnaire, an interview, and the Indiana Risk Assessment System Community Supervision Tool (IRAS–CST). The results of the IRAS–CST indicated that Wilkie-Carr's "overall risk assessment score puts [him] in the HIGH risk category to reoffend." Appellant's App. Vol. II at 72.

[8] At the December 1, 2022, hearing, Wilkie-Carr's counsel confirmed that he had reviewed the amended charging information with Wilkie-Carr. Wilkie-Carr also "waive[d] any further reading of the specific charges, or fines, fees and costs and the possible sentence that's associated with it." Tr. Vol. II at 4. Wilkie-Carr's attorney then told the trial court that Wilkie-Carr wanted to plead open "based upon negotiations with the State where they want a minimum" sentence, unless the State was willing to dismiss any of the charges.[3] Tr. Vol. II at 4. The State confirmed that it was not willing to dismiss any charges but that Monroe County had agreed "not to further the case" it had against Wilkie-Carr,

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[2] I.C. § 35-42-4-4(e)(1).

[3] An open plea is a plea agreement in which the issue of sentencing is left to the trial court's discretion. *Rodriguez v. State*, 129 N.E.3d 789, 794 (Ind. 2019) (citing *State v. Cozart*, 897 N.E.2d 478, 483 (Ind. 2008)).

presumably on the same or similar charges, if he pled open to the charges in Morgan County. *Id.* Wilkie-Carr then pled open to all four counts as charged.

[9] On March 16, 2023, at his sentencing hearing, Wilkie-Carr apologized for his crimes, and stated he now understands that his actions were not victimless. On cross-examination, the State questioned Wilkie-Carr about certain information in his PSI:

> STATE: You also told the Court in your PSI that you found yourself on the dark web with no ill intent. Is that fair?
>
> WILKIE-CARR: Yes.
>
> STATE: But you can't just get on the dark web, you have to have a special browser, is that correct?
>
> WILKIE-CARR: Yes.
>
> STATE: So you had to go out and find a browser specifically that would even access the dark web first, right?
>
> WILKIE-CARR: Yes.
>
> STATE: And then the way the dark web works is you can't just search for search terms, you have to have a specific address and you have to know that exact address, is that correct?
>
> WILKIE-CARR: Yes.
>
> STATE: So you knew what you were doing when you got on the dark web?

WILKIE-CARR: Yes, I did.

Tr. Vol. II at 44–45.

[10] Wilkie-Carr testified that he used monikers or initials to set up accounts he used to view or download child pornography. He also testified that he did not seek help for his behavior until after he was arrested and charged.

[11] Mary Patia Tabar, Wilkie-Carr's therapist of approximately three months, testified that Wilkie-Carr had disclosed that he would take his collection of child pornography with him to work and view it on his lunch break; Wilkie-Carr had disclosed that he had been a victim of sexual abuse when he was a minor; she had diagnosed Wilkie-Carr with post-traumatic stress disorder related to his alleged abuse; Wilkie-Carr made significant progress in therapy, including developing empathy; Wilkie-Carr was not likely to reoffend; and incarceration would likely be detrimental for Wilkie-Carr.

[12] Detective Black testified that Wilkie-Carr was cooperative during questioning on September 16, 2022. Detective Black also testified that, during this interview, Wilkie-Carr stated he had been viewing and downloading child pornography for approximately one year; described his behavior as an addiction; and explained how he used the dark web to locate, view, and download child pornography.

[13] Wilkie-Carr's pretrial release supervisor testified that Wilkie-Carr had complied with the conditions of his pretrial release, and that, overriding the IRAS–CST

score was appropriate because of the intensity of supervision required for Wilkie-Carr, the nature of his crimes, and the age of the children depicted in the images Wilkie-Carr possessed.

[14] In addition to this testimony, the trial court admitted three exhibits: (1) a CD with 40 images of child pornography taken from Wilkie-Carr's devices, five of which the trial court viewed; (2) a screening tool for pedophilic interests; and (3) a scholarly article regarding child pornography and pedophilia. Wilkie-Carr objected to the admission of all three exhibits.

[15] After Wilkie-Carr and the State presented argument on the length and type of sentence the trial court should impose, the trial court made an oral sentencing statement (the "Oral Statement"). The trial court stated it believed Wilkie-Carr was "likely to respond to probation" and acknowledged that he "ha[d] put in some work," although that did not carry much weight with the trial court because "it did come just maybe three months ago, and after he was caught." Tr. Vol. II at 73.

[16] The trial court noted that Wilkie-Carr had to take "a lot of steps to even get to the point where [he] could even see" child pornography and that he had minimized his behavior upon being caught. Tr. Vol. II at 74. Additionally, the trial court told Wilkie-Carr that it did not "see a huge difference between you actually doing the deed, and you actually viewing the deed. Because the victims are the children, they're not the cameraman, they're not you in this case." *Id.*

[17] The trial court found "aggravating circumstances in the nature and seriousness of the offense is [sic] huge, the repercussions on these children because of people viewing these sorts of things are unimaginable." Tr. Vol. II at 74. It also determined that "there are more aggravators than mitigators, or the aggravators outweigh the mitigators in this case." *Id.* Ultimately, the trial court sentenced Wilkie-Carr to a total of ten years, with five years executed, four years on probation, and one year suspended. *Id.* at 74–75.

[18] Approximately four weeks after the sentencing hearing, the trial court issued a written sentencing statement (the "Written Statement"). The Written Statement, which imposed the same sentence the trial court pronounced at the sentencing hearing, reads in relevant part:

> 6. **AGGRAVATING FACTORS**: Pursuant to I.C. 35-38-1-7.1, the Court found no statutory aggravating factors;
> 7. **MITIGATING FACTORS**: Pursuant to I.C. 35-38-1-7.1, the Court found no criminal history as a statutory mitigating factor;
> 8. **ADDITIONAL CONSIDERATIONS**: Pursuant to I.C. 35-38-1-7.1(c), the Court did give some consideration to the following factors that may not be specifically identified as statutory aggravating or mitigating factors:
>   A. The nature and circumstances of the offense;
>   B. Defendant shows a high risk to reoffend based on his IRAS report;
>   C. The ages of the victims depicted;
>   D. Defendant has tried to minimize his actions;
>   E. The Defendant is seeking treatment;

Appellant's App. Vol. II at 105–06.

[19] Wilkie-Carr now appeals his conviction and sentence.

Discussion and Decision[4]

1. Amendment to Charging Information

[20] Wilkie-Carr first contends that the trial court violated his substantial rights when it permitted the State to amend the charging information two days before he was set to plead guilty. We cannot agree.

[21] The Indiana Supreme Court has explained that defendants "who plead guilty to achieve favorable outcomes forfeit a plethora of substantive claims and procedural rights." *Alvey v. State*, 911 N.E.2d 1248, 1250–51 (Ind. 2009) (citing *Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001)).

> After all, "a defendant's plea of guilty is not merely a procedural event that forecloses the necessity of trial and triggers the imposition of sentence. It also, and more importantly, conclusively establishes the fact of guilt, a prerequisite in Indiana for the imposition of criminal punishment." *Norris v. State,* 896 N.E.2d 1149, 1152 (Ind. 2008).

Alvey, 911 N.E.2d at 1249 (alterations omitted).

[22] In particular, a defendant "who pleads guilty cannot challenge the propriety of the resulting conviction on direct appeal." *Alvey*, 911 N.E.2d at 1249 (citing *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004)). Similarly, a defendant who

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[4] Wilkie-Carr failed to include a majority of the relevant facts of this case in his Statement of Facts in violation of Indiana Appellate Rule 46(A)(6). Of the facts Wilkie-Carr did include in his Statement of the Facts, only about half are supported by citations to the Record on Appeal or Appendix, which is also a violation of Appellate Rule 46(A)(6)(a). Nevertheless, we will address the merits of Wilkie-Carr's claims.

pleads guilty cannot challenge the propriety of the trial court's pretrial orders. *Id.* at 1250; *Starr v. State*, 874 N.E.2d 1036, 1037 (Ind. Ct. App. 2007) (citing *Branham v. State*, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004)).

[23] Wilkie-Carr pled guilty to all four counts here. Therefore, Wilkie-Carr cannot challenge the propriety of the trial court's decision to grant the State's motion for leave to amend the charging information or the amended charging information itself.

2. Admission of Evidence at Sentencing Hearing

[24] Wilkie-Carr contends that the trial court erred when it admitted 40 photos of child pornography seized from Wilkie-Carr's phone as well as the scholarly articles. We cannot agree.

[25] We review a trial court's decision regarding admission of evidence during sentencing proceedings for an abuse of discretion. *Couch v. State*, 977 N.E.2d 1013 (Ind. Ct. App. 2012) (citing *Rabadi v. State*, 541 N.E.2d 271, 277 (Ind. 1989)). "An abuse of discretion occurs if 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." *Owen v. State*, 210 N.E.3d 256, 269 (Ind. 2023) (internal citations and quotation marks omitted), *reh'g denied* (Aug. 17, 2023).

[26] The Indiana Rules of Evidence, except with respect to privileges, do not apply in trial court sentencing proceedings. *Malenchik v. State*, 928 N.E.2d 564, 573–74 (Ind. 2010) (citing Ind. Evid. R. 101(c)(2); *Dumas v. State*, 803 N.E.2d 1113,

1120–21 (Ind. 2004); *Thacker v. State*, 709 N.E.2d 3, 9 (Ind. 1999); *Jackson v. State*, 697 N.E.2d 53, 55 (Ind. 1998)).

> The rationale for the relaxation of the evidentiary rules at sentencing is that unlike at trial, the evidence is not confined to the narrow issue of guilt. *Kellett v. State*, 716 N.E.2d 975, 983 n.5 (Ind. Ct. App. 1999). Instead, the task is to determine the type and extent of punishment. *Id.* "This individualized sentencing process requires possession of the fullest information possible concerning the defendant's life and characteristics." *Thomas v. State*, 562 N.E.2d 43, 47 (Ind. Ct. App. 1990).

Coleman v. State, 162 N.E.3d 1184, 1188–89 (Ind. Ct. App.), *trans. denied sub nom. Desean Coleman v. State*, 168 N.E.3d 740 (Ind. 2021).

[27] We presume that the trial court "is aware of and knows the law" and that the trial court "considers only evidence properly before [it] in reaching a decision." *Malenchik*, 928 N.E.2d at 574 (quoting *Dumas*, 803 N.E.2d at 1121) (citing *Yates v. State*, 429 N.E.2d 992, 993–94 (Ind. Ct. App. 1982)). Importantly, even though the Evidence Rules are inapplicable in sentencing proceedings, the evidence before the trial court must be reliable. *Id.* (quoting Robert Lowell Miller, Jr., 12 Ind. Practice Series, Indiana Evidence § 101.304, 11–12).

a. Admission of Images from Wilkie-Carr's Devices

[28] At Wilkie-Carr's sentencing hearing, the trial court admitted into evidence 40 images of child pornography. Wilkie-Carr argues that all the images except those charged were irrelevant and that the images upon which the charges were based were needlessly cumulative and prejudicial. Wilkie-Carr's arguments are

based on Evidence Rules, which do not apply to his sentencing hearing. *See Malenchik*, 928 N.E.2d at 574. Every image reveals the extent of Wilkie-Carr's depravity, and that is helpful to the trial court in fashioning an appropriate sentence. It was not error to admit the images of child pornography.

b. Admission of Academic Works

[29] The trial court admitted two academic works at the close of the evidence over Wilkie-Carr's objection. First, the trial court admitted a scholarly article entitled "Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia" published in the *Journal of Abnormal Psychology* in 2006 (the "Article"). Second, the trial court admitted a screening tool entitled "Screening Scale for Pedophilic Interests, Version 2 (SSPI-2)," published in 2017 (the "Screening Tool").

[30] Both of these exhibits were discussed during Tabar's testimony but were not admitted into evidence until afterward. Tabar testified that she was unfamiliar with the Article and the Screening Tool but "[t]hey're all going to say pretty much the same thing. There is a chance of recidivism. I don't believe it is very strong with [Wilkie-Carr]." Tr. Vol. II at 32–33.

[31] Wilkie-Carr objected to the admission of both the Article and the Screening Tool:

> I don't know about the providence of any of those things, if they're peer reviewed, if they're generally accepted in the scientific community just because it's the Journal of whatever, I misplaced the names, I don't know the valid, or maybe the

> means, that it's the end[-]all be[-]all for formal expertise. So without anything more describing where they came from or how they were developed or who wrote the article, what their [b]ona fides are, I would object to the Court considering those.

Tr. Vol. II at 61–62. The State responded that the Article and the Screening Tool's authors' qualifications, the research they conducted, and the methodology they used were "listed in the article, and all of it exceeds that of [Tabor, who] was put on the stand today." *Id.* at 62.

[32] The trial court then made the following statement: "Okay. Based on the testimony the witness provided, and the two documents suggested, I'm going to allow exhibits 2 and 3 to come into evidence understanding that there's varying opinions and varying articles both ways on this sort of issue. So I understand that." Tr. Vol. II at 62.

[33] On appeal, Wilkie-Carr renews this argument.[5] There is nothing in the record that demonstrates the Article and the Screening Tool are reliable. Neither were proffered by any witness during the sentencing hearing, and Tabar did not have

[5] The above-quoted objection is the only objection Wilkie-Carr made to the admission of the Article and the Screening Tool. Nevertheless, Wilkie-Carr raises several arguments on appeal regarding the admission of the Article and the Screening Tool that he did not raise during the sentencing hearing. A party may not object at trial on one ground and then seek reversal on appeal based on another ground; doing so results in wavier. *Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995, 1001 (Ind. Ct. App. 2015) (citing *Boatner v. State*, 934 N.E.2d 184, 187 (Ind. Ct. App. 2010)).

knowledge of these particular academic works when asked about them by the State.

[34] Assuming for the sake of argument that the trial court erred in admitting the Article and the Screening Tool, Wilkie-Carr does not explain how the trial court's admission of the Article and the Screening Tool negatively impacted his substantial rights. In fact, the trial court did not reference either of these academic works in its sentencing statements. In light of all the evidence presented at the sentencing hearing, any error the trial court committed in admitting the Article and the Screening Tool was sufficiently minor so as not to affect Wilkie-Carr's substantial rights and is therefore harmless. *See* Ind. Appellate Rule 66(A); *Tate v. State*, 161 N.E.3d 1225, 1234 (Ind. 2021) (citing Ind. Trial Rule 61).

3. Adequacy of Sentencing Statements

[35] Wilkie-Carr challenges his sentence on multiple grounds. A defendant who pleads guilty is entitled to challenge the merits of the trial court's sentencing decision. *Johnson v. State*, 145 N.E.3d 785, 786–87 (Ind. 2020) (citing *Collins*, 817 N.E.2d at 231). Wilkie-Carr argues that the trial court's sentencing statements fail to meet the requirements of Indiana Code section 35-38-1-3. We disagree.

[36] We review a trial court's sentencing decision for only an abuse of discretion. *Owen*, 210 N.E.3d at 269 (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *as amended* (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind.

2007)). "An abuse of discretion occurs if 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 *Anglemyer*, 868 N.E.2d at 490). Notably, where, as here, the defendant entered an open plea, the trial court's discretion "is limited only by the Constitution and relevant statutes." *Rodriguez*, 129 N.E.3d at 794 (quoting *Childress v. State*, 848 N.E.2d 1073, 1078 (Ind. 2006)).

[37] In reviewing a sentence, we "examine both the written and oral sentencing statements to discern" the trial court's findings. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002)). That is, we are not limited to examining only one of the statements. *Corbett*, 764 N.E.2d at 631 (quoting *Walter v. State*, 727 N.E.2d 443, 449 (Ind. 2000)).

[38] Under Indiana Code section 35-38-1-3, when sentencing a person for a felony, a trial court must state its reasons for selecting the sentence it imposes if the trial court finds aggravating circumstances, mitigating circumstances, or both. The Indiana Supreme Court has explained that sentencing statements issued pursuant to this statute

> must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.

Anglemyer, 868 N.E.2d at 490.

[39] Wilkie-Carr argues that both the Oral Statement and the Written Statement are inadequate under Indiana Code section 35-38-1-3 because they do not identify significant mitigating circumstances clearly supported by the record. As discussed in more detail below, the trial court did not abuse its discretion in identifying all significant mitigating circumstances. *See Belcher v. State*, 138 N.E.3d 318, 328 (Ind. Ct. App. 2019) (quoting *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005)) ("The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does."), *trans. denied*.

[40] Wilkie-Carr also asserts that the Oral Statement is insufficient under Indiana Code section 35-38-1-3 because it does not specify why the imposed sentence was appropriate. However, Wilkie-Carr does not present any cogent reasoning or cite any facts in the Record on Appeal in support of this contention in violation of Indiana Appellate Rule 46(A)(8)(a), so this argument is waived. *See Martin v. Hunt*, 130 N.E.3d 135, 137–38 (Ind. Ct. App. 2019) (citing *In re Moeder*, 27 N.E.3d 1089, 1097 n.4 (Ind. Ct. App. 2015), *trans. denied*).

[41] Wilkie-Carr next claims that the Written Statement is inadequate under Indiana Code section 35-38-1-3 because it "references entirely different circumstances than the [trial] court articulated" in the Oral Statement. Appellant's Br. at 10. Specifically, he alleges that the Written Statement included five considerations that were not addressed in the Oral Statement, namely: (1) "nature and circumstances of the offense," (2) "high risk to reoffend based on IRAS report,"

(3) "ages of victims depicted," (4) "defendant has tried to minimize his actions," and (5) "defendant is seeking treatment." *Id.* at 9.

[42] In its Oral Statement, the trial court expressly addressed the nature and circumstances of Wilkie-Carr's offenses, Wilkie-Carr's minimization of his actions, and the treatment Wilkie-Carr sought after being caught. The trial court did not explicitly address in its Oral Statement the ages of the victims depicted in the child pornography that Wilkie-Carr possessed or Wilkie-Carr's high risk of reoffending according to his IRAS–CST results; these considerations were only expressly noted in the Written Statement. In addition, the trial court did not explain whether it determined these two circumstances to be aggravating or mitigating, and why.

[43] Thus, the only discrepancy between the Oral Statement and the Written Statement is the inclusion of two additional considerations in the Written Statement that the trial court did not include in its Oral Statement. This error is harmless, *see McElroy*, 865 N.E.2d at 591 (citing *Whatley v. State*, 685 N.E.2d 48, 50 (Ind.1997)), because the trial court imposed the exact same sentence without the two extra factors as it did therewith, *see id.*; App. R. 66(A).

4. Identification of Mitigating and Aggravating Factors

[44] Wilkie-Carr contends that the trial court erred in identifying mitigating and aggravating circumstances. Again, we review a trial court's sentencing decision for an abuse of discretion. *Owen*, 210 N.E.3d at 269 (quoting *Anglemyer*, 868 N.E.2d at 490). There are several ways a trial court may abuse its discretion in

determining a defendant's sentence, including entering a sentencing statement that includes aggravating and mitigating factors that are not supported by the record, entering a sentencing statement that omits reasons that are clearly supported by the record, or entering a sentencing statement that includes reasons that are improper as a matter of law. *Kayser v. State*, 131 N.E.3d 717, 722 (Ind. Ct. App. 2019) (citing *Anglemyer*, 868 N.E.2d at 490–91); *McElfresh v. State*, 51 N.E.3d 103, 111 (Ind. 2016) (citing *Anglemyer,* 868 N.E.2d at 490–91).

a. Mitigating Factors

[45] Wilkie-Carr asserts that the trial court abused its discretion by omitting certain mitigating factors from its sentencing statement. To succeed on this claim, Wilkie-Carr must demonstrate that "the trial court failed to identify or find a mitigating factor" by establishing that "the mitigating evidence is both significant and clearly supported by the record." *McElfresh*, 51 N.E.3d at 112 (quoting *Anglemyer,* 868 N.E.2d at 493). This burden can be particularly difficult because, "[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Id.* (quoting *Anglemyer,* 868 N.E.2d at 493).

[46] Wilkie-Carr asserts that he presented evidence of the following nine circumstances he believes to be mitigators: (1) "no history of criminal activity"; (2) "likely to respond affirmatively to probation"; (3) "character and attitude indicate unlikely to commit another crime"; (4) "remorse"; (5) "admission of guilt/acceptance of responsibility"; (6) "cooperation with authorities"; (7)

"presentence rehabilitation efforts"; (8) "troubled childhood"; and (9) "PTSD." Appellant's Br. at 10.

[47] Of these nine allegedly mitigating factors, the trial court addressed at least five in its sentencing statements. First, the trial court stated it believed Wilkie-Carr was "likely to respond to probation." Tr. Vol. II at 73. Second, in addressing Wilkie-Carr's presentence rehabilitation efforts, the trial court acknowledged that Wilkie-Carr "ha[d] put in some work" but did "not take that as a great mitigator because it did not come just maybe three months ago, and after he was caught." *Id.* Third, concerning Wilkie-Carr's allegedly "troubled childhood" and resulting PTSD, the trial court said:

> [I]f it was true that you had a serious incident in your past that you were a victim of, and which if it is true, I hate that happened. The State makes an interesting point in terms of . . . how that affected you, but yet, these are real children, these are real souls that you've affected. And I don't see a huge difference between you actually doing the deed, and you actually viewing the deed.

Id. at 73–74. Fourth, the trial court noted that Wilkie-Carr did not have a criminal history.

[48] The trial court did not expressly state why it did not consider or otherwise did not give much, if any, weight to the remaining four mitigating factors Wilkie-Carr presented, and it was not obligated to do so, *see McElfresh*, 51 N.E.3d at 112. However, the trial court observed that Wilkie-Carr minimized his actions after he was caught, which the trial court could have considered as minimizing the weight of Wilkie-Carr's remorse, admission of guilt, and cooperation with

authorities. The trial court also commented that Wilkie-Carr had to take "a lot of steps to even get to the point where you could even see" child pornography, Tr. Vol. II at 74, which it could have reasonably determined to be an indicator that he would reoffend.

[49] Wilkie-Carr also argues that it was significant that he pled "open to the Court without the benefit of a plea agreement." Appellant's Br. at 12. The Indiana Supreme Court has held that "a defendant who pleads guilty deserves 'some' mitigating weight be given to the plea in return," *Anglemyer*, 875 N.E.2d at 220–21 (citing *McElroy*, 865 N.E.2d at 591), but "the significance of a guilty plea as a mitigating factor varies from case to case," *id.* (citing *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004)). For instance, a trial court may not consider a guilty plea to be "significantly mitigating" if "it does not demonstrate the defendant's acceptance of responsibility," *id.* (citing *Francis,* 817 N.E.2d at 238 n.3), or if "the defendant receives a substantial benefit in return for the plea," *id.* (citing *Sensback v. State,* 720 N.E.2d 1160, 1165 (Ind. 1999)).

[50] In negotiating a potential plea agreement with Wilkie-Carr, the State would agree to only a minimum sentence. Wilkie-Carr therefore made the decision to forgo entering a plea agreement and instead chose to enter an open plea. Nevertheless, Wilkie-Carr did receive a benefit from pleading to all counts as charged here: another Indiana county agreed to not pursue its case against Wilkie-Carr (presumably on the same or similar charges) if Wilkie-Carr pled guilty to all the charges then pending against him in this case.

[51] The trial court identified five of the mitigating factors Wilkie-Carr argues it should have found to be mitigating circumstances. Of the remaining four mitigating factors Wilkie-Carr identified on appeal, he has not demonstrated that any of those allegedly mitigating circumstances were both significant and clearly supported by the record. Therefore, we cannot say that the trial court abused its discretion in omitting any mitigating factors.

b. Aggravating Factors

[52] Wilkie-Carr also argues that the trial court abused its discretion by identifying improper aggravating circumstances. He contends that the trial court erred in considering as aggravators the nature and circumstances of the offense, the age of the victims, and the results of his IRAS–CST evaluation. "[W]hen a defendant challenges some, but not all, of the aggravating circumstances found by the trial court, we will not remand for resentencing if we can say with confidence the trial court would have imposed the same sentence had it not considered the purportedly erroneous aggravators." *Owen*, 210 N.E.3d at 269–70 (citing *McDonald v. State*, 868 N.E.2d 1111, 1114 (Ind. 2007)).

[53] Here, the trial court identified at least one other aggravating circumstance that Wilkie-Carr does not challenge: upon being caught, Wilkie-Carr minimized his actions. Given the minimal weight the trial court gave to the mitigating factors it identified, as discussed above, we believe the trial court would have imposed the same sentence even if it had only considered Wilkie-Carr's minimization of his repeated viewing and possession of child pornography over the course of one year. Accordingly, the trial court did not abuse its discretion in identifying

aggravating circumstances, and, even if it had, any error was harmless because the unchallenged aggravating circumstance here supports the sentence the trial court imposed.

5. Appropriateness of Sentence

[54] Finally, Wilkie-Carr argues that his sentence is inappropriate under Appellate Rule 7(B) and should be revised. We disagree.

[55] The Indiana Constitution authorizes us to independently review and revise a trial court's sentencing decision. *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019) (citing Ind. Const. art. 7, §§ 4, 6; *McCain v. State*, 88 N.E.3d 1066, 1067 (Ind. 2018)). That authority is implemented through Appellate Rule 7(B), which permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." *Faith*, 131 N.E.3d at 159 (quoting App. R. 7(B)).

[56] Our role under Appellate Rule 7(B) is to "leaven the outliers," *Faith*, 131 N.E.3d at 159–60 (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)), and we reserve that authority for exceptional cases, *id.* at 160 (citing *Taylor v. State*, 86 N.E.3d 157, 165 (Ind. 2017), *reh'g denied*). Consequently, the trial court's sentencing decision prevails unless it is "overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson v. State*, 29 N.E.3d 111, 111–12 (Ind. 2015).

[57] In considering the nature of the offense, we start with the advisory sentence to determine the appropriateness of a sentence. *T.A.D.W. v. State*, 51 N.E.3d 1205, 1211 (Ind. Ct. App. 2016) (quoting *Johnson v. State,* 986 N.E.2d 852, 856 (Ind. Ct. App. 2013)), *as amended* (May 26, 2023). Wilkie-Carr pled guilty to four counts of possession of child pornography, all as Level 5 felonies. "A person who commits a Level 5 felony . . . shall be imprisoned for a fixed term of between one (1) and six (6) years, *with the advisory sentence being three (3) years*." I.C. § 35-50-2-6(b) (emphasis added).

[58] The trial court sentenced Wilkie-Carr to five years on every count, with two-and-a-half years executed and two years on probation. The trial court ordered Counts 1, 2, and 3 to be served concurrently and Count 4 to be served consecutively thereto. Altogether, the trial court sentenced Wilkie-Carr to five years in the Indiana Department of Correction and four years on probation.

[59] Where, as here, the trial court deviated from the advisory sentence, one factor we consider is "whether there is anything more or less egregious about the offense committed by the defendant that makes it different from the 'typical' offense accounted for by the legislature when it set the advisory sentence." *T.A.D.W.*, 51 N.E.3d at 1211 (quoting *Holloway v. State,* 950 N.E.2d 803, 806–07 (Ind. Ct. App. 2011)). We also consider whether the offense was "accompanied by restraint, regard, and lack of brutality." *Stephenson*, 29 N.E.3d at 122.

[60] Wilkie-Carr used the dark web to view and download more than 40 images of child pornography during the span of approximately one year. The images of child pornography for which the State charged Wilkie-Carr depicted female toddlers. Wilkie-Carr used monikers or initials to set up the accounts he used to view or download child pornography. He viewed and downloaded these images at his residence and at his work. Wilkie-Carr described his viewing and possession of child pornography as an addiction.

[61] In considering the character of the offender, "we engage in a broad consideration of a defendant's qualities," *T.A.D.W.*, 51 N.E.3d at 1211 (citing *Aslinger v. State*, 2 N.E.3d 84, 95 (Ind. Ct. App. 2014), *clarified on other grounds on reh'g*), including whether the defendant has "substantial virtuous traits or persistent examples of good character," *Stephenson*, 29 N.E.3d at 122.

[62] Wilkie-Carr worked as a full-time mechanic before being arrested and maintained that employment through sentencing. He also has strong family support. Although Wilkie-Carr did not have a criminal history prior to the instant case, he testified at his sentencing hearing that he had been viewing child pornography for approximately one year before he was caught. Once caught, Wilkie-Carr cooperated with law enforcement, and sought therapeutic treatment, but he did not take any proactive steps to address his self-described addiction until after he was arrested and charged.

[63] Wilkie-Carr testified that he did not understand that his viewing and possession of child pornography caused harm until after he began working with Tabar.

Even after allegedly understanding that his actions were not victimless and pleading guilty to all four charges, Wilkie-Carr continued to minimize these actions. For instance, in the PSI, Wilkie-Carr wrote, "I found myself on the dark web with no ill intent." Appellant's App. Vol. II at 69. At the sentencing hearing, however, Wilkie-Carr testified to the numerous steps he took to access the dark web and obtain child pornography.

[64] Wilkie-Carr also wrote in his presentence questionnaire that Tabar had "stated that . . . the reason I found myself looking at underage children is because my brain was trying to compensate for the innocence I lost at 6 years old." Appellant's App. Vol. II at 72. When the State asked him about this statement at the sentencing hearing, Wilkie-Carr confirmed that despite allegedly being sexually abused as a child, he empathized with the children's abusers when he viewed child pornography. Wilkie-Carr also reported that he did not usually take risks, but he testified during the sentencing hearing that taking his child pornography collection with him to work and viewing it there was risky behavior.

[65] Based on the serious nature of Wilkie-Carr's offenses and his continued inability to accept full responsibility for his actions, we cannot say that Wilkie-Carr has produced compelling evidence demonstrating that the nature of his offenses or his character renders his enhanced sentence an outlier. *See Hayko v. State*, 211 N.E.3d 483, 487 n.1 (Ind. 2023), *reh'g denied* (Aug. 18, 2023).

Conclusion

[66] In sum, Wilkie-Carr cannot challenge the amended charging information that added Count 4 because he pled guilty to all charges, including Count 4. Any error in the admission of the Article and the Screening Tool at the sentencing hearing were harmless. The minor discrepancy between the Oral Statement and the Written Statement is harmless because the trial court imposed the same sentence in both, and the trial court did not abuse its discretion in its identification of mitigating and aggravating circumstances. Finally, Wilkie-Carr has not met his burden of persuading us that his sentence is inappropriate in light of the nature of his offenses and his character. We therefore affirm the trial court on all issues raised.

[67] Affirmed.

Crone, J., and Brown, J., concur.