MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Clyde H. Brock,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 15, 2022

Court of Appeals Case No. 21A-CR-2897

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-1804-F1-4

Bailey, Judge.

Case Summary

[1] Clyde H. Brock ("Brock") challenges his convictions and sentences for two counts of child molesting, as Level 1 felonies;[1] child molesting, as a Level 4 felony;[2] vicarious sexual gratification, as a Level 4 felony;[3] child solicitation, as a Level 5 felony;[4] and child molesting, as a Class C felony.[5]

[2] We affirm in part, reverse in part, and remand.

Issues

[3] Brock purports to raise four issues which we restate as the following five issues:

I. Whether Brock waived his claim of alleged error in the admission of evidence pursuant to Indiana Evidence Rule 404(b).

II. Whether the trial court erred in admitting skilled witness testimony.

III. Whether the State provided sufficient evidence to support Brock's convictions.

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[1] Ind. Code § 35-42-4-3(a)(1); I.C. § 35-31.5-2-221.5.

[2] I.C. § 35-42-4-3(b).

[3] I.C. § 35-42-4-5(a)(1).

[4] I.C. § 35-42-4-6(b); I.C. § 35-31.5-2-221.5.

[5] I.C. § 35-42-4-3(b) (2014).

IV. Whether the trial court abused its discretion in sentencing Brock.

V. Whether Brock's sentence is inappropriate given the nature of the offenses and his character.

Facts and Procedural History

[4] C.B. ("Child") was adopted by her parents, Marty Brammer ("Father") and Lily Brock ("Mother"), in 2005 when she was ten months old, and the family lived in Casper, Wyoming. In 2011, Father and Mother separated, and Child and Mother moved to Indiana where Mother's family lived. In November of 2011, Mother and Child moved to an apartment in Flora, Indiana. Father moved to Indiana in 2012 but moved back to Wyoming for work in 2014.

[5] Mother began dating Brock in 2012. While Child and Mother lived in Flora, Brock showed Child his penis and asked Child to put it in her mouth. Child did so, and Brock told Child not to tell Mother what happened.

[6] Sometime when Child was in the fourth grade, Mother and Child moved into Brock's residence in Fort Wayne. Mother and Brock married in May of 2014. During this time, Brock had Child fondle his penis after showing her how to do it. Brock also asked Child to fondle her own genitals in his presence. Child informed Mother what Brock was doing to her, and Mother confronted Brock but did not move out of the home or file for dissolution. Child did not disclose the sexual abuse to Mother again.

[7] Approximately one year after moving to Fort Wayne, Mother and Child moved to Roanoke with Brock. During this time, Brock had Child perform oral sex on him on more than one occasion. When Child asked Brock for things, he told her that she could have them if she performed oral sex on him. On one occasion, Brock performed oral sex on Child and put his mouth on her breasts while they were in Brock and Mother's bedroom. More than once, Brock had Child completely disrobe, lie on the floor with her buttocks in the air, and shake her buttocks while he masturbated. On other occasions, Brock had Child disrobe down to her underwear, and he fondled her breasts. Brock also repeatedly had Child masturbate him during this time.

[8] During this time period, Brock usually molested Child while Mother was either in the shower or at work. One incident of molestation occurred while Child's grandmother was downstairs. During that incident, Brock instructed Child to remove her pants and underwear and bend over with her buttocks in the air. Brock instructed Child to hide if anyone came near while he was molesting her. Brock instructed Child not to tell anyone about what he was doing to her. If Child complied with Brock's instructions during the molestations, he would buy her things, such as drinks from Starbucks and toys.

[9] In 2016, Child began cutting and scratching herself because of the molestations. Child cried during classes at school and eventually began disclosing the molestation to some friends. Child told E.D. that she had a bad home life. Child eventually started seeing a counselor because of the cutting but did not

disclose the molestation to her counselor because Mother was in the room during every counseling session.

[10] In June of 2017, Child went to visit her father in Wyoming over summer break. Brock asked Child to communicate with him via Facebook messenger. While in Wyoming, Brock had Child send him photographs of her "private areas." Tr. v. II at 104. Child took photographs of herself in which she was completely nude and lying down on her back. Child sent Brock the photographs through Facebook messenger. Brock instructed Child to delete the photos immediately, and she complied.

[11] While in Wyoming, Child disclosed the molestations to her friend, T.H. Child asked T.H. not to tell anyone, but T.H. told her mother. T.H.'s mother reported the allegation to the Department of Family Services ("DFS") in Wyoming and contacted Father. DFS notified Detective Randy Lutterman ("Det. Lutterman") of the Lander, Wyoming police department about the report. Det. Lutterman contacted the Allen County Sheriff's Department in Indiana regarding Child's disclosure. The Indiana Department of Child Services ("DCS") in Fort Wayne also received a call reporting the abuse of Child. Brock continued to attempt contact with Child through July 10, 2017.

[12] Det. Lutterman interviewed Child at Father's house, and that interview led Det. Lutterman to believe "there could be some evidentiary value" to Child's cellular phone. Tr. v. I at 237. Child turned over her phone to Father at Det. Lutterman's suggestion. Child participated in a forensic interview one or two

days later. Det. Lutterman procured a warrant and retrieved Child's cellular phone from Father. Det. Lutterman sent Child's phone to the Federal Bureau of Investigation ("FBI") for analysis. Brock consented to a search of his phone, and it was also sent to the FBI for analysis.

[13] When Child spoke to Mother on the phone after Child's disclosure of the molestation, Mother sounded angry and hung up on Child. Mother did not cooperate in the DCS investigation of the molestation of Child. Child remained with Father in Wyoming, and Child and Mother eventually ceased all communication with each other.

[14] Agent Jeff Robertson of the FBI ("Agent Robertson") conducted the analysis on both Child's and Brock's cellular phones. Agent Robertson recovered from Child's phone deleted messages from Brock to Child. Agent Robertson also recovered six deleted photographs taken with Child's phone on June 29 and 30 of 2017. Four of the photographs contained images of Child's vagina and two of the photographs contained images of Child's anus. The images were taken at three separate times and were all taken within a minute of Child talking to Brock on the phone.[6] Brock had a hidden vault application on his phone that was designed to hide data, such as photos and videos, and the authorities were not able to access that hidden vault.

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[6] The photographs taken from Child's phone had all been modified and were deleted within a minute of their being taken and modified. When an image is designated as "modified," that means something happened with the image on the phone, such as the image being sent to another phone. Tr. v. II at 123.

[15] The State charged Brock with two counts of child molesting, as Level 1 felonies; child molesting, as a Level 4 felony; vicarious sexual gratification, as a Level 4 felony; child solicitation, as a Level 5 felony; and child molesting, as a Class C felony. Prior to trial, the State filed a notice of 404(b) evidence and its intent to introduce a prior act of sexual abuse of Child by Brock that occurred when Child was living with Mother in Flora, Indiana. The State argued that this incident was evidence of grooming, knowledge, and plan because it was the "beginning point on the road to what happens [to Child] later." Tr. v. I at 10. The State also argued that it demonstrated the relationship between the parties and gave context to understand why Child delayed disclosing the molestation. Brock objected to the admission of the evidence and argued that the incident in Flora was "classic 404[,]" not relevant to the charges, and that the prejudice outweighed any probative value. *Id*. at 14. The trial court found that the incident that occurred in Flora was relevant and probative, and that the probative value was not substantially outweighed by the prejudicial impact. The court further noted that it would provide a limiting instruction to the jury regarding the evidence of that incident.

[16] Brock filed a motion in limine to prevent the State from calling Patricia Fox ("Fox") as an expert witness to testify about "(a) the methodology or procedure for interviewing children; [and] (b) the workings of the brain; the mind; and the memory process." App. v. III at 31. Brock argued that Fox was not qualified under Indiana Evidence Rule 702 as an expert, which he described as "psychologists, psychiatrists, neuroscientists, and neuropsychologists." *Id*. at

52. Brock also argued that Fox's testimony would not be relevant because this case did not involve recalled recollection. The State argued that Fox was an appropriate witness under Evidence Rule 701 to discuss testimony regarding script and episodic memory. The State noted that Fox had a master's degree in counseling, had been a therapist for about twenty-five years, and had specific training in the area of child forensic interviews, which included training on script and episodic memory that are relevant to this case. The trial court preliminarily ruled that, if the State laid the appropriate foundation, Fox would be permitted to testify regarding script and episodic memory.

[17] At the November 2021 jury trial,[7] Child testified at length regarding Brock's sexual abuse of her over the years, including the incident of molestation that took place in Flora, Indiana. Brock's only objection to the testimony about the Flora incident was to one question that he asserted was leading. The prosecutor rephrased that question, and Brock made no further objections. Brock cross-examined Child and asked questions addressed to Child's credibility. Specifically, Brock questioned Child regarding her prior inconsistent statements, her failure to recall all the specific details surrounding each incident of abuse, and her inability to remember the exact number of times Brock abused her.

[7] Brock's first jury trial resulted in a mistrial. The second jury trial, the verdict from which is at issue here, was held on November 1-4, 2021.

[18] Fox testified that she had no personal knowledge of the victim, the defendant, or the facts of this case, and that she was just providing generalized testimony regarding "child abuse disclosure." Tr. v. II at 47. Fox testified that she had nearly thirty years of experience as a therapist, had attended numerous trainings regarding child abuse dynamics, had taken courses on human growth and development which included information about episodic and script memory, and had conducted over 300 forensic interviews. Fox testified about forensic interviews of child abuse victims in general, and Brock's relevancy and foundation objections to that testimony were overruled. Fox also testified, without objection, about the reasons why victims of child abuse often delay disclosing the abuse and reasons why families of child abuse victims might not be aware of the abuse.

[19] When Fox was asked about episodic and script memory, Brock objected to Fox testifying about "the workings of the mind and the retrieval process functioning of memory." *Id*. at 60. Brock argued only that Fox did not qualify as an expert witness on such matters. The State explained that it was offering Fox's testimony as a skilled witness and pointed to Fox's testimony and curriculum vitae—which had been admitted without objection—regarding her experience. The trial court overruled Brock's objection.

[20] Fox testified that script memory "is something that we just do not even realize we remember;" it is an "everyday reoccurrence," like driving to work. *Id*. at 62. Fox explained that episodic memory, on the other hand, is where "a dramatic incident" has happened, such as a horrible car accident on the way to work;

"typically," one remembers such an incident "because it was unique." *Id.* Fox testified that—in her experience—when a child has been sexually abused numerous times over a period of time, the child typically "go[es] into more of a script" memory as to the number of times the abuse occurred; that is, the child "typically" cannot recall "the exact number of times the abuse occurred." *Id*. at 63.

[21] The jury found Brock guilty on all six counts. At sentencing, the trial court noted that it had reviewed the presentence investigation report, letters submitted on Brock's behalf, documents provided by Child's father, and the arguments of each counsel before making its decision on sentencing. The trial court found as aggravating factors that Brock had violated a position of trust with the victim, that the impact on the victim was greater than is necessary to prove the elements of the offense, and the nature and circumstances of the offense. As to the nature and circumstances of the offense, the trial court noted that the molestations occurred over the course of multiple years and constituted "a pattern … with some escalation and repeated acts." Tr. v. III at 77-78. The trial court did not find Brock's lack of criminal history as a mitigating factor because he did have a juvenile delinquency history related to curfew violation and public intoxication; however, the trial court did not consider his juvenile history to be an aggravating factor either. The trial court sentenced Brock to an aggregate sentence of forty-six years imprisonment, which included a seven-year concurrent sentence on Count IV, a Level 5 felony. This appeal ensued.

Discussion and Decision

Admissibility of Child's Testimony Regarding Prior Bad Act

[22] The first issue Brock raises is the admissibility of Child's testimony about the molestation for which Brock was not charged. Brock asserts that Child's testimony about the molestation that took place in Flora, Indiana is inadmissible under Indiana Rule of Evidence 404(b)(1), which prohibits admission of evidence regarding a "crime, wrong, or other act" to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

[23] However, while Brock objected on Rule 404(b)(1) grounds to the State's pre-trial notice of its intent to introduce testimony about the Flora, Indiana incident, he failed to object to the admission of that evidence at trial. After hearing argument of counsel on the State's Rule 404(b) notice, the trial court issued an order finding "that the event in Flora, IN is relevant [and] probative[,] and the probative value is not substantially outweighed by the prejudicial impact." App. v. II at 75. Thus, Child testified at trial—without objection—that Brock had Child perform oral sex upon him while Child lived in Flora in 2012 and that Brock instructed her not to disclose the abuse to Mother.

[24] "It is axiomatic that to preserve a claim of evidentiary error for purposes of appeal, a defendant must make a contemporaneous objection at the time the evidence is introduced." *Shoda v. State*, 132 N.E.3d 454, 460 (Ind. Ct. App.

2019) (citations omitted). Furthermore, "it is well settled that pretrial motions do not preserve any error for appeal." *Id.*; *see also Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) ("A contemporaneous objection at the time the evidence is introduced at trial is required to preserve the issue for appeal, whether or not the appellant has filed a pretrial motion to suppress."). Because Brock failed to object at trial to Child's testimony about the incident in Flora, he has waived his claims as to that testimony on appeal.

[25] In addition, Brock failed to claim in his initial appellate brief that the admission of the challenged evidence was fundamental error. "The fundamental error doctrine is an exception to the general rule that the failure to object at trial constitutes procedural default precluding consideration of the issue on appeal." *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013). However, "[t]he law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived." *Snow v. State*, 137 N.E.3d 965, 969 (Ind. Ct. App. 2019) (quoting *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005)), *trans. denied*. Because Brock did not argue that admission of the Rule 404(b) evidence was fundamental error until his reply brief, he has waived that claim.

[26] Waiver notwithstanding and assuming, without deciding, that the admission of Child's testimony about the molestation that occurred in Flora, Indiana was error, such error was harmless, not fundamental. As our Indiana Supreme Court has explained, "[t]he improper admission [of evidence] is harmless error if the conviction is supported by substantial independent evidence of guilt

satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction." *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012). Here, as discussed in more detail below,[8] there was substantial evidence—independent of the challenged Rule 404(b) evidence—to support Brock's convictions such that there was no substantial likelihood the challenged evidence contributed to the convictions. Therefore, any alleged error in the admission of the evidence of the molestation that occurred in Flora was harmless.

Admissibility of Fox's Testimony

[27] Brock also challenges the admission of testimony from Patricia Fox, a therapist who testified for the State about child abuse in general. Our standard of review on the admission of evidence is well-settled:

> A trial court has broad discretion in ruling on the admissibility of evidence and we will disturb its rulings only where it is shown that the court abused that discretion. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it.

Halliburton v. State, 1 N.E.3d 670, 675 (Ind. 2013) (quotations and citations omitted).

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[8] See our discussion of Sufficiency of the Evidence.

[28] Before and at trial, Brock objected to Fox's testimony about forensic interviews of children and "the workings of the mind" and memory. Tr. v. II at 60; App. v. III at 31. On appeal, as at trial, Brock contends that Fox is not qualified as an expert to testify to such matters under Rule of Evidence 702 and that her testimony constituted impermissible "vouching" for Child's credibility. The State maintains that Fox was qualified to offer opinion testimony as a skilled witness, as permitted under Rule of Evidence 701, that her testimony did not vouch for Child's credibility, and that, in any case, Brock opened the door to testimony about Child's credibility.

Skilled Witness Testimony

[29] The State does not claim that Fox was qualified as an expert to testify about child abuse under Rules of Evidence 702 and 703. Rather, it maintains that Fox provided "skilled testimony" admissible under Rule of Evidence 701. The latter rule provides that a lay witness may provide testimony in the form of an opinion if the testimony is "(a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Ind. R. Evid. 701.

[30] Our Supreme Court has held that Rule 701 "encompasses persons whom the courts have labeled 'skilled witnesses.'" *A.J.R. v. State*, 3 N.E.3d 1000, 1003 (Ind. Ct. App. 2014) (quoting *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003)).

> A skilled witness is a person who possesses specialized knowledge short of that necessary to be declared an expert under Indiana Evidence Rule 702 but beyond that possessed by an

> ordinary juror. [*Kubsch*, 784 N.E.2d at 922.] "Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge." *Hawkins v. State*, 884 N.E.2d 939, 944 (Ind.Ct.App.2008) (citation omitted), *trans. denied*.

Id. A skilled witness's specialized knowledge "allows a skilled witness to perceive more information from the same set of facts and circumstances than an unskilled witness would." *Satterfield v. State*, 33 N.E.3d 344, 353 (Ind. 2015). Such testimony "is helpful because it involves conclusions that escape the average observer." *Id*.

[31] Here, the trial court did not abuse its discretion when it ruled that Fox's testimony about child abuse was admissible as skilled witness testimony. The State laid a sufficient foundation establishing Fox's qualifications as a skilled witness on the issue of child abuse. The State established that Fox has a master's degree in counseling and is a licensed mental health counselor specializing in areas including "[t]rauma and anxiety, … sexual abuse, [and r]elationships and [f]amily issues." Ex. at 66. The uncontradicted evidence established that Fox has been a practicing therapist for nearly thirty years, with a focus that includes child and sexual abuse. Fox has taught in the areas of counseling, psychology, and social work for almost twenty-five years, has specialized training in the areas of trauma and child forensic interviews—including training about script and episodic memory, and has conducted "close to 300" forensic interviews. Tr. v. II at 46. *C.f., e.g.*, *Haycraft v. State*, 760 N.E.2d 203, 211 (Ind. Ct. App. 2001) (finding a detective was qualified as a

skilled witness to testify in a child sexual abuse case about "grooming" techniques of child molesters where the detective had "attended training on the methodology of sexual abuse and profile of offenders; … consulted sexual abuse training manuals; … investigated other sexual abuse cases; … [and] had superior knowledge of the procedures that child molesters employ compared to the average person"), *trans. denied*.

"Vouching" Testimony

[32] Fox did not testify about Child specifically. However, Brock maintains that Fox's testimony about the behavior of child abuse victims generally, including delayed disclosure of the abuse and memory issues, was impermissible "bolstering" or "vouching" for Child's credibility. We disagree.

[33] Rule of Evidence 704 provides that, although opinion testimony is not automatically objectionable, "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in criminal cases; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Evid. R**.** 704(b). Such improper "vouching" testimony "is an invasion of the province of the jurors in determining the weight they should place upon a witness's testimony." *Carter v. State*, 31 N.E.3d 17, 29 (Ind. Ct. App. 2015), *trans. denied*.

[34] However, this Court has repeatedly held that expert or skilled testimony about how victims of child abuse behave in general is not impermissible vouching for the credibility of an alleged child abuse victim's testimony about abuse. *See,*

e.g., *Richardson v. State*, 189 N.E.3d 629, 637 n.4 (Ind. Ct. App. 2022) (noting "testimony from a forensic interviewer regarding how victims of child molestation behave in general is not error"), *trans. denied*; *Hobbs v. State*, 160 N.E.3d 543, 555 (Ind. Ct. App. 2020) (holding nurse testimony about "how child-molesting victims behave in general" is not impermissible vouching testimony), *trans. denied*; *Alvarez-Madrigal v. State*, 71 N.E.3d 887, 893 (Ind. Ct. App. 2020) (holding doctor's testimony about child abuse in general was not impermissible vouching testimony because it was not an opinion about the victim's credibility or the truth of the allegations against the defendant), *trans. denied*; *Baumholser v. State*, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016) (holding forensic interviewer's testimony about the propensity of child abuse victims in general to delay disclosure was not impermissible vouching, and distinguishing *Steward v. State*, 652 N.E.2d 490 (Ind. 1995), which "specifically disallows testimony regarding evidence of a particular [child abuse] syndrome, CSAAS, which was not mentioned in the current case"), *trans. denied*; *Carter*, 31 N.E.3d at 29 (holding forensic interviewer's "broad, generalized" testimony about child abuse was not impermissible vouching where the skilled witness did not mention or testify about the specific victim in that case).[9]

[9] We decline Brock's invitation to essentially overrule this long line of cases by holding that *Steward*'s prohibition of testimony about child abuse *syndrome* as impermissible vouching applies equally to testimony about child abuse in general. *Steward*'s holding was related solely to the unreliability of the "diagnostic use of syndrome evidence in courtrooms." *Steward*, 652 N.E.2d at 493. No such potentially unreliable syndrome evidence was presented in the instant case.

[35] Here, Fox did not testify about Child at all;[10] rather, Fox only provided testimony about the behavior and thinking processes of child abuse victims in general. Such skilled witness testimony does not impermissibly "vouch" for a child witness's credibility.[11] *Id*. The trial court did not abuse its discretion when it allowed that testimony.[12]

Sufficiency of the Evidence

[36] Brock challenges the sufficiency of the evidence to support his convictions. Our standard of review of the sufficiency of the evidence is well-settled.

> When an appellate court reviews the sufficiency of the evidence needed to support a criminal conviction, it neither reweighs evidence nor judges the credibility of witnesses. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). The appellate court only considers "the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id*. (quoting *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008)). A conviction will be affirmed if there is substantial evidence of probative value supporting each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Bailey*, 907 N.E.2d at 1005. A

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[10] Thus, Brock's statements—without supporting citation to the record—that "the State elicited testimony from Fox that [Child's] action were consistent with that of a child victim" and "Basically, Fox testified that she believed [Child] had been molested" are erroneous. Appellant's Reply Br. at 9.

[11] Therefore, we do not address the State's contention that Brock opened the door to Fox's testimony by raising issues of Child's credibility in his opening statement and in his cross-examination of Child prior to Fox's testimony.

[12] On appeal, Brock briefly raises for the first time a claim that Fox's testimony "[d]oes [n]ot [s]atisfy the [b]alancing [t]est of [Rule of Evidence] 403." Appellant's Br. at 34. Because Brock failed to raise such an objection below, he has waived it for review. *See Halliburton*, 1 N.E.3d at 683 ("The law in Indiana is well settled that a defendant may not argue one ground for objection at trial and then raise new grounds on appeal.") (quotation and citation omitted).

> verdict of guilt may be based upon an inference if reasonably drawn from the evidence. *See Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007).

Tin Thang v. State, 10 N.E.3d 1256, 1258 (Ind. 2014). Moreover, "[t]he testimony of a sole child witness is sufficient to sustain a conviction for molestation." *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012).

[37] Brock was found guilty of the following:

- Count I: child molesting, as a Level 1 felony, related to Brock knowingly or intentionally performing or submitting to other sexual conduct with Child, who was under age fourteen; "to wit: [Brock] did place his penis in the mouth of [Child] or place his mouth on the female sex organ of [Child]" during the period of time between July 1, 2014, and July 6, 2017. App. v. II at 2;

- Count II: child molesting, as a Level 4 felony, relating to Brock knowingly or intentionally performing or submitting to fondling or touching with Child, who was under age fourteen, that took place between July 1, 2014, and July 6, 2017;

- Count III: vicarious sexual gratification, as a Level 4 felony, relating to Brock knowingly or intentionally directing, aiding, inducing, or causing Child, who was under age fourteen, to fondle or touch herself with intent to arose Child's or Brock's sexual desires that took place between July 1, 2014, and July 6, 2017;

- Count IV: child solicitation, as a Level 5 felony, relating to Brock knowingly or intentionally soliciting Child, who was under age fourteen, to engage in sexual conduct or sexual intercourse or touching or fondling intended to satisfy Child's

or Brock's sexual desires during the period of time between July 1, 2014, and July 6, 2017; and

- Count V: child molesting, as a Class C felony, relating to Brock knowingly or intentionally performing or submitting to fondling or touching with Child, who was under age fourteen, that took place between June 1, 2013, and June 30, 2014.

- Count VI: child molesting, as a Level 1 felony, related to Brock knowingly or intentionally performing oral sex on Child, who was under age fourteen, that took place during the period of time between July 1, 2014, and July 6, 2017.[13]

[38] Child testified that, sometime between 2012 and 2014,[14] Brock caused Child to touch his penis. That testimony was sufficient to prove Count V, Class C felony child molesting, under Indiana Code Section 35-42-4-3(b) (2014). *See Hoglund*, 962 N.E.2d at 1238.

[39] Child also testified that, sometime between July 1, 2014, and July 6, 2017, Brock caused Child to perform oral sex on him on multiple occasions; caused Child to masturbate him on multiple occasions; directed Child to masturbate herself in his presence; solicited Child to engage in oral sex and/or touching or

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[13] The State presented evidence that, at all relevant times, Brock was over age eighteen and/or twenty-one and Child was under age fourteen. Brock does not challenge the sufficiency of that evidence.

[14] Brock does not challenge the evidence of the dates when the molestation incidents occurred, and we note that, when the age of the child at the time of the crime was not at issue, we have held the evidence was sufficient to support a child molesting conviction when the victim did not give an exact date but testified to "approximate time frames by reference to other activities." *Phillips v. State*, 499 N.E.2d 803, 806 (Ind. Ct. App. 1986); *see also, e.g.*, *Krebs v. State*, 816 N.E.2d 469, 473 (Ind. Ct. App. 2004) (holding proof of the exact date and time of the molestation was not necessary where the victim's age during a specified time period was not near the dividing line between classes of felonies).

fondling with him on multiple occasions; caused Child to submit to him performing oral sex upon her. While Child did not know exact dates of each molestation incident, she provided testimony about time frames by reference to where she lived at the time and other activities that occurred in the same time periods.

[40] Again, Child's testimony alone was sufficient to support Brock's convictions. *See Hoglund*, 962 N.E.2d at 1238 (child victim's testimony alone may support a conviction); *Phillips v. State*, 499 N.E.2d 803, 806 (Ind. Ct. App. 1986) (holding evidence was sufficient when victim did not give an exact date but testified to "approximate time frames by reference to other activities"); *Kien v. State*, 782 N.E.2d 398, 407-08 (Ind. Ct. App. 2003) (holding evidence was sufficient to show two separate crimes when victim did not specify two different dates but testified that the molestation happened at least twice), *trans. denied*. However, Child's testimony also was partially corroborated by other witnesses, such as the friends to whom she disclosed abuse, and by the forensic analyses of Child's and Brock's cellular phones.

[41] The State presented sufficient evidence to support Brock's convictions. Brock's only contention otherwise is merely a request that we reweigh the evidence and judge witness credibility, *see* Appellant's Br. at 35-36, which we may not do, *see Tin Thang*, 10 N.E.3d at 1258.

Sentencing

[42] Brock maintains that the trial court erred in sentencing him. Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). 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." *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*. A trial court abuses its discretion in sentencing if it does any of the following:

> (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any[ ]—but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law."

Id. (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490-491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). So long as a sentence is within the statutory range, the trial court may impose it without regard to the existence of aggravating or mitigating factors. *Anglemyer*, 868 N.E.2d at 489. However, if the trial court does find the existence of aggravating or mitigating factors, it must give a statement of its reasons for selecting the sentence it imposes. *Id*. at 490. But the relative weight or value assignable to reasons properly found, or

those which should have been found, is not subject to review for abuse of discretion. *Gross*, 22 N.E.3d at 869.

Sentence for Count IV, Child Solicitation as a Level 5 Felony

[43] Brock asserts, and the State admits, that the trial court imposed an illegal sentence on Count IV, Child Solicitation, as a Level 5 Felony. The maximum sentence for a Level 5 felony is imprisonment for a term of six years. I.C. § 35-50-2-6(b). The trial court sentenced Brock to seven years' imprisonment on Count IV, a Level 5 felony. Because that sentence is longer than the maximum sentence permitted by law, the trial court erred when it imposed it. We reverse the sentence for Count IV and remand for resentencing on that count.

Sentences for Remaining Counts

[44] As to the remaining sentences, Brock alleges the trial court abused its discretion because it used improper aggravators and erroneously imposed consecutive—rather than concurrent—sentences on several counts.

[45] Brock's assertion that the trial court improperly found his minimal juvenile delinquency history to be an aggravator is simply incorrect; the trial court specifically stated that it did not consider Brock's juvenile history to be an aggravating circumstance. And Brock's assertion that the court found that "events progressed" as an aggravator is unsupported by citation to the record. Appellant's Br. at 39. Rather, the trial court found that the nature and circumstances of the offenses was an aggravating factor; specifically, the court noted that Brock was in a position of trust as to Child, the molestations

occurred over a period of years, and the molestations became "a pattern … with some escalation and repeated acts." Tr. v. III at 78.

[46] The trial court relied upon proper aggravating factors. A court may consider the abuse of a position of trust as an aggravating factor. *See, e.g.*, *Bacher v. State*, 722 N.E.2d 799, 802 n.5 (Ind. 2000) ("Being in a 'position of trust' with the victim is a valid aggravating circumstance.") (citation omitted). The position of trust aggravator applies in cases where the defendant—often a parent or stepparent—has a more than casual relationship with the victim and has abused the trust resulting from that relationship. *Rodriguez v. State*, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007). Thus, "[g]enerally, cohabitation arrangements of nearly any character between adults do in fact, and should, establish a position of trust between the adults and minors living or staying together." *Id*. Brock was in a position of power, trust, and care over Child both before and after he lived with her and Mother. His abuse of that position by molesting Child is a valid aggravating factor.

[47] In addition, although a trial court may not use a material element of the offense as an aggravating circumstance, it may find the nature and circumstances of the offense to be an aggravating circumstance. *Caraway v. State*, 959 N.E.2d 847, (Ind. Ct. App. 2011), *trans. denied*. The pattern and escalation/repeated acts of molestation in this case are not elements of the child molesting crimes, but permissible aggravating factors related to the nature and circumstances of the offense. *See, e.g.*, *Plummer v. State*, 851 N.E.2d 387, 390-91 (Ind. Ct. App. 2006) (holding trial court's finding that the incidents were not isolated but were part

of a series of molestations, involved the nature and circumstances of the offenses rather than elements of the offenses, and thus, the finding constituted a proper basis for an aggravating circumstance warranting enhanced sentences in a prosecution for child molesting). The trial court did not err in finding the nature and circumstances of the offenses to be an aggravating factor.

[48] Finally, Brock maintains that the aggravating factors do not support the trial court's imposition of consecutive, rather than concurrent, sentences as to Counts I, II, and V. We disagree. Again, the aggravators cited by the court were not improper, and properly found aggravators may support consecutive sentences. *See Plummer*, 851 N.E.2d at 391 (holding the violation of a position of trust and the series of repeated, rather than isolated, molestations supported the imposition of consecutive sentences). Furthermore, we note that a trial court may rely on the same factors to enhance a sentence and to impose consecutive sentences. *E.g.*, *Rhoiney v. State*, 940 N.E.2d 841, 846 (Ind. Ct. App. 2010) (citing *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000), *trans. denied*.

[49] The trial court did not abuse its discretion when it sentenced Brock.

Appellate Rule 7(B) Review

[50] Brock contends that the forty-six-year aggregate sentence for his six felony convictions is inappropriate in light of the nature of the offenses and his character. Article 7, Sections 4 and 6, of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial

court." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration in original). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

[51] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate at the end of the day 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." *Id.* at 1224. The question is not whether another sentence is more appropriate, but rather, whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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).

[52] Aside from the illegal sentence for the Level 5 felony, as already addressed above, Brock was convicted of two Level 1 felonies and sentenced to thirty-

three years for each conviction; two Level 4 felonies and sentenced to seven years for each conviction; and one Class C felony and sentenced to six years. We first note that Brock's sentences for those convictions are all within the statutory sentencing ranges and are not at the highest levels of the ranges. *See* I.C. § 35-50-2-4(a) (providing the sentencing range for conviction of a Level 1 felony is imprisonment for a fixed term of between twenty and forty years, with an advisory sentence of thirty years); I.C. § 35-50-2-5.5 (providing the sentencing range for conviction of a Level 4 felony is imprisonment for a fixed term of between two and twelve years, with an advisory sentence of six years); I.C. § 35-50-2-6(a) (providing the sentencing range for conviction of a Class C felony is imprisonment for a fixed term of between two and eight years, with an advisory sentence of four years).

[53] Second, when considering the nature of the offenses, we look at the defendant's actions in comparison to the elements of the offenses. *Cannon v. State*, 99 N.E.3d 274, 280 (Ind. Ct. App. 2018), *trans. denied*. "The nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation." *Zavala v. State*, 138 N.E.3d 291, 301 (Ind. Ct. App. 2019) (quotation and citation omitted), *trans. denied*. 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." *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (citation omitted), *trans. denied*.

[54] Here, the child molesting offenses were made worse by the fact that Brock repeatedly forced a child over whom he had care, custody, and control to submit to sex acts with him. *See, e.g.*, *Williams v. State*, 170 N.E.3d 237, 245 (Ind. Ct. App. 2021) (finding defendant's sentence was not inappropriate where defendant was father figure and in a position of trust while he lived in six-or-seven-year-old victim's household or she had been placed in his care), *trans. denied*. And Brock began his molestation of Child when she was approximately eight years old. *See Chastain v. State*, 165 N.E.3d 589, 601 (Ind. Ct. App. 2021) (noting the court may consider a victim's age that is "significantly below" the age specified in the statute when "look[ing] at the nature, extent, and depravity of the offense"), *trans. denied*. In short, Brock has failed to provide compelling evidence portraying in a positive light the nature of his offenses, such as restraint, regard, and lack of brutality. *See Stephenson*, 29 N.E.3d at 122. Brock's sentence is not inappropriate in light of the nature of his offenses.

[55] Brock does not even attempt to argue that his character supports a sentence revision, and we find no evidence to support such an argument in any case. Analysis of an offender's character "involves a broad consideration of [his] qualities, life, and conduct." *Crabtree v. State*, 152 N.E.3d 687, 705 (Ind. Ct. App. 2020), *trans. denied*. We also consider "facts such as substantial virtuous traits or persistent examples of good character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (quotation and citation omitted).

[56] Brock provides no evidence of any virtuous traits, persistent examples of good character, or any other aspect of his life and conduct that would reflect well on

his character. Brock has failed to carry his burden of persuading us that the nature of his offense and his character support a revision of his sentence.

Conclusion

[57] Brock has waived his claim of error in the admission of Rule 404(b) evidence by failing to object to the introduction of such evidence at trial, and waiver notwithstanding, any such error would have been harmless. The trial court did not abuse its discretion when it allowed Fox's skilled witness testimony about child abuse in general. The State presented sufficient evidence to support Brock's convictions. The trial court did not abuse its discretion in its sentencing on Counts I, II, III, V, and VI, and those sentences were not inappropriate. However, as the State admits, the trial court erred when it sentenced Brock to seven years for Count IV, a Level 5 felony, because the maximum sentence permitted by law for a Level 5 felony is six years.

[58] We affirm in part, reverse in part, and remand with instructions for the trial court to resentence Brock on Count IV, in accordance with this opinion.

May, J., and Bradford, C.J, concur.