MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Timothy DeWayne Forshee,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 1, 2022

Court of Appeals Case No.
21A-CR-2288

Appeal from the
Madison Circuit Court

The Honorable
David A. Happe, Judge

Trial Court Cause No.
48C04-2009-F4-2125

Molter, Judge.

[1] Repeatedly over a two-year period, Timothy DeWayne Forshee supplied his stepdaughter with alcohol until she was intoxicated, followed her to her

bedroom, and fondled her breasts and vagina. The State charged Forshee with three counts of Level 5 felony sexual misconduct with a minor, and he pleaded guilty to those charges. The trial court sentenced Forshee to three concurrent terms of six years, with one year of each sentence suspended to probation for an aggregate sentence of five years executed. Forshee appeals his sentence, arguing that the trial court abused its discretion because it failed to find two mitigating factors and it did not properly weigh the mitigating factors against the aggravating factors. He also argues his sentence is inappropriate considering the nature of his offenses and his character. Finding that the trial court did not abuse its discretion in sentencing Forshee and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

[2] In 2007, Forshee began dating Mary Jackson when Jackson's daughter, M.W., was four years old. At some point, Forshee began to reside with Jackson and M.W. He and M.W. became so close that M.W. asked Forshee to adopt her. In 2011, Forshee and Jackson married, making M.W. Forshee's stepdaughter. In 2013, Forshee and Jackson had a child, a boy named J.F.

[3] Beginning in 2016 or 2017, when M.W. was fourteen years old, Forshee gave alcohol to M.W., which intoxicated her. Forshee would follow M.W. to her bedroom, and he "placed his hand inside her clothing, touching her breasts and vagina and moving his hand around." Appellant's Conf. App. Vol. 2 at 71. This happened between three and six times. Forshee once "digitally penetrat[ed] her vagina with his finger(s) and masturbat[ed] to climax." *Id*. at

71. These incidents ended in 2018. Once Jackson learned that Forshee had been fondling M.W., she forced him to move out. Soon after, Forshee texted Jackson and explained: "No excuses but we should have never drank together, and I should have never ever let it go that far." *Id*. at 100. Jackson replied: "She said it happened six times. She is suffering mentally because of [you]." *Id*. at 72.

[4] In September 2020, the State charged Forshee with two counts of Level 4 felony child molesting and one count of Level 5 felony sexual misconduct with a minor. Nearly one year later, the State amended the charging information to three counts of Level 5 felony sexual misconduct with a minor, and Forshee agreed to plead guilty to those three charges. In exchange, the State agreed to cap Forshee's maximum executed sentence at five years with the rest of sentencing left to the trial court's discretion. In 2021, Forshee and Jackson's marriage was dissolved, and Jackson was awarded custody of J.F.

[5] Forshee has a prior conviction for resisting law enforcement, has received a few speeding tickets, and has a prior conviction for Class A misdemeanor operating a vehicle while intoxicated. As a result of his OWI conviction, Forshee's license was suspended, and he was required get an evaluation for substance abuse, which he completed. In the presentence report, Forshee remarked, "I didn't realize how much alcohol had a hold on me . . . . I just let alcohol get the best of me." Appellant's Conf. App. Vol. 2 at 80. The presentence report revealed that Forshee claimed he had no current problems with alcohol: "Mr. Forshee denies having a substance use issue at this time. When asked about his

past use, he replied, 'I guess you could say I have been an alcoholic. That is how all this stuff came about.'" *Id.*

[6] Jackson testified at the sentencing hearing that M.W. began "acting out" around the time that Forshee began touching her. *Id.* at 101. As she described it: "[M.W.] started smoking, vaping, grades were awful, didn't wanna go to school and started smokin' weed. I cried a lot around that time just trying to figure out what was wrong with my daughter." *Id.* Jackson said she can no longer trust anyone, feels "crippling" guilt for what happened to M.W., and called a suicide hotline because she "just couldn't take the pain anymore." *Id.* at 102.

[7] Forshee expressed remorse at the sentencing hearing. He did not testify that he was an alcoholic, although his aunt testified that Forshee was an alcoholic and Forshee's attorney made the same claim during closing argument. At the time of the sentencing hearing, Forshee had a job as a welder and was making child support payments to Jackson for J.F.

[8] Before imposing Forshee's sentence, the trial court found two aggravating factors: (1) Forshee committed multiple offenses over two years, and (2) Forshee had known M.W. for more than ten years but violated his position of trust with her:

> This was not a stranger to you. This was someone who had been part of your life and you'd been part of hers for over a decade as a parent figure . . . . You weren't a parent, but you were a stepparent, so you were certainly acting in a position of a parent,

> with respect to this child. That's a high level of trust . . . . And you betrayed that, um, just about as severely as you could, and repeatedly. That is . . . very significant in the court's judgment, probably the most significant aggravator here.

Tr. at 69. As mitigating factors, the trial court cited Forshee's "relatively modest criminal history," his guilty plea, and his remorse, although it minimized Forshee's remorse because it "was expressed in preparation for sentencing." *Id*.

[9] The trial judge rejected Forshee's attempt to minimize his culpability by blaming his actions on his alcohol use:

> [F]or you to project the cause of your problems on alcohol really misses the point and it's dangerous for this reason. If you think it is something outside of you that caused this to happen[], then you're really not as morally responsible . . . . Alcohol didn't cause this, you caused this.

Id. at 71–72. The trial court found the aggravating circumstances outweighed the mitigating circumstances and sentenced Forshee to three concurrent terms of six years in the Indiana Department of Correction, with one year of each term suspended to probation for an aggregate sentence of five years executed. Forshee now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion in Sentencing

[10] Forshee argues the trial court abused its discretion when it sentenced him to the maximum sentences for Level 5 felonies because it (1) failed to recognize two mitigating factors and (2) found more mitigating factors than aggravating factors. We disagree.

[11] Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). We will find an abuse of discretion when the decision is clearly against the logic and effect of the facts before the court or the reasonable, probable, and actual deductions to be drawn from them. *Hudson v. State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). A trial court may abuse its discretion by: (1) failing to enter a sentencing statement; (2) entering a sentencing statement that includes aggravating and mitigating factors unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482, 490–91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

[12] Forshee first claims the trial court abused its discretion because it failed to identify his alcoholism as a mitigating factor even though the record contained evidence of his addiction. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the

mitigating evidence is both significant and clearly supported by the record. *Davis v. State*, 173 N.E.3d 700, 704 (Ind. Ct. App. 2021) (citing *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000)). But the trial court does not have to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id.* Here, the trial court acknowledged the evidence of Forshee's alcohol use but, as was its prerogative, found that Forshee "overstate[d] the role that alcohol played in this offense" and that he was inappropriately relying on alcohol simply to deflect responsibility for sexually assaulting M.W. Tr. at 71 ("[F]or you to project the cause of your problems on alcohol really misses the point and it's dangerous . . . . Alcohol didn't cause this, you caused this.").

[13] Forshee also argues the trial court "failed to recognize the mitigating factor that these were circumstances that were unlikely to repeat themselves." Appellant's Br. p.17. However, he fails to support this argument with any explanation, record citations, or legal authority, and we cannot say the trial court erred in this respect either. *See Harlan v. State*, 971 N.E.2d 163, 171 (Ind. Ct. App. 2012) (explaining that a defendant's repeated acts of child molestation "over a span of years despite having ample opportunity to end his abusive behavior" is not strong evidence that the circumstances are unlikely to recur).

[14] Next, Forshee argues the trial court abused its discretion in imposing the maximum sentences despite finding more mitigating factors (three) than aggravating factors (two). He in effect claims the trial court did not properly weigh the aggravating factors against the mitigating factors. But trial courts no longer have any obligation to weigh aggravating and mitigating factors against

each other, so we cannot say that failing to weigh the factors as Forshee proposes was an abuse of discretion. *Anglemyer*, 868 N.E.2d at 491.

II. Inappropriateness of Sentence

[15] The Indiana Constitution authorizes appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). "That authority is implemented through Appellate Rule 7(B), which permits an appellate court to revise a sentence if, after due consideration of the trial court's decision, the sentence is found to be inappropriate in light of the nature of the offense and the character of the offender." *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019).

[16] Our review under Appellate Rule 7(B) focuses on "the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Cardwell*, 895 N.E.2d at 1225. Our role is only to "leaven the outliers," which means we exercise our authority only in "exceptional cases." *Faith*, 131 N.E.3d at 160. Thus, we generally defer to the trial court's decision, and our goal is to determine whether the defendant's sentence is inappropriate, not whether some other sentence would be more appropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as

substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[17] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as the appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a Level 5 felony is a "a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years." Ind. Code § 35-50-2-6(b). Forshee received six years for each of his Level 5 felony convictions and, consistent with the plea agreement, only five years executed on each sentence with all three sentences to be served concurrently. This resulted in an aggregate executed sentence of five years. Forshee asks us to reduce his sentence to the advisory term of three years, with two years suspended to probation, and with the executed time of one year served on home detention or work release.

[18] As for the nature of Forshee's offenses, they were egregious and justified the maximum sentences for his convictions. The Indiana Supreme Court has characterized the sexual abuse of a stepchild over several years as "a heinous violation of trust." *See Smith v. State*, 889 N.E.2d 261, 264 (Ind. 2008). Forshee had been part of M.W.'s life since she was four years old, and they were so close she wanted him to adopt her. Yet, Forshee repeatedly encouraged M.W., who was fourteen at the time, to drink to the point of intoxication, and he then sexually abused her. *See Kocielko v. State*, 938 N.E.2d 243, 256 (Ind. Ct. App. 2010) (holding that the maximum sentence was not inappropriate where defendant provided whiskey to the victim until she was drunk and then

sodomized her), *trans. denied*. This is not compelling evidence portraying the offense in a positive light.

[19] The impact of Forshee's offenses also do not portray Forshee's offenses in a positive light. *See Cardwell*, 895 N.E.2d at 1224 ("whether we regard a sentence as appropriate . . . turns on . . . the damage done to others"). M.W. began "acting out" around the time the abuse began, trying drugs, smoking, and not wanting to attend school. Appellant's Conf. App. Vol. 2 at 101. Jackson suffers from feelings of guilt, cannot trust anyone, and sought suicide-prevention counseling because she "just couldn't take the pain anymore." *Id*. at 101–02.

[20] As for Forshee's character, repeatedly committing the same crime reflects poorly on his character. *See Norris v. State*, 113 N.E.3d 1245, 1256 (Ind. Ct. App. 2018), *trans. denied.* And although Forshee's criminal record is not extensive, "[e]ven a minor criminal record reflects poorly on a defendant's character." *Reis v. State*, 88 N.E.3d 1099, 1105 (Ind. Ct. App. 2017). Forshee further points to his alcohol abuse to cast his character in a more positive, or at least sympathetic light, but that consideration cuts both ways. As discussed above, the trial court reasonably concluded Forshee overstates the impact of his alcoholism and inappropriately relies on that consideration to avoid taking responsibility for his actions.

[21] Forshee also contends his maximum sentence is inappropriate because he is not the worst of offenders. In general, maximum sentences are reserved for the

worst offenders and offenses. *Buchanan v. State*, 767 N.E.2d 967, 974 (Ind. 2002). But this is not a guideline to determine whether a worse offender can be imagined. *Id*. at 973. "[I]t will always be possible to identify or hypothesize a significantly more despicable scenario." *Id.* at 973. Although maximum sentences are appropriate for the worst offenders, "we refer generally to the *class* of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders." *Id*.

[22] Forshee claims he "cannot be the 'very worst offender'" because "[w]hile the offenses he is convicted of are repulsive, he showed sincere remorse from the beginning," "took responsibility for his actions," and "pleaded guilty." Appellant's Br. at 16. In addressing this argument, "we must concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on the nature, extent, and depravity of the offense for which the defendant was sentenced, and what it reveals about the defendant's character." *Newsome v. State*, 797 N.E.2d 293, 302 (Ind. Ct. App. 2003), *trans. denied*.

[23] We recognize Forshee does not have a significant criminal record and that he expressed remorse, but he also repeatedly violated his position of trust with M.W. by getting her drunk and sexually assaulting her. Forshee admits his crimes were "repulsive." *See* Appellant's Br. at 16. Forshee's crimes made M.W. act out and crippled Jackson with guilt and suicidal thoughts. Appellant's Conf. App. Vol. 2 at 101. Even though Forshee may not be the very worst offender, he falls within the class of the worst offenders. *See Buchanan*, 767 N.E.2d at 973. He has failed to prove that he has substantial

virtuous traits or persistent examples of good character such that his sentence is inappropriate. *See Stephenson*, 29 N.E.3d at 122.

[24] In sum, Forshee has failed to show that his sentence is inappropriate considering the nature of his offenses and his character.

[25] Affirmed.

Mathias, J., and Brown, J., concur.