MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brian Marshall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 12, 2023

Court of Appeals Case No. 22A-CR-2194

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

Trial Court Cause No. 45G03-2003-F3-46

Memorandum Decision by Judge May
Judges Mathias and Bradford concur.

May, Judge.

[1] Brian Marshall pled guilty to Level 4 felony sexual battery[1] and received a seven-year sentence. He appeals, asserting his sentence is inappropriate due to the nature of his offense and his character. We affirm.

Facts and Procedural History

[2] In March of 2020, Marshall lived with C.M. and their thirteen-year-old daughter, J.M. On March 20, 2020, Marshall, who did not have a job, had been drinking alcohol while C.M. and J.M. were in the living room watching television. Marshall came into the living room, announced that he wanted "adult time" and instructed J.M. to go to her bedroom. (Tr. Vol. II at 36.) C.M. told Marshall that she did not want to have sex, but he demanded because it was his "right as [her] husband." (*Id.*) He tried to pull her into the bedroom, but she resisted and tried to walk away. Marshall then grabbed her neck and began choking her.

[3] When C.M. broke away from Marshall's grip, he grabbed a knife, held it to her throat, and tried to cut her shirt off. C.M. was able to get the knife away from Marshall, but he told her it would only get worse if she did not give in to his demands. C.M. went to the bedroom, where Marshall he began performing "rough oral sex" while inserting a finger into her vagina and groping her breasts. (*Id.* at 37.) C.M. cried and repeatedly said she "didn't want this." (*Id.*)

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[1] Ind. Code §§ 35-42-4-8(a)(1)(A) & -8(b).

After some time, she pushed him away and told him "Stop. Enough." (*Id*.) Although she got dressed and walked to the kitchen, he pulled her back into the bedroom and undressed her again. C.M. resisted and Marshall became "rougher and angrier" and he again inserted his finger into her vagina and performed oral sex on her. (*Id*. at 38.) C.M. kicked Marshall in his midsection and he punched her in her stomach and face, breaking one of her teeth. Marshall then pinned C.M. down, shoved his hand into her vagina, removed his hand, and then shoved it into her rectum. Marshall knew that C.M. had a prior medical issue that required surgery and that anal penetration could cause her severe injury.

[4] C.M. screamed for help multiple times. When J.M. walked into the bedroom and saw what was happening, C.M. told J.M. to lock herself in her bedroom and call 911. Marshall ran after J.M. but did not catch her. C.M. locked herself in the bathroom. Marshall tried to break into the bathroom but was unsuccessful. Marshall then went outside, and C.M. was able to lock herself in J.M.'s bedroom with J.M. Marshall twice tried to convince them that emergency responders had arrived, but the 911 operator told J.M. that the police had not yet arrived, so they did not come out of the bedroom. When the police arrived, C.M. and J.M. reported what had occurred. Police took Marshall into custody, and paramedics transported C.M. to the hospital.

[5] The State charged Marshall with Level 3 felony rape,[2] Level 5 felony intimidation,[3] Level 6 felony strangulation,[4] Level 6 felony domestic battery resulting in moderate bodily injury,[5] Level 6 felony domestic battery,[6] and Level 4 felony sexual battery. On March 23, 2022, Marshall pled guilty to Level 4 felony sexual battery pursuant to a plea agreement and a stipulated factual basis. In exchange, the State agreed to dismiss the remaining charges and to cap Marshall's sentence at seven years.

[6] In the trial court's sentencing order, it identified three aggravating factors. (Appellant's App. Vol. 2 at 125-26.) At the sentencing hearing, the trial court described the aggravators thus: (1) "the harm, injury, loss or damage suffered . . . was significant and greater than the elements necessary to prove the commission of the offense," (Tr. Vol. II at 68); (2) "[t]he defendant was in the position of having care, custody or control of the victim of the offense," (*id.*); and (3) "the nature and circumstances of the crime [were] significant and an aggravating factor in the gruesomeness of the execution." (*Id.*) As to mitigation, the trial court found: "The Defendant admitted his guilt by way of the plea agreement, thus saving the Court and taxpayers of this county the time

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[2] Ind. Code § 35-42-4-1(a)(1).

[3] Ind. Code §§ 35-45-2-1(a)(1) & -1(b)(2(A).

[4] Ind. Code § 35-42-2-9(c).

[5] Ind. Code §§ 35-42-2-1.3(a)(1) & -1.3(b)(3).

[6] Ind. Code §§ 35-42-2-1.3(a)(1) & -1.3(b)(2).

and expense of a trial." (Appellant's App. Vol. II at 125.) The trial court found the aggravators outweighed the mitigators and imposed a seven-year sentence.

Discussion and Decision

[7] Marshall argues his seven-year sentence is inappropriate. Our standard of review for claims of inappropriate sentence is well-settled:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. The appellant bears the burden of demonstrating his sentence [is] inappropriate.

George v. State, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020) (internal citations omitted), *trans. denied*. We consider both the total number of years of a sentence and the way the sentence is to be served in assessing its appropriateness. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[8] "When considering the nature of the offense, we first look to the advisory sentence for the crime." *McHenry v. State*, 152 N.E.3d 41, 46 (Ind. Ct. App. 2020). When a sentence deviates from the advisory sentence, "we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence." *Madden v. State*, 162 N.E.3d

549, 564 (Ind. Ct. App. 2021). Marshall pled guilty to a Level 4 felony, which is punishable by a sentence of two to twelve years, with the advisory sentence being six years. Ind. Code § 35-50-2-5.5. Marshall's plea agreement capped his sentence at seven years, and that is the sentence imposed by the trial court.

[9] Marshall claims the "nature of the offense does not call for an aggravated sentence." (Appellant's Br. at 12.) In support, while he admits the "offense in this case was physically rough, and involved the threat of force[,]" (*id.* at 11), he argues he should have received the advisory sentence because "the nature of the assault [was] considered in the felony classification and sentencing range." (*Id.*) The Level 4 felony sexual battery of which Marshall was convicted occurs when a person, "with intent to arouse or satisfy the person's own sexual desires" or another person's sexual desires, touches another person while compelling that person to submit to the touching by threatening or using deadly force. Ind. Code § 35-42-4-8(a)(1)(A) & -8(b). In a lengthy episode, Marshall forced several different forms of sexual touches on C.M., some of which he knew were dangerous for her because of her health conditions. He strangled her, threatened her with a knife, and repeatedly hit her in the face with such force that he broke her tooth. He did all this knowing that his daughter was in the house, and she, in fact, visually witnessed part of the sexual battery episode and called the police for help. Both C.M. and their daughter testified at sentencing that the experience caused them to have nightmares for weeks. The trial court aptly described Marshall's crime as "gruesome in the execution, heinous overall and shocks the conscious of any reasonable person."

(Appellant's App. Vol. 2 at 136.) We see nothing inappropriate about Marshall receiving the maximum sentence permitted by his plea agreement for his heinous crime.

[10] "When considering the character of the offender, one relevant fact is the defendant's criminal history. The significance of criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Maffett v. State*, 113 N.E.3d 278, 286 (Ind. Ct. App. 2018) (internal citation omitted). Marshall's record contains the following convictions: Class A misdemeanor reckless driving in 1990, Class A misdemeanor criminal recklessness with a deadly weapon in 1993, Class C misdemeanor operating while intoxicated in 2001, Class A misdemeanor operating while intoxicated in 2009, and Class A misdemeanor operating while intoxicated in 2015. As Marshall notes, these offenses are mostly misdemeanor driving offenses relating to his alcoholism and, as such, are unlike the sexual battery for which he was being sentenced herein. (*See* Appellant's Br. at 10.) However, that record does reveal that Marshall's repeated engagement with the criminal justice system over a period of thirty years did not dissuade him from committing additional crimes. Nor did those repeated convictions encourage him to receive treatment for his alcoholism and drug abuse, or his underlying mental health issues – all of which he now suggests should prompt us to reduce his sentence for this crime. While Marshall claims he apologized to his wife and daughter and felt remorse for what he had put them through, the record indicates he had been charged with invasion of privacy for violating the protective order entered to

keep him from bothering them. Marshall did not present any evidence at sentencing and the factors to which he has pointed on appeal do not convince us that his character is so superlative that it renders a seven-year sentence inappropriate. *See*, *e.g.*, *Webb v. State*, 149 N.E.3d 1234, (Ind. Ct. App. 2020) (finding nothing inappropriate about a cumulative twenty-year sentence for Level 4 felony and a habitual offender finding in light of continuing criminal behavior).

Conclusion

[11] In light of Marshall's offense and character, we find nothing inappropriate about his receiving the maximum sentence permitted by his plea agreement. Accordingly, we affirm.

[12] Affirmed.

Mathias, J., and Bradford, J., concur.