MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

A. David Hutson
Hutson Legal
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Justin Freytag,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 5, 2023

Court of Appeals Case No. 22A-CR-2408

Appeal from the Clark Circuit Court

The Honorable Vicki L. Carmichael, Judge

Trial Court Cause No. 10C04-2011-F1-22

Memorandum Decision by Senior Judge Robb
Judges Crone and Kenworthy concur.

Robb, Senior Judge.

Case Summary and Issue

[1] Justin Freytag pleaded guilty to three counts of child molesting and one count of possession of child pornography, and the trial court sentenced him to an aggregate term of fifty years. The sole issue Freytag raises on appeal is whether his sentence is inappropriate in light of the nature of these offenses and his character. Concluding Freytag's sentence is not inappropriate, we affirm.

Facts and Procedural History

[2] Although the guilty plea transcript reveals a small amount about the nature of Freytag's offenses, a more detailed version exists in the probable cause affidavit. Freytag cites the affidavit in his brief, and his presentence investigation report incorporates the probable cause affidavit by directing the reader to the affidavit for the official version of events surrounding his crimes. *See* Appellant's Br. p. 7; Appellant's App. Vol. 2, p. 65.

[3] In the fall of 2020, the Indiana State Police received a tip that led them to obtain a search warrant for Freytag's home where they seized Freytag's cell phone. The phone contained thousands of images of child pornography. These images included a video from 2018 of a nude female child and the hands of a man using his fingers and penis to penetrate the vaginal area of the child. The video also showed the male masturbating over and ejaculating on the child. In other images from 2018, another young female child was partially nude, and the same male hands were spreading open her legs. A tattoo on a finger of the male's hand in these images was consistent with a tattoo on Freytag's finger.

Appellant's App. Vol. 2, pp. 19-20; Tr. Vol. Two, pp. 10-11. The two children were identified as children for whom Freytag's wife provided daycare in their home.

[4] The State charged Freytag with one count of child molesting, a Level 1 felony;[1] two counts of child molesting as Level 4 felonies;[2] one count of child exploitation, a Level 4 felony;[3] and four counts of possession of child pornography as Level 5 felonies.[4] Freytag ultimately pleaded guilty to the Level 1 child molesting count, both Level 4 child molesting counts, and one count of Level 5 possession of child pornography. In exchange, the State dismissed the remaining charges and agreed to cap the sentence at fifty years. The court sentenced Freytag to the full fifty years, and this appeal followed.

Discussion and Decision

I. Standard of Review

[5] Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App.

---

[1] Ind. Code § 35-42-4-3 (2015).

[2] *Id.*

[3] Ind. Code § 35-42-4-4 (2017).

[4] *Id.*

2014) (quoting *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007)). Our Supreme Court has long said that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Accordingly, the defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Inappropriate Sentence

[6] Freytag argues his sentence is inappropriate because it amounts to a life sentence for offenses where he was neither violent toward the victims nor caused them physical injury. He also submits that he was employed, his criminal history is remote and not significant, and he is at low risk to reoffend.

A. Nature of the Offense

[7] Our analysis of the nature of the offense starts with the advisory sentence, as it is the starting point selected by the legislature as an appropriate sentence for the crime. *Reis v. State*, 88 N.E.3d 1099, 1104 (Ind. Ct. App. 2017). Freytag pleaded guilty to Level 1 felony child molesting, two counts of Level 4 felony child molesting, and one count of Level 5 possession of child pornography. A person who commits a Level 1 felony child molesting offense described in Indiana Code section 35-31.5-2-72(1) shall be imprisoned for a fixed term between twenty and fifty years with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(c) (2014). A person who commits a Level 4 felony shall be imprisoned for a fixed term between two and twelve years with an advisory

sentence of six years. Ind. Code § 35-50-2-5.5 (2014). And a person who commits a Level 5 felony shall be imprisoned for a fixed term between one and six years with a three-year advisory sentence. Ind. Code § 35-50-2-6(b) (2014). The court sentenced Freytag to the maximum fifty years on the Level 1 felony and imposed advisory sentences on the other offenses, with all sentences to be served concurrently.

[8] The nature of the offense is found in the details and circumstances surrounding the offense and the defendant's participation therein. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). More specifically, we may examine the nature, extent, heinousness, and brutality of the offense as well as consider the defendant's position of trust relative to the victim. *Pritcher v. State*, 208 N.E.3d 656, 668 (Ind. Ct. App. 2023). When evaluating a defendant's sentence that 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. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (quoting *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011)), *trans. denied*.

[9] Freytag acknowledges that his offenses "provoke disgust" and are such that "a significant term of incarceration is appropriate." Appellant's Br. p. 11. Yet, he contends that his prison term amounts to a life sentence that is inappropriate because his crimes were not violent, did not result in physical injury, and did

not involve "severe psychological manipulation . . . threats, and/or coercion" of the victims. *Id.* at 12.

[10] Freytag's actions, however, were particularly egregious and depraved. When examining the nature, extent, and depravity of an offense, courts may consider a victim's age that is significantly below the statutory requirement. *Chastain v. State*, 165 N.E.3d 589, 601 (Ind. Ct. App. 2021), *trans. denied*. Here, the two children were extremely young—between one and two years old—and significantly below the statutory age requirement of fourteen. *See* Ind. Code § 35-42-4-3.

[11] Moreover, Freytag was in a position of power, trust, and care over the two toddlers as his wife babysat for them and sometimes left them in his care. Freytag clearly abused this position of trust. *See McCoy v. State*, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006) (noting that abuse of position of trust, by itself, constitutes valid aggravating factor supporting maximum enhancement of sentence for child molesting).

B. Character of the Offender

[12] Our analysis of a defendant's character involves a broad consideration of a defendant's qualities, including age, criminal history, background, past rehabilitative efforts, and remorse. *Pritcher*, 208 N.E.3d at 668. In examining a defendant's criminal history, the significance varies based on the gravity, nature, temporal proximity, and number of prior offenses in relation to the

current offense. *Id.* However, even a minor criminal record reflects poorly on a defendant's character. *Id.*

[13] Here, Freytag has just one prior conviction from 2006 for operating while intoxicated. However, the impact of his lack of documented criminal history is undercut by the uncharged criminal conduct in the record, specifically the thousands of images of child pornography on his phone. "We have held that allegations of prior criminal activity may be considered during sentencing even if the defendant has not been convicted of an offense related to the activity." *Chastain*, 165 N.E.3d at 599. While Freytag was charged with just four counts of possession of child pornography and pleaded guilty to only one of those, his possession of each image constitutes a separate violation of the statute that the court could consider in sentencing him. *See Koetter v. State*, 158 N.E.3d 820, 825-26 (Ind. Ct. App. 2020) (noting that possession of each photograph or digitized image is distinct violation).

[14] Freytag also argues that his gainful employment and support of his family reflect well on his character. However, we have long held that most people are gainfully employed such that this consideration does not weigh in favor of a lesser sentence. *Pritcher*, 208 N.E.3d at 669.

[15] In addition, Freytag highlights his mother's testimony at his sentencing hearing that his childhood involved domestic, and possibly sexual, abuse. Yet, this information does not reflect well on his character. Rather, this Court has recognized that a defendant's decision to perpetuate a cycle of abuse, despite

knowing from personal experience the harm it causes, is not a character trait that should be lauded. *McHenry v. State*, 152 N.E.3d 41, 47 (Ind. Ct. App. 2020).

[16] Finally, Freytag's Indiana Risk Assessment System evaluation categorized him as a low risk to reoffend, and he advances this assessment in support of a downward revision of his sentence. However, given his possession of thousands of pornographic images of children, and his willingness to perform and record similar acts, we do not agree that this assessment reflects so positively on his character as to mandate a sentence revision.

[17] In sum, we cannot say that Freytag has shown that his offenses were accompanied by restraint or regard or that his character reveals "substantial virtuous traits or persistent examples of good character" such that his requested reduction of his sentence is warranted. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Thus, Freytag has not shown that his sentence is inappropriate in light of the nature of the offenses and his character.[5]

---

[5] In the midst of appealing his sentence as inappropriate, Freytag claims the trial court failed to account for the fact that he accepted responsibility for his actions by pleading guilty. These claims involve two separate sentencing standards: whether his sentence is inappropriate pursuant to Indiana Appellate Rule 7 and whether the trial court abused its discretion in identifying mitigating and aggravating factors. Our Supreme Court has made clear that inappropriate sentence and abuse of discretion claims are to be analyzed separately. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). Accordingly, "an inappropriate sentence analysis does not involve an argument that the trial court abused its discretion in sentencing the defendant." *Id.* We need not address Freytag's argument that the trial court abused its discretion because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate), *trans. denied*. Nevertheless, to the extent he argues the court abused its

Conclusion

[18] We conclude that Freytag's sentence was not inappropriate.

[19] Affirmed.

Crone, J., and Kenworthy, J., concur.

---

discretion for failing to consider his acceptance of responsibility, his argument fails based on the substantial benefit he received by pleading guilty. *See Powell v. State*, 895 N.E.2d 1259, 1262-63 (Ind. Ct. App. 2008) (guilty plea does not rise to level of significant mitigation where defendant received substantial benefit from plea or where evidence is such that decision to plead guilty is merely pragmatic one), *trans. denied*.