MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua Whitfield,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 12, 2023

Court of Appeals Case No. 23A-CR-51

Appeal from the Starke Circuit Court

The Honorable Kim Hall, Judge

Trial Court Cause No. 75C01-2207-F1-1

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur..

Bailey, Judge.

Case Summary

[1] Joshua Whitfield appeals his convictions, following a jury trial, for two counts of child molesting as Level 1 felonies,[1] and his sentence for the same. We affirm.

Issues

[2] Whitfield raises two issues, which we restate as follows:

I. Whether his convictions violate the Double Jeopardy clause.

II. Whether the trial court abused its discretion at sentencing.

Facts and Procedural History

[3] Whitfield is the biological father of B.W., who was born in 2007. In 2012, B.W.'s aunt and uncle were granted guardianship of B.W., and B.W. began living with them. In 2016, B.W. was still living with his aunt and uncle but began to visit Whitfield on weekends. Whitfield lived on Bender Street in Knox at the time. When B.W. visited, he would sleep on the couch in the living room. During one visit, B.W. and Whitfield were in Whitfield's bedroom, and B.W. was watching television. Whitfield pulled down his own pants and told B.W. to "suck his penis." Tr. v. II at 117. B.W. complied and after it was over,

[1] Ind. Code § 35-42-4-3(a)(1).

Whitfield told B.W., "Don't tell anyone or I'll beat you." *Id*. B.W. was nine years old at the time. This was the first time anything like this had happened, but it happened at least a few more times at the Bender Street address. One such additional incident occurred when Whitfield came out of the bathroom and told B.W. to go to Whitfield's room where he made B.W. perform oral sex and then once again told him he would beat him if he told anyone.

[4] In June 2017, B.W. moved in full-time with Whitfield. At that time, Whitfield lived on Garden Street in North Judson. B.W. had his own room at the home on Garden Street. Whitfield continued to demand B.W. perform oral sex on him around nine or ten times while they lived on Garden Street. The encounters took place in B.W.'s bedroom.

[5] In the fall of 2017, B.W. moved with Whitfield to a house on Bass Lake, where he again had his own bedroom. While living at the Bass Lake house, Whitfield began demanding that B.W. engage in anal sex. It began on a day when B.W.'s stepmother and half-sisters were at their grandmother's house. Whitfield told B.W. to go clean his sisters' bedroom and when B.W. did, Whitfield came up behind him, told B.W. to pull down his pants and bend over, and then put his penis in B.W.'s anus. The encounter lasted for a few minutes during which B.W. cried and told Whitfield, "Stop, it hurts." Tr. v. II at 124. Whitfield responded by telling B.W. to "[s]hut up and quit being a sissy." *Id*. Whitfield required B.W. to engage in anal sex nearly every weekend thereafter unless B.W.'s grandmother was home. Each time, B.W. asked Whitfield to stop and

told him it hurt. Whitfield continued to tell B.W. to "quit being a sissy," and on one occasion he hit B.W., making B.W. afraid to tell anyone. *Id*. at 126.

[6] In 2018, the Department of Child Services ("DCS") placed B.W. back in the home of his aunt and uncle. The last sexual encounter B.W. had with Whitfield was when he was ten years old.

[7] In January 2022, another child reported to his school that B.W. was engaging in aberrant behavior. DCS became involved, and B.W. was interviewed and reported Whitfield's sexual abuse of him. As part of the investigation, B.W. was examined by a Sexual Assault Nurse Examiner. The results of the exam showed that B.W. had a healed scar in his anal folds which was consistent with those seen in forced penetration and with more than one injury.

[8] The State charged Whitfield with Count I, Level 1 felony child molesting; Count II, Level 1 felony child molesting; Count III, Level 4 felony sexual misconduct with a minor;[2] and Count IV, Level 5 felony incest.[3] Following a trial, the jury found Whitfield guilty of all charges. The trial court held a sentencing hearing where Whitfield asked the trial court to vacate the jury's verdicts as to Counts III and IV. The State had no objection, and the trial court "decline[d] to accept the jury's guilty verdicts as to Counts III and IV." App. v. II at 143. The trial court also held that, based on Whitfield's age and the age of

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[2] I.C. § 35-42-4-9(a)(1).

[3] I.C. § 35-46-1-3.

his victim, Whitfield was a credit restricted felon. The trial court found five aggravating factors and one mitigating factor and sentenced Whitfield to concurrent sentences of thirty-seven years executed for Counts I and II. This appeal ensued.

Discussion and Decision

Double Jeopardy

[9] Whitfield maintains that the convictions under both Counts I and II constitute double jeopardy in violation of his constitutional rights. Claims of double jeopardy are questions of law which we review de novo. *E.g.*, *Brown v. State*, 160 N.E.3d 205, 215 (Ind. Ct. App. 2020).

[10] Under Indiana Supreme Court case law analyzing double jeopardy claims, we distinguish between procedural double jeopardy claims, where a defendant is charged with the same offense in successive prosecutions, and substantive double jeopardy claims, which are based on multiple convictions in a single prosecution. *See Hill v. Stat*e, 157 N.E.3d 1225, 1228 (Ind. Ct. App. 2020) (citing *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020)).

> Substantive double-jeopardy claims principally arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries.

Powell, 151 N.E.3d at 263. In the former situation, the analysis laid out in *Wadle* applies; in the latter situation, *Powell* applies. *Koziski v. State*, 172 N.E.3d 338, 341 (Ind. Ct. App. 2021), *trans. denied*.

[11] However, here, neither the *Wadle* nor the *Powell* analysis is implicated because Whitfield was not charged with "a single criminal act or transaction," *Powell*, 151 N.E.3d at 263, but with two separate and distinct acts, as shown by the amended charging information and B.W.'s testimony. Count I alleged that Whitfield engaged in *anal* sex with B.W., and B.W. testified that the anal sex happened while B.W. lived with Whitfield at the Bass Lake house sometime between the fall of 2017 and January 31, 2019. Count II, on the other hand, alleged that Whitfield engaged in *oral* sex with B.W., and B.W. testified that the oral sex happened at the Bender Street and Garden Street houses sometime between January 1, 2016, and the fall of 2017. Thus, the record establishes that each of the two counts involved different conduct, in a different location, during a different time period.[4]

[12] Each of those separate and distinct acts violated the same single subsection of a single statute—i.e., child molesting as a Level 1 felony under Indiana Code

[4] We note that, in child molestation cases, "the exact date" when the crime occurred "is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Cabrera v. State*, 178 N.E.3d 344, 346 (Ind. Ct. App. 2021) (citing *Baker v. State*, 948 N.E.2d 1169, 1174 (Ind. 2011)). Such limited circumstances do not exist here.

Section 35-42-4-3(a)(1) and Indiana Code Section 35-31.5-2-221.5(1).[5] *Cf. Carranza v. State*, 184 N.E.3d 712, 716 (Ind. Ct. App. 2022) (finding *Wadle* double jeopardy analysis applied where the defendant was charged with two counts of child molesting under *two separate subsections*); *Koziski*, 172 N.E.3d at 342 (same). And, of course, "[a] defendant may be charged with as many counts of rape, criminal deviate conduct, or child molesting as there are separate acts committed." *Roberts v. State*, 712 N.E.2d 23, 30 (Ind. Ct. App. 1999) (quoting *DeBruhl v. State*, 544 N.E.2d 542, 545 (Ind. Ct. App. 1989)), *trans. denied*. "Obviously, the separate acts are not the same offense" for purposes of double jeopardy. *DeBruhl*, 544 N.E.2d at 545.

[13] The record establishes that, for each of Counts I and II, Whitfield was convicted based on separate and distinct criminal acts. Therefore, the convictions on those counts do not violate the prohibition against double jeopardy.

Sentencing

[14] Whitfield purports to challenge his thirty-seven-year aggregate sentence for his two felony convictions as inappropriate under Indiana Appellate Rule 7(B). Article 7, Sections 4 and 6, of the Indiana Constitution "authorize[]

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[5] The State is mistaken when it alleges that the anal sex alleged in Count I violated subsection (2) of Indiana Code Section 35-31.5-2-221.5 rather than subsection (1). Subsection (1) relates to the "sex organ" and the mouth or anus of another, whereas subsection (2) relates only to penetration "by an object." *Id*. Here, the record establishes that Whitfield used his "sex organ" for both Count I, anal sex, and Count II, oral sex. There is no allegation or evidence related to penetration "by an object" for either count. *Id*.

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). However, Whitfield does not actually raise a Rule 7(B) claim, as he admits that the offenses he committed were "egregious" and that his character is "called into question" because of his extensive criminal history.[6] Appellant's Br. at 10.

[15] Whitfield's actual contention is that the trial court erred in sentencing him by failing to give sufficient weight to a mitigating factor. 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

[6] To the extent Whitfield challenges the location where his sentence is to be served—an appropriate focus for a Rule 7(B) claim, *see King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008)—he has failed to show that his placement is inappropriate, especially given his admissions as to the nature of the offenses and his character.

> 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.), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)).

[16] 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. 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. However, 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, and a trial court is under no obligation to explain why a proposed mitigator does not exist or why the court found it to be insignificant, *Sandleben v. State*, 22 N.E.3d 782, 796 (Ind. Ct. App. 2014), *trans. denied*. Moreover, the "trial court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor, and the court is not required to give the same weight to proffered mitigating factors as does a defendant." *Smoots v. State*, 172 N.E.3d 1279, 1288 (Ind. Ct. App. 2021).

[17] Whitfield asserts that the trial court failed to give sufficient weight to the mitigating factor of Whitfield's mental health. However, that claim necessarily fails because the weight assigned to a mitigator is not subject to review for abuse

of discretion. *Gross*, 22 N.E.3d at 869. The court did not abuse its discretion in Whitfield's sentencing.

Conclusion

[18] Whitfield's convictions do not violate the prohibition against double jeopardy, and the trial court did not abuse its discretion in sentencing Whitfield.

[19] Affirmed.

Tavitas, J., and Kenworthy, J., concur.