MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sewell Jerome Evans,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 14, 2022

Court of Appeals Case No. 21A-CR-1522

Appeal from the Madison Circuit Court

The Honorable Angela Warner Sims, Judge

Trial Court Cause No. 48C01-1905-F1-1312

Tavitas, Judge.

Case Summary

[1] Sewell Jerome Evans appeals his sixty-five-year sentence for two counts of child molesting, Level 1 felonies. Evans argues that his sentence is an abuse of discretion and that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We disagree with Evans, and we affirm.

Issues

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

I. Whether the trial court abused its discretion when sentencing Evans.

II. Whether the sixty-five-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

Facts

[3] N.B. was born in July 2003. Doug and Sheila Martin were friends with N.B.'s mother. Evans lived with the Martins, who are his aunt and uncle. N.B. often went to the Martins' house with her mother, and N.B.'s mother played cards with the Martins. N.B. considered the Martins to be like grandparents to her, and N.B. often spent the night at the Martins' residence.

[4] When N.B. was eleven or twelve years old, she was watching television with Evans, who was approximately forty-five years old at the time, and no one else was in the Martins' house. Evans told N.B. to go to his bedroom. Evans put a

towel down on the floor in his bedroom, told N.B. to lay on the towel, and removed N.B.'s pants and underwear. Evans then put "oil or lotion" on his penis and N.B.'s vagina. Tr. Vol. I p. 95. Evans put his penis in N.B.'s vagina and asked N.B. if "it felt good." *Id.* at 97. N.B. responded, "No." *Id.* Evans then said, "It should start feeling good," and N.B. responded, "No, it doesn't feel good, it hurts." *Id.* There was blood on the towel when Evans finished. Evans told N.B. to keep the incident a secret and, if N.B. told anyone, "he would turn it against [her] and say that [she] seduced him." *Id.* at 100. Evans had multiple sexual encounters with N.B. until she was about fourteen years old. Evans also took pictures of N.B.'s genitals and told N.B. to send him pictures. Evans threatened to send the pictures to N.B.'s parents if N.B. did not comply, and on one occasion, Evans sent a picture of N.B.'s genitals to N.B's father.[1]

[5] N.B and her mother traveled to Kings Island with Evans and others. During the trip, N.B. told Evans that she "was done" and that she was "going to call the cops." *Id.* at 113. Evans threatened to take N.B.'s phone away and to break her phone. Evans tried to have a sexual encounter with N.B. in the back seat of the vehicle, but N.B. refused. N.B. told her mother some of Evans's actions, and her mother demanded that Evans "never . . . go around the family again." *Id.* at 117. Evans, however, kept trying to contact N.B. Evans repeatedly drove

[1] N.B.'s father did not have Evans's phone number and did not realize the picture depicted his daughter.

past N.B. while she was with her friends, looked into the windows of N.B.'s house, called N.B., and left messages in N.B.'s mailbox.

[6] In 2019, when N.B. was fifteen years old, during an interview at Kid's Talk, a child advocacy center[2], regarding an incident of abuse by another perpetrator, N.B. also reported the incidents with Evans. In May 2019, the State charged Evans with two counts of child molesting, Level 1 felonies. A jury found Evans guilty of both counts in May 2021.

[7] At sentencing, the trial court found the following aggravators: (1) Evans's criminal history; and (2) Evans's position of trust. The trial court found no mitigating factors and found that consecutive sentencing was supported by the evidence of "multiple acts that resulted, not only in multiple counts, they [sic] occurred a length or a period of time." Tr. Vol. III p. 72. The trial court sentenced Evans to consecutive sentences of thirty-five years on Count I and thirty years on Count II for an aggregate sentence of sixty-five years. Evans now appeals.

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[2] Kid's Talk is "a center where children, adolescen[ts] and adults with developmental disabilities come to have a discussion . . . about allegations of crimes that may have been committed against them." Tr. Vol. I p. 217.

Analysis

I. Sentencing Abuse of Discretion

[8] Evans first argues the trial court abused its discretion in sentencing him. "[S]ubject to the review and revise power [under Indiana Appellate Rule 7(B)], sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse of discretion occurs only 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." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[9] A trial court abuses its discretion during sentencing in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91), *cert. denied*, 137 S. Ct. 475 (2016). "When an abuse of

discretion occurs, this Court will remand for resentencing only if 'we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.'" *Id*. at 194 (quoting *Anglemyer*, 868 N.E.2d at 491).

[10] Evans first argues that his criminal record should not have been an aggravator because the convictions "differed both in type and severity from the charges in this case." Appellant's Br. p. 11. We note that the trial court did, in fact, consider the type and severity of Evans's prior convictions. Evans's criminal history includes two convictions for Class A misdemeanor domestic battery, two convictions for Class D felony criminal confinement, and additional convictions for Class D felony intimidation and Class D felony resisting law enforcement. Evans also violated his probation multiple times. At sentencing, the trial court stated: "[T]he type of criminal history does [ ] give the Court some further cause for concern in light of the allegations and charges that were brought in this case, given that, we have domestic battery, confinement, at least on more than one (1) occasion." Tr. Vol. III p. 70.

[11] Moreover, a defendant's criminal history is a valid aggravating factor. *See* Ind. Code. § 35-38-1-7.1(a)(2). Evans is merely requesting that we assign a different weight to his criminal history than the trial court did. Our Supreme Court has held that "[t]he relative weight or value assignable" to properly found aggravators "is not subject to review for abuse" of discretion. *Anglemyer*, 868 N.E.2d at 491. A trial court cannot "now be said to have abused its discretion in failing to 'properly weigh'" valid aggravating factors. *Id.* Thus, the weight of

a criminal history may vary, but the consideration of it is not an abuse of discretion. *Harris v. State*, 163 N.E.3d 938, 955 (Ind. Ct. App. 2021), *trans. denied*. The trial court did not abuse its discretion by considering Evans's criminal history as an aggravating factor.

[12] Evans also argues that the fact he was in a "position of trust is scarcely a unique situation" and does not warrant an "enhanced sentence since virtually every molesting case would result in an enhanced sentence." Appellant's Br. pp. 12-13. Our courts have repeatedly held that an abuse of a position of trust is a valid aggravator. *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016), *trans. denied*. "The position-of-trust aggravator is frequently found by sentencing courts where an adult has committed an offense against a minor and there is at least an inference of the adult's authority over the minor." *Id.* Again, Evans is merely requesting that we assign a different weight to a valid aggravator, which we cannot do. *See Anglemyer*, 868 N.E.2d at 491. The trial court did not abuse its discretion by considering Evans's position of trust as an aggravating factor.

[13] Finally, Evans argues that consecutive sentencing was an abuse of discretion because both convictions involved the "same acts involving the same child." Appellant's Br. p. 11. In imposing consecutive sentences, the trial court stated:

> The Court finds, given that these were multiple acts that resulted, not only in multiple counts, they [sic] occurred a length or a period of time. The evidence at trial certainly supported two (2) complete and separate acts that occurred between the Defendant

> and the victim, so the Court finds that consecutive sentences would be appropriate given those facts.

Tr. Vol. III p. 72.

[14] Our Supreme Court has held:

> The circumstances do . . . bear on whether consecutive sentences are appropriate. Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences if for no other reason than to preserve potential deterrence of subsequent offenses. Similarly, additional criminal activity directed to the same victim should not be free of consequences. Finally, the nature of the crime can certainly be significant. All of these circumstances must be balanced in view of the fact that the legislature has already built into its sentencing range the consequences to victims, moral revulsion, and other factors inherent in the crime.

Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008).

[15] In support of his argument, Evans relies upon our Supreme Court's opinions in *Walker v. State*, 747 N.E.2d 536 (Ind. 2001) (enhanced, consecutive sentences resulting in an aggregate sentence of eighty years for two counts of child molesting involving the same child was "manifestly unreasonable"), and *Harris v. State*, 897 N.E.2d 927 (Ind. 2008) (enhanced, consecutive sentences resulting in an aggregate 100-year sentence for two counts of child molesting to

concurrent sentences).[3] In other cases, however, our Supreme Court has approved of consecutive sentencing under similar circumstances. *See, e.g., Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019) (ordering consecutive sentences for an aggregate executed sentence of sixty years and distinguishing *Harris* because that case "involved the revision of enhanced, not advisory, sentences to be served concurrently instead of consecutively"); *Smith v. State*, 889 N.E.2d 261, 264 (Ind. 2008) (finding the "the extended period of time over which" the defendant molested the victim as a serious aggravating circumstance where the defendant was convicted of four incidents of abuse but the "record indicates substantial additional sexual misconduct on [the defendant's] part during these and other incidents"). Given the multiple convictions for sexual abuse of N.B., the evidence of other uncharged similar conduct, and the fact that one of the sentences was the advisory sentence and the other sentence was only five years above the advisory sentence, we cannot say the trial court abused its discretion by ordering consecutive sentences here.

II. Inappropriate Sentence

[16] Next, Evans argues that his sentence is inappropriate. The Indiana Constitution authorizes independent 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). Our Supreme Court has implemented this

[3] These cases addressed consecutive sentencing in the context of an Appellate Rule 7(B) analysis. Evans, however, raises the issue in the context of an abuse of sentencing discretion.

authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender." Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice*, 6 N.E.3d at 946). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith*, 131 N.E.3d at 160).

[17] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell*, 895 N.E.2d at 1225). The point is "not to achieve a perceived correct sentence." *Id*. "Whether a sentence should be deemed inappropriate '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*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "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).

[18] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the

crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). In the case at bar, Evans was sentenced for two Level 1 felonies. Indiana Code Section 35-50-2-4(b) provides that "a person who commits a Level 1 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years."[4] The trial court here sentenced Evans to consecutive sentences of thirty years and thirty-five years for an aggregate sentence of sixty-five years.

[19] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. When N.B. was eleven or twelve years old, Evans started sexually abusing N.B., and the abuse continued until N.B. was approximately fourteen years old. Evans took pictures of N.B.'s genitals and sent a photo to N.B.'s father. When N.B. told Evans that she "was done," Evans threatened N.B., repeatedly drove past N.B. while she was with her

[4] The State argues that the conviction carried a maximum sentence of fifty years. We assume that the State is referring to Indiana Code Section 35-50-2-4(c), which provides:

> A person who commits a Level 1 felony child molesting offense described in:
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> (1) IC 35-31.5-2-72(1); or
>
> (2) IC 35-31.5-2-72(2);
>
> shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.

Indiana Code Section 35-31.5-2-72 defines certain credit restricted felons, but the parties and the trial court here agreed that Evans did not qualify as a credit restricted felon. Accordingly, Indiana Code Section 35-50-2-4(c) is inapplicable, and the maximum sentence was forty years.

friends, looked into the windows of N.B.'s house, called N.B., and left messages in N.B.'s mailbox. Tr. Vol. I p. 113.

[20] Evans argues that he did not physically harm N.B., but N.B. testified that the first act of sexual abuse "hurt" and that she was bleeding afterward. *Id.* at 97. Evans also contends that N.B. did not suffer "any adverse psychological effect from the acts" because N.B. had a child and married at seventeen years old. Appellant's Br. p. 15. Nurse Holly Renz testified, however, that "children who have been victimized by child sexual abuse have a proclivity or [ ] a predisposition to having these hyper sexualized behaviors." Tr. Vol. II p. 15. The record here indicates that, at a young age, N.B. had another sexual relationship with a friend's father and that N.B. later became pregnant and married at the age of seventeen. We find Evans's arguments unpersuasive, and we find nothing in the nature of the offense that makes his sentence inappropriate.

[21] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. "Even a minor criminal history is a poor

reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*).

[22] As noted, Evans has two convictions for Class A misdemeanor domestic battery, two convictions for Class D felony criminal confinement, and additional convictions for Class D felony intimidation and Class D felony resisting law enforcement. Evans also violated his probation multiple times. The trial court noted Evans's lengthy criminal history and convictions for abusive behavior. Evans makes no other argument regarding his character except to note the harshness of a sixty-five-year sentence on a fifty-year-old man. Again, we do not find Evans's arguments persuasive. Given the depravity of Evans's offenses and his criminal history, we cannot say the sixty-five-year sentence imposed by the trial court is inappropriate in light of the nature of the offenses and the character of the offender.

Conclusion

[23] The trial court did not abuse its discretion when sentencing Evans, and his sixty-five-year sentence is not inappropriate. Accordingly, we affirm.

[24] Affirmed.

Bradford, C.J., and Crone, J., concur.