MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Rodney M. Perry,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 4, 2022

Court of Appeals Case No. 21A-CR-1527

Appeal from the Boone Superior Court

The Honorable Matthew C. Kincaid, Judge

Trial Court Cause No. 06D01-1910-F1-002099

May, Judge.

[1] Rodney M. Perry appeals his forty-five-year aggregate sentence for Level 1 felony child molesting[1] and Level 4 felony child molesting.[2] He raises two issues on appeal, which we restate as:

1. Whether the trial court abused its discretion when finding aggravating and mitigating factors; and

2. Whether Perry's sentence is inappropriate in light of the nature of his offense and his character.

We affirm.

Facts and Procedural History

[2] Perry's daughter, S.P., lived with Perry while her mother was participating in work release. When S.P. was seven or eight years old, Perry started sexually abusing her. The abuse occurred about once per week and continued until S.P. was about eleven years old. Perry would cover S.P.'s face with a blanket and have intercourse with her. Perry warned S.P. not tell anyone about what he was doing to her because, if she did, he would go to prison for the rest of his life or shoot himself.

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[1] Ind. Code § 35-42-4-3(a).

[2] Ind. Code § 35-42-4-3(b).

[3] The Department of Child Services (DCS) became involved with the family when S.P. and her sister A.P. told their grandfather that Perry smelled like marijuana. When Perry found out the girls reported his alleged marijuana use, he tried to hit both A.P. and S.P., but he was able to reach only S.P. and hit her across her face. Perry left a red mark in the shape of a hand on S.P.'s face. A.P. took a picture of S.P.'s face and sent it to her mother, who reported the incident to DCS.

[4] DCS began their investigation by sending family case manager (FCM) Marilyn Stump to visit S.P. at school. S.P. reported that her dad, Perry, hit her again and was using methamphetamine, cocaine, and heroin. S.P. then asked FCM Stump if she could talk about something else. S.P. reported Perry had been sexually abusing her approximately once a week since she was seven or eight years old. S.P. was shaking and appeared scared as she reported the abuse. S.P. explained that the last time the abuse happened was less than a week before her meeting with the FCM. After the interview, FCM Stump arranged a forensic interview for S.P. On August 13, 2019, S.P. disclosed the details of Perry's sexual abuse to the forensic interviewer.

[5] In October 2019, the State charged Perry with Level 1 felony child molesting and Level 4 felony child molesting. The trial court held a jury trial, the jury returned a guilty verdict for both charges, and the trial court entered convictions accordingly. During the sentencing hearing, S.P.'s court appointed advocate testified the physical, emotional, and mental damage that Perry caused S.P. "is significant and extensive" and "will affect her for a long time, perhaps the rest

of her life." (Tr. Vol. 3 at 244.) When determining Perry's sentence, the trial court found no mitigating circumstances and the following aggravating circumstances: (1) the harm the victim suffered was greater than the harm a victim of child molestation is expected to experience; (2) Perry's extensive criminal history extending from juvenile to adulthood; (3) Perry's past probation violations; (4) Perry's position of care, custody, and control over S.P.; (5) S.P.'s young age; (6) Perry's violation of the no contact order with S.P. during these proceedings and the criminal charges against him for invasion of privacy based thereon; and (7) the nature of the offense and Perry's character. The trial court sentenced Perry to a term of forty-five years for the Level 1 felony and a term of six years for the Level 4 felony. The court ordered the sentences served concurrently.

Discussion and Decision

1. Abuse of Discretion

[6] Sentencing decisions rest within the sound discretion of the trial court, and we review such decisions only for an abuse of discretion. *Morrell v. State*, 118 N.E.3d 793, 796 (Ind. Ct. App. 2019), *clarified on reh'g on other grounds*, 121 N.E.3d 577 (Ind. Ct. App. 2019), *trans. denied*. "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances." *Allen v. State*, 875 N.E.2d 783, 788 (Ind. Ct. App. 2007) (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007)). When a trial court imposes a felony sentence, "it is required to issue a sentencing statement

that includes a reasonably detailed recitation of the trial court's reasons for the sentence imposed." *Anglemyer*, 868 N.E.2d at 484-85. If the court finds aggravating or mitigating circumstances, "the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id.* at 490. A trial court may abuse its discretion in imposing a sentence by failing to enter a sentencing statement, identifying aggravating and mitigating factors the record does not support, omitting reasons clearly supported in the record and advanced for consideration, or stating reasons for sentence that are improper as a matter of law. *Id.* at 490-91.

[7] Perry first argues the trial court abused its discretion when it found the harm to S.P. to be an aggravating factor because he did not use significant force or cause physical injury to S.P. While the State did not provide evidence of physical injury or use of force, Perry molested S.P., his own daughter, every week for three or four years when she was between seven and eleven years old, and he coerced her to remain silent about the abuse. Perry was S.P.'s only caretaker because her mother was participating in work release. There was testimony that the years of abuse left S.P. with mental and emotional damage from which she may not recover. This evidence supports the trial court finding an aggravator in the harm to S.P.

[8] Perry also argues the trial court erred by not considering the following as mitigating factors: (1) Perry provided shelter for S.P. and her sibling; (2) Perry made sure S.P. attended school; and (3) Perry was employed before his

incarceration. "The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005) (internal citation and quotation marks omitted), *trans. denied.* "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Ware v. State*, 816 N.E.2d 1167, 1177 (Ind. Ct. App. 2004) (quoting *Matshazi v. State,* 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004)), *trans. denied*.

[9] The trial court's sentencing statement indicates it searched the record and applicable case law but did not find any mitigating factors. The trial court noted Perry has four children but they are not in his custody and have not been since his arrest. The fact that Perry sheltered and made sure S.P. attended school were not required to be found as mitigating factors, especially not when he was sexually abusing her. Perry's incarceration, rather than being a hardship, will keep S.P. and her sibling safe. "A trial court is not required to find that a defendant's incarceration would result in undue hardship on his dependents." *Hunter v. State*, 72 N.E.3d 928, 935–36 (Ind. Ct. App. 2017) (citing *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009)), *trans. denied*. "Many persons convicted of crimes have dependents and, absent special circumstances showing that the hardship to them is 'undue,' a trial court does not abuse its discretion by not finding this to be a mitigating factor." *Id.* Nor was the trial court's refusal to find a mitigator in Perry's employment before his

incarceration an abuse of discretion. *See Holmes v. State*, 86 N.E.3d 394, 399 (Ind. Ct. App. 2017) (holding the trial court did not abuse its discretion by not recognizing the defendant's employment as a mitigating factor).

Appropriateness of Sentence

[10] We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. App. R. 7(B). Our role in reviewing a sentence pursuant to Appellate Rule 7(B) "should be to attempt to leaven the outliers and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "The defendant bears the burden of persuading this court that his or her sentence is inappropriate." *Kunberger v. State*, 46 N.E.3d 966, 972 (Ind. Ct. App. 2015). "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014).

[11] When considering the nature of the offense, the advisory sentence is the starting point for determining the appropriateness of a sentence. *Anglemyer,* 868 N.E.2d at 494. A Level 1 felony is punishable by imprisonment for a fixed term between twenty and fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(c). Perry was sentenced to forty-five years. A Level 4 felony

is punishable by imprisonment for a fixed term between two years and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. Perry was sentenced to six years. The trial court found various aggravating factors, including S.P.'s young age; the severity and repeated nature of the offense; Perry's extensive criminal history,[3] pending charges, and probation violations; Perry's position of care, control, and custody over S.P.; and Perry's violation of the no contact order with S.P.

[12] The nature of Perry's offenses against his young daughter is particularly troubling. Perry sexually abused S.P. weekly for three or four years, and he threatened to commit suicide, when he was her only available parent, to keep her silent. Testimony indicated S.P. suffered mental and emotional damage from which she may not recover. The nature of Perry's offense merits a sentence above the advisory. *See Reis v. State*, 88 N.E.3d 1099, 1104 (Ind. Ct. App. 2017) (holding egregious nature of defendant's offense supported near-maximum sentence).

[13] "When considering the character of the offender, one relevant fact is the defendant's criminal history. The significance of criminal history varies based

[3] In 2007, Perry was convicted of misdemeanor illegal possession of an alcoholic beverage. In 2009, Perry was convicted of Class D felony intimidation. In 2010, Perry was convicted of misdemeanor operating a vehicle while intoxicated and misdemeanor criminal trespass. In 2012, Perry was convicted of misdemeanor driving while suspended. In 2013, Perry was convicted of misdemeanor public intoxication. In 2014 and 2016, Perry again was convicted of misdemeanor driving while suspended. In 2016, Perry was convicted of misdemeanor domestic battery. In 2017, Perry was convicted of possession of marijuana and possession of drug paraphernalia.

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). We note Perry's significant criminal history, probation violation, and violation of the no-contact order for S.P. and her mother. Prior to the case at bar, Perry accumulated several convictions. Perry also has several other misdemeanor convictions relating to alcohol, criminal misconduct, and driving offenses. In addition, Perry was alleged to be a delinquent several times as a juvenile. Thus, we cannot say that Perry's sentence is inappropriate given his character. *See Shinkle v. State*, 129 N.E.3d 212, 217-18 (Ind. Ct. App. 2019) (holding sentence was not inappropriate and observing that the defendant's "extensive criminal history . . . reflects poorly on his character"), *trans. denied*.

Conclusion

[14] The trial court did not abuse its discretion at sentencing by rejecting Perry's proposed mitigating factors or by finding an aggravator in the harm to S.P. We cannot say that Perry's sentence is inappropriate given the nature of his offense and his character. Consequently, we affirm the trial court's decision.

[15] Affirmed.

Brown, J., and Pyle, J., concur.