MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kurt Spurlin,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 3, 2023

Court of Appeals Case No. 22A-CR-2127

Appeal from the Marion Superior Court

The Honorable Sheila Carlisle, Judge

The Honorable Lisa Borges, Senior Judge

Trial Court Cause No. 49D29-2011-FA-34257

Memorandum Decision by Judge Mathias
Judges May and Bradford concur.

Mathias, Judge.

[1] Kurt Spurlin appeals his convictions for eight counts of Class A felony child molesting following a jury trial. He presents two issues for our review:

I. Whether the trial court abused its discretion when it instructed the jury.

II. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm.

Facts and Procedural History

[3] From approximately 2006 to 2011, Spurlin molested his daughter J.W., who was born in 2003. Spurlin had vaginal intercourse with J.W. "four to five times a week" during that time. Tr. Vol. 2, p. 188. Spurlin also had anal intercourse with J.W. "[a]bout once a month," and he forced her to perform oral sex on him. *Id.* Spurlin threatened to kill J.W. if she told anyone about the molestations, and she did not disclose the molestations to anyone. Finally, in 2012, for reasons unrelated to the molestations, J.W. was removed from Spurlin's custody, and she was later adopted. In 2018, J.W. told an uncle that Spurlin had molested her, but the uncle did not do anything with that information. In 2020, J.W. told a therapist about the molestations, and the therapist reported it to the Department of Child Services and law enforcement.

[4] The State charged Spurlin with fourteen counts of Class A felony child molesting. During his trial, J.W. testified regarding the years of molestations

and the impact those events had on her life. J.W. stated, "[i]t has caused me to have a lot of PTSD and trauma. It's also given me night terrors and just made it harder to be in society." *Id.* at 202. The State dismissed five of the counts, and the jury found Spurlin guilty of eight counts of Class A felony child molesting and acquitted him of one count. The trial court entered judgment of conviction on the jury verdicts and sentenced Spurlin to an aggregate term of 180 years executed. This appeal ensued.

Discussion and Decision

Issue One: Jury Instructions

[5] Spurlin first contends that the trial court committed fundamental error in "failing to give a modified unanimity instruction to the jury, since any evidence arguably supporting Spurlin's convictions on [seven of the] counts . . . cannot be shown to have been found by a unanimous jury." Appellant's Br. at 13. However, we do not reach the merits of this issue because, as the State points out, Spurlin invited any error.

[6] As our Supreme Court has explained,

> [a] party's failure to object to an alleged error at trial results in waiver, also known as "procedural default" or "forfeiture." *Bunch v. State*, 778 N.E.2d 1285, 1287 (Ind. 2002). While there are certain exceptions to this rule, . . . it's designed to promote fairness "by preventing a party from sitting idly by," ostensibly agreeing to a ruling "only to cry foul" when the court ultimately renders an adverse decision. *Hale v. State*, 54 N.E.3d 355, 359 (Ind. 2016).

> When the failure to object accompanies the party's affirmative requests of the court, "it becomes a question of invited error." *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014). This doctrine—based on the legal principle of estoppel—forbids a party from taking "advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct." *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005). The doctrine may apply to a variety of errors the party requested of the trial court, such as the adoption of an erroneous jury instruction or the admission of evidence prejudicial to the defendant. *See, e.g., Brantley v. State*, 91 N.E.3d 566, 573 (Ind. 2018); *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995).

Durden v. State, 99 N.E.3d 645, 651 (Ind. 2018).

[7] Here, the trial court "g[a]ve [Spurlin's unanimity] instruction[s] as tendered." Tr. Vol. 3, p. 84. Thus, even assuming that the unanimity instructions, Instruction Nos. 42-50, constitute fundamental error, Spurlin invited it, and he "is not entitled to relief on direct appeal." *See Miller v. State*, 188 N.E.3d 871, 875 (Ind. 2022).

Issue Two: Sentence

[8] Spurlin next contends that his sentence is inappropriate in light of the nature of the offenses and his character. Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "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." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence

modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[9] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[10] Initially, we note that Spurlin did not receive the maximum sentence. Class A felony child molesting carries a sentencing range of twenty to fifty years with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(a) (2022). The trial court imposed the advisory thirty-year sentence on each count, and the court ordered that the sentences on six of the counts would run consecutively with the remaining counts to run concurrently for an aggregate sentence of 180 years.

[11] At the conclusion of the sentencing hearing, the trial court stated as follows:

> As to (1) the harm, injury, loss, or damage suffered by the victim of an offense was significant and greater than the elements necessary to prove the commission of the offense, I do find that aggravator. I understand the argument that that is sometimes

used for physical injury, but I think we've heard that what J.W. went through actually included physical injury from time to time. Her flashbacks about being choked by Mr. Spurlin, the reference in the Pre-sentence Investigation to marks on her when she was removed from his care, consistent with physical abuse, much of which appears to have been to control her and to make her submit to something that no child should ever have to submit to.

She was less than 12 years, so that is an appropriate aggravator, and I find that one.

I find that the defendant did, according to the evidence, commit the offense in the presence or within the hearing of other individuals who were under the age of 18 at the time and were not the victim of the offense for which he's been convicted.

He was in a position having care, custody, or control of J.W. And as his -- as his position as her father, when we -- when we think of a father figure, we think that's someone that -- that takes every care for their child, that always has their child's best interest, never putting himself above his children and his wants or needs above what is good for his children. And that certainly is not the behavior that the defendant has been convicted of during this -- during this trial.

We -- we heard the evidence, and through that evidence were able to picture that first act where a three year-old, holding a stuffed animal, is forced to submit to really a horrendous sexual act. She had no way to be responsible for it, no way to avoid it, no way to get away from it. She literally was a helpless victim, and that – that's very clear. Her testimony at trial was very credible. The jurors clearly believed what she had to say about what had happened to her.

So we -- we were able to picture what happened because of the evidence that was presented. But J.W. lived it, and continues to experience it repeatedly, to the extent that basically it has

> tortured her. It's just been torture for her. And that takes a great deal of courage to begin to heal from.
>
> You know, it comes up again in your mind. It comes up in strange situations, in a situation where you want to have a sexual relationship, but that's interfered with because of the sexualization that took place during childhood. That is -- that is a serious ongoing interference with the ability to become a strong adult, and so that takes a lot of courage to get through. It took a lot of courage to come forward and to tell all the people that you had to tell.
>
> And speaking very directly to J.W., that was a very courageous, very brave thing to do, and that was recognized.
>
> I do believe the testimony was that there was a threat. I found the testimony with regard to he would kill her if she told or even resisted really in my mind -- but I remember the testimony that he would -- had threatened to kill her if she told. And that in my mind was credible testimony, and so I would find it proven for the purposes of the aggravator.
>
> As to the mitigators, it is a mitigator that the defendant has a very limited criminal history and basically has lived his entire life avoiding any kind of conviction other than that January 30, 2018, possession of methamphetamine conviction. And so that is his only prior felony.

Tr. Vol. 3, pp. 135-37.

[12] On appeal, Spurlin contends that,

> [b]ecause [he] had a difficult childhood, he had substance abuse and mental health issues, he was willing to engage in counseling and education, and he scored low on his assessment predicting sexual and violent recidivism, the sentence appears to be

> unreasonable in light of his character. And although the trial Court found aggravating circumstances of the offenses, they do not appear to be any more aggravating than any case in which child molesting took place. It is respectfully suggested that this case is, in fact, an outlier that should be levened [sic], whether by this Court or upon remand to the trial Court for a new sentencing hearing.

Appellant's Br. at 25.[1]

[13] We do not agree. Spurlin has not presented compelling evidence of substantial virtuous traits or persistent examples of positive attributes to show a good character. *See Stephenson*, 29 N.E.3d at 122. And the nature of the offenses is among the most egregious group of crimes imaginable. J.W. was only three years old when Spurlin began forcing her to have vaginal intercourse. The frequency with which he molested J.W., the number of years the attacks continued, and J.W.'s testimony regarding the impact of the molestations on her daily life to this day persuade us that his 180-year sentence is not inappropriate.

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[1] To the extent Spurlin contends that the trial court abused its discretion when it sentenced him, we agree with the State that that issue is waived for lack of cogent argument. Waiver notwithstanding, and even assuming that the trial court erred when it identified J.W.'s age as an aggravating circumstance and when it declined to find certain mitigating circumstances, the valid aggravators are sufficient to support the 180-year sentence. As our Supreme Court recently reiterated, "'[o]ur precedent is clear: "'[e]ven when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist.'" *McCain v. State*, 148 N.E.3d 977, 984 (Ind. 2020) (quoting *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) (citation omitted)).

Conclusion

[14] For all these reasons, we affirm Spurlin's convictions and sentence.

[15] Affirmed.

May, J., and Bradford, J., concur.