MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ronald J. More
Richmond, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Joshua Millar,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 24, 2023

Court of Appeals Case No. 22A-CR-1015

Appeal from the Wayne Superior Court

The Honorable Charles K. Todd, Jr., Judge

Trial Court Cause No. 89D01-1901-F4-7

Memorandum Decision by Chief Judge Altice
Judges Brown and Tavitas concur.

Altice, Chief Judge.

Case Summary

[1] Following a jury trial, Joshua Millar was convicted of Level 4 felony sexual misconduct with a minor and sentenced to seven years, with two years suspended. Millar presents three issues for review:

> 1. Did the trial court abuse its discretion in admitting evidence of Millar's prior acts under Ind. Evidence Rule 404(b)(2)?
>
> 2. Is the evidence sufficient to support Millar's conviction?
>
> 3. Is Millar's sentence inappropriate?

[2] We affirm.

Facts & Procedural History

[3] Millar was involved in a romantic relationship with C.M.'s mother, and he would sometimes stay the night at C.M.'s home. At some point on May 31, 2018, Millar told C.M., who was fourteen at the time, to pretend to be asleep so that her mother and younger sister would leave the house without her. Around 1:00 a.m. on June 1, C.M. was pretending to be asleep when her mother called a cab for a ride to Walmart. After C.M.'s mother and younger sister left, Millar locked the doors and went into the bedroom, where he opened a window "so that he could . . . hear if they came back." *Transcript Vol. II* at 233. He came out and asked C.M. if she was "nervous" and then he picked her up and took her into the bedroom where he laid her down on the bed. *Id*. at 234. Millar pulled off her shorts and underwear and got on top of her. C.M. testified that

Millar then "tried to stick his penis inside of [her]." *Id*. at 236. When she reacted to the pain, Millar told C.M. "to just relax and stop moving and don't be so tense" as he proceeded to "st[i]ck his penis inside of [her]." *Id*. Millar next "put his face in [C.M.'s] vagina." *Id*.

[4] At some point, Millar jumped up and left the room. C.M. was "[s]cared and in pain" and, when she started to dress herself, she discovered that she was bleeding from her vagina. *Id*. at 237. Millar soon returned to the bedroom with a wet towel, bleach, and Windex that he used to clean up the bed. C.M. noticed that Millar had blood on his face and T-shirt. Millar told C.M. not to tell her mom and that she was "definitely still a virgin after that." *Id*. at 238. He then instructed her to get herself cleaned up and lay back down on the futon in the family room. When C.M.'s mother and sister returned around 3:00 a.m., C.M. was asleep. C.M.'s mother testified that Millar had changed his shirt while she was at Walmart and that she noticed there was a wet spot on the bed, which Millar explained as being caused by a spill.

[5] On June 12, 2018, C.M. disclosed the sexual assault to her mother, who immediately went to the police. C.M. was not comfortable talking to the police regarding the assault, and she refused a physical examination at the hospital. C.M. gave two forensic interviews at JACY House in Richmond on June 13 and 14, 2018. C.M. testified that it was "really hard for [her] to say what was on [her] mind" and that she "couldn't talk" to the interviewer. *Transcript Vol. III* at 7, 8. She did write out her thoughts but did not want to read out loud what she wrote because "it was really hard for [her] to talk about." *Id*. at 8.

[6] The police collected samples from the top of the mattress where the assault occurred. Subsequent DNA testing revealed that the mattress contained DNA from C.M., her mother, and Millar. C.M. also kept her blood-stained underwear from the assault, but after her disclosure, she "panicked," placed the underwear in a plastic bag, and threw it in the trash. *Id*. at 3. C.M.'s mother retrieved the underwear from the trash, and the police came to the house to retrieve it. Subsequent testing revealed Millar's DNA on C.M.'s underwear.

[7] On January 30, 2019, the State charged Millar with sexual misconduct with a minor as a Level 4 felony. A three-day jury trial commenced on March 7, 2022. At trial, C.M. testified that Millar told her "he would go away for 30 years and that somebody would get hurt" if she told anyone about the assault. *Id*. at 9. She also testified that Millar wanted to run away with her once she turned eighteen. Over Millar's objection, C.M. was permitted to testify that Millar had told her he loved her and had kissed her on the cheeks in December 2017. She also testified that in March of 2018, Millar placed her on his lap, kissed her on the lips, and, when she tried to pull away, said "he thought that [she] liked him." *Transcript Vol. II* at 245. C.M. testified about a third incident that occurred in May 2018. She explained that Millar woke her up and repeatedly motioned for her to remove her pants and that when she refused, Millar removed her pants and "tried to stick his penis inside of [her] but he couldn't get it in and he told [her] that [she] was not ready yet." *Id*. at 247. At the conclusion of the evidence, the jury found Millar guilty as charged.

[8] At the sentencing hearing on April 1, 2022, the trial court found Millar's criminal history to be an aggravating factor, but not significant because it consisted of only misdemeanor convictions and it had been six years since his last conviction. The trial court also found as aggravating that Millar was in a position of trust to C.M. The court afforded "some mitigation" to the fact that Millar had been a reliable financial provider for his family and that there would be hardship to his children upon his incarceration. *Transcript Vol. III* at 224. The trial court entered judgment of conviction and sentenced Millar to seven years, with two years suspended. Millar now appeals. Additional facts will be provided as necessary.

Discussion & Decision

1. Admission of Evidence

[9] At trial, the State offered evidence of Millar's sexual behavior toward C.M. on several occasions during the six months prior to the instant sexual assault. Specifically, C.M. was permitted to testify that Millar had previously kissed her and had attempted to force sexual intercourse on her. The State argued that these acts were evidence of "grooming" or preparing the victim for sexual activity. *Transcript Vol. II* at 199. Millar objected pursuant to Evid. R. 404(b). The trial court ruled that the evidence fell within an exception and was admissible for the purpose of proving Millar's plan and preparation. The trial court provided the jury with a limiting instruction to this effect.

[10] We review challenges to the admission of evidence for an abuse of discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018). We will reverse the trial court only where its decision is clearly against the logic and effect of the facts and circumstances. *Id*. Evid. R. 404(b)(1) provides that evidence of other crimes or wrongful acts is not admissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The well-established rationale behind this rule is that the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. *Hall v. State*, 137 N.E.3d 279, 284 (Ind. Ct. App. 2019). Such evidence, however, may be admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Evid. R. 404(b)(2).

[11] To determine whether evidence is admissible for a permitted purpose under Rule 404(b)(2):

> first, the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and second, the court must balance whether the probative value of the evidence is outweighed by prejudicial effect.

Schnitzmeyer v. State, 168 N.E.3d 1041, 1046 (Ind. Ct. App. 2021) (citing *Pierce v. State*, 29 N.E.3d 1258, 1269 (Ind. 2015)); *see also* Ind. Evidence Rule 403 (providing, in pertinent part, that relevant evidence may be excluded if its probative value "is substantially outweighed by a danger of" unfair prejudice).

[12] Here, in the six months leading up to the instant offense, Millar told C.M. that he loved her and wanted to run away with her. His sexual advances toward C.M. started with kisses on the cheek, then advanced to kissing her on the mouth, and eventually escalated to attempted sexual intercourse, which occurred only weeks prior to the instant offense. We agree with the State and the trial court that this prior act evidence was relevant as evidence of grooming. Indeed, it showed an escalation in Millar's sexual contact with C.M. that was designed to condition C.M. into accepting his sexual advances. *See Piercefield v. State*, 877 N.E.2d 1213 (Ind. Ct. App. 2007) (holding that evidence of victims' past massages of defendant's feet, back, and buttocks was relevant to establishing preparation and plan in trial for child molestation because the evidence showed defendant's grooming of victims to familiarize them with touching him and to create a more physical relationship with them); *Flanders v. State,* 955 N.E.2d 732, 743 (Ind. Ct. App. 2011) (finding that evidence of holding hands, although not overtly sexual, was relevant to show that defendant was familiarizing victim with being touched by him and was creating a more physical relationship with her). The prior act evidence was relevant and not unduly prejudicial. The trial court did not abuse its discretion in permitting C.M. to testify about Millar's prior sexual advances.

2. Sufficiency

[13] Millar challenges the sufficiency of the evidence by arguing that C.M.'s testimony was incredibly dubious. The incredible dubiosity rule is applied in extremely limited circumstances. Under this rule, we will impinge on the trier

of fact's responsibility to judge the credibility of the witnesses only when confronted by "'inherently improbable' testimony or coerced, equivocal, wholly uncorroborated testimony of 'incredible dubiosity.'" *Moore v. State*, 27 N.E.3d 749, 755 (Ind. 2015) (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)). The witness's testimony must be wholly uncorroborated. That is, we will only impinge on the jury's duty to judge witness credibility "where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt." *Id*. (quoting *Tillman*, 642 N.E.2d at 223).

[14] In arguing that C.M.'s testimony was incredibly dubious, Millar points out that C.M. would not give a statement to the police, that she would not tell a forensic interviewer what had happened, and that she refused a physical examination. None of this, however, renders C.M.'s testimony inherently improbable, contradictory, or equivocal. In fact, C.M.'s testimony was not so improbable or contrary to human experience that no reasonable person could believe it. She did not equivocate when she testified that Millar forced intercourse on her by "sticking his penis inside of [her]." *Transcript Vol. II* at 236. The jury clearly found C.M. to be credible, and her testimony supports the jury's verdict. *See Ferrell v. State*, 746 N.E.2d 48, 51 (Ind. 2001) ("If the testimony believed by the trier of fact is enough to support the verdict, then the reviewing court will not disturb it"). Further, there was evidence corroborating C.M.'s testimony. C.M.'s mother testified that she noticed a wet spot on her bed after the sexual assault occurred, and there was evidence that Millar's DNA was found in

C.M.'s blood-stained underwear. Because there is nothing incredibly dubious about C.M.'s testimony, Millar's challenge to the sufficiency of the evidence fails.

3. Inappropriate Sentence

[15] Millar argues that his seven-year sentence, with two years suspended, is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The analysis pursuant to App. R. 7(B) is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012).

[16] Whether a sentence is inappropriate 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. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). More particularly, the defendant must show that his sentence is inappropriate with "compelling evidence portraying in a positive light the nature of the offense[s] (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).

[17] In 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. *Brown v. State*, 160 N.E.3d 205, 220 (Ind. Ct. App. 2020). Millar was convicted of a Level 4 felony, the sentencing range for which is two to twelve years with an advisory sentence of six years. *See* Ind. Code § 35-50-2-5.5. The trial court sentenced Millar to seven years, with two years suspended.

[18] We begin with the nature of the offense. Millar was C.M.'s mother's boyfriend, and he often stayed at C.M.'s house. He was thus in a position of trust to C.M. when he started grooming and manipulating her approximately six months prior to the assault. Millar started by telling C.M. that he loved her and wanted to run away with her and then he turned to physical touching, kissing her on the cheeks and then on the mouth. Millar first attempted to have sex with C.M. a few weeks before this assault. After the assault, Millar threatened C.M. to not tell anyone what happened, telling her that someone would get hurt and that he would go away for thirty years.

[19] As to the character of the offender, we note that Millar has a minor criminal history that consists of misdemeanor convictions occurring more than six years prior to this offense. Reflecting poorly on his character is that after the instant offense, Millar was convicted of misdemeanor aggravated menacing. In this regard, we further note Millar's actions of threating C.M.

[20] The seven-year sentence imposed by the trial court is one year above the advisory sentence, and the executed portion of Millar's sentence is one year less

than the advisory. In light of the nature of the offense and character of the offender, we cannot say that Millar's sentence is inappropriate.

[21] Judgment affirmed.

Brown, J. and Tavitas, J., concur.