MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dana M. Moyes,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 22, 2023

Court of Appeals Case No. 23A-CR-704

Appeal from the Pike Circuit Court

The Honorable Jeffrey L. Biesterveld, Judge

Trial Court Cause No. 63C01-2206-F5-142

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Dana Moyes appeals her convictions and corresponding sentence for two counts of neglect of a dependent, as Level 6 felonies.[1] We affirm.

Issues

[2] Moyes presents four issues for our review:

1. Whether the trial court abused its discretion when it excluded certain evidence.

2. Whether the State presented sufficient evidence to support her convictions.

3. Whether the court abused its discretion when it sentenced her.

4. Whether her sentence is inappropriate in light of the nature of the offenses and her character.

Facts and Procedural History

[3] Moyes has eleven children, eight of whom resided with her. Those eight children are: G.G., V.G., L.F., D.M., S.M., K.M., N.M, and I.B. *See* Ex. at 4. In addition, for several months in 2019, Moyes babysat a child, D.K., overnight during the week while D.K.'s mother, Cynthia Parker, worked. Parker would

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[1] Ind. Code § 35-46-1-4(a)(1) (2023).

often drop D.K. off at Moyes' house at approximately 6:30 p.m. and would not see him again until after school the next day. It was Parker's "understanding" that "the older kids . . . would be walking with [D.K.] to the bus stop[.]" Tr. Vol. 1 at 200. At that time, Moyes and her children lived in a house in the small town of Alford.

[4] On the morning of March 5, 2019, seven-year-old D.K. walked alone from Moyes' house to his bus stop, which was a five- to six-minute walk away. At the time he left, Moyes was still asleep, but some of Moyes' children were awake. D.K. was "sure" he did not see Moyes that morning. *Id*. at 189. It was cold, and D.K. was wearing a "jacket," but no hat or gloves. *Id*. at 155. D.K. made it to the bus stop and waited, but the bus did not come. D.K. believed he had missed the bus, so he returned to Moyes' house. When he arrived back at the house, V.G. told D.K. to go back to the bus stop and wait for "five[,] ten minutes" in order to be sure he had missed the bus. *Id*. D.K. then walked back toward the bus stop.

[5] Sophomore Lilly Willis was driving to school when she saw D.K. walking alone by the side of the road. D.K.'s face and nose were "a little red," and it looked like he had been crying. *Id*. at 128. Willis stopped her car and offered D.K. a ride. D.K. agreed, and Willis drove D.K. to his school. Parker, who learned of the incident later that day, was "surprised" to learn "that D.K. was walking to the bus stop by himself." *Id*. at 201.

[6] The Indiana Department of Child Services ("DCS") was informed of the incident. On March 8, DCS Family Case Manager ("FCM") Raejean Foster spoke with Moyes. Moyes provided FCM Foster with two different explanations for where she had been when D.K. left for school alone. Moyes initially told FCM Foster that she had been in the shower, but she also told FCM Foster that she "was driving [V.G.] to school." *Id*. at 138. Moyes also reported to FCM Foster that D.K. had been wearing "a thick coat, mittens[,] and a hat" on the morning of March 5. *Id*. at 139. Moyes further stated that D.K. walked to the bus stop alone about "fifty percent of the time" and that either she or G.G. walked D.K. the other times. *Id*. at 141. DCS and Moyes then entered into a safety plan regarding D.K. Pursuant to the safety plan, Moyes agreed to ensure D.K. "gets to the bus stop and on the bus" and that "there is an age-appropriate person walking [D.K.] to the bus stop daily." Ex. at 6.

[7] At some point thereafter, Moyes and the children moved to a house in Petersburg. The house was near a "coal yard" and a highway that had "quite a bit of traffic," including semis and "coal truck traffic[.]" Tr. Vol. 1 at 236. On November 18, 2020, four-year-old K.M. got out of the house while under the care of G.G. and was found by a neighbor, who returned K.M. to his home with the help of a neighboring police officer. Following that incident, FCM Foster responded to Moyes' home. When FCM Foster arrived, there were no adults present, but G.G. let her into the home and called Moyes. FCM Foster

learned that Moyes was on the way home from the hospital after having had a scheduled C-section to deliver I.B. Moyes arrived shortly thereafter.

[8] FCM Foster learned that G.G. and V.G. were home and watching the kids when K.M. got out. FCM Foster also observed that the house was equipped with a "doggie door" that was large enough for K.M. to use. Tr. Vol. 2 at 14. Moyes admitted to FCM Foster that K.M. "could get through the doggie door" and that he used it "often[.]" *Id*. at 15, 18. FCM Foster also learned that K.M. was able to unlock the front door and "walk out." *Id*. FCM Foster and Moyes "discuss[ed] the coal truck hazards and the traffic hazards as it relates to the smaller children." *Id*. at 17. And Moyes "acknowledge[d] that she understood that [it] was dangerous for the kids." *Id*. at 18.

[9] As a result of the incident, DCS and Moyes entered into another safety plan. In that safety plan, Moyes agreed that "her children are her responsibility" and that "their safety is crucial." Ex. at 22. Moyes also agreed to "place a lock on the outside doors" and on the "doggie door." *Id*. And Moyes agreed that "the younger children cannot be outside without an adult" or G.G. present. *Id*. FCM Foster returned to the home on December 16 and saw that Moyes had installed a chain lock "up high" for the exterior door as well as a board in front of the doggie door. *Id*. at 31.

[10] A few months later, on March 30, 2021, K.M. again got out of the house unsupervised and was found by another neighbor. Following that incident, FCM Stephanie Gilmour responded to Moyes' house. FCM Gilmour observed

the "same hazards that were there from November." *Id*. at 78-79. FCM Gilmour learned that there was no adult present and that Moyes was in Vincennes, so she spoke to Moyes on the phone. Either during that phone conversation or during a subsequent in-person meeting at the DCS office, Moyes disclosed to FCM Gilmour that she had "taken the lock off the doggie door[.]" *Id*. at 80. After that incident, DCS and Moyes entered into an additional safety plan, whereby Moyes agreed that G.G. "is not the babysitter/caregiver for" K.M. and that "this is the second time since November 2020 [K.M.] has gotten out of the home while in the care of" G.G. Ex. at 24.

[11] On June 24, 2022, the State charged Moyes with multiple counts of neglect of a dependent, as Level 6 felonies.[2] In relevant part, one count alleged that Moyes had failed to adequately supervise K.M. on March 30, 2021, and one count alleged that Moyes had endangered D.K. when she allowed him to walk to the bus stop alone on March 5, 2019. On June 29, a representative from DCS called Moyes and informed her that the "police were looking for her at her house." Tr. Vol. 2 at 189. After she had learned about the charges against her, Moyes went to Virginia. Moyes returned to Indiana several days later, and, on

[2] The State initially charged Moyes with six counts of neglect of a dependent, as Level 6 felonies. However, Counts 2 and 6 were dismissed prior to trial. And the jury acquitted Moyes of Counts 1 and 3.

July 5, FCM Foster located Moyes at a hospital in Vincennes. Moyes then turned herself in to the police.

[12] On September 13, DCS terminated FCM Gilmour's employment based on allegations of perjury related to testimony she had given during an earlier deposition in the instant case. On February 2, 2023, the State filed a motion in limine seeking to prohibit Moyes from questioning Gilmour about her termination from DCS. The State alleged that any discussion about the alleged perjury would be "offered for no permissible purpose" and that it would be a "profound waste of the court's time[.]" Appellant's App. Vol. 2 at 112.

[13] The court held a multi-day jury trial. Prior to the start of the second day of trial, the parties discussed the State's motion in limine. Moyes objected to the motion on the ground that "the fact that Ms. Gilmour was fired, even if only allegedly for actions relating to this case, is simply relevant information" that goes toward her bias. Tr. Vol. 1 at 77. The State responded and asserted that the allegations surrounding Gilmour's termination from DCS, for which she had an appeal pending, was a "waste of time" and had "nothing to do with whether or not Ms. Gilmour is telling the truth about the facts in this case." *Id.* at 78. The court took the matter under advisement.

[14] During the trial, V.G. testified that D.K. would walk alone to the bus stop "[p]retty much every time." *Id.* at 157. And he testified that it was usually his or G.G.'s responsibility to get D.K. to the bus stop. The State then called Gilmour as a witness. Moyes again objected to the State's motion in limine.

The court determined that Moyes could question Gilmour about her "prior employment and current employment," but not ask questions about her termination from DCS because "it would not be appropriate." *Id*. at 164. The court also concluded that "the probative value is clearly outweighed here by any prejudice." *Id*. Gilmour then testified that she had been a family case manager on March 5, 2019, and that it had been "seven degrees outside" when Willis picked D.K. up from the side of the road. *Id*. at 167.

[15] D.K. testified that he "[n]ormally went by himself" to the bus stop. *Id*. at 185. G.G. then testified that Moyes was "almost never" awake in the mornings to help get the younger children ready for school and that Moyes usually slept until 1:00 p.m. *Id*. at 217. G.G. also testified that, when Moyes learned that D.K. had been picked up by Willis, Moyes said that "he was a dumb kid" who "should have known better." *Id*. at 221. And G.G. testified that Moyes did not "in any way express remorse or feel sorry for not being up to make sure [D.K.] was on the bus." *Id*. at 222.

[16] The jury found Moyes guilty, and the court entered judgment of conviction accordingly. At the ensuing sentencing hearing, Brian Moyes ("Brian"), the biological father of several of the children, testified that, since Moyes' arrest and incarceration, he had been caring for six of Moyes' children. He also testified that, because he cares for the children, he has not worked and has fallen "somewhere in the range of seven months" behind on his rent and that he was in danger of losing the family's housing. Tr. Vol. 3 at 85. He testified that, if he loses the house, the "State will take" the children. *Id*. at 86. Moyes then gave

an allocution during which she "apologize[d] for her actions" regarding D.K. *Id*. at 124. She also stated that the family was "on the brink of losing everything" because Brian "had to quit his job to stay home and care for the kids." *Id*. at 125.

[17] At the conclusion of the hearing, the court identified as aggravating the fact that Moyes "has a previous criminal history of arrest[s] for which prior lenient treatment has not been successful." *Id*. at 134. The court also found as aggravating the fact that Moyes was "in a position of trust in having care, custody, and control[of] the victims of the offenses" and that the victims "were each less than 12 years of age at the time the offenses were committed." *Id*. Finally, the court identified as an aggravating factor Moyes' pending criminal charges. The court found that "there are no mitigating factors in this case." *Id*. The court then determined that a "sentence less than [an] enhanced sentence will depreciate the seriousness of the crimes." *Id*. Accordingly, the court sentenced Moyes to 730 days on each count, with 365 days of each sentence suspended, and the court ordered the sentences to run consecutively. This appeal ensued.

Discussion and Decision

Issue One: Exclusion of Evidence

[18] Moyes first asserts that the court abused its discretion when it excluded certain evidence. Decisions regarding the admission or exclusion of evidence are entrusted to the sound discretion of the trial court. *Laird v. State*, 103 N.E.3d

1171, 1175 (Ind. Ct. App. 2018), *trans. denied*. On appeal, we review the trial court's decision only for an abuse of that discretion. *Id*. The trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before it, or if the court has misinterpreted the law. *Id*.

[19] On appeal, Moyes contends that the court abused its discretion when it excluded evidence that Gilmour had been terminated by DCS due to allegations of perjury. Moyes asserts that, if "DCS believed Gilmour lied on the stand during Moyes' probable cause hearing, it is reasonable to question the trustworthiness of her testimony in this case." Appellant's Br. at 21. And Moyes maintains that, under Indiana Evidence Rule 616, evidence of the reason for Gilmour's termination shows that she is biased.

[20] Indiana Evidence Rule 616 provides that "[e]vidence that a witness has a bias, prejudice, or interest for or against any party may be used to attack the credibility of the witness." Here, Moyes sought to introduce evidence that DCS had terminated Gilmour because Gilmour allegedly lied under oath when she testified at an earlier hearing that DCS had entered into "over a hundred" safety plans with Moyes. Appellant's App. Vol. 2 at 110. But the fact that DCS terminated Gilmour over allegations of perjury related to DCS' actions does not show that Gilmour had a bias or prejudice against a party to the case—Moyes. At most, it shows that Gilmour had a bias or prejudice against DCS. But DCS was not a party to the case. As such, the proffered evidence was not admissible under Rule 616. *Cf. Kirk v. State*, 797 N.E.2d 837 (Ind. Ct. App. 2003)

(explaining that evidence that the victim was mad at the defendant and had a "desire for revenge" would be admissible under Rule 616).

[21] In any event, even if the court abused its discretion when it excluded that evidence, any error was harmless. It is well settled "that a claim of error in the admission or exclusion of evidence will not prevail on appeal 'unless a substantial right of the party is affected.'" *Troutner v. State*, 951 N.E.2d 603, 612 (Ind. Ct. App. 2011) (quoting *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005)), *trans. denied*. That is, even if the trial court errs in admitting or excluding evidence, this Court will not reverse the defendant's conviction if the error is harmless. *Caesar v. State*, 139 N.E.3d 289, 292 (Ind. Ct. App. 2020). We "consider the likely impact of the improperly admitted or excluded evidence on a reasonable, average jury in light of all the evidence in the case." *Hayko v. State*, 211 N.E.3d 483, 492 (Ind. 2023). "Ultimately, the error's probable impact is sufficiently minor when—considering the entire record—our confidence in the outcome is not undermined." *Id*.

[22] Here, as it relates to the incident with D.K., Gilmour only testified that it was approximately seven degrees Fahrenheit when Willis picked up D.K. But that evidence was merely cumulative to other evidence. Indeed, Willis also testified that it was cold that morning. And the State submitted as evidence a weather report showing a minimum temperature of 9.1 degrees Fahrenheit at a nearby airport. *See* Ex. at 8. Further, Gilmour testified about the safety plan that Moyes had entered into in 2017 after an issue with G.G. babysitting V.G. But

that evidence was again cumulative to the actual safety plan that the State had submitted as evidence. *See id*. at 12.

[23] And as it relates to K.M., Gilmour simply testified that there was a second incident on March 20, 2021, where K.M. got out of the house unsupervised, that she responded to the house, and that Moyes had taken the lock off the doggie door. But the fact that K.M. escaped a second time and that Gilmour was the family case manager who responded is also demonstrated by the safety plan that Moyes signed on April 1, 2021. Indeed, in that safety plan, which was signed by Moyes and Gilmour, Mother acknowledged that "this is the second time" since November 2020 that K.M. "has gotten out of the home." Ex. at 24.

[24] In other words, even if Moyes had successfully attacked Gilmour's credibility through the admission of evidence regarding her termination from DCS, there was sufficient evidence remaining to support the convictions. Further, while the court did not allow Moyes to go into detail regarding Gilmour's termination, Moyes was still permitted to—and indeed did—elicit testimony from Gilmour that she had previously been employed by DCS and that she was now employed by the prosecutor's office. Having considered the entire record, we can say with confidence that the probable impact of the exclusion of testimony regarding the details of Gilmour's termination from DCS was sufficiently minor so as to not affect Moyes' substantial rights. Thus, any error in the admission of that evidence was harmless.

Issue Two: Sufficiency of the Evidence

[25] Moyes also contends that the State failed to present sufficient evidence to support her convictions. Our standard of review on a claim of insufficient evidence is well settled:

> For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh the evidence. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*.

Love v. State, 73 N.E.3d 693, 696 (Ind. 2017).

[26] To show that Moyes committed neglect of a dependent, as a Level 6 felony, the State was required to prove that Moyes, while having the care of a dependent, knowingly or intentionally placed the dependent in a situation that endangered the dependent's life or health. Ind. Code § 35-47-1-4(a)(1). A person engaged in conduct knowingly if, when she engaged in the conduct, she was aware of a high probability that she was doing so. *Burden v. State*, 92 N.E.3d 671, 675 (Ind. Ct. App. 2018). The mens rea under our child neglect statute requires the defendant to have a subjective awareness of a high probability that she placed the dependent in a dangerous situation. *See id*.

[27] Our Court has repeatedly held that that statute "must be read as applying only to situations that expose a dependent to an actual or appreciable danger to life or health." *Id*. (quotation marks and citations omitted). To be

> an "actual and appreciable" danger for purposes of the neglect statute when children are concerned, the child must be exposed to some risk of physical or mental harm that goes *substantially beyond the normal risks* of bumps, bruises, or even worse that accompany the activities of the average child.

Scruggs v. State, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008) (emphasis in original).

[28] On appeal, Moyes contends that the State failed to present sufficient evidence to support either her conviction as it relates to D.K. or her conviction as it relates to K.M. We address each argument in turn.

D.K.

[29] Regarding D.K., the State alleged that Moyes endangered D.K. by allowing him, at seven years old, to walk alone to school in seven-degree weather. Appellant's App. Vol. 2 at 32. Moyes asserts that the State presented insufficient evidence to support that conviction because "the State did not prove that [she] had a subjective awareness of a high probability that, by allowing D.K. to walk to his bus stop alone, she had placed D.K. in a situation that endangered his life or health." Appellant's Br. at 24.

[30] Here, the evidence at trial demonstrated the following: Moyes babysat D.K. overnight while his mother worked. Moyes would often sleep late in the mornings, maybe waking long enough to wake up one or two of the older children before going back to sleep. It was Parker's understanding that the older kids would walk with D.K. to the bus stop, which was a five- to six-

minute walk away from Moyes' house. However, D.K. almost always walked to the bus stop alone. In particular, on March 5, 2019, D.K. left the house alone wearing only a light jacket with no hat or gloves even though it was approximately seven degrees outside. Moyes was asleep that morning, and D.K. was "sure" that he did not see her. Tr. Vol. 1 at 189.

[31] D.K. made it to the bus stop without incident but believed he had missed the bus, so he returned to the house. Once he returned, V.G. did not let D.K. back into the house and sent him back to the bus stop still dressed only in a light jacket. D.K. walked back toward the bus stop but was ultimately picked up by Willis and driven to his school. Further, after DCS learned of the incident and FCM Foster spoke to Moyes, Moyes claimed to FCM Foster that D.K. had been dressed "appropriately" with a thick coat, hat, and mittens. Tr. Vol. 1 at 139. Moyes also gave two different explanations for where she was when D.K. had left the house.

[32] In other words, Moyes allowed a seven-year-old child to walk five to six minutes to the bus stop unattended by anyone, despite Parker's understanding that someone would walk with D.K. Further, Moyes allowed him to leave the house in seven-degree weather without confirming that he was appropriately dressed. Moyes was also not awake to help D.K. when he returned home after believing that he had missed the bus. As a result, Moyes not only placed D.K. in actual and appreciable danger from the weather by being very underdressed for the sub-freezing temperatures, she also exposed him to the risk of being picked up by a stranger—which indeed occurred in this case. It was fortunate

that D.K. was picked up by Willis, a person who wanted to help him, as opposed to someone with a sinister motive.

[33] Stated differently, D.K. was exposed to a risk of physical or mental harm that went substantially beyond the normal risks of bumps, bruises, or worse that accompany the activities of the average child. *See Scruggs*, 883 N.E.2d at 191. In addition, Moyes gave incorrect information about having seen D.K. and what he was wearing when she spoke to DCS, and she gave FCM Foster two different stories about what she was doing when D.K. left for the bus stop alone, which could further cause a reasonable jury to infer that she was aware that she had placed D.K. in danger by not assuring he was dressed for the weather. Based on the evidence presented, a reasonable jury could find that Moyes had a subjective awareness of a high probability that she had placed D.K. in a dangerous situation. As such, the State presented sufficient evidence to support her conviction as to D.K.

K.M.

[34] As it relates to K.M., the State specifically alleged that Moyes had placed K.M. in danger by failing to adequately supervise him on March 30, 2021, which resulted in K.M. escaping from the home. Appellant's App. Vol. 2 at 31. Moyes contends that the State failed to prove that she had knowingly placed K.M. in danger because K.M. was at home with his fourteen-year-old sister, who DCS had indicated was an age-appropriate caregiver for K.M. She further

contends that a "child wandering out of his house to play in the neighbor's yard" does not amount to "criminal neglect[.]" Appellant's Br. at 29.

[35] But Moyes disregards the evidence that demonstrates that her house was located in a dangerous area. Indeed, the house was located near a coal yard and a high-traffic highway. The evidence also demonstrates that Moyes knew of the dangers that surrounded her home. After K.M. escaped from the house on November 18, 2020, FCM Foster spoke with Moyes and "discuss[ed] the coal truck hazards and the traffic hazards as it relates to the smaller children." Tr. Vol. 2 at 17. And Moyes "acknowledge[d] that she understood that [it] was dangerous for the kids." *Id*. at 18. Moyes also admitted to FCM Foster that K.M. could get through a doggie door and that he would use it often. As a result, Moyes agreed to, and indeed did, put a lock on the doggie door. However, Moyes subsequently removed that lock and, on March 30, 2021, K.M. again got out of the house unsupervised and was found by a neighbor.

[36] Based on that evidence, a reasonable jury could find that Moyes had a subjective awareness of a high probability that she had placed K.M. in a dangerous situation. And those risks of danger went beyond the simple bumps and bruises from normal childhood activities. As such, the State presented sufficient evidence to support her conviction as to K.M. We therefore affirm that conviction.

Issue Three: Abuse of Discretion in Sentencing

[37] Next, Moyes asserts that the trial court abused its discretion when it sentenced her. 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).

[38] 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 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, 490-91 (Ind.) ("*Anglemyer I*"), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007)) (*Anglemyer II*").

[39] The sentencing range for a Level 6 felony is six months to two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). Here, the trial court identified as aggravators the fact that Moyes "has a previous criminal history of arrest[s] for which prior lenient treatment has not been successful." Tr. Vol. 3 at 134. The court also found as aggravating the fact that Moyes was "in a position of trust in having care, custody, and control[of] the victims of the

offenses" and that the victims "were each less than 12 years of age at the time the offenses were committed." *Id.* Finally, the court identified as an aggravating factor Moyes' pending criminal charges. The court found that "there are no mitigating factors in this case." *Id.* The court then determined that a "sentence less than [an] enhanced sentenced will depreciate the seriousness of the crimes." *Id.* Accordingly, the court sentenced Moyes to two years on each count, with one year of each sentence suspended, and the court ordered the sentences to run consecutively.

[40] Here, Moyes contends that the court abused its discretion when it failed to identify as mitigating factors the hardship that her incarceration would place on her family and her remorse. She also contends that the court abused its discretion when it identified as aggravating the fact that she was a caregiver for K.M. and D.K. We address each argument in turn.

Hardship

[41] On this issue, Moyes first asserts that the court abused its discretion when it failed to recognize "the undue hardship [her] incarceration will cause her children[.]" Appellant's Br. at 33. 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. *Anglemyer I*, 868 N.E.2d at 493. Further, "'[i]f the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.'" *Id.* (*quoting Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)).

[42] As our Supreme Court has observed, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State,* 720 N.E.2d 1146, 1154 (Ind. 1999). On appeal, Moyes directs us to evidence that, since her incarceration, Brian cared for several of the children, that he has had to leave his job to watch them, and that he is in financial trouble as a result.

[43] While Brian testified at sentencing that Moyes' incarceration has caused and would continue to cause a financial hardship and place him at risk of losing the house because he had to stop working and care for the children, he also testified that all but one of the children attend school during the day and that he had been awarded a daycare voucher for the youngest child in his care. He also testified that there was a plan in place for family and friends to take the children in should he lose the house. Further, while Moyes contends that she provided childcare while Brian worked, G.G. testified that Moyes often slept until 1 p.m. and that she and V.G. were responsible for getting the younger children up and ready for school. And G.G. testified that she was responsible for watching the younger children almost every day. Based on that evidence, we cannot say that the trial court abused its discretion when it declined to identify as a mitigator the undue hardship Moyes' incarceration would have on her family.

<u>Remorse</u>

[44] Moyes next contends that the court abused its discretion when it failed to identify her remorse as a mitigating factor. According to Moyes, the fact that

she apologized for her actions concerning D.K. and indicated her regret regarding her decision to leave K.M. home with G.G. "provides clear support" for the court to find her remorse to be a mitigating factor. Appellant's Br. at 34.

[45] However, "substantial deference must be given to a trial court's evaluation of remorse." *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). "The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the remorse is genuine." *Id*. And it is clear that the court considered Moyes' argument that she was remorseful and rejected it. Indeed, the court specifically found that "actions speak louder than words" and that Moyes "lacks remorse for her actions in this cause." Tr. Vol. 3 at 134. Moyes has not met her burden on appeal to demonstrate that the court abused its discretion when it rejected her proffered mitigator.

Improper Aggravator

[46] Moyes also contends that the court abused its discretion when it identified as aggravating the fact that she "was in the position of caregivers to the victims" because "this was an element of the offense." Appellant's Br. at 35. But even if we assume for the sake of argument that Moyes is correct and that the court improperly relied on that factor, Moyes is still not entitled to a new sentencing hearing. It is well settled that a court's reliance on an improper aggravator is harmless unless the defendant can show that the trial court would have imposed a different sentence absent the aggravator. *See Kayser v. State*, 131 N.E.3d 717, 722 (Ind. Ct. App. 2019). And here, there were other valid aggravating factors

upon which the trial court relied in imposing Moyes' sentence, including the young age of both victims and her pending criminal charges. And Moyes does not challenge either of those aggravators on appeal. Thus, we are confident that the trial court would have rendered the same sentence irrespective of this aggravator.

Issue Four: Appropriateness of Sentence

[47] Finally, Moyes contends that her sentence is inappropriate in light of the nature of the offenses and her character. Indiana Appellate Rule 7(B) provides that "[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This Court has recently held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has recently explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[48] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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).

[49] Moyes contends that her sentence is inappropriate in light of the nature of the offenses because neither "D.K. nor K.M. were harmed or placed in immediate threat of harm," and because neither "suffered any emotional distress[.]" Appellant's Br. at 37. And she contends that her sentence is inappropriate in light of her character because "she suffered from severe untreated depression" at the time of the incident involving D.K., she "expressed remorse" and "regret" for her actions" and because her "criminal history is insignificant." *Id*. at 38.

[50] But Moyes has not met her burden to demonstrate that her sentence is inappropriate. In regard to the nature of the offense involving K.M., Moyes

removed the lock from the doggie door despite her knowledge that K.M. frequently used that door to leave the house unsupervised. Indeed, K.M. had previously been found by a neighbor after having escaped through the doggie door, which incident resulted in Moyes entering into a safety plan with DCS. Further, the house they resided in at the time was near a coal yard and a highway that had heavy truck traffic. Despite the fact that Moyes acknowledged the danger of a four-year-old wandering near those busy roads unsupervised, Moyes removed the lock that prevented K.M. from escaping.

[51] As it relates to D.K., not only did Moyes allow a seven-year-old child to walk to his bus stop several minutes away in sub-freezing temperatures, she was not even awake when D.K. left the house to ensure that he was properly dressed or accompanied by one of her older children. Further, Moyes was still asleep when D.K. walked back to the house after he believed he had missed the bus, only to be turned away by one of Moyes' children and told to walk back to the bus stop, again unaccompanied by an older child or properly dressed. It was only because of Willis' concern that D.K. was not forced to walk all the way to school in seven-degree weather wearing only a light jacket. Moyes has not presented compelling evidence portraying the nature of the offenses in a positive light.

[52] As to her character, the court explicitly rejected her claim that she was remorseful and regretful for her actions. Further, despite the repeated involvement of DCS and Moyes' entry into several different safety plans, she continued to fail to supervise her children and the child she cared for, which

reflects poorly on her character. Indeed, while we acknowledge that Moyes does not have an extensive criminal history, at the time of her sentencing hearing, Moyes was facing an additional fourteen counts of neglect of a dependent in a different cause number. Moyes has not demonstrated that her sentence is inappropriate in light of her character. We therefore affirm her sentence.

Conclusion

[53] The trial court did not abuse its discretion when it excluded testimony regarding Gilmour's termination from DCS. In addition, the State presented sufficient evidence to support both of Moyes' convictions. Further, the court did not abuse its discretion when it sentenced Moyes. And Moyes' sentence is not inappropriate in light of the nature of the offenses or her character. We affirm the trial court.

[54] Affirmed.

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