## MEMORANDUM DECISION





ATTORNEY FOR APPELLANT

Gregory L. Fumarolo
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Jacob F. Barnhart,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

April 13, 2023

Court of Appeals Case No. 22A-CR-1734

Appeal from the DeKalb Superior Court

The Honorable Adam C. Squiller, Judge

Trial Court Cause No. 17D01-2105-FA-1

**Memorandum Decision by Judge Tavitas**
Judges Vaidik and Foley concur.

**Tavitas, Judge.**

## Case Summary

[1] Jacob Barnhart appeals his convictions and sentences for two counts of child molesting, Class A felonies. Barnhart argues that: (1) the fifteen-year delay between the initial reporting of his offenses and his prosecution violated his due process rights; (2) the trial court abused its discretion by admitting evidence of other bad acts; (3) the evidence is insufficient to sustain his convictions; and (4) his sentence is inappropriate. Barnhart's arguments fail, and accordingly, we affirm.

## Issues

[2] Barnhart raises four issues, which we restate as:

I. Whether the delay between the initial reporting of Barnhart's offenses and his prosecution violated Barnhart's due process rights.

II. Whether the trial court abused its discretion by admitting evidence of Barnhart's other bad acts.

III. Whether the evidence is sufficient to sustain Barnhart's convictions.

IV. Whether Barnhart's ninety-year sentence is inappropriate in light of the nature of the offenses and Barnhart's character.

## Facts

[3] F.K. ("Mother") has two daughters, S.K., who was born in June 1995, and R.K., who was born in January 2000. Shortly after R.K.'s birth, Mother began a relationship with Barnhart, who was born in June 1970, and the relationship continued for approximately ten years.

[4] When S.K. was five or six years old, on "either the first day before school, [ ] the night before the first day of school, or very early on in the school year . . . ," Mother was at work, and S.K. was taking a bath. Tr. Vol. II pp. 135-36. Barnhart entered the bathroom, shut the door, and asked S.K. if her "pussy was clean." *Id*. at 136. Barnhart then asked if "he could check," spread S.K.'s legs, and "lick[ed] it twice." *Id.*

[5] On another evening while Mother was working, S.K. saw Barnhart watching a pornographic movie and saw Barnhart's erect penis. S.K. ran to her room and pretended to be asleep. Barnhart was calling for S.K. and entered S.K.'s bedroom. S.K. saw Barnhart's erect penis again, and Barnhart rubbed seminal fluid on S.K.'s lips. S.K. was "very scared" and quickly wiped the fluid off. *Id.* at 139. At that point, Mother arrived home, and Barnhart quickly left S.K.'s bedroom.

[6] In 2004, the children were removed from Mother's care and began living with their maternal grandmother ("Grandmother"). S.K. visited Mother at her apartment occasionally. During one of those visits, S.K. fell asleep on the living room floor. She woke to Barnhart pulling down her pants and placing his

hands in her underwear. Barnhart was "rubbing between the labia." *Id.* at 143. S.K. began to fight back, and Barnhart left.

[7] During another visit with Mother at Barnhart's family's residence in January 2006, Barnhart put R.K., who was five or six years old, on his bed and covered R.K.'s head with a pillow. Barnhart then "lick[ed]" R.K.'s vagina, rubbed his penis on the outside of R.K.'s vagina, and put his penis inside of her vagina. *Id.* at 163. R.K. stated that "it hurt so bad." *Id.* at 164.

[8] The next day, R.K. asked Grandmother to pick her up, and R.K. reported the assault to Grandmother. S.K. heard R.K.'s statements to Grandmother and told Grandmother, "It's true because he's done it to me for years." *Id.* at 144. Grandmother contacted law enforcement, and S.K. and R.K. were interviewed. R.K., however, had problems talking about the incident in front of men. The State declined to file charges against Barnhart.

[9] In 2012, Mother, who had moved away, contacted law enforcement again regarding the allegations. Law enforcement again investigated the allegations, and the State again declined to file charges against Barnhart.

[10] In December 2020, S.K., now an adult, contacted the Sheriff's Department regarding Barnhart's actions. In May 2021, the State charged Barnhart with: (1) Count I, child molesting, a Class A felony, for "knowingly or intentionally perform[ing] or submit[ting] to sexual intercourse or deviate sexual conduct" with S.K. "on or about 1/1/2000 to 12/31/2002"; and (2) Count II, child molesting, a Class A felony, for "knowingly or intentionally perform[ing] or

submit[ting] to sexual intercourse or deviate sexual conduct" with R.K. "on or about 1/1/2004 to 9/20/2005." Appellant's App. Vol. II pp. 25-26.

[11] In April 2022, the State filed a notice of intention to use "other bad acts" evidence and impeachment evidence. Appellant's App. Vol. II p. 91. The State's motion concerned the following evidence: (1) all sex acts by Barnhart against S.K. and R.K. to be "clarified with a *Baker* instruction"[1]; (2) sex acts against a third child charged in a separate case; (3) Barnhart battered Mother on January 4, 2003, because Mother confronted Barnhart about molesting S.K.; (4) Barnhart threatened Mother if she did not help him with the child molesting investigation, and Mother left Indiana; (5) Barnhart asked Mother if she would perform sexual acts with her son, whether she was attracted to young children, and whether Mother would "set him up with the minor daughters of a mutual friend"; and (6) Barnhart's 2017 fraud conviction. *Id.* at 91-92. After a hearing, the trial court entered the following on the Chronological Case Summary ("CCS"): "the Defendant has no objection to paragraph (1), paragraph (2) is not admissible, paragraphs (3), (4), and (5) shall be addressed in trial and ruled upon, and Defendant has no objection to paragraph (6)." *Id.* at 16.

[12] A jury trial was held in May 2022. The jury found Barnhart guilty as charged. The trial court discussed several aggravators, including: Barnhart's criminal history; the young age of the victims; Barnhart's position of trust with the

[1] *See Baker v. State*, 948 N.E.2d 1169 (Ind. 2011).

victims; Barnhart's threats of harm to the victims; the severe trauma suffered by the victims; and Barnhart's lack of remorse. The trial court sentenced Barnhart to forty-five years on each conviction to be served consecutively for an aggregate sentence of ninety years in the Department of Correction. Barnhart now appeals.

## Discussion and Decision

### *I. Delay in Prosecution*

[13] Barnhart argues that the fifteen-year delay between the initial reporting of the offenses in 2006 and the filing of charges in 2021 violated his Fifth Amendment rights to due process.[2] Our Supreme Court has held that, "[a]lthough the prosecution can exercise discretion on when to bring charges, that discretion is not unlimited." *Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016) (citing *Schiro v. State*, 888 N.E.2d 828, 834 (Ind. Ct. App. 2008), *trans. denied*). The United States Supreme Court has recognized that a pre-indictment delay in prosecution can result in a Due Process Clause violation. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 869, 102 S. Ct. 3440, 3447 (1982). "Although statutes of limitations often operate to prevent too much delay before criminal charges are brought, 'even where a charge is brought within the statute of limitations, the

[2] Although Barnhart mentions the Indiana Constitution, he makes no separate argument regarding the Indiana Constitution. Accordingly, Barnhart has waived any argument related to the Indiana Constitution. *See Abel v. State*, 773 N.E.2d 276, 278 n.1 (Ind. 2002) ("Because Abel presents no authority or independent analysis supporting a separate standard under the state constitution, any state constitutional claim is waived.").

particulars of the case may reveal that undue delay and resultant prejudice constitute a violation of due process.'" *Ackerman*, 51 N.E.3d at 189 (quoting *Patterson v. State*, 495 N.E.2d 714, 718 (Ind. 1986)). "Despite this, the passage of time alone is not enough to establish prejudice." *Id.* "If it were, then the Constitution would serve as a functional statute of limitation." *Id.*

> Rather, the defendant has the burden of proving that he suffered "actual and substantial prejudice to his right to a fair trial," and upon meeting that burden must then demonstrate that "the State had no justification for delay," which may be demonstrated by showing that the State "delayed the indictment to gain a tactical advantage or for some other impermissible reason."

*Id.* at 189-90 (quoting *Schiro*, 888 N.E.2d at 834).

[14] We note that Barnhart did not raise this argument to the trial court. In general, a claim that prosecution is untimely brought must be raised through a motion to dismiss. *See* Ind. Code § 35-34-1-4(a)(8) ("The court may, upon motion of the defendant, dismiss the . . . information upon any of the following grounds . . . (8) The prosecution is untimely brought."). "The failure to file a pre-trial motion to dismiss raising a constitutional challenge results in waiver of the issue on appeal." *Jackson v. State*, 165 N.E.3d 641, 645 (Ind. Ct. App. 2021) (citing *Payne v. State*, 484 N.E.2d 16, 18 (Ind. 1985)), *trans. denied*. Accordingly, Barnhart has waived the issue.

[15] Barnhart argues that he should be able to raise the issue because due process is a "fundamental constitutional right." Appellant's Br. p. 19. To the extent Barnhart is asserting a claim of fundamental error, we note that "[a]n error is

fundamental if it made a fair trial impossible or was a 'clearly blatant violation[] of basic and elementary principles of due process' that presented 'an undeniable and substantial potential for harm.'" *Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022) (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)).

[16] The charges here were filed within the statute of limitations, which allows a prosecution for child molesting to be commenced before the victim reaches thirty-one years of age. *See* Ind. Code § 35-41-4-2(e). The victims here were in their twenties when the charges were filed. Accordingly, Barnhart had the burden of proving that he suffered "actual and substantial prejudice to his right to a fair trial." *Ackerman*, 51 N.E.3d at 189. If Barnhart met that burden, he then had the burden of demonstrating that the State had no justification for the delay. Barnhart, however, failed to meet his burden.

[17] Barnhart points to no prejudice from the delay of filing charges. For example, Barnhart identifies no witnesses or evidence that he was unable to present as a result of the delay. Moreover, because Barnhart did not raise this issue below, no record was made regarding the reasons for the prosecutor's delay in filing charges. Accordingly, we are left with merely speculation as to the prosecutor's reasoning. Barnhart has failed to demonstrate a due process violation, much less fundamental error.

### *II. Admission of Evidence*

[18] Barnhart next challenges the trial court's admission of certain testimony. In particular, Barnhart challenges the admission of S.K.'s testimony regarding: (1)

other molestations of S.K. by Barnhart; (2) Barnhart's battery of Mother; and (3) Barnhart's methamphetamine usage.

[19] We ordinarily review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018) (citing *Williams v. State*, 43 N.E.3d 578, 581 (Ind. 2015)). In those instances, we will reverse only if a ruling is "clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014). "The effect of an error on a party's substantial rights turns on the probable impact of the impermissible evidence upon the jury in light of all the other evidence at trial." *Gonzales v. State*, 929 N.E.2d 699, 702 (Ind. 2010).

[20] We note that Barnhart failed to object to some of S.K.'s challenged statements. Where "a defendant fails to object to an instruction, he waives appellate review." *Miller*, 188 N.E.3d at 874. We may still review the admission of such evidence for fundamental error, but, again, an error is only fundamental "if it made a fair trial impossible or was a 'clearly blatant violation[ ] of basic and elementary principles of due process' that presented 'an undeniable and substantial potential for harm.'" *Id.* (quoting *Clark*, 915 N.E.2d at 131).

### *A. Other Molestations of S.K.*

[21] After S.K. testified regarding Barnhart's molestation of her during her bath, the State asked her about other times that Barnhart molested her. At trial, Barnhart objected and claimed that the evidence was inadmissible under Indiana Code

Section 35-37-4-15 and Indiana Evidence Rule 403. The trial court overruled the objection and allowed a continuing objection. S.K. then testified regarding the incident in which Barnhart rubbed seminal fluid on her lips and the incident in which Barnhart rubbed his finger "between [her] labia." Tr. Vol. II p. 143.

[22] On appeal, Barnhart briefly argues that the testimony was inadmissible under Indiana Code Section 35-37-4-15, Indiana Evidence Rule 403, and Indiana Evidence Rule 404(b). Barnhart, however, did not raise an objection at trial based on Evidence Rule 404(b). "A defendant may not raise one ground for objection at trial and argue a different ground on appeal." *Small v. State*, 736 N.E.2d 742, 747 (Ind. 2000). Accordingly, Barnhart's Rule 404(b) argument is waived.

[23] As for Indiana Code Section 35-37-4-15, this Court has twice held that the statute is a nullity. *See Day v. State*, 643 N.E.2d 1, 2 (Ind. Ct. App. 1994) ("[T]his statute is a nullity since it conflicts with the common law rules of evidence."); *Brim v. State*, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) (stating that Indiana Code Section 35-37-4-15 "conflicts with the rule adopted in *Lannan* [*v. State*, 600 N.E.2d 1334 (Ind. 1992) ] [and] would also appear to be a nullity"), *trans. denied*. Accordingly, Barnhart's argument regarding Indiana Code Section 35-37-4-15 fails.

[24] We are left with Barnhart's argument regarding Evidence Rule 403, which provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair

prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

[25] The State argues that the evidence of Barnhart rubbing his finger between S.K.'s labia was evidence directly supporting Count I, not evidence of an uncharged act.[3] The State points out that both the licking incident and the rubbing incident could support the conviction for Class A felony child molesting of S.K.[4] We agree with the State. *See* Issue III, *supra* (discussing the relevant statutory authority and definitions). S.K.'s testimony regarding the rubbing incident was highly probative of the Class A felony child molesting charge, and the probative value of this evidence was not substantially outweighed by the danger of prejudice. Accordingly, Barnhart's Evidence Rule 403 argument fails.

---

[3] Although the rubbing incident occurred outside of the date range listed in the charging information, generally, time is not of the essence in child molesting prosecutions. *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). "The exact date becomes important only in limited circumstances, including the case where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Id.* Both incidents occurred well before S.K. turned fourteen years of age.

[4] In *Baker*, 948 N.E.2d at 1177, our Supreme Court held:

> [T]he State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.

Pursuant to *Baker*, the trial court instructed the jury as follows:

> The State has presented evidence that the Defendant may have committed more than one act of child molesting against S.K. between January 1, 2000 and December 31, 2002. Before you may find the Defendant guilty, you must all unanimously find and agree that the State proved beyond a reasonable doubt the Defendant committed the same specific, single act of child molesting against S.K. between January 1, 2000 and December 1, 2002.

Appellant's App. Vol. II p. 131; *see also* Tr. Vol. II p. 237.

[26] As for the incident in which Barnhart rubbed seminal fluid on S.K.'s lips, Barnhart barely mentions this incident on appeal and makes no argument explaining how this testimony was irrelevant, how the probative value was substantially outweighed by the danger of prejudice, or how he was prejudiced at all. Even if the trial court erred by admitting this evidence, we conclude that any error was harmless given the brief mention of this incident and the substantial other testimony that supported the convictions. *See, e.g., Richardson v. State*, 189 N.E.3d 629, 635 (Ind. Ct. App. 2022) (noting that "[t]he improper admission is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction") (quoting *Hoglund v. State*, 962 N.E.2d 1230, 1238) (Ind. 2012)).

### *B. Domestic Battery of Mother*

[27] S.K. testified that Barnhart became "extremely angry" with Mother and was "bashing [Mother's] head against the wall." Tr. Vol. II p. 141. Barnhart objected, and the trial court sustained the objection. The trial court then directed the jury to disregard S.K.'s last statement about Barnhart hitting Mother's head against the wall. The evidence at issue was stricken by the trial court. "We presume the jury followed the trial court's admonishment and that the excluded testimony played no part in the jury's deliberation." *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). Accordingly, Barnhart has failed to demonstrate an abuse of discretion regarding this testimony.

### *C. Methamphetamine Use*

[28] S.K. testified that the children were "removed from [Mother's] care when they were [ ] busted for the methamphetamine charge." Tr. Vol. II p. 142. Barnhart did not object to this testimony and, thus, must demonstrate fundamental error.

[29] Even if we assume that the admission of this testimony was erroneous, we conclude that any error was harmless and did not result in fundamental error. "In general, the admission of evidence that is merely cumulative of other evidence amounts to harmless error as such admission does not affect a party's substantial rights." *Richardson v. State*, 189 N.E.3d 629, 636 (Ind. Ct. App. 2022). In addition to S.K.'s challenged testimony, S.K. also testified: "We were removed from my mother's care when I was [ ] about nine, ten years old. . . . [T]hey had a large meth lab in our basement, and they were busted for it basically." Tr. Vol. II p. 130. Barnhart did not object to this testimony, and he makes no argument regarding this testimony on appeal. The challenged testimony was merely cumulative of S.K.'s other testimony, which Barnhart does not challenge on appeal. Moreover, S.K.'s passing reference to "they" being arrested for possessing methamphetamine does not even specifically mention Barnhart. Under these circumstances, Barnhart has failed to demonstrate fundamental error.

## *III. Sufficiency of the Evidence*

[30] Next, Barnhart challenges the sufficiency of the evidence to support his convictions. Sufficiency of evidence claims "warrant a deferential standard, in

which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262 (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* at 263. We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[31] At the time of Barnhart's offenses, Indiana Code Section 35-42-4-3(a) provided: "A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting[.]" The offenses were Class A felonies if "committed by a person at least twenty-one (21) years of age." Ind. Code § 35-42-4-3(a)(1). Indiana Code Section 35-41-1-9 defined deviate sexual conduct as "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." A finger is an

object for purposes of the child molesting statute. *Seal v. State*, 105 N.E.3d 201, 209 (Ind. Ct. App. 2018), *trans. denied*. Moreover, "the female sex organ includes the external genitalia and . . . the slightest penetration of the female sex organ constitutes child molesting." *Id.*

[32] Barnhart argues that the evidence is insufficient to sustain his conviction in Count II because the incident involving R.K. occurred in January 2006, which is outside the date range in the charging information. The charging information for Count II alleged that Barnhart "knowingly or intentionally perform[ed] or submitt[ed] to sexual intercourse or deviate sexual conduct" with R.K. "on or about 1/1/2004 to 9/20/2005." Appellant's App. Vol. II p. 26. The evidence, however, demonstrated that the incident occurred in January 2006. Although the incident occurred outside of the date range listed in the charging information, generally, time is not of the essence in child molesting prosecutions. *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). "The exact date becomes important only in limited circumstances, including the case where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Id.* The January 2006 incident occurred well before R.K. turned fourteen years of age. The deviation in the dates alleged in the charging information and the evidence presented at trial does not impact the sufficiency of the evidence to support the conviction.

[33] Barnhart also contends that the evidence is insufficient to sustain his convictions because: (1) R.K. was not examined and no evidence was gathered from the scene; (2) no other witnesses corroborated R.K.'s and S.K.'s accounts;

and (3) the delay in prosecution "might indicate a lack of credibility in the statements of the alleged victims and/or no other evidence to support their claims." Appellant's Br. p. 26. Barnhart's arguments are merely requests that we reweigh the evidence or judge the credibility of the witnesses, which we cannot do.

[34] The State presented evidence that, when S.K. was five or six years old and taking a bath, Barnhart asked S.K. if her "pussy was clean." Tr. Vol. II p. 136. Barnhart then asked if "he could check," spread S.K.'s legs, and "lick[ed] it twice." *Id.* After the children were removed from Mother's care in 2004, S.K. was visiting Mother and fell asleep on the living room floor. She woke to Barnhart pulling down her pants and placing his hands in her underwear. Barnhart was "rubbing between the labia." *Id.* at 143. In January 2006, Barnhart put R.K., who was five or six years old, on his bed and covered R.K.'s head with a pillow. Barnhart then "lick[ed]" R.K.'s vagina, rubbed his penis on the outside of R.K.'s vagina, and put his penis inside of her vagina. *Id.* at 163. R.K. testified that "it hurt so bad." *Id.* at 164.

[35] Thus, for Count I, the State presented evidence that Barnhart, who was over the age of twenty-one, performed an act involving his mouth and S.K.'s sex organ and that Barnhart performed an act involving the penetration of S.K.'s sex organ by an object—Barnhart's finger, when S.K. was under the age of fourteen. For Count II, the State presented evidence that Barnhart, who was over the age of twenty-one, had sexual intercourse with R.K., who was under

the age of fourteen. We conclude that the evidence is sufficient to sustain Barnhart's convictions.

### *IV. Sentencing*

[36] Finally, Barnhart 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 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."[5] 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 v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). 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) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[5] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Ind. Ct. App. 2021) (Tavitas, J., concurring in result).

[37] "'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 v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). 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).

[38] The maximum possible sentence here was fifty years for a Class A felony, *see* Indiana Code Section 35-40-2-4, and the trial court imposed consecutive forty-five-year sentences for an aggregate of ninety years. Barnhart, however, argues that the trial court should have imposed a presumptive sentence of thirty years.

[39] Our analysis of the "nature of the offense" requires us to look at the nature, extent, heinousness, and brutality of the offense. *See Brown v. State*, 10 N.E.3d 1, 5 (Ind. 2014). We may also consider whether the offender "was in a position of trust" with the victim. *Pierce v. State*, 949 N.E.2d 349, 352 (Ind. 2011). Barnhart acknowledges that the offenses for which he was sentenced were "senseless and reprehensible." Appellant's Br. p. 29. Barnhart, however, argues that the duration of time for the offenses was "very short" and were

"typical offense[s]." We disagree. Barnhart molested two very young girls, and he was in a position of trust with the children. S.K. testified at sentencing regarding the life-long impact on her and R.K. S.K. further testified that she takes medications because she "used to force [her]self to stay awake because [she] would have dreams of being raped and molested every single night." Tr. Vol. III p. 3. The nature of the offense does not warrant a reduction in Barnhart's sentence.

[40] Our analysis of the character of the offender involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See Harris v. State*, 165 N.E.3d 91, 100 (Ind. 2021); *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020). 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. *Pierce*, 949 N.E.2d at 352-53; *see also 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*).

[41] Barnhart's criminal history includes convictions for intimidation, a Class D felony, which was later reduced to a Class A misdemeanor; visiting a common nuisance, a Class B misdemeanor; two convictions for possession of marijuana, Class A misdemeanors; possession of paraphernalia, a Class A misdemeanor;

driving while suspended, a Class A misdemeanor; public intoxication, a Class B misdemeanor; domestic battery, a Level 6 felony; possession of methamphetamine, a Level 6 felony; and fraud, a Level 6 felony. Barnhart had multiple probation revocations. Barnhart also had pending charges for child molesting, a Level 1 felony, regarding a third child, and possession of marijuana, a Class B misdemeanor.

[42] S.K. testified that Barnhart was a very violent person. The trial court noted that Barnhart showed no remorse and stated, "There were times when you appeared to find the testimony of these now adult women that you traumatized to be amusing, which is a reaction that I find speaks volumes about your character." Tr. Vol. III p. 9. Barnhart's character, thus, does not warrant a reduction in his sentence. Barnhart's sentence is not inappropriate in light of the nature of the offenses and his character.

## Conclusion

[43] The delay between the initial reporting of the offenses and the filing of charges did not violate Barnhart's due process rights. Barnhart's arguments regarding the admission of parts of S.K.'s testimony fails. Moreover, the evidence is sufficient to sustain his convictions, and his sentence is not inappropriate. Accordingly, we affirm.

[44] Affirmed.

Vaidik, J., and Foley, J., concur.