

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Robert R. Romero, Jr.,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 4, 2024

Court of Appeals Case No.
23A-CR-1888

Appeal from the Allen Superior Court
The Honorable David M. Zent, Judge

Trial Court Cause No.
02D06-2106-F1-12

Memorandum Decision by Judge Bailey
Judges Crone and Pyle concur.

Bailey, Judge.

Case Summary

- [1] Following a two-day jury trial, Robert Romero was found guilty of one count of Level 1 felony child molesting¹ and one count of Level 4 felony child molesting² and was sentenced to an aggregate executed forty-five-year sentence. Romero raises two issues on appeal, which we restate as: (1) whether the trial court, in the course of jury voir dire, denied him the right to a fair trial before an impartial jury, and (2) whether his sentence is inappropriate based on the nature of the offenses and his character. Concluding that he was not denied a fair trial before an impartial jury and his sentence is not inappropriate, we affirm.

Facts and Procedural History

- [2] S.R. is D.R.'s youngest child.³ In June 2011, Romero met D.R. at their place of employment, and they soon entered into a romantic relationship. In November, Romero moved in with D.R. and S.R. Romero and D.R. married

¹ Ind. Code § 35-42-4-3(a)(1).

² I.C. § 35-42-4-3(b).

³ D.R. also has two adult daughters and one deceased son.

in April 2012.⁴ In October 2017, Romero adopted S.R. At the time of the adoption, the family lived together in Fort Wayne, Indiana.

[3] During her marriage to Romero, D.R. worked as a certified nursing assistant. She usually worked the third shift, from 10:00 p.m. to 6:00 a.m., five days each week and every other weekend. Romero stopped working in 2015 and began receiving disability benefits. Romero cared for S.R. while D.R. was at work.

[4] Romero, then forty-eight years old, began sexually abusing S.R. in 2012, when she was five years old. Romero told S.R. that he had a “third leg” that had been mostly “burnt off,” and he asked S.R. if she wanted to see it. (Tr. Vol. II, p. 201.) S.R. eventually learned that what Romero called his “third leg” was his penis. (*Id.*) “Almost every day” until S.R. was “[e]leven, twelve, maybe thirteen” years old, Romero told S.R. to kiss his penis, put her mouth on his penis, and put his penis in her mouth. (*Id.* at 202, 207.) He also made S.R. use her hand to masturbate him, and he put his hands under her shirt and fondled her breasts. Romero, at times, would ejaculate while making S.R. fellate and masturbate him.

[5] Romero abused S.R. when D.R. was either at work or home asleep. The abuse occurred while Romero and S.R. sat on the couch watching movies in the living room and in S.R.’s bedroom when Romero tucked her in at bedtime. Romero

⁴ The marriage was dissolved in June 2022.

told S.R. that if she “ever told [her] mother[, D.R., about the abuse,] it would cause [S.R.] and [Romero] to get in trouble.” (*Id.* at 202.)

[6] When S.R. was in the seventh grade and around twelve years old, her mental health declined, and she began engaging in self-harm—using a knife and razors to cut her arm. In the fall of 2020, at the start of her eighth-grade school year, S.R. told her best friend, M.B., that Romero had been sexually abusing her. S.R. asked M.B. not to tell anyone because she “wasn’t ready to tell anyone else.” (*Id.* at 212.) About a week or two later, S.R. contacted a suicide-prevention hotline and disclosed the sexual abuse. The hotline alerted the Department of Child Services (“DCS”), and DCS sent a case worker to S.R.’s home to speak with her about the abuse. That same day, S.R. participated in a forensic interview at a local child advocacy center. She disclosed during the interview that Romero had molested her.

[7] On December 9, 2020, Romero was interviewed by the police, after agreeing to provide a voluntary statement. He denied the allegations that he had molested S.R., but he admitted to an incident “about kissing on the lips.” (Tr. Vol. III, p. 129.) On June 24, 2021, the State charged Romero with one count of Level 1 child molesting and one count of Level 4 child molesting. Romero’s jury trial began on June 6, 2023.

[8] During the voir dire process, the trial court asked the prospective jurors, “Do any of you . . . feel that a person who has been arrested is probably guilty or else he or she would not have been arrested?” (Tr. Vol. II, at 74.) Juror 50 replied,

“If I could kill that motherf***er, I would. I’m a victim of child sexual abuse.”

(*Id.*) The trial court told Juror 50 not to swear in court, and the following exchange occurred:

[JUROR 50]: I’m also impartial [sic] because apparently the person who was abused is a transgender individual, [sic] I am also transgender.

[COURT]: Okay.

[JUROR 50]: I cannot be fair.

[COURT]: Okay.

[JUROR 50]: Yep.

[COURT]: That’s fine. Thank you for your honesty.

[JUROR 50]: Yep.

[COURT]: And please don’t be surprised if nobody asks you any questions.

[JUROR 50]: Okay.

(*Id.* at 75.) Later in the voir dire process, the trial court asked the prospective jurors if they, or anyone close to them, had been the victim of a crime. The court then asked Juror 50 if the “same answer you said earlier” applied. (*Id.* at 80.) The juror replied, “Yep.” (*Id.*)

[9] The deputy prosecutor did not ask Juror 50 any questions during voir dire, instead stating to Juror 50: “[Y]ou’ve made your position and your thoughts very clear, I’m not going to make you talk about that anymore[.] [S]o I’m not ignoring you, but I am going to skip past you during [j]ury selection[.]” (*Id.* at 83.) However, in response to a broad question posed by the deputy prosecutor to the prospective jurors about “any questions, concerns, anything of importance to you that we haven’t addressed so far today,” Juror 50 volunteered, “I would really like to stop hearing about child abuse today.” (*Id.* at 99.) The deputy prosecutor replied, “That’s one of the reasons we’re not asking you any questions[.]” (*Id.*)

[10] After Romero’s counsel had questioned the panel of prospective jurors, Juror 50 and seven other prospective jurors from that panel were excused. Four jurors from the panel were selected to serve. Three additional panels of prospective jurors were questioned before a final jury was selected and impaneled.

[11] At the conclusion of the trial on June 7, 2023, the jury found Romero guilty as charged. On July 17, following a sentencing hearing, the court imposed an aggregate executed forty-five-year sentence. Romero now appeals.

Discussion and Decision

I. Voir Dire

[12] Romero argues that the trial court denied him the right to a fair trial before an impartial jury. The Federal and Indiana Constitutions guarantee the right to an

impartial jury. *Ramirez v. State*, 7 N.E.3d 933, 936 (Ind. 2014). The function of voir dire is to ascertain whether jurors can render “a fair and impartial verdict in accordance with the law and the evidence.” *Von Almen v. State*, 496 N.E.2d 55, 59 (Ind. 1986).

[13] Romero contends that he should be provided a new trial because Juror 50’s remark during voir dire that they would like to “kill that mother***er” was “so patently inappropriate and inflammatory” that it tainted the entire jury pool and “shift[ed] the presumption of innocence to one of guilt[.]” (Appellant’s Br. at 7, 10.) Romero maintains that the “only valid remedy” was for the trial court to declare a mistrial and impanel a new jury because “[e]very juror in that courtroom, presumably, heard what Juror 50 said and was influenced by it.” (*Id.* at 10, 11.)

[14] We note that Romero did not object when the juror made the remark, and he did not request action by the trial court. Therefore, he has waived this issue for our review. *See Miller v. State*, 623 N.E.2d 403, 412 (Ind. 1993) (noting that failure to object to the manner in which the jury was chosen resulted in waiver); *see also Bardonner v. State*, 587 N.E.2d 1353, 1357 n.4 (Ind. Ct. App. 1992) (noting that the proper method to raise a challenge during voir dire is “a motion to strike or discharge the jury panel or [to] challenge the array”), *trans. denied*.

[15] Acknowledging that he did not raise this argument to the trial court by objecting below, Romero argues that the juror’s remark and its effect on the jury pool amounted to fundamental error. Fundamental error is an extremely

narrow exception to the waiver doctrine that applies only when the error constitutes a blatant denial of basic due process principles that makes it impossible to receive a fair trial. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). A matter rising to the level of fundamental error is a matter that the trial court has a sua sponte duty to correct. *Id.*

[16] In this case, Romero has not demonstrated that Juror 50’s remark deprived him of a fair trial before an impartial jury. Following the impertinent remark, the trial court immediately cautioned Juror 50 not to swear and then confirmed that the juror could not remain impartial. Juror 50’s unfortunate remark was not repeated, and the juror was not questioned again by counsel or the trial court. After counsel had finished questioning the jury panel, Juror 50 and seven other prospective jurors were excused from that panel—including a juror who expressed that they had presumed Romero was guilty simply because Romero had been charged with a crime. While four jurors from that panel were selected to serve, the balance of the jury was selected from panels of prospective jurors who were questioned after Juror 50 had been excused.

[17] In addition, during preliminary instructions, the trial court instructed the impaneled jury regarding the State’s burden of proof in the case, stating that the “State has the burden of proving the defendant guilty beyond a reasonable doubt”; “a person charged with a crime is presumed innocent”; and “the fact that charges have been filed, the defendant arrested, and brought to trial, is not to be considered . . . as any evidence of guilt.” (Tr. Vol. II, p. 183.) After closing arguments, the trial court reminded the jury of the State’s burden of

proof. *See Deaton v. State*, 999 N.E.2d 452, 455 (Ind. Ct. App. 2013) (holding, any error that occurred during voir dire “was cured by the multiple reminders of the proper burden of proof and any error was therefore not fundamental”), *trans. denied*. And when the jury is properly instructed, we will presume they followed such instructions. *Weisheit v. State*, 26 N.E.3d 3, 20 (Ind. 2015) (quotation marks and citations omitted).

[18] Romero has failed to establish that Juror 50’s remark during voir dire had the effect of tainting the jury and shifting the presumption of innocence to that of guilt. Therefore, Romero was not denied a fair trial before an impartial jury. No error—fundamental or otherwise—occurred.

II. Inappropriate Sentence

[19] Romero next argues his forty-five-year aggravated sentence is inappropriate based on the nature of the offenses and his character. Our standard of review regarding such claims is well-settled. Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Sentencing decisions rest within the discretion of the trial court and, as such, should receive considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). “Such deference 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).

[20] The defendant bears the burden of demonstrating his sentence is inappropriate under the standard, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors in the record for such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). Ultimately, “whether we regard a sentence as [in]appropriate 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 factors that come to light in a given case.” *Cardwell*, 895 N.E.2d at 1224. In conducting our review, we focus on a defendant’s aggregate sentence rather than the number of counts, the length of the sentence on any individual count, or whether the individual sentences are consecutive or concurrent. *Id.* at 1225.

[21] Regarding Romero’s offenses, a person who commits a Level 1 felony child-molesting offense described in Indiana Code section 35-42-4-3(a)(1) (that is, the defendant is at least twenty-one years old and the victim is less than fourteen years old) shall be imprisoned for a fixed term of between twenty and fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(c). A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. Here, the trial court sentenced Romero to thirty-five years for the Level 1 felony and ten years for the Level 4 felony and ordered the sentences to be served consecutively. Romero’s forty-five-year sentence is

above the advisory term but less than the sixty-two-year maximum term the trial court could have imposed.

[22] On appeal, Romero does not claim his sentence is inappropriate because of the nature of the offenses. He concedes that the nature of the offenses is “egregious.” (Appellant’s Br. at 12.) Romero used deception to get his adopted daughter to touch his penis. He then continued to abuse her, “[a]lmost every day” for seven years by placing his penis in her mouth; forcing her to masturbate him; fondling her breasts; and ejaculating while forcing her to fellate or masturbate him. (Tr. Vol. II, p. 207.) S.R. was five years old when the abuse began, which is well below the statutory limit of fourteen years. Also, Romero—S.R.’s father by choice as well as her caregiver—was in a position of trust over S.R.

[23] In addition, the abuse that S.R. suffered at the hands of Romero had a severe impact on her. S.R. told the trial court at sentencing that “[e]motionally and mentally” Romero had “ruined [her] entire life,” strained her relationship with her family, and “destroyed [her] only chance . . . at being a normal kid.” (Tr. Vol. III, p. 174.) S.R.’s half-sister informed the court that S.R. now suffers from “[PTSD], severe anxiety, severe clinical depression, and body dysmorphia.” (*Id.* at 175.) The sister added that Romero “made [S.R.] so uncomfortable to be in her own body[] that she would try to quote, “cut out the dirtiness.”” (*Id.* at 177.) S.R.’s mother told the court that Romero “took away [the] relationship [she had with S.R.] . . . and now we have to rebuild it[.]” (*Id.* at 179.)

[24] Regarding his character, Romero claims his sentence is inappropriate because the offenses for which he was convicted are “unlikely to occur again”; he is at an “advanced age” and suffers from “diminished mental capacity”; he no longer lives with the victim; “it is unreasonable to believe, based upon his mental and physical condition, that he will be entrusted with the care of a child again”; and it is “unlikely something of this nature could ever happen again” because he lived in an assisted care facility in April 2021, after D.R. had filed for divorce. (Appellant’s Br. at 13.) He also claims that his criminal history is limited to misdemeanor offenses, and no executed sentences were imposed for those crimes.

[25] In examining a defendant’s character, one relevant factor is his or her criminal history, the significance of which “varies based on the gravity, nature, and number of prior offenses in relation to the current offense.” *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Romero’s criminal history is comprised of two prior misdemeanor convictions for crimes that occurred in Texas—one in 1993 for the unlawful carrying of a weapon and one in 2005 for deadly conduct. And while Romero’s criminal history is limited, this court has held that “[e]ven a minor criminal record reflects poorly on a defendant’s character[.]” *Reis*, 88 N.E.3d at 1105.

[26] Also, Romero’s sexual abuse of his adopted daughter demonstrates his poor judgment and character. Romero abused his position of trust with respect to S.R. who was in his care, custody, and control at the time of the incidents. *See Garner v. State*, 7 N.E.3d 1012, 1016 (Ind. Ct. App. 2014) (declining to revise a

defendant’s sentence because his “abuse of his position of trust was demonstrative of his lack of character.”). And Romero threatened S.R. not to tell her mother what Romero had done.

[27] In sum, Romero has failed to persuade this Court that his sentence is inappropriate in light of the offenses and his character. We decline to revise his sentence pursuant to Appellate Rule 7(B).⁵

Conclusion

[28] The trial court did not deny Romero his right to a fair trial before an impartial jury, and his sentence is not inappropriate based upon the nature of the offenses and his character.

[29] Affirmed.

Crone, J., and Pyle, J., concur.

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⁵ Romero also argues that when the trial court imposed an aggravated sentence, it “failed to give proper weight to the circumstances and mitigators” he presented at sentencing. (Appellant’s Br. at 12-13.) However, Romero’s argument fails because he cannot challenge the weight the trial court assigned to the mitigating circumstances under current law. Our Supreme Court’s decision in *Anglemyer v. State* made it clear that “the trial court no longer has any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence, . . . [and] a trial court can[not] now be said to have abused its discretion in failing to ‘properly weigh’ such factors.” 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218.

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