MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph D. Cole,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 30, 2023

Court of Appeals Case No. 21A-CR-837

Appeal from the Orange Circuit Court

The Honorable Steven L. Owen, Judge

Trial Court Case No. 59C01-1909-F4-621

Memorandum Decision by Senior Judge Shepard
Judges Bradford and Foley concur.

Shepard, Senior Judge.

[1] A jury determined Joseph D. Cole was guilty of two counts of Level 1 felony child molesting[1] resulting from his sexual misconduct with his daughter and her half-sister. Cole appeals his convictions and his one-hundred-year sentence. We affirm.

Facts and Procedural History

[2] On the night of August 31, 2019, seven-year-old So.C. (a girl), five-year-old K.H. (a girl), and thirteen-year-old Sc.C. (a boy) were at the home of their "Nana," Annette Moon. Tr. Vol. 3, p. 70. Moon's son, Cole, was also present. So.C. and Sc.C. are Cole's biological children. K.H. and So.C. have the same mother, and K.H. thought of Cole as a father figure after her biological father had passed away. Cole likewise treated K.H. like a daughter.

[3] At bedtime, Cole, and all three children got into bed together. Sc.C. was on one side of the bed, closest to a wall. So.C. was next to him, and K.H. was next to her, with Cole next to K.H., on the opposite side of the bed from Sc.C.

[4] After about an hour, So.C. heard Cole tell K.H. to "suck his private." *Id.* at 75. Sc.C. also heard Cole tell K.H. to "suck it and lick it." *Id.* at 107. In addition, Sc.C. heard Cole tell K.H. his name was Josh, the name of K.H.'s mother's boyfriend. After a moment, Sc.C. heard K.H. crying, and she got up and ran to the end of the bed. Next, Sc.C. heard Cole say, "he . . . didn't feel it and to do

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[1] Ind. Code § 35-42-4-3 (2015).

it again." *Id.* at 109. Instead, K.H. climbed into the bed next to Sc.C., who had been facing the wall.

[5] When Sc.C. turned over, he saw Cole pull So.C. closer to him. Next, he felt the bed shaking, and he saw Cole "hump" So.C. *Id.* at 110. So.C. felt Cole "put his private in [hers]." *Id.* at 73. So.C. explained she felt the skin of his "private" on hers, but it did not go all the way in. *Id.* at 74-75. Cole tried several times to fully insert his penis in her vagina, ultimately without success. Sc.C. heard Cole order So.C. to "spread her vagina and stick her butt up in the air or he was going to shove something up there that she would never forget." *Id.* at 111.

[6] Next, Sc.C. pulled off the cover and turned on a light. He saw an "awful" look on So.C.'s face. *Id.* Cole and So.C. were naked from the waist down. So.C. put her pants on, and Sc.C. took the girls into the living room, where Moon appeared and asked them what happened. Moon took the children into her bedroom after Sc.C. explained. Cole entered Moon's room and accused Sc.C. of "making up stories." *Id.* at 112.

[7] The children stayed in Moon's room for the rest of night. The next day, the girls' mother picked up the children and took them to her house, where someone called the police. Two days later, the children met with a forensic child examiner, who questioned them about the abuse allegations. So.C. disclosed during her interview she had experienced sexual abuse. K.H. was

rescheduled for a second interview because she was not ready to talk. During the second interview, K.H. disclosed she had also experienced sexual abuse.

[8] Next, Cole agreed to be questioned by a detective and an employee of the Indiana Department of Child Services at a DCS office. DCS recorded the interview. Cole first claimed he did not remember anything, noting he had been drinking. He also claimed he had a history of engaging in sexual conduct while asleep and not remembering any of it.

[9] Later in the interview, Cole said Sc.C. would not allege wrongdoing "if something didn't happen." Tr. Vol. 3, p. 222. He also stated he remembered waking up with his penis exposed. Cole agreed it was "possible" he had tried to have sex with one of his daughters. *Id.* at 234. He then agreed he touched "the vagina area" of one of the girls and rubbed his penis on both of their "behinds." *Id.* at 238.

[10] The State charged Cole with two counts of child molesting, both as Level 4 felonies. Later, the State amended the charging information to add two counts of child molesting as Level 1 felonies.

[11] At trial, the State offered as evidence the audio and video recording of Cole's interview. The court accepted the exhibit, over Cole's objection, and played it for the jury in a redacted form, subject to an admonition we discuss below.

[12] The jury determined Cole was guilty of all four counts. The trial court entered a judgment on the jury's verdict but later vacated both Level 4 felony

convictions on double jeopardy grounds. The court sentenced Cole to the maximum term of fifty years for each Level 1 felony conviction, to be served consecutively, for a total sentence of one hundred years. This appeal followed.

Issues

[13] Cole raises three issues, which we restate as:

I. Whether there is sufficient evidence to sustain the convictions.

II. Whether the trial court erred by admitting into evidence the recording of Cole's interview.

III. Whether Cole's sentence is inappropriate in light of the nature of the offenses and his character.

Discussion and Decision

I. The Evidence Is Sufficient

[14] We neither reweigh the evidence nor judge the credibility of witnesses when reviewing claims of insufficient evidence. *Wisneskey v. State*, 736 N.E.2d 763 (Ind. Ct. App. 2000). Rather, we look to the evidence and reasonable inferences drawn from it in support of the judgment. *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002), *trans. denied*. We will affirm the conviction if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id*.

[15] To convict Cole of two counts of Level 1 felony child molesting as charged, the State was required to prove beyond a reasonable doubt (1) Cole, (2) a person over twenty-one years old, (3) knowingly or intentionally (4) performed or

submitted to other sexual conduct (5) with K.H. (for Count III) or So.C. (for Count IV), (6) a child under fourteen years old. Ind. Code § 35-42-4-3; Appellant's App. Vol. II, pp. 86-87. "Other sexual conduct" is defined as an act involving "a sex organ of one (1) person and the mouth or anus of another person; or . . . the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-221.5 (2014).

[16] Cole claims there is a "complete lack of evidence" showing he engaged in "other sexual conduct" with K.H. Appellant's Br. p. 18. We disagree. So.C. heard Cole tell K.H. to "suck his private." Tr. Vol. 3, p. 75. Sc.C. also heard Cole tell K.H. to "suck it and lick it." *Id.* at 107. Sc.C. next heard K.H. crying, and she ran to the end of the bed. Cole then said "he . . . didn't feel it and to do it *again*." *Id.* at 109 (emphasis added). K.H. later disclosed to a forensic child examiner she had experienced sexual abuse. This is sufficient evidence from which a finder of fact could determine beyond a reasonable doubt Cole induced K.H. to put her mouth on his penis.

[17] As for the charge involving So.C., Cole again claims there is no evidence he engaged in "other sexual conduct" as defined by statute and the charging information. Instead, he notes, the State's evidence appeared to show he put his penis in So.C.'s vagina, which is a different aspect of the offense of child molesting. *See* Ind. Code § 35-42-4-3 (defining child molesting in the alternative as requiring a child to perform or submit to "sexual intercourse" or "other sexual conduct"); Ind. Code § 35-31.5-2-302 (2012) (defining "sexual intercourse" as an act including "any penetration of the female sex organ by the

male sex organ"). He concludes the State charged him under the wrong portion of the child molesting statute and should be held responsible for its failure to provide evidence to support the offense as described in the charging information. In response, the State says Cole is, in essence, arguing there was a variance between the charged offense and the evidence presented at trial. The State further contends any variance does not require reversal of the jury's verdict. We agree with the State.

[18] "'A variance is an essential difference between the pleading and the proof.'" *Mitchem v. State*, 685 N.E.2d 671, 677 (Ind. 1997) (quoting *Madison v. State*, 234 Ind. 517, 531, 130 N.E.2d 35, 41 (1955)). Not all variances require reversal. *Hall v. State*, 791 N.E.2d 257 (Ind. Ct. App. 2003). We determine whether a variance requires reversal by considering:

> (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby;
>
> (2) will the defendant be protected in [a] future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Wessling v. State, 798 N.E.2d 929, 937 (Ind. Ct. App. 2003).

[19] The evidence and information Cole received before trial reasonably should have notified him the State would attempt to prove he engaged in sexual intercourse with So.C., not "other sexual conduct." Specifically, the detective informed Cole during the interview one of the children had said Cole had attempted

sexual intercourse with So.C. Cole agreed it was possible he had committed such an act. In addition, the probable cause affidavit alleged Cole had tried to put his penis in So.C.'s vagina. Finally, the State's discovery disclosures to Cole included a written voluntary statement by Sc.C., in which he described hearing Cole order So.C. to "spread her vagina." Appellant's App. Vol. II, p. 46.

[20] Cole has not alleged the difference between the charging information and the evidence submitted at trial misled or prejudiced him. During opening statements, he told the jury he did not think the State would put forth sufficient evidence to prove the four offenses. In his closing argument, Cole said the State had charged him with molesting So.C. by other sexual conduct, but the evidence tended to point toward sexual intercourse. He further stated the evidence related to sexual intercourse "fails the requirement that they prove beyond a reasonable doubt that he performed other sexual conduct." Tr. Vol. 4, p. 48. But Cole did not express surprise at the State's evidence, and he also argued, with respect to sexual intercourse, there was insufficient evidence he penetrated So.C.'s vagina. He also asked the jurors to refrain from finding him guilty just because they "feel bad for the girls." *Id.* at 46. He was not prejudiced in presenting a defense.

[21] In addition, we conclude Cole is not in danger of being prosecuted twice for the same offense because the charging information states with particularity the date and victim at issue. Cole has failed to demonstrate the variance is fatal. *See Rupert v. State*, 717 N.E.2d 1209 (Ind. Ct. App. 1999) (variance not material in

prosecution for child molesting; evidence at trial showing defendant committed deviate sexual conduct with the victim in a different way than was alleged in the charging information did not require reversal); *cf. Allen v. State*, 720 N.E.2d 707, 713-14 (Ind. 1999) (reversing conviction of criminal deviate conduct due to material variance; charging information had alleged Allen had committed the offense involving his sex organ, but the evidence at trial showed the perpetrator had used a "blunt object," which could have been any number of items and misled Allen).

II. The Trial Court Did Not Err in Admitting the Interview Recording

[22] Cole argues the trial court should have rejected the recording of his interview with the detective and the DCS employee because it contained irrelevant and highly prejudicial information, including: (1) statements by the detective vouching for the truth of the children's statements; and (2) the detective repeatedly accusing Cole of lying. Cole further argues the detective improperly accused Cole of other, uncharged misconduct without any evidentiary support, including masturbating in bed while the children were present and leaving bite marks on one or both children. He concludes the jury should not have heard the recording.

[23] When a party appeals the admission or exclusion of evidence, we determine whether the trial court abused its discretion. *McCallister v. State*, 91 N.E.3d 554 (Ind. 2018). We reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it. *Id.*

[24] In general, relevant evidence is admissible, and irrelevant evidence is inadmissible. Ind. Evidence Rule 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action." Ind. Evidence Rule 401.

[25] In Cole's case, before the jurors heard the recorded interview, the trial court admonished them not to consider the detective's statements as evidence:

> Ladies and gentlemen of the jury you are about to hear and see an interview that occurred between Sergeant David Henderson, Rebecca Nale [of DCS] and the defendant, Joseph D. Cole. During this interview the questions asked and the statements contained within the questions asked by either Sergeant Henderson or Miss Nale are not being offered for their truth but are designed solely to illicit [sic] a response from the defendant, Joseph Cole. Statements or representations that interrogators make may or may not be true. They are designed primarily to illicit [sic] a response. *Therefore any questions or statements made by Sergeant Henderson or Miss Nale that are contained within the statement that you're about to hear and see are not to be considered by you as evidence*. They are to be used merely as an explanation of the defendant's answers or to put the defendant's response in context. However, obviously the answers provided by the defendant, Joseph Cole to these questions and/or statements can be considered by you as evidence in this case.

Tr. Vol. 3, pp. 210-11 (emphasis added). The trial court repeated its admonishment during final jury instructions. And during closing arguments, Cole reminded the jury the detective's questions and statements were "not evidence." Tr. Vol. 4, p. 40.

[26] A timely and accurate admonishment of the jury is presumed to cure any error in the admission of evidence. *Brooks v. State*, 934 N.E.2d 1234 (Ind. Ct. App. 2010), *trans. denied*. The trial court instructed the jury to disregard the detective's questions and statements because they were not evidence. We presume juries follow the admonitions of the court. *Tharpe v. State*, 955 N.E.2d 836 (Ind. Ct. App. 2011), *trans. denied*.

[27] Cole argues the admonition could not cure any evidentiary error because the trial court informed the jury the detective's statements "may or may not be true." He cites no authority to support his argument. In any event, we conclude, reading the admonition as a whole, the trial court properly instructed jurors to disregard the questions because they were not evidence. Cole has failed to show reversible error.

III. Cole's Sentence is Not Inappropriate

[28] Cole claims his one-hundred-year sentence is inappropriate and asks the Court to reduce his sentence to thirty years. Article 7, section 6 of the Indiana Constitution authorizes the Court of Appeals to review and revise sentences. Indiana Appellate Rule 7(B) implements this authority, stating we may revise a sentence "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."

[29] The main role of sentencing review under Appellate Rule 7(B) is to "leaven the outliers." *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018). "[S]entencing is

principally a discretionary function in which the trial court's judgment 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).

[30] Whether a sentence is 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." *Cardwell*, 895 N.E.2d at 1224. Accordingly, "we may look to any factors appearing in the record" in our review. *Stokes v. State*, 947 N.E.2d 1033, 1038 (Ind. Ct. App. 2011), *trans. denied*. The defendant has the burden of persuading us the sentence is inappropriate. *Dilts v. State*, 80 N.E.3d 182 (Ind. Ct. App. 2017), *trans. denied*.

[31] At the time Cole committed his offenses, the maximum sentence for Level 1 felony child molesting was fifty years, with a minimum sentence of twenty years and an advisory sentence of thirty years. Ind. Code § 35-50-2-4(c) (2014).

[32] "The nature of the offenses is found in the details and circumstances of the commission of the offenses and the defendant's participation." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Cole argues his offenses were not part of a pattern of molestation but merely a single incident. We disagree,

because Cole committed two separate acts of molestation against two children, in the presence of each other.

[33] Cole next argues the nature of the offense is not egregious because he did not use any force against the children beyond what was necessary to accomplish the offense. Even so, Cole, as the children's father or father figure, was in a position of trust, and he betrayed the children's trust by requiring them to submit to sexual conduct. He also committed his offenses in the presence of another minor, his son Sc.C. K.H. and So.C. were much younger than the maximum victim age (fourteen) set forth in the statute governing the offense of child molestation, and Cole was much older (thirty-four) than the minimum age (twenty-one) set for perpetrators of that offense as a Level one felony. Ind. Code § 35-42-4-3. In addition, Cole tried to deceive five-year-old K.H. into believing he was her mother's boyfriend during the molestation.

[34] The State persuasively argues the harm to the victims was greater than necessary to prove the elements of the offenses. K.H. and So.C.'s mother spoke on the children's behalf at sentencing. After the police had arrested Cole, K.H. cried as she told her mother, "I don't have a daddy now. . . . [M]y real dad's dead and [Cole] is in jail, what am I going to do." Tr. Vol. 4, p. 124. So.C. has had difficult incidents in school and day care, demonstrating ongoing anger issues. In addition, Sc.C. was not a direct victim of either offense, but he experienced trauma from witnessing Cole's acts of molestation, and "he's not been doing well in school and he used to be an A student, a star student." *Id.* at 125.

[35] "The character of the offender is found in what we learn of the offender's life and conduct." *Croy*, 953 N.E.2d at 664. Cole claims his character evidence proves his sentence should be reduced because: (1) he has a minimal criminal history; (2) he has strong family and community support, as shown by several letters of support the trial court received at sentencing; and (3) his risk of reoffending is low, according to the Indiana Risk Assessment System ("IRAS") assessment tool.

[36] Cole has only one prior conviction, for Class C misdemeanor operating a vehicle with a controlled substance or its metabolite in the body. The conviction was entered five years before the offenses here. But Cole also reported he has used marijuana and synthetic THC in the past. In addition, he had pending charges of child molestation in another county when the trial court imposed the sentence here. Cole was leading a less than law-abiding life. *See Bostick v. State*, 804 N.E.2d 218 (Ind. Ct. App. 2004) (trial court did not err in failing to give substantial weight to defendant's lack of criminal history; defendant's uncharged use of controlled substances and months-long sexual relationship with a fifteen-year-old outweighed the absence of formal convictions).

[37] Several friends and family members submitted letters attesting to Cole's character, but the trial court also received a letter from a woman who claimed Cole had molested her for six years beginning when she was four or five and he was ten. We also note there were no formal child support orders in place requiring Cole to support Sc.C. and So.C.

[38] Finally, many Indiana trial courts have access to the IRAS tool, but it is only one source of information to consider at sentencing. *See Malenchik v. State*, 928 N.E.2d 564, 575 (Ind. 2010) (offender assessment tools "are appropriate supplemental tools for judicial consideration at sentencing" but cannot "serve as aggravating or mitigating circumstances"). Viewing Cole's character as a whole, it does not outweigh the terrible nature of his offenses. We cannot say the trial judge wrongly saw Cole as deserving the maximum possible penalty.

Conclusion

[39] For the reasons stated above, we affirm the judgment of the trial court.

[40] Affirmed.

Bradford, J., and Foley, J., concur.