MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Brown Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 27, 2021

Court of Appeals Case No. 20A-CR-2041

Appeal from the Floyd Superior Court

The Honorable Susan L. Orth, Judge

Trial Court Cause No. 22D01-2001-F4-94

Vaidik, Judge.

Case Summary

[1] Robert Brown Jr. appeals his thirty-year sentence for three counts of Level 4 felony child exploitation, arguing it is inappropriate in light of the nature of the offenses and his character. We agree and reduce his sentence to twenty-one years, with eighteen years executed and three suspended to probation.

Facts and Procedural History

[2] In December 2019, Brown's girlfriend Brianna Stevers discovered evidence of child pornography on one of Brown's electronic devices and reported it to law enforcement. The next month, Detective Phillip Kaiser of the New Albany Police Department executed a search warrant at Brown's house and seized all his electronic devices. These devices contained "thousands" of images and videos depicting naked children involved in sexual positions or acts. Tr. p. 41. Three of these videos showed young girls—ages approximately three to five—exposing their vaginas to the camera.

[3] In July 2020, the State charged Brown with three counts of Level 4 felony child exploitation—for "creat[ing]" the three videos just mentioned[1]—and two counts of Level 5 felony possession of child pornography. Appellant's App. Vol. II p.

[1] Brown ultimately pled guilty to "creating" these videos but stated he did so by "filming [] something that was taking place on an iPad with a separate device." Tr. p. 10. The record does not indicate whether Brown personally filmed the original videos (i.e., the videos depicted on the iPad). In any event, he does not dispute that he "created" videos for purposes of the child-exploitation statute.

75. In March, the court issued a protective order barring Brown from contacting Stevers. While the case was pending, Brown twice violated the protective order by attempting to contact Stevers and was charged with two new offenses—Level 5 felony obstruction of justice and Class A misdemeanor invasion of privacy. In September, Brown and the State entered into a plea agreement, under which Brown would plead guilty to the three counts of Level 4 felony child exploitation and the State would dismiss all remaining charges.

[4] At the sentencing hearing, Corporal Matt Edgell of the New Albany Police Department testified that of the hundreds of child-pornography cases he has worked, this case involved "the most child pornography [] found on any one case" and in terms of "how egregious some of the acts" depicted were, it was "top three." Tr. p. 39. He also stated some of the child pornography found on Brown's devices dated back to 2013. Corporal Edgell went on to describe some of the "disturbing" images he had seen:

> I saw an infant with a bottle being inserted into her vagina. I saw an infant with a dog penis being inserted. I saw a girl, a video of a girl that was probably, I would guess, about eight (8) years old that was standing in a doorway [and] a guy sets up the video and then walks over and forcefully holds her against the doorway and—and rapes her. I saw . . . bestiality videos where it was a human and a dog. [A]nd then I saw multiple infants being raped or displayed.

Id. at 39-40 (cleaned up). Corporal Edgell also testified Brown took pictures of children in local public places and later modified the pictures "to zoom in on [the child's] crotch or a butt." *Id.* at 40. Detective Kaiser similarly testified this

was the "[m]ost disturbing case [he'd] ever had, period." *Id.* at 34. He also noted one video appeared to show a young girl being molested in a bathtub, and although the camera did not show the molester's face, he believed it to be Brown based on voice recognition.[2] Brown's mother testified he was a "good man" and pointed to his twenty-year career as an airline pilot and recent graduation from law school as indicators he would work hard at rehabilitation. *Id.* at 57. Numerous other members of Brown's family testified as to Brown's character and offered to support him through any ordered rehabilitation.

[5] The trial court identified five mitigators: (1) Brown's "background," which included no criminal history and substantial education and employment; (2) he pled guilty; (3) he cannot pursue or return to his career; (4) his imprisonment will be a financial harm to his family; and (5) he cooperated with the investigation. *Id.* at 135. The court identified two aggravators: (1) "the images go far beyond what are necessary elements [] to the crime charged" and (2) Brown twice violated a protective order. *Id.* at 133. The court noted these aggravating factors were "significant" and "of extremely high weight." *Id.* at 133-34. The court sentenced Brown to ten years on each count, to be served consecutively, for an aggregate sentence of thirty years.

[6] Brown now appeals.

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[2] Detective Kaiser noted he was still investigating this crime and anticipated child-molesting charges being filed in another county in the future. However, our review of the Odyssey Case Management System reveals no pending charges against Brown.

Discussion and Decision

[7] Brown contends his thirty-year sentence is inappropriate and asks us to reduce it. Indiana Appellate Rule 7(B) provides that an appellate 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." The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Id.* "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell*, 895 N.E.2d at 1224). Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[8] Brown was convicted of three Level 4 felonies. A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two and twelve years, with the advisory sentence being six years. Ind. Code § 35-50-2-5.5. The court

sentenced Brown to an above-advisory ten years for each count, to be served consecutively, for a total sentence of thirty years.

[9] The nature of these offenses is indisputably "horrific," as Brown admits. Appellant's Br. p. 10. Brown created three videos depicting young girls—ages approximately three to five—exposing their vaginas to a camera. Furthermore, for at least seven years he collected and possessed "thousands" of images of child pornography, the contents of which both Corporal Edgell and Detective Kaiser described as some of the worst they had ever seen. As to Brown's character, he has no criminal history and maintains much family support. However, we agree with the trial court these factors do not outweigh the seriousness of his offenses. Such behavior warrants a lengthy sentence.

[10] Nonetheless, our research of comparable cases reveals Brown's thirty-year, fully executed sentence is an outlier. While there is no requirement we compare a defendant's sentence with sentences received by other defendants in similar cases, such comparisons can be a proper consideration when deciding whether a particular sentence is inappropriate. *Knight v. State*, 930 N.E.2d 20, 22 (Ind. 2010). This is because "a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds." *Serino v. State*, 798 N.E.2d 852, 854 (Ind. 2003).

[11] In *Kelp v. State*, 119 N.E.3d 1071 (Ind. Ct. App. 2019), the defendant possessed and traded thousands of images of child pornography, some of which contained pre-pubescent children, for over five years. He was convicted of one count of

Level 4 felony child exploitation, one count of Level 5 felony child exploitation, and one count of Level 5 felony possession of child pornography. Like Brown, Kelp had no criminal history and was gainfully employed. The trial court sentenced him to ten years on the Level 4 felony and five years on the Level 5 felonies. However, those sentences were ordered to be served concurrently, for an aggregate sentence of ten years. We later affirmed this sentence on appeal. Similarly, in *Custance v. State*, 128 N.E.3d 8 (Ind. Ct. App. 2019), the defendant pled guilty to Level 5 felony child exploitation and Level 6 possession of child pornography. Notably, the defendant had no criminal history but his collection of child pornography, some of which he traded online, was "prolific" and included sexual images of pre-pubescent children. *Id.* at 11. The trial court sentenced him to five years for the Level 5 felony and two years for the Level 6 felony, to be served concurrently, and suspended one-and-a-half years, leaving a total executed sentence of three-and-a-half years. Again, we affirmed this sentence on appeal.

[12] Given our review of comparable cases, we conclude Brown's thirty-year sentence is an "outlier" and in need of revision. Brown contends we should revise his sentences to run concurrently, leaving him with an aggregate sentence of ten years, or reduce his sentences to the advisory, six years, which served consecutively would leave him with an aggregate sentence of eighteen years. We believe the higher aggregate sentence—eighteen years—is warranted here, as is some time suspended to probation. Unlike in *Kelp* and *Custance*, Brown pled guilty to three Level 4 felonies. And the facts here are more egregious.

Brown possessed child pornography, some of which he created, that went far beyond that needed for a conviction: images involving infants, violent rape, bestiality, and photos he apparently took and edited of local children to emphasize their "crotch" and "butt." Detective Kaiser testified he believed at least one video showed Brown molesting a young girl. This aggravating factor alone supports the imposition of consecutive sentences. *Gober v. State*, 163 N.E.3d 347, 356 (Ind. Ct. App. 2021) ("[A] single aggravating circumstance may be sufficient to support the imposition of consecutive sentences."), *trans. denied*. We therefore revise Brown's sentences to seven years for each count of child exploitation, with six years executed and one suspended to probation. These sentences are to be served consecutively, for an aggregate sentence of twenty-one years, with eighteen executed and three suspended to probation.

[13] Reversed and remanded.

Kirsch, J., concurs.

May, J., dissents.