MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jerold Leroy Gaines,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 14, 2023

Court of Appeals Case No. 23A-CR-502

Appeal from the Morgan Superior Court

The Honorable Dakota R. VanLeeuwen, Judge

Trial Court Cause No. 55D01-2110-F1-1449

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Jerold Leroy Gaines pleaded guilty in Morgan Superior Court to Level 4 felony child molesting. The trial court ordered him to serve a ten-year sentence, with seven years executed in the Department of Correction and three years suspended to probation. Gaines appeals his sentence. Specifically, he argues that the trial court abused its discretion when it failed to consider mitigating factors supported by the evidence and that his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] From 2014 to 2016, Gaines lived with his girlfriend and her daughter, A.M., who was born in December 2007. In July 2021, A.M. disclosed to her mother that Gaines molested her. A.M. stated that Gaines came into her bedroom, got into her bed with her, and made her suck on his penis. Tr. p. 58. A.M. told her mother that this had occurred more than five times. She also stated that Gaines fondled her chest. *Id*. A.M. told a forensic interviewer that Gaines ejaculated into her mouth after he made her suck on his penis. Appellant's App. Vol. 2, p. 23. She also stated that Gaines made her fondle his penis in the bathroom of the home. *Id*.

[4] The State charged Gaines with two counts of Level 1 felony child molesting and two counts of Level 4 felony child molesting. Gaines agreed to plead guilty to one count of Level 4 felony child molesting and the State agreed to dismiss

the remaining charges. Gaines's plea agreement left his sentence open to the trial court's discretion.

[5] The trial court held Gaines's guilty plea hearing on January 9, 2023. Gaines admitted that, during the years that he lived with A.M., he fondled her to arouse his own sexual desires. Tr. p. 30.

[6] The trial court held Gaines's sentencing hearing on February 10, 2023. At the hearing, Gaines testified that he was molested by his brother when he was a child, and he believes he suffers from Post-Traumatic Stress Disorder. *Id*. at 45, 48-49. He also apologized for molesting A.M. *Id*. at 50. A.M. testified that Gaines molested her repeatedly when she was between the ages of six to nine years old. *Id*. at 56. A.M.'s mother stated that, after her relationship with Gaines ended, A.M. would only sleep with her mother for approximately two years and A.M. wanted to get rid of her bed. *Id.* at 58. She also suffers from insomnia. *Id*. A.M. only has one friend and avoids social interactions. *Id*. at 59. A.M.'s mother stated that during the time Gaines was molesting her daughter, he was "[o]utwardly . . . the most deceptively perfect step-father figure I've ever seen . . ." *Id*.

[7] After considering the evidence, the Pre-Sentence Investigation Report, and the parties' arguments, the trial court found the following aggravating circumstances: Gaines' "vast breach of trust" with A.M., that A.M. was less than twelve years of age, and A.M.'s pain, suffering, and trauma. *Id*. at 66. The trial court considered Gaines's guilty plea and his lack of criminal history as

mitigating circumstances. However, the court also noted that Gaines received a significant benefit from his guilty plea.

[8] The trial court ordered Gaines to serve ten years, with seven years executed in the Department of Correction and three years suspended to sex offender probation. He ordered Gaines to pay for A.M.'s counseling and to register as a sex offender.

[9] Gaines now appeals. Additional facts will be provided as necessary.

Mitigating Circumstances

[10] Gaines claims the trial court abused its discretion when it failed to consider his proffered mitigating circumstances. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind.), *clarified on other grounds on reh'g*, 875 N.E.2d 218 (2007). An abuse of discretion occurs if a 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." *Id.* (internal quotation omitted). One way a trial court abuses its discretion during sentencing is when it "enters a sentencing statement that 'omits reasons that are clearly supported by the record and advanced for consideration.'" *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (quoting *Anglemyer*, 868 N.E.2d at 491), *trans. denied*.

[11] Gaines argues that the trial court failed to consider the following mitigating circumstances that he argues were supported by the record: his expression of remorse, the concern that Gaines suffers from PTSD, his service in the Army

National Guard, and that his Indiana Risk Assessment scored him as low risk to reoffend. Before we address each proposed mitigating circumstance, we observe that "the trial court [was] not required to accept the defendant's arguments regarding what constitutes a mitigating factor or assign proposed mitigating factors the same weight as the defendant." *Mehringer v. State*, 152 N.E.3d 667, 673 (Ind. Ct. App. 2020).

A. Remorse

[12] Gaines apologized for his offenses, told the court he was remorseful, and agreed to pay for A.M.'s counseling. In response to Gaines's argument that the trial court should have considered his expression of remorse as a mitigating circumstance, the State argued that Gaines's remorse seemed to stem from the fact that he had to face the consequence of going to prison and would not see his family. The trial court noted that Gaines had denied committing the offenses to the investigating police officer, had accused A.M. of lying, and had claimed he was too intoxicated to remember anything.

[13] Although the trial court did not expressly state that it was not considering Gaines's expression of remorse as a mitigating factor, from the sentencing statement we can infer that the trial court did not believe Gaines's claim that he was remorseful for the injuries he inflicted on A.M. *See Phelps v. State*, 969 N.E.2d 1009, 1020 (Ind. Ct. App. 2012) (explaining that the trial court is in the best position to observe the defendant and determine whether his expression of remorse is genuine). That was within the trial court's discretion, and we

therefore cannot say the court erred when it declined to find Gaines's expression of remorse to be a mitigating circumstance.

B. PTSD

[14] Gaines and his counsel expressed concern that Gaines suffers from PTSD resulting from child abuse that was inflicted upon him by his older brother. However, Gaines has never been diagnosed with PTSD. And Gaines disclosed the abuse just a few days before the sentencing hearing.

[15] The court noted that Gaines began the process of a psychosexual evaluation after A.M. had accused him of molesting her, but he failed to follow through after his services were stopped due to COVID. Gaines's claim that he suffers from PTSD was simply conjecture. The court acted within its discretion when it rejected this proposed mitigator as well.

C. Service in the National Guard

[16] Gaines argues that his service in the Army National Guard should have been considered as a mitigating circumstance.[1] But Gaines does not explain why this fact should have been considered as mitigating, and the trial court was not required to find it to be. *See Mehringer*, 152 N.E.3d at 673.

[1] Gaines also suggests that the trial court failed to consider letters describing his character to the court, including one from his sergeant in the National Guard. But the trial court acknowledged receipt of the letters and that the court reviewed them before imposing Gaines's sentence. Tr. p. 55.

D. Low Risk to Reoffend

[17] Gaines also notes that the risk assessment the probation department conducted while preparing the Pre-Sentence Investigation Report resulted in IRAS scores of low risk to reoffend in six of the seven categories. During his argument at the sentencing hearing, Gaines mentioned the results of the risk assessment but did not provide a compelling reason why low scores in six categories should be considered as a mitigating factor. Tr. pp. 63-64. Moreover, our Supreme Court has held that, although trial courts may employ such results "in formulating the manner in which a sentence is to be served[,]" the IRAS scores "are not intended to serve as aggravating or mitigating" factors. *See Kayser v. State*, 131 N.E.3d 717, 722 (Ind. Ct. App. 2019) (quoting *Malenchik v. State*, 928 N.E.2d 564, 575 (Ind. 2010)). The trial court did not abuse its discretion when it declined to find Gaines's IRAS scores to be a mitigating factor.

Inappropriate Sentence

[18] Gaines also argues that his ten-year sentence, with seven years executed and three years suspended to probation, is inappropriate in light of the nature of the offense and his character. Pursuant to Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence

modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[19] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing "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). The defendant bears the burden of persuading us that his sentence is inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1045 (Ind. Ct. App. 2016).

[20] A Level 4 felony carries a sentencing range of two to twelve years, with an advisory term of six years. I.C. § 35-50-2-5.5. Gaines received a sentence less than the maximum allowed and seven years of executed time, which is near the advisory six-year sentence.

[21] Concerning the nature of the offense, over the course of approximately two years, Gaines repeatedly molested A.M., who was six when the molestation began. Gaines fondled A.M., made A.M. touch his penis, and made A.M. suck on his penis. A.M. stated that Gaines made her suck on his penis at least five times and that he ejaculated into her mouth. Gaines's offenses have caused

A.M. significant trauma and have made it difficult for her to trust others. The nature of the offense more than supports the ten-year sentence.

[22] Gaines has also not persuaded us that his character supports his claim that his sentence is inappropriate. By his own admission, Gaines acted as a father figure to A.M. and violated his position of trust with her when he molested her. When he was confronted with A.M.'s accusations, he lied to the police and accused A.M. of lying. Gaines later pleaded guilty to the offense, but he also received a significant benefit from his guilty plea because the State agreed to dismiss two Level 1 felonies and one Level 4 felony in exchange for his plea of guilty to one Level 4 felony.

[23] We would not categorize Gaines as one of the "worst offenders." He apologized to A.M., spared her the pain of testifying about the molestation, and agreed to pay for her counseling. Gaines also loves and has the support of his family. But the trial court thoughtfully considered Gaines's character when it ordered him to serve a less than maximum sentence with three years of his sentence suspended to probation.

[24] For all of these reasons, we conclude that Gaines's ten-year sentence, with seven years executed in the Department of Correction and three years suspended to probation, is not inappropriate in light of the nature of the offense and his character.

Conclusion

[25] Gaines has not established any error in the trial court's sentencing decision. Therefore, we therefore affirm his ten-year sentence.

[26] Affirmed.

Vaidik, J., and Pyle, J., concur.