MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Elmer Jones Jay Demoss, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 28, 2022

Court of Appeals Case No. 22A-CR-662

Appeal from the Vanderburgh Circuit Court

The Honorable David D. Kiely, Judge

Trial Court Cause No. 82C01-2101-F1-547

Mathias, Judge.

[1] Elmer Jones Jay Demoss, Jr. appeals his convictions on four counts of Class A felony child molesting and two counts of Level 1 felony child molesting, and he

also appeals his ensuing sixty-year aggregate sentence. Demoss raises the following three issues for our review:

I. Whether the trial court committed fundamental error when it did not interject itself to strike certain testimony.

II. Whether the trial court committed fundamental error when it did not sua sponte sever the State's charges.

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

[2] We affirm.

Facts and Procedural History

[3] D.D. was born in 1990, and Demoss is D.D.'s father. In 2001, Demoss obtained custody of D.D., and they shared a home with several other family members in Evansville.

[4] About five months later, Demoss began molesting D.D. In particular, over the next "eight plus" years, Demoss repeatedly engaged in or forced D.D. to engage in acts of oral sex or anal penetration. Tr. Vol. 2, p. 74. D.D. would later estimate that Demoss molested him "[m]ore than 50 times." *Id.* D.D. informed various school officials that he was being molested, but those officials apparently never followed through on his reports. D.D. eventually ran away from home, committed criminal offenses, became addicted to drugs, and, around 2011, was found to be HIV positive. In 2014, D.D. reported the

molestations to law enforcement, but D.D. never appeared for follow-up interviews with officers, and they did not pursue the matter further.

[5] Also in 2014, Demoss began dating M.R. At the time, M.R. had a seven-year-old son, B.R. Demoss moved into an apartment in Arkansas with M.R. and B.R. later that year. Sometime in 2015 or 2016, the three moved into a house in Evansville.

[6] Demoss began molesting B.R. in Arkansas and continued molesting B.R. after they moved to Evansville. In particular, on multiple occasions at the Evansville house, Demoss engaged in or forced B.R. to engage in acts of oral sex. Demoss also repeatedly fondled B.R. On at least one occasion, Demoss attempted to anally penetrate B.R.

[7] Around 2020, M.R. became suspicious of changes in B.R.'s attitude and asked him about Demoss. B.R. then told M.R. of the molestations, and M.R. contacted law enforcement. In the course of investigating B.R.'s allegations, officers reached out to D.D. about his 2014 allegations. D.D. met with Detective Brian Turpin of the Evansville Police Department and disclosed Demoss's molestations of him during D.D.'s childhood.

[8] The State charged Demoss with the following thirteen counts:

- Count 1: Class A felony child molesting for deviate sexual conduct with D.D.;
- Count 2: Class A felony child molesting for deviate sexual conduct with D.D.;

- Count 3: Class A felony child molesting for deviate sexual conduct with B.R.;
- Count 4: Class A felony attempted child molesting for an attempted anal penetration of B.R.;
- Count 5: Level 1 felony child molesting for other sexual conduct with B.R.;
- Count 6: Level 1 felony child molesting for other sexual conduct with B.R.;
- Count 7: Class D felony intimidation for threatening B.R.;
- Count 8: Level 6 felony intimidation for threatening B.R.;
- Count 9: Class C felony child molesting for fondling D.D.;
- Count 10: Class A felony child molesting for deviate sexual conduct with B.R.;
- Count 11: Class C felony child molesting for fondling B.R.;
- Count 12: Level 1 felony child molesting for an attempted anal penetration of B.R.; and
- Count 13: Level 4 felony child molesting for fondling B.R.

[9] Demoss did not move to sever any of the State's charges. At his ensuing jury trial, the State called Detective Turbin. Without objection, Detective Turbin testified as follows:

> Q [by the State:] If I say the phrase "delayed disclosure[,"] what does that mean in the sexual crime[s] world?
>
> A So, delayed disclosure is the norm and what delayed disclosure means is they're not immediately disclosing. So, disclosure can be from any time from when it happened until after that. A delayed disclosure is when they're not immediately reporting what happened, and that's the norm, that they don't report immediately.

> Q Have you learned through your training and through your experience in these interviews why victims of these kinds of crimes don't report immediately?
>
> A Yes. Sometimes it's embarrassment and shame, sometimes it's fear of what will happen if they do report, you know[,] fear of physical harm, fear of being removed from their family, just a lot of unknowns. A lot of it is also them processing it. I mean[,] we have to think children do not process things like adults do and they have to come to a place where they feel safe enough to make that disclosure.

Id. at 19-20. Following Detective Turbin's testimony, both D.D. and B.R. testified against Demoss.

[10] The jury found Demoss guilty on Counts 1, 2, 3, 5, 6, 9, 10, 11, and 13. At his ensuing sentencing hearing, the court found the following aggravating factors: Demoss "is a high risk to reoffend"; Demoss's "prior criminal history," which includes four felony convictions, ten misdemeanor convictions, and multiple violations of suspended placements; Demoss's "position of having care over the victims"; that there were "two separate victims"; and that "these were ongoing acts of molestation." *Id.* at 174-75. As a mitigating factor, the court acknowledged that one of the victims "did not want [Demoss] to go to prison." *Id.* at 175. The court then entered its judgment against Demoss on four Class A felonies and two Level 1 felonies, and the court sentenced Demoss to an aggregate term of sixty years in the Department of Correction. This appeal ensued.

I. Admission of Evidence

[11] On appeal, Demoss first asserts that the trial court committed fundamental error when it permitted Detective Turbin to testify that a sexual-assault victim's delayed disclosure of the assault to authorities was "the norm." Appellant's Br. at 14. Demoss acknowledges that he did not object to this testimony in the trial court. Thus, to demonstrate reversible error on this issue, he must show that the admission of this testimony was fundamental error.

[12] As our case law makes clear, "[a]n error is fundamental, and thus reviewable on appeal, if it made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Nix v. State*, 158 N.E.3d 795, 800 (Ind. Ct. App. 2020) (quoting *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018)), *trans. denied*. And "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Id.* at 801 (quoting *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*). That is because fundamental error

> is extremely narrow and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation. At the same time, *if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error*.

Durden, 99 N.E.3d at 652 (emphasis added; quotation marks and citations omitted).

[13] As we have repeatedly acknowledged, "[a]n attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can readily imagine any number of viable reasons why attorneys might not object." *Nix*, 158 N.E.3d at 801; *see also Merritt*, 99 N.E.3d at 710 ("The risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not sua sponte by our trial courts."). Fundamental error in the erroneous admission of evidence might include a claim that there has been a "fabrication of evidence," "willful malfeasance on the part of the investigating officers," or otherwise that "the evidence is not what it appears to be." *Nix*, 158 N.E.3d at 801 (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)). But absent an argument along those lines, "the claimed error does not rise to the level of fundamental error." *Id.* (quoting *Brown*, 929 N.E.2d at 207).

[14] Demoss does not assert that Detective Turbin's testimony was not what it appeared to be. Rather, his argument is simply that the purportedly erroneous admission of this evidence implicated his due-process rights because it vouched for the credibility of the victims. But Demoss's argument on this issue "would turn fundamental error from a rare exception to the general rule for appellate review." *Nix*, 158 N.E.3d at 802. As we explained in *Nix*, "[t]here are often tactical reasons for an attorney to not object to the admission of evidence or the questioning of witnesses, and, however discerning our trial courts may be, they are not expected or required to divine the mind of counsel." *Id.* And, "if a defense counsel lacks a tactical reason for not objecting to prejudicial evidence

that would not have been admitted with a proper objection, the defendant has the post-conviction process available to him to pursue relief." *Id.* Because Demoss's argument on this issue is simply that, with a proper objection, Detective Turbin's testimony would not have been admissible, and Demoss fails to argue that Detective Turbin's testimony was somehow not what it appeared to be, Demoss has not shown fundamental error.

II. Severance of Charges

[15] Demoss also asserts that the trial court committed fundamental error when it did not sua sponte sever the State's charges against him. Specifically, Demoss argues that, had his trial counsel moved to sever, the trial court would have been obliged under Indiana Code Section 35-34-1-11(a)[1] to grant the motion. Thus, Demoss continues, the trial court should have severed the charges even though his counsel made no such motion.

[16] Demoss's appellate counsel has made this argument to our Court before, and we have rejected the argument in a published opinion. *See Norton v. State*, 137 N.E.3d 974, 982 (Ind. Ct. App. 2019), *trans. denied*. Nonetheless, Demoss's appellate counsel neither cites nor discusses our precedent in *Norton* in her brief

[1] This statutes provides in relevant part:

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense . . . .

in this appeal. *See* Appellant's Br. at 4, 16-18. We remind counsel that she has an affirmative obligation to "not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . ." Ind. Professional Conduct Rule 3.3(a)(2).

[17] Counsel's omission notwithstanding, as we explained in *Norton*, the defendant "only had an automatic right to have the charges against him severed if he had made a timely motion. The burden was on him to make the motion, not on the trial court to take action sua sponte." 137 N.E.3d at 982. Accordingly, and without expressing any opinion on the merits of Demoss's argument that he would have been entitled to severance had he made a proper motion, the trial court did not commit fundamental error when it did not sua sponte sever Demoss's charges.

III. Sentence

[18] Last, Demoss asserts that his aggregate sixty-year sentence is inappropriate in light of the nature of the offenses and his character. Under 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 showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[20] Initially, we note that the trial court did not impose the maximum possible sentence it could have. The trial court entered judgment of conviction against Demoss on four Class A felonies and two Level 1 felonies. The Class A felonies each carried a sentencing range of twenty to fifty years with an advisory sentence of thirty years. I.C. § 35-50-2-4(a). The Level 1 felonies each carried a sentencing range of twenty to forty years with an advisory sentence of thirty years. I.C. § 35-50-2-4(b). Thus, on four Class A felony convictions and two Level 1 felony convictions, Demoss faced a maximum term of 280 years. The court, however, imposed the advisory sentence for each conviction and ran two of the sentences consecutive to each other (one for each of Demoss's victims)

and had the other sentences run concurrently to those two, for an aggregate term of sixty years.

[21] We cannot say that Demoss's sentence is inappropriate. Regarding the nature of the offenses, Demoss's one-sentence argument on appeal is that his offenses, "while horrific, did not involve threats of force." Appellant's Br. at 19. But his offenses did involve the serial molestation of his son and his girlfriend's son over numerous years. Demoss cannot show that his sentence is inappropriate in light of the nature of the offenses.

[22] Neither is Demoss's sentence inappropriate in light of his character. He asserts that, given his current age, "[i]t is unlikely that he will ever leave prison"; that "he has struggled with addiction"; that two witnesses "ask[ed] for leniency"; and that one of the victims indicated that he did not want Demoss to go to jail. *Id.* But Demoss disregards his extensive criminal record, which includes multiple felony convictions and revocations of suspended placements, and that the instant offenses involved his longtime abuse of positions of trust, all of which reflect his poor character. We affirm his sentence.

Conclusion

[23] For all of the above-stated reasons, we affirm Demoss's convictions and sentence.

[24] Affirmed.

Robb, J., and Foley, J., concur.