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IN THE
COURT OF APPEALS OF INDIANA

S.B.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 17, 2021

Court of Appeals Case No. 21A-CR-698

Appeal from the Howard Circuit Court

The Honorable Lynn Murray, Judge

Trial Court Cause No. 34C01-1906-F1-1913

Tavitas, Judge.

Case Summary

[1] S.B. appeals her sentences, entered pursuant to a plea agreement, for two counts of incest as Level 4 felonies. S.B. alleges that: (1) the trial court erred in imposing consecutive terms of imprisonment that exceeded the fifteen-year

maximum term allowed under Indiana Code Section 35-50-1-2; and (2) her twenty-four-year aggregate sentence is inappropriate in light of the nature of her offenses and her character. We agree with S.B. that incest is not an enumerated "crime of violence" pursuant to Indiana Code Section 35-50-1-2(a); however, S.B. has failed to meet her burden on appeal of demonstrating that her odious crimes constituted a single episode of criminal conduct. Thus, we conclude that the trial court did not err in imposing consecutive sentences that exceeded the fifteen-year statutory limit prescribed in Indiana Code Section 35-50-1-2(d)(3). Further, S.B. has not carried her burden to persuade us that her twenty-four-year aggregate sentence is inappropriate in light of the nature of her offenses and her character. Accordingly, we affirm.

Issues

[2] S.B. raises two issues on appeal, which we restate as follows:

I. Whether S.B.'s twenty-four-year aggregate sentence exceeds the statutory maximum prescribed by Indiana Code Section 35-50-1-2.

II. Whether S.B.'s sentence is inappropriate in light of the nature of her offenses and her character.

Facts

[3] In late June 2019, C.K. sent messages to an acquaintance via Facebook Messenger, wherein C.K. confessed that C.K. and his ex-girlfriend, S.B.,

engaged in numerous sex acts with S.B.'s minor sons.[1] At the time, S.B.'s sons were six years old and three years old, respectively. The acquaintance notified and relayed C.K.'s sexually explicit confessions to the police.

[4] In S.B.'s police interview on June 23, 2019, S.B. initially denied knowledge of the crimes and cited her methamphetamine use with C.K. for her lack of memory. S.B. subsequently admitted that she and C.K. snorted methamphetamine, undressed her sons, and engaged in oral and anal sex acts with her sons including the following:[2] (1) S.B. and C.K. massaged the bottoms and penises of both boys; (2) S.B. performed oral sex on her three-year-old son; (3) C.K. performed oral sex on S.B.'s six-year-old son; (4) S.B. and C.K. engaged in sexual activity in the presence of the boys; and (5) C.K. watched pornography with the six-year-old boy and coached the six-year-old boy to mimic various acts of digital and anal penetration on S.B.

[5] On June 15, 2019, the State charged S.B. with two counts of child molesting, as Level 1 felonies, as well as two counts of incest, as Level 4 felonies, which the State later amended in September 2019 to change the address of the offenses. The amended charging information for Count III reads:

> The undersigned affiant, being duly sworn according to law upon oath deposes and says that between May 1, 2019 and June 24, 2019 at or near [address] in Howard County, State of Indiana,

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[1] C.K. and S.B. are adults.

[2] These facts are drawn from the probable cause affidavit.

> [S.B.] being at least eighteen years of age, to-wit: age 31 years, did engage in sexual intercourse or other sexual contact with another person, to-wit: T.H.; knowing that said other person is related to the defendant biologically as a child and the other person was less than 16 years of age, to-wit: 6 years old, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

S.B.'s App. Vol. II p. 40. The amended charging information for Count IV reads:

> The undersigned affiant, being duly sworn according to law upon oath deposes and says that between May 1, 2019 and June 24, 2019 at or near [address] in Howard County, State of Indiana, [S.B.] being at least eighteen years of age, to-wit: [31] years old did engage in sexual intercourse or other sexual contact with another person, to-wit: M.T..; knowing that said other person is related to the defendant biologically as a child and the other person was less than 16 years of age, to-wit: 3 years old, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

Id. at 41.

[6] The State and S.B. tendered a plea agreement to the trial court on February 24, 2021. Therein, S.B. agreed to plead guilty to the two charged counts of incest ("Counts III and IV") in exchange for the State's agreement not to file additional charges and to dismiss the remaining charges. The plea agreement left sentencing to the trial court's discretion.

[7] At S.B.'s change of plea and sentencing hearing on April 7, 2021, S.B., by counsel, stipulated that the facts recited in the probable cause affidavit regarding

the two incest counts, as summarized above, constituted a sufficient factual basis for Counts III and IV. *See* S.B.'s Tr. Vol. II p. 11. The trial court approved the plea agreement. The probable cause affidavit recites four Facebook messages that C.K. sent to a friend regarding the incidents of child molesting and incest. The fourth message states: "The next and last time was in the boys['] room" and recounts depraved acts that C.K. and S.B. committed with the boys. *Id*. at 18.

[8] The pre-sentence investigation report contained the probation department's recommendation that S.B. should serve consecutive terms of twelve years for each count, with three years suspended and three years on probation. Defense counsel argued: "We would suggest to the court that if the court is inclined to run the sentences consecutive, then we would suggest two eight-year sentences, execute one, but don't execute the other." *Id.* at 14.

[9] In sentencing S.B., the trial court found S.B.'s entry of a guilty plea, which spared her sons the trauma of a trial, and her lack of prior criminal history to be mitigating circumstances. As aggravating circumstances, the trial court identified: (1) the boys' tender ages;[3] and (2) S.B.'s violation of her position of

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[3] The trial court made the following remarks regarding the nature of the offenses:

> With the nature and circumstances of these defenses [sic], it's part of the crime that incest, the victims of sexual offenses [are] children, and I agree that that by itself is not an aggravating factor, but particularly to the age of these victims, these children were only six and three years of age respectively when they were victims repeatedly of being sexually assaulted by [C.K.], who was a non-relative and mother's boyfriend and their mother, who says she acted under [C.K.]'s influence or control, but the probable cause

trust as a mother by sexually abusing her sons and subjecting them to sexual abuse by C.K. The trial court imposed the following sentences, which the court ordered to be served consecutively: Count III, twelve years executed in the Department of Correction; and Count IV, twelve years, with nine years executed and three years suspended to supervised probation. Defense counsel did not object. S.B. now appeals.

Analysis

I. Consecutive Sentencing Statute

[10] S.B. argues that the trial court imposed consecutive terms of imprisonment that are not authorized pursuant to Indiana Code Section 35-50-1-2 (the "consecutive sentencing statute"). In its sound discretion, a trial court may impose consecutive or concurrent terms of imprisonment. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana Code Section 35-50-1-2(c), however, limits the court's discretion and specifies the parameters for ordering consecutive sentences for multiple crimes. "The legislature prescribes penalties for crimes, and the trial court's discretion does not extend beyond the statutory limits." *Edwards v. State*, 147 N.E.3d 1019, 1021 (Ind. Ct. App. 2020).

> affidavit speaks in her own statements of not only participating, but actually facilitating these events. The damage[ ] to these two young children is unspeakable and life-lasting, even [if S.B. was] suffering from mental health concerns or even under the influence, it's still difficult to imagine committing such depraved offenses against such young children.

S.B.'s Tr. Vol. II p. 17.

"Therefore, in reviewing a sentence, we will consider whether it was statutorily authorized." *Id*.

[11] Specifically, S.B. argues the trial court erred in ordering consecutive sentences exceeding the statutory limit of fifteen years set by Indiana Code Section 35-50-1-2 because: (1) incest is not a "crime of violence" pursuant to Indiana Code Section 35-50-1-2(a); and (2) the offenses for which she was convicted arose from a single episode of criminal conduct.[4] The entirety of S.B.'s argument in her brief alleging that the trial court abused its discretion consists of the following:

> The stipulated factual basis evidence [sic] a single "episode of criminal conduct." (I.C. 35-50-1-2(b))[.] "Incest", defined I.C. 35-46-1-3, is not a "crime of violence" listed in I.C. 35-50-1-2(a); therefore, the maximum of consecutive sentences to which [S.B.] could have been sentenced is fifteen (15) years. I.C. 35-50-1-2(d)(3). . . .

S.B.'s Br. p. 6 (internal citation omitted). S.B. has failed to demonstrate, in his single-sentence argument that lacks any citation to authority, that the trial court exceeded its statutory authorization in sentencing S.B.

[4] Although S.B. did not object at the time of sentencing, we note that "an appellate court can review claims of sentencing error without insisting that the claim first be presented to the trial court." *Reed v. State*, 866 N.E.2d 767, 770 n.2 (Ind. 2007); *Bell v. State*, 59 N.E.3d 959, 962 (Ind. 2016) ("[T]his Court and the Court of Appeals review many claims of sentencing error (improper consideration of an aggravating circumstance, failure to consider a proper mitigating circumstance, inaccurate weighing of aggravating and mitigating circumstances, etc.) without insisting that the claim first be presented to the trial judge.").

At the time of S.B.'s offenses, Indiana Code Section 35-50-1-2 provided, in part, as follows:

> (a) As used in this section, "crimes of violence" means the following:
>
> (1) Murder (IC 35-42-1-1).
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> (2) Attempted murder (IC 35-41-5-1).
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> (3) Voluntary manslaughter (IC 35-42-1-3).
>
> (4) Involuntary manslaughter (IC 35-42-1-4).
>
> (5) Reckless homicide (IC 35-42-1-5).
>
> (6) Battery (IC 35-42-2-1) as a:
>
> (A) Level 2 felony;
>
> (B) Level 3 felony;
>
> (C) Level 4 felony; or
>
> (D) Level 5 felony.
>
> (7) Aggravated battery (IC 35-42-2-1.5).
>
> (8) Kidnapping (IC 35-42-3-2).
>
> (9) Rape (IC 35-42-4-1).
>
> (10) Criminal deviate conduct (IC 35-42-4-2) (before its repeal).
>
> (11) Child molesting (IC 35-42-4-3).
>
> (12) Sexual misconduct with a minor as a Level 1 felony under IC 35-42-4-9(a)(2) or a Level 2 felony under IC 35-42-4-9(b)(2).

(13) Robbery as a Level 2 felony or a Level 3 felony (IC 35-42-5-1).

(14) Burglary as a Level 1 felony, Level 2 felony, Level 3 felony, or Level 4 felony (IC 35-43-2-1).

(15) Operating a vehicle while intoxicated causing death (IC 9-30-5-5).

(16) Operating a vehicle while intoxicated causing serious bodily injury to another person (IC 9-30-5-4).

(17) Child exploitation as a Level 5 felony under IC 35-42-4-4(b) or a Level 4 felony under IC 35-42-4-4(c).

(18) Resisting law enforcement as a felony (IC 35-44.1-3-1).

(19) Unlawful possession of a firearm by a serious violent felon (IC 35-47-4-5).

(b) As used in this section, "episode of criminal conduct" means offenses or a connected series of offenses that are closely related in time, place, and circumstance.

(c) Except as provided in subsection (e) or (f) the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:

(1) aggravating circumstances in IC 35-38-1-7.1(a); and

(2) mitigating circumstances in IC 35-38-1-7.1(b);

in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-

> 50-2-8 and IC 35-50-2-10 (before its repeal) to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the period described in subsection (d).
>
> (d) Except as provided in subsection (c), the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct may not exceed the following:
>
> * * * * *
>
> (3) If the most serious crime for which the defendant is sentenced is a Level 4 felony, the total of the consecutive terms of imprisonment may not exceed fifteen (15) years . . . .

I.C. § 35-50-1-2.[5]

A. Crime of Violence

[12] Although S.B.'s sparse argument consists of only: "'Incest', defined I.C. 35-46-1-3, is not a 'crime of violence' listed in I.C. 35-50-1-2(a)[,]" we are able to ascertain her argument for purposes of analysis. S.B.'s Br. p. 6. Our Supreme Court has held that "'[c]rimes of violence' is a defined term, a straightforward list . . . ." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). *Ellis* is instructive here. In that case, Ellis argued that, because attempted murder was not an

[5] Subsequently amended by Ind. P.L. No. 184-2019, § 15 (eff. July 1, 2019); and Ind. P.L. No. 142-2020, § 83 (eff. July 1, 2020).

enumerated "crime of violence"[6] as defined in Indiana Code Section 35-50-1-2(a) when the trial court imposed consecutive sentences for his two attempted murder convictions and burglary conviction, his sentences violated the consecutive sentencing statute. *See* I.C. § 35-50-1-2(c) (1998). Ellis argued that the statutory limit should apply to his two attempted murder convictions. In reversing the trial court in part, our Supreme Court held:

> [T]he trial court erred when it ordered Ellis' sentences for the two counts of attempted murder to be served consecutively for a total term of 100 years. This portion of the sentence exceeded the statutory limitation. The limitation should have been fifty-five years for consecutive sentencing . . . .

Ellis, 736 N.E.2d at 737-38. In so holding, our Supreme Court agreed with *Ballard v. State*, 715 N.E.2d 1276, 1280 (Ind. Ct. App. 1999), which noted: "[T]he [consecutive sentencing] statute is clear. The legislature delineated the exact crimes by name and citation that were to be considered violent crimes."

[13] Here, we agree with S.B. that, because incest is not designated as a "crime of violence" in Indiana Code Section 35-50-1-2(a), our Supreme Court's holding in *Ellis* necessitates the finding S.B.'s incest convictions are not excepted from the sentencing limits delineated in the consecutive sentencing statute.[7] *See, e.g., Ballard*, 715 N.E.2d at 1280 (holding that, "[i]f battery as a Class C felony had

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[6] Indiana Code Section 35-50-1-2(a)(2) now enumerates attempted murder as a "crime of violence[.]"

[7] We urge our General Assembly to consider the addition of incest as a "crime of violence" under Indiana Code Section 35-50-1-2(a).

been intended to be included as a crime of violence, it would have appeared in Indiana Code section 35-50-1-2(a). The statute is unambiguous: battery was not intended to be included as a violent crime.").

B. Episode of Criminal Conduct

[14] We have determined above that S.B.'s incest convictions are not statutory "crimes of violence" pursuant to Indiana Code Section 35-50-1-2(a). Next, we consider S.B.'s sparse claim that her crimes arose from a single "episode of criminal conduct" for which her consecutive sentences must be limited to fifteen years pursuant to subsection (d) of the consecutive sentencing statute.

[15] As noted above, unless a defendant's offenses are enumerated "crimes of violence[,]" the consecutive sentencing statute limits the maximum consecutive terms of imprisonment that a trial court may impose for a single "episode of criminal conduct." I.C. § 35-50-1-2(c), -(d); *Yost v. State*, 150 N.E.3d 610, 614 (Ind. Ct. App. 2020).

> An "episode of criminal conduct" is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b). *See also Purdy v. State*, 727 N.E.2d 1091, 1092 (Ind. Ct. App. 2000) (quotation and citation omitted) (stating a single episode of criminal conduct is "an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series"), *trans. denied*. For criminal actions to be considered a single episode of criminal conduct, it is not necessary that the victim of each action is the same. *Harris v. State*, 861 N.E.2d 1182, 1188 (Ind. 2007). Nor is it required that the alleged conduct was so closely

> related in time, place and circumstances "that a complete account of one charge cannot be related without referring to details of the other charge," although that is a factor the court may consider. *Id*.

Yost, 150 N.E.3d at 614.

[16] S.B. argued for the first time on appeal that the stipulated factual basis evidences a single "episode of criminal conduct." During the sentencing hearing, defense counsel did not object to the probation department's recommendation of consecutive sentences totaling twenty-four years. Nor did defense counsel argue that the facts stipulated for the required factual basis for the guilty plea constituted a single act of criminal conduct.

[17] The hearing record includes S.B.'s admission to the truth of the allegations in Counts III and IV of the State's charging informations, which each provide that S.B. committed the charged offenses "*on or between the dates of May 1, 2019 and June 24 of 2019*[.]" *See* Tr. Vol. II p. 9 (emphasis added). Also, S.B., by counsel, stipulated that the portion of the probable cause affidavit that recounted the circumstances of Counts III and IV (summarized above in "Facts") constituted a sufficient factual basis for her guilty plea. *Id*. at 9. The factual basis—comprised of C.K.'s four Facebook Messenger messages and S.B.'s admissions to the police that she and C.K. snorted methamphetamine, undressed her sons, and engaged in multiple sex acts with her sons—does not provide any timeframe for the various sex acts. *See* S.B.'s App. Vol. II pp. 17-18. The only inkling of a timeline stems from C.K.'s fourth Facebook message, which after

detailing acts of fondling, oral sex, digital penetration, and anal sex between S.B. and her sons, provides: "[t]he next and last time we was [sic] in the boys [sic] room . . . ." *Id.* at 18. We find that this language from the stipulated factual basis supports a finding that the charged acts did not constitute a single episode of criminal conduct.

[18] We are left with the probable cause affidavit alleging more than one incident of depraved sexual activity with the boys. At this juncture, the record is devoid of any facts or argument that lead us to a conclusion that there was a single episode of criminal conduct. Additionally, we note that the hearing record reveals that defense counsel proposed an eight-year sentence to be followed by a suspended eight-year sentence. This evinces the defense's recognition that the charged offenses did not constitute a single episode of conduct for which S.B.'s sentence was subject to a fifteen-year limit.

[19] Based on the foregoing, we conclude that the evidence before the trial court reasonably supported the determination that the charged offenses did not constitute a single episode of criminal conduct. Absent support in the record for a finding that S.B.'s offenses constituted a single episode of conduct, we cannot say that the trial court exceeded its statutory authority in imposing consecutive sentences of more than the statutory limit prescribed in subsection (d)(3) of the consecutive sentencing statute.

II. Inappropriateness of Sentence

[20] S.B. also argues that her twenty-four-year aggregate sentence is inappropriate in light of the nature of her offenses and her character. The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender." Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[21] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id*. "Whether a sentence should be deemed 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.'" *Id*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial

court's sentence "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).

[22] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). Here, S.B. pleaded guilty to two counts of incest, as Level 4 felonies. The sentencing range for a Level 4 felony is between two and twelve years, with an advisory sentence of six years. I.C. § 35-50-2-5.5. Here, the trial court imposed consecutive twelve-year sentences to be served as follows: Count III, twelve years executed in the Department of Correction; and Count IV, twelve years, with nine years executed and three years suspended to supervised probation. Although the trial court did not order S.B.'s sentences to be fully executed, the court imposed two maximum sentences for an aggregate twenty-four-year term.

[23] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. S.B. engaged in oral and anal sex acts with her sons including: (1) massaging the bottoms and penises of both boys; (2) performing oral sex on her three-year-old son; and (3) submitting to digital and anal penetration by her six-year-old son. The level of depravity of a mother, engaging in various forms of sexual activity with her three-year-old and six-

year-old sons, along with her boyfriend, is unthinkable. S.B. is among the worst of the worst offenders we have encountered. We refuse to say that the nature of S.B.'s vile offenses does not support the maximum sentence.

[24] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history,[8] background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). At the urging of C.K., and under the influence of methamphetamine, thirty-one-year-old S.B. desecrated her sacred duty to protect her tender-aged children and subjected them to unconscionable outrages. S.B.'s readiness to betray her children's trust and to make them pawns to depraved adult whims reflects exceedingly poorly on her character. The stipulated factual basis includes C.K.'s confession that S.B. elected to violate the younger child, who was unable to report her, and remained "scared" to abuse the older child until C.K. manipulated that child into agreeing not to "say[ ] something[.]" *See* S.B.'s App. p. 17. As with the nature of her offenses, nothing about S.B.'s character renders her sentence inappropriate.

[8] We acknowledge that S.B. lacks any prior criminal history.

Conclusion

[25] S.B. has failed to meet her burden of demonstrating that the trial court exceeded its statutory authority. Moreover, S.B.'s sentence is not inappropriate in light of the nature of her offenses and her character. We affirm.

[26] Affirmed.

Mathias, J., and Weissmann, J., concur.