MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Timothy Steven Gray,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 19, 2022

Court of Appeals Case No. 22A-CR-859

Appeal from the Pike Circuit Court

The Honorable Jeffrey L. Biesterveld, Judge

Trial Court Case No. 63C01-2105-F1-144

Friedlander, Senior Judge.

[1] Timothy Steven Gray appeals after pleading guilty to one count of Level 1 felony child molesting,[1] arguing that the court abused its discretion in sentencing and that his sentence is inappropriate in light of the nature of the offense and his character. Finding no sentencing error, we affirm.

Facts and Procedural History

[2] P.T., who was eleven years old, and her six-year-old sister, L.H., were fifty-four-year-old Gray's cousins. The girls stayed with Gray three or four nights per week, and the girls' mother would care for Gray's mother while he worked.

[3] On May 23, 2021, Gray's neighbor, Eric, went to Gray's house to drop off some items to place on a burn pile and to let Gray know that the water inspector was there to test the water. When Eric arrived and did not see any lights on in Gray's house, he walked to the basement door, where he saw a light coming from the window. Eric peered through the window and "had a hard time believing what he was seeing." Appellant's App. Vol. 2 Conf., p. 14.

[4] P.T. and Gray were both naked, with P.T. "on all fours on top of [Gray]'s [f]ace [while he] perform[ed] an oral sex act" on her while L.H., who was not wearing any underwear, was "jerking [Gray] off." *Id.* at 14, 35. Eric knocked on the door which caused Gray to answer. Eric told Gray about the water inspector, and while Gray was busy with the inspector, told the girls to get into

[1] Ind. Code § 35-42-4-3(a) (2021).

his vehicle. Eric took the girls to their mother's house, and she called the police. P.T. told her mother that Gray was performing an oral sex act on her and that "there ha[d] been numerous sexual acts in the past." *Id.* at 14.

[5] When the responding officer arrived at the girls' home, she began speaking to the girls' mother. Eric interrupted the interview to inform the officer that Gray was leaving his home and that Gray had said in the past "that if he ever got arrested again that he would just commit suicide." *Id.* at 13. The officer pursued Gray's vehicle, which was traveling at "high speed." *Id.* Gray stopped his vehicle and was "highly upset and emotional." *Id.* at 14. The officer placed Gray in handcuffs and advised him of his rights. When the officer asked Gray if he knew the reason for the stop, Gray responded "I did not do it[.] I swear I did not do it." *Id.*

[6] The officer and a Department of Child Services worker returned to the girls' home, and the DCS worker asked P.T. what had happened that evening. P.T. told her that Gray was "teaching her about her [c]lit" and "licking her vagina." *Id.* P.T. also told her that she performed oral sex on Gray the night before. Gray's DNA was found on P.T.'s external genital swabs.

[7] When the officer interviewed Gray, Gray admitted that he was performing oral sex on P.T. when Eric saw him. He said that the girls "commonly watched pornography on his phone and that they had been watching pornography before the sexual act had occurred." *Id.* In explanation for the sexual act, Gray told the officer that P.T. "asked him to do it and that he just wanted to make her feel

good." *Id.* He further explained that P.T. wanted to know if he would "lick it," and that he was lying on the bed when "she [came] up there." State's Ex. 1.

[8] During a forensic interview, P.T. disclosed that Gray made her and L.H. "watch porn of 'girls barely legal getting [f***ed]' that he searched for on his phone." *Id.* at 34. P.T. said that Gray also "watch[ed] her, her little sister, and her 11-year-old friend bathe together as well as getting dressed." *Id.* at 34. P.T. said that Gray had purchased "a purple dildo, lube, . . . and thongs for the girls to wear and dance" for him. *Id.* P.T. said that Gray would "ejaculate[e] on the floor, the wall by the stairs, on her belly, and in her mouth." *Id.* Further, she disclosed that Gray "tried to insert his penis in her vagina . . . and another time licked his fingers and put them in her vagina, but stopped when she said it hurt too bad." *Id.* at 34-35. Gray would also give the girls money for "making him feel good," and that meant "making his penis come." *Id.* at 35. This "activity had been going on almost every day for over a year." *Id.*

[9] P.T. said that she loved Gray and did not want to tell on him. She explained that Gray gave her "this vitamin that [he would] stick in [her] butt" to help her focus and pay attention in class. State's Ex. 2. She also disclosed that Gray made P.T. and her friend "stick Mountain Dew in his butt" to make him high. *Id.* She also said that the day before Eric discovered them, Gray made P.T. and L.H. "suck his thing" and take a shower with him. *Id.*

[10] Gray's former stepdaughter, Peyton, testified at the sentencing hearing. She had testified against Gray about eight years prior when he was the defendant in

a child neglect case. She disclosed that he had touched her inappropriately for four years. She was six years old when Gray started giving her baths without other adults present and touched her when they took showers together. Gray would shave Peyton's legs and show her pornography. She also disclosed that he had her "expose [her]self to him so he could check for hygiene." Tr. Vol. II, p. 39.

[11] The State charged Gray with Level 1 felony child molesting as to P.T., and on November 17, 2021, Gray pleaded guilty as charged. At the sentencing hearing, the trial court had access to the presentence investigation report. The report revealed that Gray had three prior felony convictions, including two counts of Class D felony neglect of a dependent and Class D felony performance before a minor that is harmful to minors in 2014. Gray's probation was completed in 2017.

[12] The trial court found as aggravating factors that (1) Gray was in a position of care and control of the victim, (2) the harm suffered by the victim was significant and greater than necessary to prove the elements of the crime, and (3) Gray committed a crime of violence in the presence of a minor who was not the victim. The court found Gray's acceptance of responsibility by pleading guilty as a mitigating circumstance. The court sentenced Gray to fifty years in the DOC. The trial court denied Gray's motion to correct error and this appeal ensued.

Discussion and Decision

I. Abuse of Discretion

[13] Gray suggests that the trial court abused its discretion when sentencing him by failing "to address all of the mitigating factors that the evidence proves, clearly impl[ying] that the court improperly overlooked or discounted them." Appellant's Br. p. 10. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. Stat*e, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion occurs if the 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.* at 491. A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91.

[14] First, Gray says that the court erred by failing to give mitigating weight to his argument that he is unlikely to commit another crime. We have observed, however, that a defendant who repeatedly abuses a child is not unlikely to commit another crime. *See Ware v. State*, 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004) (rejects defendant's argument along these lines where defendant engaged "in an on-going sexual relationship over the course of several months."). Here,

P.T. and her sister L.H. endured Gray's sexual abuse for over a year on almost a daily basis. Gray's stepdaughter testified to his abuse of her and use of the same grooming methods he used with P.T. and L.H. Additionally, this is Gray's fourth felony conviction for illegal conduct involving a minor. The court did not abuse its discretion by failing to find this proffered mitigating circumstance or by failing to give this circumstance mitigating weight.

[15] Next, Gray claims that his age will likely cause a hardship for him in prison, and "that by pleading guilty, at the age of 55-years, he was likely facing a life sentence," citing health conditions that will likely arise as he ages while serving even the minimum sentence of twenty years. Appellant's Br. p. 6. We agree with the State's observation that "[a]ll people—including those convicted of serious crimes—age." Appellee's Br. p. 11. And here, Gray has not provided the trial court or this Court with evidence that he will be unable to obtain medical treatment in the DOC or that he suffers from serious health conditions beyond normal aging. *See Moyer v. State*, 796 N.E.2d 309, 314 (Ind. Ct. App. 2003) (abuse of discretion in sentencing where defendant testified about "lymphoma, malignancy of the larynx, [] recurring tumors" and "pulmonary disease."). Instead, Gray reported in his presentence investigation report that his physical health was "good." Appellant's App. Vol. II, p. 64. We find no such abuse of discretion here.

[16] Gray asserts that he "has led a law abiding life for a substantial period of time." Appellant's Br. p. 12. We cannot agree. Gray's current conviction is his fourth felony conviction. Instead of being a mitigating circumstance, his criminal

history, all of which involves illegal conduct with minors, is an aggravating circumstance. We find no abuse of discretion.

[17] Additionally, Gray argues that he "cooperated with the investigators relatively soon after he was arrested." Appellant's Br. p. 12. The record reflects otherwise, however. After Eric had discovered Gray and Gray had finished talking with the water inspector, he drove away from his home at a "high speed," while followed by a police officer. Appellant's App. Vol. II, p. 13. He had previously told someone that he would commit suicide if he was arrested again. Though Gray did give a police interview shortly after being taken into custody, he minimized and lied about the extent of his abuse of the girls, claiming when pulled over, "I did not do it[.] I swear I did not do it." *Id.* at 14.

[18] Moreover, the weight given to Gray's guilty plea is not appropriate for our review. A "trial court can not now be said to have abused its discretion in failing to 'properly weigh'" aggravating and mitigating circumstances. *Anglemyer*, 868 N.E.2d at 491. "The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." *Id.* Thus, Gray's abuse of discretion argument fails.

II. Inappropriate Sentence

[19] Gray says that his fifty-year sentence executed in the Department of Correction is not appropriate considering his character. *See* Appellant's Br. p. 11. The State makes a convincing argument that the issue is waived for the failure to present a cogent argument along these lines. *See* Appellee's Br. p. 13.

"However, we prefer to decide issues on their merits when possible," and do so here. *Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), *trans. denied*.

[20] We may review and revise criminal sentences pursuant to the authority derived from article 7, section 6 of the Indiana Constitution. Indiana Appellate Rule 7(B) empowers us to 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." Because a trial court's judgment "should receive considerable deference[,]" our principal role is to "leaven the outliers." *Cardwell v. State*, 895 N.E.2d 1219, 1222-25 (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). Gray bears the burden to persuade this Court that his sentence is inappropriate, *see Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors appearing in the record for such a determination. *Stokes v. State*, 947 N.E.2d 1033, 1038 (Ind. Ct. App. 2011), *trans. denied*.

[21] As to the nature of the offense, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Gray was convicted of Level 1 felony child molesting which carries a sentencing range of between twenty and fifty years

with a thirty-year advisory sentence. *See* Ind. Code § 35-50-2-4 (2014). Gray received the maximum sentence of fifty years executed.

[22] Our consideration of the nature of the offense recognizes the range of conduct that can support a given charge and the fact that the particulars of a given case may render one defendant more culpable than another charged with the same offense. *See, e.g.*, *Hamilton v. State*, 955 N.E.2d 723, 727 (Ind. 2011) (in the context of child molesting, the victim's age "suggests a sliding scale in sentencing" because "[t]he younger the victim, the more culpable the defendant's conduct").

[23] The statutory definition of the offense required the State to prove beyond a reasonable doubt that fifty-four-year-old Gray, who was at least twenty-one years of age, with P.T., his eleven-year-old cousin, who was under fourteen years of age, knowingly or intentionally performed or submitted to sexual conduct or other sexual conduct, in this case an act involving the sex organ of one person and the mouth of another person. *See* Ind. Code § 35-42-4-3(a).

[24] As for the nature of the offense, we need not repeat the lurid details set forth in the Facts and Procedural History section of this decision of the extensive sexual abuse suffered by P.T., L.H., their friend, and Gray's former stepdaughter at Gray's hands and while in his care. Most certainly, the particulars of Gray's behavior render him among the more culpable within the range of conduct for the charged offense. Suffice it to say, we find nothing about the nature of the

offense suggesting that a downward revision of his sentence is warranted. And Gray appears to concede as much. *See* Appellant's Br. pp. 9-16.

[25] As for the character of the offender analysis, we observe that Gray exploited and groomed his young cousins, sexually abusing them while they were in his care. And he did so after grooming and sexually abusing his stepdaughter.

[26] "When considering the character of the offender, one relevant fact is the defendant's criminal history." *McFarland v. State*, 153 N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied*. This conviction is Gray's fourth felony conviction involving illegal conduct with minors. Gray has a pattern of victimizing minors, and that victimization was brought to light later on in Gray's life. Gray sexually abused P.T. and L.H. for more than a year before his criminal behavior was discovered. He groomed P.T. to the point that she was reluctant to tell others about what he was doing because she loved him. He engaged in criminal sexual activity in front of L.H. in addition to abusing her. Plus, he abused his former stepdaughter for four years. The fact that these girls did not speak up sooner does not reflect positively on his character. Moreover, his guilty plea and remorse do not reflect favorably upon his character. In exchange for his guilty plea, the State agreed not to prosecute him for the other juvenile victims in this case. While it is true that by pleading guilty Gray spared P.T. the embarrassment and emotional stress brought on by testifying at trial, Gray received the substantial benefit that resulted from the State's decision not to pursue additional charges.

[27] Gray has not met his burden of showing that his sentence should be revised downward due to substantial virtuous traits or persistent examples of good character and has conceded that the nature of the offense does not support a downward revision of his sentence.

Conclusion

[28] In light of the foregoing, we affirm the trial court's judgment.

[29] Judgment affirmed.

Pyle, J., and Foley, J., concur.