MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Kyle J. O'Connor,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 13, 2023

Court of Appeals Case No. 22A-CR-2386

Appeal from the Morgan Superior Court

The Honorable Brian H. Williams, Judge

Trial Court Cause No. 55D02-2103-F4-446

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

[1] Kyle O'Connor appeals his sentence of three years, all executed in the Department of Correction ("DOC"), for his conviction for domestic battery resulting in bodily injury to a pregnant woman, a Level 5 felony. O'Connor argues that: (1) the trial court abused its discretion by failing to consider several sentencing mitigators; and (2) his sentence is inappropriate. We find that the trial court did not abuse its discretion and that O'Connor's sentence is not inappropriate. Accordingly, we affirm.

Issues

[2] O'Connor raises two issues on appeal, which we restate as:

I. Whether the trial court abused its discretion by declining to consider several sentencing mitigators.

II. Whether O'Connor's sentence is inappropriate.

Facts

[3] On the evening of March 29, 2021, O'Connor; his then-fiancée, Melinda Hickey; and two of O'Connor's children, K.O., age eight, and M.O., age three, were planning on setting up a tent and camping in O'Connor's yard. At the time, Hickey was three months pregnant with O'Connor's twins.

[4] O'Connor was drinking whiskey the entire evening and displaying erratic behavior. At approximately 9:00 p.m., as the family tried to set up the tent, O'Connor was having a "bad attitude," and Hickey slapped him in the face.

Tr. Vol. II p. 206. O'Connor and Hickey then had an argument inside the house during which O'Connor asked Hickey to leave the house, and Hickey pushed O'Connor. After the argument, Hickey went to the bedroom, and O'Connor went back outside. Shortly thereafter, O'Connor drove to the liquor store and returned with candy for the children and a bottle of whiskey.

[5] By approximately 10:00 p.m., O'Connor and Hickey had made progress setting up the tent, and the family was getting settled inside when it started raining. O'Connor stepped outside of the tent to fix the rain cover and, when he returned inside the tent, "steam [was] coming off of him" from being in the rain. *Id*. at 215. Hickey thought that O'Connor was smoking in the tent and slapped him in the face for the second time that evening.[1] O'Connor again asked Hickey to leave the house, but she refused.

[6] At approximately midnight, Hickey and the children went to bed while O'Connor sat by the fire and continued to drink. Shortly after 3:00 a.m., O'Connor was "a little intoxicated and ready for bed" and went to his and Hickey's bedroom, but Hickey told him to sleep on the couch. Tr. Vol. III p. 161. O'Connor testified that Hickey also kicked him in the face as he tried to get into bed. O'Connor then "jumped across the bed and attacked" Hickey. Tr. Vol. II p. 224. Hickey testified that O'Connor strangled, punched, and bit her; held her head between his legs; and grabbed her hair. Hickey requested

[1] O'Connor testified that Hickey hit him on the face with a flashlight.

O'Connor to stop, and O'Connor responded, "[N]o b***h, I'll show you." *Id.* at 228.

[7] After several minutes, O'Connor released Hickey, who ran outside and told a neighbor that O'Connor attacked her. The neighbor called 911, and when the police arrived, Hickey was "frantic, panicked, crying, [and] kind of hysterical." Tr. Vol. III p. 78. Martinsville Police Department Officer Michelle Weaver testified that O'Connor "barricaded" himself inside the house and that, approximately one hour later, the police arrested O'Connor. *Id.* at 84. Hickey's injuries included a black eye, severe bruising to her entire body, and bite marks.

[8] On March 29, 2021, the State charged O'Connor with five counts: Count I, criminal confinement, a Level 4 felony; Count II, strangulation, a Level 5 felony; Count III, domestic battery resulting in bodily injury to a pregnant woman, a Level 5 felony; Count IV, resisting law enforcement, a Class A misdemeanor; and Count V, disorderly conduct, a Class B misdemeanor.

[9] The trial court held a jury trial in August 2022. O'Connor testified in his own defense and denied punching and strangling Hickey. O'Connor testified that Hickey scratched and punched him and that he "was just trying to hold [Hickey] to where she could not hurt [him or] herself." *Id.* at 151. The jury found O'Connor guilty of Counts III and V and not guilty of the remaining counts.

[10] On September 22, 2022, the State filed a Presentence Investigation ("PSI") report, which placed O'Connor in the moderate risk to reoffend category based primarily on his criminal attitude and behavioral patterns, criminal history, and substance abuse. The trial court held a sentencing hearing on September 29, 2022, and entered judgment of conviction on Count III, domestic battery resulting in bodily injury to a pregnant woman, a Level 5 felony.[2]

[11] At the sentencing hearing, O'Connor advanced as mitigators, as relevant here: 1) the hardship to O'Connor's dependents; 2) O'Connor was unlikely to reoffend; 3) O'Connor would respond affirmatively to probation; and 4) O'Connor paid restitution to the victim. Regarding his hardship argument, O'Connor testified that he lives with M.O., whom he has custody over; along with his girlfriend; her son; and his mother and that his girlfriend was unable to provide for her son's or M.O.'s care. In a letter to the trial court, O'Connor's girlfriend stated that she is a supervisor at UPS where O'Connor works and that she and her son would be "homeless" without O'Connor's support. Ex. Vol. I p. 86. O'Connor further testified that he is gainfully employed and pays child support in the amount of $55 and $155 weekly for two of his other children, K.O. and Ke.O.; that he visits K.O. every other weekend during the school year and every other week during the summer; and that he was working on obtaining parenting time to visit Ke.O.

[2] The trial court did not enter judgment of conviction on Count V due to double jeopardy concerns.

[12] The trial court found two aggravators: 1) O'Connor's criminal history, which consisted of four juvenile adjudications, including two for battery, and two adult misdemeanor convictions for possession of paraphernalia and possession of marijuana; [3] and 2) the offense was committed within hearing range of M.O.[4] The trial court explained that the second aggravator was "the most compelling of the two." Tr. Vol. III p. 234. In addition, the trial court found as mitigating that O'Connor paid restitution and found that the aggravators and mitigators were "essentially equal." *Id*. at 236. The trial court further found that Hickey "probably did instigate" the offense by kicking O'Connor but that Hickey's conduct did not "excuse" O'Connor's response. *Id*. at 235. The trial court sentenced O'Connor to the advisory sentence of three years, all executed in the DOC. O'Connor now appeals.

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[3] The trial court did not consider O'Connor's expunged adult conviction.

[4] Indiana Code Section 35-38-1-7.1(a)(4) provides that a trial court may consider as aggravating that:

> The person:
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> (A) committed a crime of violence [as defined by] (IC 35-50-1-2); and
>
> (B) knowingly committed the offense in the presence or within hearing of an individual who:
>
> (i) was less than eighteen (18) years of age at the time the person committed the offense; and
>
> (ii) is not the victim of the offense.

Discussion and Decision

I. Abuse of Discretion—Sentencing

[13] O'Connor first argues that the trial court abused its discretion by failing to find three mitigators: 1) the hardship to O'Connor's dependents; 2) O'Connor was unlikely to reoffend; and 3) O'Connor would respond affirmatively to probation. We disagree.

[14] Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse occurs only 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." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[15] A trial court abuses its discretion in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91), *cert. denied*.

[16] The trial court "'is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does.'" *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009), *cert. denied*), *cert*. *denied*. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

A. Hardship

[17] Trial courts are permitted to find as mitigating the hardship to a defendant's dependents. *See* Ind. Code § 35-38-1-7.1(b)(10). We have explained, however, that "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Smoots v. State*, 172 N.E.3d 1279, 1288 (Ind. Ct. App. 2021) (quoting *Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002)).

[18] Here, while O'Connor's sentence certainly imposes a hardship on his family, O'Connor fails to identify special circumstances that render this hardship undue. O'Connor's girlfriend is employed at UPS, and O'Connor fails to explain why she would be unable to find alternative housing for her and her son. Moreover, while O'Connor supports M.O., pays child support for K.O. and Ke.O., and is engaged in his children's lives, that is the case with many

convicted persons. *Cf. id.* (finding defendant "presented no evidence to demonstrate that the hardship to his family would be any worse than that normally suffered by a family whose relative is imprisoned"). Further, although O'Connor pays child support for K.O. and Ke.O, O'Connor "fail[s] to demonstrate the degree to which [K.O. and Ke.O. rely] upon him" for support. *See Roney v. State*, 872 N.E.2d 192, 205 (Ind. Ct. App. 2007), *trans. denied*, *abrogated on other grounds by Bethea v. State*, 983 N.E.2d 1134 (Ind. 2013). Accordingly, the trial court did not err in declining to find undue hardship as a mitigator.

B. Unlikely to Reoffend and Likely to Respond Affirmatively to Probation

[19] Trial courts may consider as mitigating that "[t]he person is likely to respond affirmatively to probation or short-term imprisonment" and that "[t]he character and attitudes of the person indicate that the person is unlikely to commit another crime." Ind. Code § 35-38-1-7.1(b)(7), (8). O'Connor argues that these mitigators are significant and clearly supported because he: 1) completed two substance abuse programs and has not consumed alcohol or abused illegal drugs since the day of the offense; 2) was in the process of completing a voluntary domestic violence program, of which he had completed four classes by the time he was sentenced; 3) completed a program of informal adjustment to retain custody of M.O. after the instant offense; and 4) successfully completed a period of probation for his adult possession convictions. O'Connor also directs us to a letter written to the trial court by his co-worker, which states that O'Connor "learned a lot" from this offense and

"made many changes and improvements to make him a better person and a better father." Ex. Vol. I p. 85.

[20] We commend O'Connor on taking steps to address the behaviors underlying the instant offense. We cannot say, however, that the mitigators he proffers are significant and clearly supported in the record. The PSI report placed O'Connor in the moderate risk to reoffend. We have previously held that:

> While an offender's risk assessment scores should not be considered as aggravating or mitigating factors in and of themselves, they "may be considered to 'supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.'"

Mehringer v. State, 152 N.E.3d 667, 674 (Ind. Ct. App. 2020) (quoting *J.S. v. State*, 928 N.E.2d 576, 578 (Ind. 2010)), *trans. denied*. Here, the PSI report relied on O'Connor's criminal attitude and behavioral patterns, criminal history, and substance abuse. Of note, O'Connor has two juvenile adjudications for battery, and he committed a similar offense here. O'Connor also had his probation twice revoked in another juvenile adjudication. Although O'Connor has completed two substance abuse programs, he was ordered to complete an alcohol and drug program when sentenced on his adult possession convictions, yet he reoffended here. We find that the trial court did not err in declining to consider O'Connor's proffered mitigators. Accordingly, the trial court did not abuse its discretion in sentencing O'Connor.

II. Inappropriate Sentence

[21] O'Connor next argues that his three-year sentence in the DOC, is inappropriate in light of the nature of the offense and his character. We disagree.

[22] 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."[5] 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) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[23] "'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.*

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[5] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Ind. Ct. App. 2021) (Tavitas, J., concurring in result).

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).

[24] 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). As such, "the defendant bears a particularly heavy burden in persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011) (citing *Golden v. State,* 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), *trans. den*ied.), *trans. denied*.

[25] In the case at bar, O'Connor was convicted of domestic battery resulting in bodily injury to a pregnant woman, a Level 5 felony. Level 5 felonies carry a sentencing range of one and six years, with the advisory sentence set at three years. Ind. Code § 35-50-2-6(b). O'Connor was sentenced to the advisory sentence of three years in the DOC.

[26] Our analysis of the "nature of the offense" requires us to look at the nature, extent, heinousness, and brutality of the offense. *See Brown v. State*, 10 N.E.3d 1, 5 (Ind. 2014). Here, neither Hickey nor O'Connor comported themselves at their best on the evening the battery took place. Nonetheless, O'Connor's response of punching, head locking, and biting Hickey was a disproportionate response to Hickey's actions. O'Connor could have simply walked away, as he had already done that night each time Hickey battered him. Moreover, since the incident, Hickey has suffered panic attacks and engaged in therapy for several months. Given that O'Connor was sentenced to the advisory sentence, we are unable to say that O'Connor's sentence is inappropriate in light of the nature of the offense.

[27] Our analysis of the character of the offender involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See Harris v. State*, 165 N.E.3d 91, 100 (Ind. 2021); *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020). The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense. *Pierce*, 949 N.E.2d at 352-53; *see also Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. "Even a minor criminal history is a poor reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*).

[28] Here, O'Connor's criminal history includes two juvenile battery adjudications similar to the instant offense. O'Connor has participated in substance abuse and domestic violence programs, expressed remorse, and paid restitution. O'Connor also supports M.O., his girlfriend, his girlfriend's son, and his mother; pays child support for K.O. and Ke.O.; and is engaged in his children's lives. O'Connor was sentenced to the advisory sentence, and we do not find he has met the hefty burden to demonstrate that sentence is inappropriate.

[29] Lastly, O'Connor also argues that his placement in the DOC is inappropriate. "The place that a sentence is to be served is an appropriate focus for application of our review and revise authority." *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007) (quoting *Hole v. State*, 851 N.E.2d 302, 304 n.4 (Ind. 2006)). "Nonetheless, we note that it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate. As a practical matter, trial courts know the feasibility of alternative placements in particular counties or communities." *Fonner v. State*, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007). "Additionally, the question under Appellate Rule 7(B) is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate. A defendant challenging the placement of a sentence must convince us that the given placement is itself inappropriate." *Id.* at 344.

[30] O'Connor argues that his placement in the DOC is inappropriate based on his "limited" criminal history and successful completion of his previous probationary sentence. We find this argument insufficient to demonstrate that

O'Connor's placement in the DOC is inappropriate. Accordingly, we decline to revise O'Connor's sentence or his placement.

Conclusion

[31] The trial court did not abuse its discretion in sentencing O'Connor, and O'Connor's sentence is not inappropriate. Accordingly, we affirm.

[32] Affirmed.

Vaidik, J., and Foley, J., concur.