MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Nathan Barkdull,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 29, 2022

Court of Appeals Case No.
22A-CR-885

Appeal from the
Monroe Circuit Court

The Honorable
Valeri Haughton, Judge

Trial Court Cause No.
53C02-2103-F5-190

Vaidik, Judge.

Case Summary

[1] Nathan Barkdull pled guilty to Level 5 felony stalking and Class A misdemeanor invasion of privacy, and the trial court sentenced him to five years, with two-and-a-half years in prison and two-and-a-half years suspended to probation, for stalking and sixty days for invasion of privacy, to be served consecutively. Barkdull now appeals his sentence. We affirm.

Facts and Procedural History

[2] In 2020, Barkdull, who was in his late thirties, needed a place to stay and moved in with a long-time friend. The friend had a sixteen-year-old daughter, S.H., whom Barkdull had known since she was around four years old. Not long after Barkdull moved in, he and S.H. began a sexual relationship. S.H. snuck into Barkdull's room at night so no one would know. At some point, S.H. decided she was no longer interested in a relationship with Barkdull. S.H. told Barkdull, which upset him. Around that same time, S.H.'s mother found out about their relationship and kicked Barkdull out.

[3] In December 2020, S.H. obtained a protective order against Barkdull. After the protective order was issued, S.H. and Barkdull sent many text messages to each other. In the messages, Barkdull called S.H. degrading names, including "cu*t," "hoe," "bitc*," "whore," "tramp," and "slut." Ex. 1. Barkdull encouraged S.H. to commit suicide, telling her to do him a "favor" and "cut [her]self . . . bone

deep all the way around" her wrist. *Id.* Barkdull also threatened S.H. and her family, including these messages:

> Way to go you crush my wants and dreams while I'm down and keep ducking me along u need to fix the damage u have done stop blocking every account or I'll just learn to hate I as much if not way more then u hate me so communicate or I'll just hate your fuc*ing guts u do this as Valentine's Day and my bday coming days away and I'm homeless your the best person in the world I hope karma kills your hoe as* bitc*
>
> * * * * *
>
> Go get tested or spread the sh*t cum slut bye bye hope you die
>
> * * * * *
>
> Happy Birthday you LYING CHEATING WHORE don't be mad or cry when you suffer . . .
>
> * * * * *
>
> [Your dad is] so heartless that he doesn't care if I come to trailer and kill everyone . . .

Id. Finally, Barkdull sent nude photos of S.H. to other people.

[4] In March 2021, the State charged Barkdull with Level 5 felony stalking for stalking S.H. and threatening to kill her and her family,[1] Level 5 felony child exploitation for disseminating nude photos of S.H., and Class A misdemeanor invasion of privacy for violating the protective order. *See* Cause No. 53C02-2103-F5-190. While Barkdull was in jail, he had his cellmate contact S.H. to tell her happy birthday. As a result, the State charged Barkdull with another count of Class A misdemeanor invasion of privacy. *See* Cause No. 53C02-2105-CM-448.

[5] Barkdull and the State entered into a plea agreement covering both cause numbers. Barkdull agreed to plead guilty to Level 5 felony stalking in F5-190 and Class A misdemeanor invasion of privacy in CM-448. In exchange, the State agreed to dismiss the remaining counts. For the stalking count, sentencing was left to the discretion of the trial court, except that there was a "cap of 3 years DOC." Appellant's App. Vol. II p. 31. For the invasion-of-privacy count, the sentence was sixty days. The sentences were to run consecutively.

[6] At sentencing, evidence was presented that Barkdull had a juvenile adjudication and four misdemeanor convictions: leaving the scene of an accident (2018), operating while intoxicated (2009), and intimidation and criminal recklessness

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[1] "Stalk" means "a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened. The term does not include statutorily or constitutionally protected activity." Ind. Code § 35-45-10-1. Stalking is elevated from a Level 6 to a Level 5 felony if the defendant "makes an explicit or an implicit threat with the intent to place the victim in reasonable fear of" serious bodily injury or death. I.C. § 35-45-10-5(b).

(2009). For the intimidation and criminal-recklessness convictions, Barkdull underwent anger-management counseling. Barkdull admitted he sent S.H. "really angry" texts but claimed he was "extremely stressed." Tr. p. 64. He acknowledged he had anger-management and substance-abuse issues and needed treatment. Barkdull argued the trial court should find the following mitigators: (1) he pled guilty and accepted responsibility; (2) S.H. facilitated his stalking conviction by contacting him after the protective order was issued; and (3) he had gone years without being involved in the criminal-justice system. The court identified two aggravators: (1) Barkdull's criminal history and (2) his disregard of court orders. *See id.* at 79. The court rejected as a mitigator that S.H. facilitated the stalking, pointing out that she was "a young girl" and Barkdull was "a grown man" and that Barkdull's messages were "vile." *Id.* at 80. The court found Barkdull's guilty plea and acceptance of responsibility to be a mitigator but said the aggravators outweighed it.[2] The court sentenced Barkdull to five years, with two-and-a-half years in the Department of Correction and two-and-a-half years suspended to probation, for stalking and sixty days for invasion of privacy, to be served consecutively.

[7] Barkdull now appeals his sentence.

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[2] Barkdull claims the trial court's sentencing statement is inadequate because it did not "clearly" outline the mitigators. Appellant's Br. p. 10. But as just detailed above, the court identified Barkdull's guilty plea and acceptance of responsibility as a mitigator and declined to find as a mitigator that S.H. facilitated the stalking. Because we find the court's sentencing statement to be adequate, we decline Barkdull's request to remand the case for clarification.

Discussion and Decision

[8] Barkdull first contends the trial court erred in not finding as a mitigator that S.H. facilitated his stalking conviction. The finding of mitigators rests within the sound discretion of the trial court, and we review such decisions only for an abuse of that discretion. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied*. One way a trial court abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Id.*

[9] Barkdull argues S.H. facilitated the stalking "to some degree" by sending him "somewhere between one hundred and three hundred text messages, despite an active protective order." Appellant's Br. p. 13. The trial court rejected this proposed mitigator:

> I think throughout much of what I heard yesterday there was an emphasis on [S.H.] being, engaging with you voluntarily Mr. Barkdull. But quite frankly even though the law doesn't recognize her as a child . . . she was legally a child, she was a minor, she was 16 years old and even though it may have been, and I'm going to put in, I guess, air quotes voluntary on her part we're still talking about an over 20 year difference in ages. Somebody that is not matured yet versus someone is almost 40 years old, so that's something that the Court also took into account and takes into account and just cannot ignore. I'm, and I'm going to add that in addition I know that you said you were angry when you wrote those texts but that was too much to write in one setting and I don't care how angry somebody is no one should ever write anything that vile to another human being especially to someone who is a minor who cannot, who isn't fully formed yet. I'll just

> say that, just straight out. This is, this is not adult to adult, this was a grown man talking to a young girl.

Tr. p. 80.[3]

[10] Barkdull claims their age difference alone does not mean that S.H. was "impressionable" or "lacked maturity." Appellant's Br. p. 14. But even setting aside their age difference, the trial court found that Barkdull's messages to S.H. were "vile" and threatening. As the State argues on appeal, "There is nothing in the record to suggest that S.H. induced or facilitated Barkdull into threatening to kill her and her family." Appellee's Br. p. 17. The court did not abuse its discretion in not finding as a mitigator that S.H. facilitated the stalking.

[11] Barkdull next contends that even if the trial court did not abuse its discretion in sentencing him, his five-year sentence for stalking is inappropriate. Indiana Appellate Rule 7(B) provides that an appellate court "may revise a sentence authorized by statute 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." The appellate court's role under Rule 7(B) is to "leaven the outliers," and "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 159-60 (Ind. 2019) (quotation omitted). "Whether a sentence is inappropriate ultimately turns on the culpability of the

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[3] Barkdull says it's unclear whether the trial court found their age difference to be an aggravator or used it to reject his proposed mitigator that S.H. facilitated the stalking. Considering the court's sentencing statement as a whole, it is apparent it used their age difference to reject Barkdull's proposed mitigator. As a result, we need not address Barkdull's argument that the trial court erred in finding their age difference as an aggravator.

defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). Because we generally defer to the judgment of trial courts in sentencing matters, defendants must persuade us that their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016).

[12] The sentencing range for a Level 5 felony is one to six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6(b). Here, the trial court sentenced Barkdull to an above-advisory term of five years. The court ordered two-and-a half years to be executed, which was six months less than what the plea agreement allowed. Barkdull asks us to revise his sentence by "suspending" the two-and-a-half-year executed portion of his sentence.[4] Appellant's Br. p. 10.

[13] The nature of the offenses is serious and troubling. After sixteen-year-old S.H. broke up with the nearly forty-year-old Barkdull, he became unhinged. As Barkdull himself acknowledges on appeal, he sent "hateful" and "frightening" messages to S.H. Appellant's Br. p. 17. In these messages, Barkdull called S.H. degrading names, encouraged her to commit suicide, and threatened to kill her and her family. Even after Barkdull was arrested and in jail, he had his cellmate contact S.H., which resulted in another charge of invasion of privacy.

[4] Barkdull has nearly served the executed portion of his sentence. According to the DOC's website, Barkdull will be released from prison on October 27, 2022.

[14] Barkdull's character does not fare much better. His character is most accurately reflected in the substance of the messages he sent to S.H. Although Barkdull pled guilty, it was a pragmatic decision. The evidence of his crimes was strong, and he received a benefit in the dismissal of Level 5 felony and Class A misdemeanor charges and a cap on his executed time. Barkdull also has four prior misdemeanor convictions. For two of the convictions (intimidation and criminal recklessness), Barkdull underwent anger-management counseling. Despite this counseling, Barkdull says he acted out of anger here.

[15] Barkdull has failed to persuade us that his five-year sentence with two-and-a-half years executed—six months less than the plea agreement allowed—is inappropriate.

[16] Affirmed.

Riley, J., and Bailey, J., concur.