MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robin Hardy,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 30, 2023

Court of Appeals Case No. 22A-CR-2656

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-2005-F4-33

Memorandum Decision by Judge Crone
Judges Brown and Felix concur.

Crone, Judge.

Case Summary

[1] Robin Hardy appeals his convictions, following a jury trial, for two counts of level 4 felony child molesting involving different victims. The trial court imposed a sixteen-year sentence with fourteen years executed and two years suspended to probation. Hardy asserts that the State presented insufficient evidence to support one of his convictions. He further contends that the trial court abused its discretion during sentencing and that his sentence is inappropriate in light of the nature of his offenses and his character. Finding sufficient evidence, no abuse of discretion, and that Hardy has not met his burden to demonstrate that his sentence is inappropriate, we affirm.

Facts and Procedural History

[2] In May 2020, Hardy lived in a three-bedroom duplex with his girlfriend Shakira, their three-month-old son E.W., and Shakira's other three children: seven-year-old daughter A.W., five-year-old son A.V., and two-year-old son A. Shakira's eleven-year-old female cousin K.J. also frequented the home and would often stay the night.

[3] On May 2, 2020, Hardy watched the children while Shakira worked an overnight shift. After the boys had gone to sleep, Hardy asked K.J. and A.W. to come into his and Shakira's bedroom. While the girls were in the bedroom with the door closed, Hardy told them that they were going to play "truth [or] dare." Tr. Vol. 2 at 192. K.J. and A.W. were lying on the bed with Hardy between them. Hardy kissed K.J. on the lips and reached under her clothes and touched

her breasts and between her legs. Hardy took K.J.'s hand and placed it under his clothes on his bare genitals. Hardy also touched A.W. between her legs, which made her feel "scared." *Id.* at 223. Hardy instructed both K.J. and A.W. not to tell anyone what had happened. A day or two later, Hardy kissed A.W. on the mouth.

[4] K.J. and A.W. eventually told Shakira what Hardy had done. The girls were taken to the hospital and examined, and they were also interviewed at a child advocacy center. Male DNA was found on K.J.'s breasts, around her mouth, and on her external genitals.

[5] The State charged Hardy with two counts of level 4 felony child molesting, one count involving A.W. and one count involving K.J., and two counts of level 5 felony sexual misconduct with a minor. A jury trial began on September 19, 2022. The jury found Hardy guilty as charged; however, the trial court vacated the two level 5 felony convictions due to double jeopardy concerns and entered judgment of conviction solely on the two level 4 felony charges. Following a sentencing hearing, the trial court imposed consecutive eight-year sentences for the child molesting convictions, with fourteen years executed and two years suspended to probation. This appeal ensued.

Discussion and Decision

Section 1 – The State presented sufficient evidence to support the challenged conviction.

[6] Hardy challenges the sufficiency of the evidence to support his child molesting conviction as to A.W. In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the conviction and the reasonable inferences arising therefrom. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey*, 907 N.E.2d at 1005.

[7] To convict Hardy of level 4 felony child molesting as to then seven-year-old A.W., the State was required to prove that he performed or submitted to any fondling or touching, of either A.W. or himself, with intent to arouse or to satisfy the sexual desires of either A.W. or himself. Ind. Code § 35-42-4-3(b). Hardy concedes that he fondled or touched A.W. and challenges only the sufficiency of the evidence that he did so with the intent to arouse or to satisfy his or A.W.'s sexual desires.

[8] It is well established that "[t]he intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual consequence to which such conduct usually points." *Carter v. State*, 31 N.E.3d 17, 30 (Ind. Ct. App. 2015), *trans. denied*. Here, A.W. testified that she was lying on Hardy's bed at night with K.J. when Hardy "touched between [her] legs." This touching made A.W. feel "scared." Tr. Vol. 2 at 223. The evidence further demonstrated that, during the same encounter, Hardy kissed K.J., touched her genitals, and made K.J. touch his genitals. Contrary to Hardy's suggestion, it is of no moment that A.W. did not specify that her genitals were touched, as this Court has previously found that because "an inner thigh is in close proximity to the genitals, an erogenous zone, it may itself be the source of sexual gratification." *Altes v. State*, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005) (citing *Nuerge v. State*, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997), *trans. denied*), *trans. denied*. More importantly, the circumstances surrounding the touching, as well as evidence that Hardy specifically instructed A.W. not to tell anyone what he had done, is indicative of Hardy's sexual intent. This circumstantial evidence lends itself to a reasonable inference that Hardy acted with the requisite intent to arouse. We conclude that the State presented sufficient evidence to support Hardy's child molesting conviction as to A.W.

Section 2 – The trial court did not abuse its discretion during sentencing.

[9] Hardy next contends that the trial court abused its discretion during sentencing. In general, "sentencing decisions are left to the sound discretion of the trial court, and we review the trial court's decision only for an abuse of this discretion." *Singh v. State*, 40 N.E.3d 981, 987 (Ind. Ct. App. 2015), *trans. denied* (2016). "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." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (quotation marks omitted), *clarified on reh'g*, 875 N.E.2d 218. A trial court may abuse its discretion by: (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.

[10] The trial court in this case found the following aggravating factors: Hardy's criminal history, his history of failure to appear, the victims were in his care, custody, and control, he has a child support arrearage, his substance abuse history, his poor behavior while in jail, and the long-term effect of the crimes on his victims. Hardy challenges only the last aggravating factor. Specifically, he argues that this aggravator is already "cooked into the prescribed sentencing range" because "[c]hild molesting carries a serious sentencing range because of

the anticipated harm to the victims." Appellant's Br. at 20. Although Hardy cites no legal authority, we agree that generally the "emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime." *Gober v. State*, 163 N.E.3d 347, 354 (Ind. Ct. App. 2021) (citation omitted), *trans. denied*. Here, however, the record indicates that the trial court indeed found that the long-term effect of Hardy's crimes, especially on K.J., was greater than that usually associated with the crime of child molesting. In noting the significant trauma caused to the victims, the court specifically referenced a letter from K.J.'s mother, which documented that her daughter has experienced "major mental issues" and has "so many problems" and "complications in life" due to the molestation. Appellant's App. Vol. 4 at 146. Under the circumstances, the trial court did not abuse its discretion in finding that the long-term impact of Hardy's crimes on his victims was an aggravating factor.

Section 3 – Hardy has not met his burden to demonstrate that his sentence is inappropriate.

[11] Hardy also asks us to reduce his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The 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." Hardy has the burden of showing that his sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 490. When reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is

perceived as the correct result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012).

[12] "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. "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). As we assess the nature of the offense and character of the offender, "we may look to any factors appearing in the record." *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). Ultimately, 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." *Cardwell*, 895 N.E.2d at 1224. We are guided in appellate review to focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count. *Id*. at 1225.

[13] Turning first to the nature of the offenses, we observe that "the advisory sentence is the starting point the Legislature selected as appropriate for the crime committed." *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing

range for a level 4 felony is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The trial court sentenced Hardy to an aggregate executed sentence of fourteen years, which was only slightly above the advisory sentence for each of his two convictions and well below the maximum allowable executed sentence for his crimes. Hardy dedicates a single sentence in his brief to the inappropriateness of his sentence in light of the nature of his offenses, stating, "the nature of the offense[s] does not appear to be aggravated." Appellant's Br. at 24. This bald assertion frankly does not come close to satisfying his burden to persuade us that sentence reduction is warranted in light of the nature of these serious offenses which were committed against the child and cousin of his live-in girlfriend.

[14] Hardy places more effort in attempting to persuade us that a sentence reduction is warranted based upon his character, but this effort is unavailing. An offender's character is shown by his "life and conduct." *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). This assessment includes consideration of the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). Hardy has a long criminal history which began in 2010 when he was convicted of class D felony theft. Thereafter, he accumulated numerous misdemeanor convictions over a short time frame for driving while suspended. Although we agree with Hardy that these convictions are dissimilar to his current convictions, we also agree with the trial court that these repeated crimes, including repeated failures to appear in court to answer for these crimes, demonstrate "some type of disdain it would seem for the law."

Tr. Vol. 4 at 17. The record also indicates that Hardy was placed in segregation while incarcerated awaiting trial due to his poor behavior. This reflects negatively on his character. Although Hardy points to other examples of his good character such as his military service and letters of support from his family, we cannot say that such evidence is so compelling as to overcome the considerable deference we owe to the trial court in fashioning an appropriate sentence. Indeed, Hardy would be hard pressed to present us with examples of good character that could overshadow the fact that he abused a position of trust by molesting the young children in his care. In sum, Hardy has not met his burden to demonstrate that the sentence imposed by the trial court is inappropriate, and therefore we affirm.

[15] Affirmed.

Brown, J., and Felix, J., concur.