MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jeffrey Todd Long,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 10, 2024

Court of Appeals Case No. 23A-CR-1179

Appeal from the Carroll Circuit Court

The Honorable Benjamin A. Diener, Judge

Trial Court Cause No. 08C01-2107-F1-4

Memorandum Decision by Judge Brown
Judges Bailey and May concur.

Brown, Judge.

[1] Jeffrey Todd Long appeals the trial court's denial of his motion to sever and asserts his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] In 2008, Long and Ashley Long were married. In 2019, Long lived with his mother, Ashley, his thirteen-year-old stepdaughter, A.L., and his and Ashley's son, J.L.J. Over the course of 2019, Long forced A.L. to perform oral sex on him, and when she turned fourteen Long began putting his fingers in her genitals, asking her for a "hand job," and "it became sexual contact where his genitals would be put into [her] vagina." Transcript Volume III at 104. On June 23 or the early morning of June 24, 2021, Long had sex with A.L. on the couch while her brother J.L.J. was asleep on the couch.

[3] On June 26, 2021, Ashley gave A.L. a pregnancy test because she had been "acting very weird," and Ashley believed A.L. might be pregnant. *Id.* at 72. She learned from a friend of A.L. that Long "had been raping A.L. for years." *Id.* Ashley later confronted Long and informed law enforcement.

[4] On July 8, 2021, the State charged Long with Count I, child molesting as a level 1 felony; Count II, child seduction as a level 2 felony; Count III, sexual misconduct with a minor as a level 4 felony; Count IV, rape as a level 3 felony; and Count V, sexual misconduct with a minor as a level 4 felony.

[5] On July 31, 2022, Long filed a Motion for Severance of Counts claiming that, if the charges were tried together, he would "be deprived of his right to . . . the protections against prior and/or subsequent bad act evidence set forth in

Indiana Rule of Evidence 404(b)," and that the court had "the authority and discretion pursuant to I.C. 35-34-1-11(a) to order a severance of the trial of the above charges." Appellant's Appendix Volume II at 22. On August 18, 2022, the trial court held a hearing on the motion and took the matter under advisement. On September 20, 2022, it denied the motion. On April 3, 2023, Long filed a Motion to Enter Plea of Guilty intending to plead guilty to Count V, which the court denied on April 10, 2023.

[6] In April 2023, the court held a jury trial, at which Ashley testified that, on June 26, 2021, after she gave A.L. a pregnancy test, she learned from A.L.'s friend that Long "had been raping A.L. for years." Transcript Volume III at 72. According to Ashley, she went to her and Long's bedroom, where she found Long and A.L., who was curled up in the fetal position at the top of the bed, and when she confronted Long, he said "I'm sorry. I messed up. I was drunk." *Id.* at 73. He "said he was drunk and that it was consensual," to which Ashley stated that it could not have been consensual because of A.L.'s age. *Id.* at 74. Long "looked like a deer in headlights because he knew that he'd – he'd done it." *Id.* at 74-75.

[7] A.L. testified that in 2019, when she was thirteen, Long "got drunk one night, and he had came up to [her] bedroom, and he had asked [her] to perform oral on him." *Id.* at 99. She described the incident further, stating that she "said no and he did not care," "[h]e had pulled his pants down anyways, and he had kept begging [her] to do it, and [she] kept saying no, and if [she] didn't he had grabbed [her] by the back of [her] head," and he "shoved his genitals in [her]

mouth." *Id.* at 101. She affirmed that he "finish[ed] in [her] mouth," and it tasted like "[c]orn chips." *Id.* She stated that the conduct continued, would occur "in his room, sometimes it would be in [her] bedroom," he would request that she perform oral sex on him or would perform oral sex on her, and it continued until she turned fourteen years old. *Id.* at 102. She testified that, when she turned fourteen, "[i]t became more than just oral," "it started off as he would stick his fingers inside of me or he would ask me to give him a hand job," "later on . . . it became sexual contact where his genitals would be put into my vagina," these interactions occurred from when she was fourteen years old and continued until she was fifteen, the encounters happened "[a] few times a month," and they "would either be in [her] bedroom or his" and that it happened once on the couch. *Id.* at 104. She stated that between the ages of fourteen and fifteen, "[i]t happened [approximately] 30 to 40 times." *Id.* at 107. She reported that once, Long offered to buy her a guitar and to supply her with nicotine "if [she] had never told anyone anything or anything like that . . . ." *Id.* at 110.

[8] A.L. testified further that she informed her friend about "what was happening," and eventually told the grandmother of her friend "a few weeks before it came out." *Id.* at 106. As for why she didn't report the abuse sooner, she stated that she thought Ashley would not believe her because Long told her that no one would believe her and that he threatened to "beat [her] to the point where [she would not] even [be] able to walk." *Id.* at 107.

[9] Asked to recount "the last time that [Long] had sexual intercourse with [her]," she stated that she had been fifteen and Long "had asked [her] to perform oral on him," "he had grabbed [her] by [her] hair," she had "performed oral on him," "[a]nd then he laid [her] back and he had stuck his genitals in [her] vagina," and that "he had came in me." *Id.* at 109. She stated that her brother had been present on the couch but had not woken up, Long had held her down, and "he got on top of [her]" and "force[d] [her] legs apart." *Id.* at 110. She reported that she had undergone a sexual assault examination with a nurse after the abuse had been reported.

[10] On cross-examination, she stated that Long "would threaten to beat [her] with his belt if [she] didn't take [her] pants off, and sometimes he would take them off of [her] himself," one time he "slugged [her] into the fridge," and she alleged instances of him hitting her in the face, choking, holding her arms, putting her in a headlock, and picking her up by her neck. *Id.* at 133, 138. On redirect, she stated that he told her "I hope you know I love you," and he made her watch pornography with him "two or three times in his bedroom . . . ." *Id.* at 143.

[11] J.L.J. testified that he would sometimes be asked "to go get A.L.," "A.L. would go in [Long's] room," and J.L.J. "would try to go in there, but the door was always locked, both doors." *Id.* at 165.

[12] Rachel Moore, a nurse, testified that she performed a sexual assault examination on A.L. on or about June 26, 2021, she noticed "three bruises on her arm, a bruise on her leg, as well as some redness behind her ear, and some

petechiae in her mouth," and petechiae are "small red dots on the inside of [the] mouth that are capillaries that have burst," and they "can happen either from strangulation, so choking of the patient, or it can happen from the force of a penis in the mouth for oral sex." Transcript Volume IV at 15-16. Rebecca Tobey, a forensic biologist, testified about internal genital swabs taken from A.L.'s sexual assault kit, and that "[s]tatistical analysis provides moderate support for the inclusion of Jeffrey Long," and affirmed that the vaginal cervical swabs provided "very strong support for the inclusion" of Long. *Id.* at 47-48.

[13] Long testified that, on June 23, 2021, he had sexual intercourse with A.L., while he was forty-two and she was fifteen, on the couch while J.L.J. was asleep on the couch. He stated that he "had a lot to drink that night," A.L. "wanted to experience a sexual -- kind of -- you know, to have sex," and he "just did it." *Id.* at 105. When asked "when [A.L.] was 13, which would have been in the charging information between September 1 and October 19 of 2019 . . . [d]id you have sexual intercourse with her," Long responded: "No." *Id.* at 126. He denied participating in "oral sex or a sex act involving either of your sex organs and the mouth of the other" or having any sexual contact with her within that time period. *Id.* He responded that he never had any form of sexual contact with A.L. when she was fourteen, specifically "beginning October 20 of 2019, through October 19 of '20, and then continuing on from that date until the day before the incident, which is the 22nd of June of 2021 . . . ." *Id.* He denied any form of battery or sexual contact except for affirming that he had "sex with [his] 15-year-old daughter on June 23rd, 2021." *Id.* at 129.

[14] On April 13, 2023, the jury convicted Long as charged. On May 4, 2023, the court merged Counts I and II as well as Counts III and IV, and it sentenced him to forty years on Count I, twelve years on Count IV, and nine years on Count V, to run consecutively, for a total executed sentence of sixty-one years.

Discussion

I.

[15] Long argues that the trial court erred in the denial of his motion to sever because "[t]he complexity of the facts unique to Count V, combined with their sensational nature, would make it unlikely that the jury would be able to independently examine Counts I through IV without considering the facts unique to Count V." Appellant's Brief at 11. He claims that Count V was the only count identifying Long with DNA evidence, "the only count with corroboration of physical injury," and "the only charge with the particularly egregious fact that Long's juvenile son was physically present on the same couch during the sexual activity." *Id.* Long argues that the facts of Count V "create the forbidden inference prohibited by [Ind.] Evidence Rule 404(b) in the jury's mind . . . .," and that "the facts . . . unique to Count V, to which Long admitted his guilt at trial . . . created the forbidden inference that if he committed that charge, then he must have committed the other four counts." *Id.* at 11, 17.

[16] When severance is not a matter of right, a trial court's refusal to sever charges is reviewed for an abuse of discretion. *Craig v. State*, 730 N.E.2d 1262, 1265 (Ind.

2000) (citing *Kahlenbeck v. State*, 719 N.E.2d 1213, 1216 (Ind. 1999)). On appeal, a defendant "must show [that] 'in light of what actually occurred at trial, the denial of a separate trial subjected him to . . . prejudice.'" *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. Ct. App. 1999) (quoting *Brown v. State*, 650 N.E.2d 304, 306 (Ind. 1995) (quoting *Hunt v. State*, 455 N.E.2d 307, 312 (Ind. 1983))).

[17] Ind. Code § 35-34-1-9(a) provides:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> > (1) are of the same or similar character, even if not part of a single scheme or plan; or
> >
> > (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

[18] Ind. Code § 35-34-1-11(a) provides that whenever two or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses and that in all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of the offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering the number of offenses charged; the complexity of the evidence to be offered;

and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

[19] With respect to Long's argument regarding Evidence Rule 404(b),[1] we note that he cites *Byers v. State*, 709 N.E.2d 1024, 1026-1027 (Ind. 1999), which did not involve a motion to sever and discussed Ind. Evidence Rule 404(b)(1) in the context of admitting witness testimony about a prior arrest on an unrelated charge. He also cites a 2013 dissent from the denial of transfer in which Justice Rucker proposed that a defendant should be entitled to severance under Ind. Code § 35-34-1-11(a) unless the State could demonstrate that, if the charges were severed, the testimony of all victims would be admissible under Ind. Evidence Rule 404(b) in all trials. *Wells v. State*, 983 N.E.2d 132, 139-140 (Ind. 2013) (Rucker, J., dissenting from denial of transfer).[2] "However, neither this court nor our Indiana Supreme Court has ever adopted the analysis advanced by Justice Rucker in *Wells*." *Vasquez v. State*, 174 N.E.3d 623, 631 (Ind. Ct. App. 2021). This Court bases its decision "on the precedent we have interpreting how we should review the trial court's discretionary decision under Indiana Code section 35-34-1-11(a)." *Id.*

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[1] Ind. Evidence Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Evidence of other crimes or acts can be admissible, however, for other purposes, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evidence Rule 404(b)(2).

[2] Chief Justice Dickson concurred with Justice Rucker's dissent.

[20] The record reveals that there were five charged offenses, the evidence was not overly complex, and A.L. and Long testified and were cross examined. The testimony of A.L. and Long distinguished between the events of June 23, 2021 and the events alleged in the other counts. The date and A.L.'s age was identified while discussing each event. During closing argument, the prosecutor described the separate counts and the facts underlying each and stated that "Count 5 is the specific instance on the couch." Transcript Volume IV at 188. The court read the Preliminary Instructions, which clearly delineated the counts, allegations, and relevant dates, and likewise distinguished the counts when reading the Final Jury Instructions. Count V, to which Long admitted, related to the events of June 23, 2021, whereas the other counts alleged events occurring over extended periods of time. We cannot say the trial court abused its discretion in denying Long's Motion for Severance of Counts. *See Vasquez*, 174 N.E.3d at 631 (holding the trial court did not abuse its discretion in denying the defendant's motion for severance of ten charges involving two victims where the evidence as to each victim was easily distinguishable), *trans. denied*.

II.

[21] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "[A]ppellate review should 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." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

[22] Ind. Code § 35-50-2-4(c) provided at the time of the offense that a person who commits a level 1 felony child molesting offense described in Ind. Code § 35-42-4-3(a)(1) shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years.[3] Ind. Code § 35-50-2-5 provides that a person who commits a level 3 felony shall be imprisoned for a fixed term of between three and sixteen years, with the advisory sentence being nine years. Ind. Code § 35-50-2-6 provides that a person who commits a level 4 felony shall be imprisoned for a fixed term of between two and twelve years, with the advisory sentence being six years.

[23] Our review of the nature of the offenses reveals that Long engaged in sexual acts with A.L. starting when she was thirteen, and when she turned fourteen, he began putting his fingers inside of her, asking her for hand jobs, and having sex with her. On July 23, 2021, Long had sex with A.L. and ejaculated inside her while her brother was asleep on the same couch. A.L. testified that Long frequently forced himself on her and was often physically violent with her.

[24] Our review of the character of the offender reveals that Long admitted to having sex with A.L. on the couch on July 23, 2021. Long's criminal history

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[3] Subsequently amended by Pub. L. No. 109-2023, § 1 (eff. July 1, 2023).

included sentences in Tennessee including: possession of alcohol in 1998; manufacture of schedule II meth for resale as a felony in 2001; theft and forgery as felonies in 2005; theft in 2006; contempt of court in 2011; driving on a suspended license in 2013; and "Driving on Revsus [sic] 3rd offense" in 2016. In Indiana, Long had a charge for resisting law enforcement as a class A misdemeanor that was pending at the time the presentence investigation report ("PSI") was completed. The PSI also indicates Long's overall risk assessment score using the Indiana Risk Assessment System places him in the high risk to reoffend category.

[25] After due consideration, we conclude Long has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offenses and his character.[4]

[26] For the foregoing reasons, we affirm the trial court.

[27] Affirmed.

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[4] To the extent Long argues the court abused its discretion in sentencing him or ordering that his sentences under Counts I, IV, and V be served consecutively, we need not address this issue because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate"), *trans. denied*), *trans. denied*. Even if we were to address whether the court abused its discretion in sentencing him, we would not find his argument to be persuasive in light of the record, his criminal history, and the lack of a cogent argument citing relevant authority on the imposition of consecutive sentences.

Bailey, J., and May, J., concur.