MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Brian A. Karle
Ball, Eggleston, PC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General for Indiana

Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Donte Frazier,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 18, 2022

Court of Appeals Case No. 21A-CR-2654

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-1908-F1-7

Bailey, Judge.

Case Summary

[1] Donte Frazier ("Frazier") appeals the sentence for his convictions of three counts of child molesting, as Level 1 felonies.[1] The only issue he raises on appeal is whether his eighty-two-year sentence is inappropriate given the nature of the offense and his character.

[2] We affirm.

Facts and Procedural History

[3] Frazier and C.B. ("Mother") began dating in February of 2014. At that time, Mother had four children, including A.H. who was born in April of 2009. Frazier and Mother were in an on-and-off relationship from early 2014 through March of 2017, and they had two children together during that time. After Frazier's and Mother's relationship ended in 2017, Frazier continued to have contact with Mother and the children, including A.H.

[4] During the calendar year of 2016, Frazier twice had sexual intercourse with A.H., who was six years old at that time. Sometime between July 1, 2014, and July 21, 2019, Frazier engaged in other sexual conduct by digitally penetrating A.H.'s vagina. Frazier committed those three crimes while A.H. and the other children were in his care and custody and while A.H.'s older brother was within

[1] Ind. Code § 35-42-4-3(a).

earshot. Frazier told A.H. that he would hurt A.H.'s mother and siblings if she ever told anyone about the sexual abuse.

[5] On July 20, 2019, then-ten-year-old A.H. was at a friend's house when the friend's mother, Lakeshia Burton ("Burton"), saw A.H. crying. A.H. disclosed to Burton that she had been molested by her mother's ex-boyfriend, Frazier. Burton contacted A.H.'s Father and Mother and told them about A.H.'s statements. The next morning, Burton drove A.H. and A.H.'s Father to the police station and A.H. was forensically interviewed at Heartford House. Later, A.H. was taken to Riley Children's Hospital of Indianapolis for a sexual assault examination. A.H. was tested for sexually transmitted infections and found to have chlamydia and gonorrhea.

[6] On August 27, 2019, the State charged Frazier with six counts of child molesting as Level 1 felonies[2] as to A.H. Counts I and II alleged Frazier had sexual intercourse with A.H. during the 2016 calendar year. Count III alleged Frazier committed other sexual conduct against A.H. by performing oral sex upon A.H. during the 2018 calendar year. Count IV alleged Frazier committed other sexual conduct against A.H. by requiring her to perform oral sex upon him during the 2018 calendar year. Count V alleged Frazier committed other sexual conduct against A.H. by digitally penetrating her vagina between July 1, 2014, and July 21, 2019. Count VI alleged Frazier engaged in deviate sexual

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[2] Count VI, which related to the time period from January 1, 2014, through June 20, 2014, was brought as a "Class A felony," the equivalent of a Level 1 felony. App. at 24.

conduct against A.H. by digitally penetrating her vagina between January 1, 2012, and June 30, 2014. The State also alleged that Frazier has a habitual offender status.

[7] Frazier was tried by a jury on October 4 and 5 of 2021. An investigating police officer testified that Frazier admitted to the officer that Frazier had tested positive for chlamydia and possibly gonorrhea in 2016 or 2017, and subsequently obtained treatment. A.H. and her brother testified at trial about specific incidents of Frazier's sexual abuse of A.H. during the period between 2014 and 2019, including two instances of sexual intercourse and one instance of digital penetration. Mother testified that, after giving birth to her and Frazier's first child in 2014, Mother tested positive for chlamydia.

[8] The jury found Frazier guilty of Counts I, II, and V, and not guilty of the other counts. Frazier then admitted to being a habitual offender. A presentence investigation report ("PSI") was prepared and filed with the trial court. Frazier's criminal history, as provided in the PSI, began with a delinquency petition for what would have been Class D felony theft if committed by an adult, and it was resolved through a diversion in 2005. Frazier's adult criminal history began when he was waived to adult court and convicted of Class A misdemeanor resisting law enforcement.

[9] On August 29, 2007, Frazier was convicted of Class A misdemeanor conversion and Class B misdemeanor battery. On November 28, 2007, Frazier was convicted of Class A misdemeanor resisting law enforcement. In 2008,

Frazier was convicted of Class D felony theft and Class A misdemeanor criminal trespass in two separate cases. On May 20, 2009, Frazier was convicted of Class A misdemeanor battery resulting in bodily injury. On November 5, 2010, Frazier was convicted of Class B felony conspiracy to commit armed robbery or robbery resulting in bodily injury. In 2017, Frazier was convicted of Class A misdemeanor driving while suspended. In 2018, Frazier was convicted of Class B misdemeanor criminal mischief, and in a separate case he was convicted of Class A misdemeanor domestic battery.

[10] At sentencing, the trial court found aggravating circumstances in that: Frazier had a criminal history; he had fourteen petitions to revoke probation filed against him, seven of which were granted; he had one petition to execute community corrections sentence filed against him which was granted; he had previously been unsuccessfully released from probation; he had twelve failures to appear in court; he had failed substance abuse treatment; and prior attempts of rehabilitation had failed. The trial court also found aggravating circumstances in the overall seriousness of the offenses; the harm, injury, or loss suffered by A.H., which was more than what is necessary to prove the elements of the offenses; the fact that Frazier was in a position of care, custody, and control of A.H.; the fact that he threatened A.H. with harm if she told anyone; and the fact that the acts were committed in the presence of A.H.'s siblings. The trial court found a single mitigator—i.e., that Frazier's incarceration would be a hardship on his children—but noted that any mitigating value was

diminished by the fact that Frazier had molested A.H., who is his children's half-sister.

[11] The trial court sentenced Frazier to thirty-eight years in the Department of Correction ("DOC") on Count I, enhanced by six years for being a habitual offender; thirty-eight years in the DOC on Count II, to run consecutive to Count I; and thirty-eight years in the DOC on Count V, to run concurrent with Count I. Frazier's aggregate sentence is eighty-two years, with four of those years suspended to probation. This appeal ensued.

Discussion and Decision

[12] Frazier contends that the eighty-two-year aggregate sentence for his three Level 1 felony convictions is inappropriate in light of the nature of the offense and his character. Article 7, Sections 4 and 6, of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration in original). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

[13] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should

receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate at the end of the day 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.* at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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).

[14] Frazier contends that the nature of the offenses does not support his thirty-eight-year sentence for each count of child molesting. First, we note that Frazier's sentences for his three Level 1 felonies are within the statutory sentencing range and are not at the highest level of the range. *See* I.C. § 35-50-2-4(c) (providing the sentencing range for a person convicted of child molesting as a Level 1 felony, as described in I.C. § 35-31.5-2-72(1),[3] is imprisonment for a fixed term of between twenty and fifty years, with an advisory sentence of thirty years).

[3] Indiana Code Section 35-31.5-2-72(1) describes a "credit restricted felon" as a person over age twenty-one who is convicted of child molesting involving sexual intercourse, deviate sexual conduct, or other sexual conduct with a victim less then twelve years of age.

Thus, while each of Frazier's sentences for child molesting as a Level 1 felony is eight years over the thirty-year advisory sentence, each is well below the fifty-year maximum sentence.

[15] Second, when considering the nature of the offense, we look at the defendant's actions in comparison to the elements of the offense. *Cannon v. State*, 99 N.E.3d 274, 280 (Ind. Ct. App. 2018), *trans. denied*. "The nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation." *Zavala v. State*, 138 N.E.3d 291, 301 (Ind. Ct. App. 2019) (quotation and citation omitted), *trans. denied*. One factor we consider is "whether there is anything more or less egregious about the offense committed by the defendant that makes it different from the typical offense accounted for by the legislature when it set the advisory sentence." *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (citation omitted), *trans. denied*.

[16] Here, the child molesting offenses were made worse by the fact that Frazier repeatedly forced a young child over whom he had care, custody, and control to submit to sex acts with him. *See, e.g.*, *Williams v. State*, 170 N.E.3d 237, 245 (Ind. Ct. App. 2021) (finding defendant's sentence was not inappropriate where defendant was father figure and in a position of trust while he lived in six-or-seven-year-old victim's household or she had been placed in his care), *trans. denied*. Moreover, Frazier threatened violence against A.H.'s family if she disclosed his criminal behavior. As our Supreme Court has noted, "[a] harsher sentence becomes more appropriate as the threatened harm increases in

severity, especially when the defendant directly threatens the victim or a witness." *Hamilton v. State*, 955 N.E.2d 723, 728 (Ind. 2011).

[17] In addition, the nature of Frazier's offenses was severe and resulted in greater injury than necessary to prove the commission of child molestation as a Level 1 felony; Frazier transmitted chlamydia and gonorrhea to A.H. through his criminal actions. *See* I.C. § 35-42-4-3(a) (requiring the State to prove that Frazier, who was over 21 years of age, knowingly caused A.H., who was under 14 years of age, to perform or submit to sexual intercourse or other sexual conduct); *see also Brown v. State*, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002) (finding it a valid aggravating factor that the young victim of child molesting contracted gonorrhea from the defendant), *trans. denied*. Frazier also committed the crimes against A.H. within hearing range of the other children in the household, such that A.H.'s brother was prompted to investigate and thereby witness his young sister being sexually assaulted. And Frazier began his molestation of A.H. when she was only six years old. *See Chastain v. State*, 165 N.E.3d 589, 601 (Ind. Ct. App. 2021) (noting the court may consider a victim's age that is "significantly below" the age specified in the statute when "look[ing] at the nature, extent, and depravity of the offense"), *trans. denied*.

[18] Thus, Frazier's case is distinguishable from the cases he cites as support for his claim that his sentences should have run concurrently rather than consecutively because his molestation was of only one victim. Unlike the situations in those cases, Frazier molested his one young victim multiple times over a period of approximately four years, threatened violence to her family if she disclosed the

abuse, and gave her sexually transmitted diseases.[4] *Cf. Rivers v. State*, 915 N.E.2d 141, 144 (Ind. 2009) (molestation limited to two occasions over short period of time); *Harris v. State*, 897 N.E.2d 927, 928 (Ind. 2008) (molestation limited to two incidents over the course of a few days); *Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001) (molestations limited to two identical incidents involving the same child over a three-month period and caused no additional physical harm to child).

[19] In short, Frazier has failed to provide compelling evidence portraying in a positive light the nature of his offenses, such as restraint, regard, and lack of brutality—quite the opposite. *See Stephenson*, 29 N.E.3d at 122. Frazier's sentence is not inappropriate in light of the nature of his offenses.

[20] Nor does Frazier's character support a sentence revision. Analysis of an offender's character "involves a broad consideration of [his] qualities, life, and conduct." *Crabtree v. State*, 152 N.E.3d 687, 705 (Ind. Ct. App. 2020), *trans. denied*. We also consider "facts such as substantial virtuous traits or persistent examples of good character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (quotation and citation omitted).

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[4] Moreover, as previously noted, our review of a defendant's sentence under Rule 7(B) does not attempt to determine whether another sentence might be more appropriate; rather, the test is whether the sentence is inappropriate. *See, e.g.*, *Pedigo v. State*, 146 N.E.3d 1002, 1014 (Ind. Ct. App. 2020), *trans. denied*. Thus, we focus less upon comparing the facts of a case to others, whether real or hypothetical, and more upon the nature, extent, and depravity of the offense for which the defendant is being sentenced and what it reveals about his character. *Anglin v. State*, 787 N.E.2d 1012, 1019 (Ind. Ct. App. 2003), *trans. denied*.

[21] Frazier has a criminal history going from 2005 through 2018 that includes violent offenses. This reflects poorly on his character. *See Rutherford*, 866 N.E.2d at 874. Moreover, Frazier provides no evidence of any virtuous traits, persistent examples of good character, or any other aspect of his life and conduct that would reflect well on his character. Although he asserts that he suffers from untreated mental health issues, he cites no evidence of such alleged mental health issues other than his own self-serving statements and Mother's lay opinion that he suffers from depression. And the trial court did not err in finding Frazier's history of substance abuse was not a mitigating factor, especially given his failure to seek substance abuse treatment and his failure to complete court-ordered treatment while previously incarcerated. *See Healey v. State*, 969 N.E.2d 607, 617 (Ind. Ct. App. 2012) (finding trial court did not err in declining to find defendant's substance abuse history to be a mitigator where defendant failed to seek treatment in the past with the one minor exception), *trans. denied*; *Iddings v. State*, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) (noting "a history of substance abuse is sometimes found by trial courts to be an aggravator, not a mitigator"), *trans. denied*.

[22] While we acknowledge—as the trial court did—the mitigating factor that Frazier's long-term incarceration would cause a hardship on his other dependent children, we agree with the trial court that this mitigator is minor compared to the horrendous fact that Frazier, over a period of four years, repeatedly sexually abused a young child who was placed in his care, giving her sexually transmitted diseases and threatening her family if she disclosed the

abuse. Frazier has failed to carry his burden of persuading us that the nature of his offense and his character support a revision of his sentence.

[23] Affirmed.

Najam, J., and Bradford, C.J., concur.