

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Anna-Maria Junette San Nicolas
Pablo,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 29, 2021
Court of Appeals Case No.
21A-CR-331

Appeal from the
Madison Circuit Court

The Honorable
Mark K. Dudley, Judge

Trial Court Cause No.
48C06-2003-MR-751

Molter, Judge.

[1] Anna-Maria Junette San Nicolas Pablo (“Pablo”) pleaded guilty to murdering her eleven-month-old daughter, and the trial court imposed a fully-executed sentence of sixty years. Pablo requests that we revise her sentence under Appellate Rule 7(B) because she believes her sentence is inappropriate considering her character and the nature of the offense. But her sentence is only five years more than the advisory sentence, and we cannot say that is inappropriate under the circumstances.

[2] We therefore affirm.

Facts and Procedural History

[3] Pablo lived in Elwood, Indiana with E.P., her eleven-month-old daughter; her boyfriend, Zachary Foor (“Zachary”); and Zachary’s mother, Jody Foor (“Jody”). Tr. Vol. I at 36. E.P. had several health issues. *Id.* at 119. Around 1:00 a.m. on March 17, 2020, E.P. woke up and became “fussy,” which upset Zachary. *Id.* at 36. He took E.P. to the bathroom and turned on the sink and shower. *Id.* at 36–37. Despite the noise from the running water, Pablo could hear Zachary hitting E.P. and yelling, “stop whining, you’re not winning this.” *Id.* at 37. Pablo entered the bathroom, but she did not attempt to intervene and she left when Zachary instructed. *Id.*

[4] Once E.P. was outside the bathroom, Pablo saw that she was naked, shivering, and had water coming out of her mouth. *Id.* Although Pablo suspected E.P.

had water in her lungs, she did not call emergency services or take E.P. to the hospital. *Id.*

[5] Between 3:30 a.m. and 4:20 a.m., Pablo searched the internet for “how to get water out of a baby’s mouth and nose without a bulb syringe;” “pupils of baby when sleeping;” “dry drowning symptoms;” “[one-] year old is cold to the touch but breathin[g];” and “how to warm up a [one-] year old.” Conf. Ex. Vol. I at 91.

[6] Around 5:30 a.m., Pablo saw Zachary in the bathroom again beating E.P., this time with a trindle tool, which tore a piece of skin off of E.P.’s buttocks. Tr. Vol. I at 37; Conf. Ex. Vol. I at 17. Pablo also noticed significant bruising to E.P.’s face, eyes, and buttocks. Tr. Vol. I at 37; Conf. Ex. Vol. I at 6–11, 17. Still, she left E.P. at home and did not seek any medical assistance.

[7] Between 4:40 a.m. and 6:30 a.m., Pablo used her phone to call Zachary in another room of the house, to access Facebook, and to play “Bubble Pop! Puzzle Game.” Conf. Ex. Vol. I at 117–20. At approximately 6:30 a.m., Pablo used her phone to search “infant CPR.” Tr. Vol. I at 37; Conf. Ex. Vol. I at 124. For the next few hours, Pablo continued using her phone to access Facebook and Snapchat, play games, listen to music, and call Zachary. Conf. Ex. Vol. I at 128–31. At 10:50 a.m., Pablo texted Jody and asked her to come home. *Id.* at 133. Five minutes later, Pablo used her phone to search for “rigor mortis.” *Id.* at 91.

[8] At approximately 12:00 p.m., Pablo and Jody took E.P. to the hospital. Tr. Vol. I at 38; Conf. Ex. Vol. I at 18. Pablo told hospital staff that E.P. had been alert and talking twenty minutes before arriving at the hospital and that she had performed CPR on E.P. in the car. Conf. Ex. Vol. I at 24. Hospital staff examined E.P. and determined that she had no pulse, was cold to the touch, and had multiple bruises on her sternum, bilateral forearm, bilateral thigh, and vaginal area. *Id.* at 6–17, 24. E.P. also had a triangular cut of skin missing from her buttocks; blood escaping from her ear, nose, and mouth; and extensive tearing inside the mouth along her bottom gum line and her superior labial frenulum. Tr. Vol. I at 36; Conf. Ex. Vol. I at 6–17. Hospital staff attempted to revive E.P., but she was already in rigor mortis and was pronounced dead at 12:36 p.m. Tr. Vol. I at 36; Conf. Ex. Vol. I at 34, 65.

[9] At approximately 12:20 p.m., Detective Ben Gosnell arrived at the hospital after receiving a call regarding E.P. Tr. Vol. I at 35–36, 60–61. Around this time, a registered nurse asked about E.P.’s injuries. Conf. Ex. Vol. I at 34. Pablo stated that her uncle stole her car when E.P. was in it, and when the uncle returned the car, she noticed new bruises on E.P. *Id.* Detective Gosnell later took statements from Pablo, Zachary, and Jody. *Id.* at 61. Pablo initially told Detective Gosnell that she took E.P. to her uncle’s house in Lafayette and that her uncle caused E.P.’s injuries. *Id.* at 62. Pablo stated that after leaving her uncle’s home, E.P. would not stop crying. *Id.* 62–63. Detective Gosnell later contacted Pablo’s uncle and learned that he lived in Alaska, was in Alaska

at the time of E.P.'s death, and had not visited Indiana for several years. *Id.* at 76–78.

[10] Detective Gosnell obtained a search warrant for Pablo and Zachary's home and cell phones. *Id.* at 67, 80. Detective Gosnell and other officers found several blood-stained diapers. *Id.* at 75–76; Conf. Ex. Vol. I at 57–60. Pablo's cell phone records showed that for about two weeks before E.P. died, Pablo communicated with friends about Zachary's behavior and, in particular, how Zachary's bad temper was escalating. Tr. Vol. I at 38; Conf. Ex. Vol. I at 83, 85–88. During this time, Pablo continued to leave E.P. alone with Zachary, would hide and conceal E.P.'s bruises, and would lie about the source of E.P.'s bruises by saying that the bruises resulted from a fall. Tr. Vol. I at 38, 127, 159. On March 4, 2020, thirteen days before E.P. died, Pablo used her phone to search "how to get rid of bruises on face." Conf. Ex. Vol. I at 89. The phone contained a picture of E.P. taken on that date showing bruises on E.P.'s face. *Id.* at 92.

[11] E.P.'s autopsy report indicated that her cause of death was blunt force injuries to her head and suffocation-strangulation. Tr. Vol. I at 78–80; Conf. Ex. Vol. I at 64. The report noted that the manner of death was homicide. Tr. Vol. I at 78–80; Conf. Ex. Vol. I at 64. E.P.'s toxicology report indicated a toxic level of diphenhydramine, or Benadryl, in her system. Tr. Vol. I at 80; Conf. Ex. Vol. I at 64.

- [12] On March 24, 2000, the State charged Pablo with E.P.'s murder. Appellant's App. Vol. 2 at 17–18. Three days later, Pablo called Detective Gosnell. Tr. Vol. I at 89, 120. She told him that Zachary—not her uncle—was responsible for E.P.'s injuries, and that although she tried, she was unable to help E.P. because Zachary would not let her into the bathroom while he was beating E.P. *Id.* at 89.
- [13] On November 6, 2020, the State and Pablo entered a plea agreement; Pablo agreed to plead guilty to murder, *see* Indiana Code section 35-42-1-1, and in exchange, the State agreed not to seek a life without parole enhancement. Appellant's App. Vol. 2 at 56–57. The plea agreement left Pablo's sentencing to the trial court's discretion. *Id.* at 56.
- [14] On November 13, 2020, the trial court held the guilty plea hearing. Pablo testified that she contributed to E.P.'s death and thus pleaded guilty to murder. Tr. Vol. I at 30, 43–45. However, Pablo also claimed that she tried to retrieve E.P. from Zachary, but Zachary pushed her away. *Id.* at 39. Pablo also stated that she repeatedly told Zachary that she wanted to call 911 or take E.P. to the hospital, but Zachary was afraid of being arrested so he told Pablo to not call 911 or take E.P. to the hospital. *Id.* at 39, 42. Pablo claimed that once she had taken E.P. to the hospital, Zachary texted her a message, threatening to kill her if she did not lie about how E.P. was injured. *Id.* at 39, 110.

[15] The sentencing hearing was held on two dates, January 14, 2021, and January 28, 2021. *Id.* at 51, 147. At the January 14 hearing, Pablo testified that Zachary had physically abused her during their relationship. *Id.* at 128. Pablo admitted that she initially lied to Detective Gosnell about what had happened to E.P. and agreed that she should have taken some action to help E.P. on the morning that E.P. died. *Id.* at 110–12. Pablo claimed that around that time that Zachary began hitting E.P., Zachary took her phone, which thwarted Pablo’s efforts to communicate with others to get help for E.P. *Id.* at 111–12, 124–25, 129, 133–34. She testified that Zachary returned her phone around 12:00 p.m. when she took E.P. to the hospital. *Id.* However, at the January 28 portion of the sentencing hearing, Pablo admitted she had lied during the first day of the sentencing hearing when she claimed Zachary possessed her phone during the early hours of March 17, 2020, until 12:00 p.m. of that day, and that she actually had her phone the entire time. *Id.* at 147, 167–70.

[16] Pablo’s pre-sentence investigation report showed that she was twenty-three years old, had no prior juvenile or criminal history, did not use illegal drugs, graduated from high school, and had attended some college. *Conf. Appellant’s App. Vol. 2* at 70–71, 73–75. The State asked the trial court to impose the maximum sentence for murder—sixty-five years. *Tr. Vol. I* at 174. Pablo asked for “less than the presumptive sentence” of fifty-five years. *Id.* at 176–77.

[17] In imposing Pablo’s sixty-year sentence, the trial court cited the following as aggravating factors: 1) E.P. was less than twelve years old; 2) Pablo was in a

position of trust, care, custody, or control; 3) Pablo's lack of remorse; and 4) Pablo's lack of honesty during the sentencing hearing. *Id.* at 178–79; Appellant's App. Vol. 2 at 62. As mitigating factors, the trial court cited Pablo's guilty plea and her lack of criminal record. Tr. Vol. I at 179; Appellant's App. Vol. 2 at 62.

[18] Pablo now appeals her sentence.

Discussion and Decision

[19] Pablo claims her sixty-year sentence is inappropriate and asks us to reduce it. The Indiana Constitution confers jurisdiction in this Court for “review and revision of sentences for defendants in all criminal cases” “to the extent provided by rule.” Ind. Const. art. 7, § 6. “That authority is implemented through Appellate Rule 7(B), which permits an appellate court to revise a sentence if, after due consideration of the trial court's decision, the sentence is found to be inappropriate in light of the nature of the offense and the character of the offender.” *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019). Our role is only to “leaven the outliers,” which means we exercise our authority only in “exceptional cases.” *Id.* at 160. Thus, we generally defer to the trial court's decision, and our goal is to determine whether the defendant's sentence is inappropriate, not whether some other sentence would be more appropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). “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).

Nature of Offense

- [20] Pablo first argues her sentence is inappropriate considering the nature of her offense. She admits it is impossible to portray the nature of her crime in a positive light, but she contends her involvement in E.P.'s death showed restraint, regard, and a lack of brutality. *See Stephenson*, 29 N.E.3d at 122. In particular, she claims nothing in the record shows that she caused E.P.'s injuries and death directly. And while Pablo acknowledges that she could have done more to protect E.P., she explains that Zachary's dominating, controlling behavior prevented her from doing more.
- [21] This is not compelling evidence that the trial court imposed an inappropriate sentence. We start with the advisory sentence for the offense. *Anglemyer*, 868 N.E.2d at 494; *Holloway v. State*, 950 N.E.2d 803, 806 (Ind. Ct. App. 2011). Here, murder carries an advisory sentence of fifty-five years, so Pablo's sixty-year sentence exceeds the advisory sentence by only five years. *See Ind. Code* § 35-50-2-3(a).
- [22] When determining whether a sentence exceeding the advisory sentence is inappropriate, "we consider whether there is anything more or less egregious about the offense as 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) (quoting *Holloway*, 950 N.E.2d at 807), *trans. denied*. Factors the trial court identified as making this crime more egregious were that E.P. was less than twelve years old, that Pablo was in a position of trust responsible for E.P.’s care, and that Pablo lacked remorse. Tr. Vol. I at 178–79. We cannot say these were unreasonable considerations for increasing the sentence five years above the advisory sentence.

[23] Moreover, Pablo’s argument that her conduct reflected restraint, regard, and a lack of brutality ignores that despite seeing E.P.’s bruises and wounds after Zachary had beaten her, and also suspecting that water had entered E.P.’s lungs, Pablo did not call emergency services or take her to the hospital. *Id.* at 37. While it appears that Pablo spent some time tending to E.P.’s wounds, she spent more time using her phone to access Facebook and Snap Chat, play games, and to send text messages to her friend. *Id.* at 37-38; Conf. Ex. Vol. I at 128–31. Pablo’s internet searches, such as “how to get water out of a baby’s mouth and nose without a bulb syringe,” “dry drowning symptoms,” “infant CPR,” and “rigor mortis,” leave no doubt that Pablo knew E.P. needed medical attention. Conf. Ex. Vol. I at 91.

[24] We also reject Pablo’s attempt to minimize the severity of her offense by arguing that she was under Zachary’s control. During and after the time that Zachary beat E.P., Pablo had access to her cell phone, which she used to text

family and friends. Conf. Ex. Vol. I at 86–88, 133. Pablo did not describe E.P.’s condition or request help in any of these text messages. *Id.* Rather than being isolated from family and friends, she had the means and opportunity to seek their help in obtaining medical care for E.P. and chose not to.

[25] Considering these factors, we conclude that Pablo has failed to show that the nature of her offense was characterized by restraint, regard, and lack of brutality. *See Stephenson*, 29 N.E.3d at 122. Further, Pablo’s offense was sufficiently egregious to justify a sentence that exceeds the advisory sentence by five years. *See Moyer*, 83 N.E.3d at 142; Ind. Code § 35-50-2-3(a). Accordingly, Pablo’s sixty-year sentence is not inappropriate considering the nature of her offense.

Character of Offender

[26] Pablo also contends her sixty-year sentence is inappropriate considering her character. Specifically, Pablo points out she (1) has no juvenile or criminal record; (2) has no history of substance abuse; (3) was only twenty-three years old when she committed her offense; and (4) generally took E.P. to doctors’ appointments for her health problems. Conf. Appellant’s App. Vol. 2 at 70–73 ; Tr. Vol. I at 119. None of this is compelling evidence that the trial court imposed an inappropriate sentence.

[27] Pablo’s lack of criminal history and substance abuse are factors to consider but not in isolation from other factors the trial court considered. *See Cardwell*, 895

N.E.2d at 1224 (whether a sentence is inappropriate turns on many factors that come to light in a given case). For example, Pablo’s poor judgment does not cast her character in a positive light. As mentioned above, she would leave E.P. alone with Zachary despite awareness of his abuse, and when Pablo returned home to find bruises on E.P., she would hide the bruises and explain to others that the bruises were caused by E.P. falling off a bed. *Id.* at 38, 159. Similarly, instead of seeking medical attention for E.P.’s injuries, on March 4, 2020, thirteen days before E.P. died, Pablo used her phone to search “how to get rid of bruises on face.” Conf. Ex. Vol. I at 89. Thus, Pablo was aware for several weeks before E.P. died that Zachary was a serious threat to E.P.’s safety, yet Pablo continued exposing E.P. to the danger presented by Zachary.

[28] Pablo also showed poor character in the aftermath of Zachary’s assault on E.P. Even though Pablo suspected that E.P. had water in her lungs, she did not call emergency services or take E.P. to the hospital. Tr. Vol. I at 37. She was on her phone accessing Facebook, Snapchat, and “Bubble Pop! Puzzle Game” while E.P. lingered from her injuries. Conf. Ex. Vol. I at 117–20, 128–31. These decisions and actions do not speak well to Pablo’s character.

[29] Pablo’s lies to medical professionals, police investigators, and the trial court also show poor character. *See Lisk v. State*, 145 N.E.3d 838, 841 (Ind. Ct. App. 2020) (defendant’s lies during presentence investigation interview showed poor character and was one factor in finding that her maximum sentence was not inappropriate.). For instance, after Pablo took E.P. to the hospital at 12:00

p.m., she told hospital staff that E.P. had been alert and talking twenty minutes earlier, despite admitting during the sentencing hearing that she believed E.P. had died two hours before Pablo took E.P. to the hospital. Tr. Vol. I at 135. When hospital staff asked about E.P.'s injuries, Pablo again lied, stating that her car had been stolen by her uncle while E.P. was in the car and that E.P. returned home with the bruises. Conf. Ex. Vol. I at 34. Pablo again lied when she told Detective Gosnell that her uncle had caused E.P.'s injuries. Tr. Vol. I at 62–63. Pablo also lied to the trial court during the sentencing hearing when she testified that Zachary possessed her cell phone from the time he began to beat E.P. until Pablo took E.P. to the hospital, and that it was Zachary who searched the internet about E.P.'s injuries. Tr. Vol. I at 111, 124–25, 129, 133–35, 168.

[30] As for Pablo's invitation to consider her age when assessing whether her character justifies a reduced sentence, at twenty-three years old, Pablo is "well past the age of sixteen where the law requires special treatment." *Corcoran v. State*, 774 N.E.2d 495, 500 (Ind. 2002) (holding that a twenty-two-year-old defendant is past the age afforded special consideration); *see also Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (same for a twenty-four-year-old defendant). Pablo points to nothing in the record that shows she is exceptionally immature or is plagued by significant mental or emotional limitations that would justify using her age to reduce her sentence.

[31] We also reject Pablo’s argument that the fact that she regularly took E.P. to her doctor’s appointments illustrates her good character. Those efforts are overshadowed by her failure to seek help from family or friends during the previous times that Zachary had beaten E.P. and by lying to family and friends about the source of E.P.’s injuries. Tr. Vol. I at 38, 159. Even two weeks before March 17, 2020, Zachary posed a dire threat to E.P., yet Pablo did nothing, even continuing to leave E.P. alone with Zachary. *Id.* at 38.

[32] In sum, we find that Pablo has failed to cast her character in a positive light by showing “substantial virtuous traits or persistent examples of good character.” *See Stephenson*, 29 N.E.3d at 122. Therefore, we conclude that Pablo’s sixty-year sentence is not inappropriate considering her character.

[33] Affirmed.

Vaidik, J., and May, J., concur.