MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Christopher Dowling,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 13, 2022

Court of Appeals Case No. 21A-CR-2081

Appeal from the Madison Circuit Court

The Honorable David A. Happe, Judge

Trial Court Cause No. 48C04-2007-F1-1734

Najam, Judge.

Statement of the Case

[1] Christopher Dowling appeals his convictions for three counts of Level 1 felony child molesting and his resulting eighty-year sentence. Dowling raises four issues for our review, which we restate as the following three issues:

1. Whether the trial court committed fundamental error when it permitted a police officer to testify that he had sent Dowling's criminal history to the prosecutor or when it permitted alleged "drumbeat" evidence from other witnesses.

2. Whether the trial court abused its discretion when it sentenced Dowling.

3. Whether Dowling's sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm.

Facts and Procedural History

[3] In 2014, twelve-year-old K.H. and her ten-year-old sister, L.H., lived with their mother in Alexandria. Abigail Chaplin was the girls' regular babysitter, watching them four or five nights of the week. Chaplin would frequently bring her boyfriend, Dowling, to the house with her.

[4] During this time, Dowling repeatedly molested K.H. and L.H. On one occasion, he began tickling K.H. on her sides, and then he moved his hands under her clothes and touched her breasts and buttocks. He then moved her

underwear to the side and inserted his penis into her vagina, and he ejaculated into her underwear.

[5] On a different occasion with L.H., he began tickling her on her sides, and then moved his hands under her clothes and touched her breasts and vagina. Another time, while Chaplin was making dinner, Dowling pulled down L.H.'s pants, put his hand over her mouth, and inserted his fingers into her vagina. On a third occasion, he "dragged" L.H. "into the bathroom and tried to have [her] give him oral sex" by "grabb[ing her] by [her] throat." Tr. Vol. 1 at 102-03. L.H. bit down on Dowling's penis, and he struck her with the back of his hand on her face and then "dragged [her] back out to the living room." *Id.* at 103. On a fourth occasion, Dowling "pushed [L.H.] up against the wall" and "choked [her] out." *Id.* at 104. He then put her on the floor, and she almost blacked out. He then inserted his penis into her vagina.

[6] After the fourth incident, L.H. told a friend what had happened, and the information came back to the girls' mother, who immediately took them to the police station. From there, the girls were taken to Kids Talk, a child advocacy center, and asked to provide a statement. K.H. reported that Dowling had touched her over her clothes and had touched her breasts and buttocks under her clothes but did not report the intercourse. L.H. likewise reported only that Dowling had touched her over her clothes. K.H. would later testify that she had been "scared" to talk about what Dowling had done. *Id.* at 191. L.H. also later testified that she was "scared and oblivious to what had really happened," and added that Dowling had said "he would kill me and my sister if we ever said

anything." *Id.* at 106. When she was twelve and again when she was thirteen, L.H. attempted suicide.

[7] In 2020, L.H. disclosed the 2014 molestations to her aunt and foster mother, Carie Martin. Martin took L.H. back to Kids Talk, where L.H. interviewed with Julie Coon. L.H. informed Coon of the full scope of Dowling's 2014 molestations. A follow-up interview was scheduled with K.H., and she likewise disclosed the full extent of Dowling's molestations of her.

[8] The State charged Dowling with multiple counts of child molesting against K.H. and L.H. The girls were the State's first two witnesses at his trial, and they recounted Dowling's molestations of them in detail. They likewise explained their two interviews with Kids Talk.

[9] The State also called Martin, who testified to the girls' emotional and physical wellbeing when they lived with her around 2020. During her testimony, she also stated, without objection, that she had taken L.H. to Kids Talk in 2020 after L.H. had told her that "she had been raped by Chris Dowling." Tr. Vol. 2, at 80. The State called Alexandria Police Department Officer Joe Heath, who testified, without objection, that he had been asked to investigate the girls' initial interviews with Kids Talk based on the allegations of "[i]nappropriate touching" by their babysitter's "boyfriend," and he added that K.H.'s Kids Talk interview "line[d u]p with the disclosures previously made by L.H." *Id.* at 181, 185. The State also called Coon, who testified, without objection, that L.H.

"[g]raphically" described Dowling's molestations of her in the July 2020 interview, and that K.H. had also "disclose[d] allegations of abuse." *Id.* at 155.

[10] And the State called Greenwood Police Department Detective Michael Williams. Detective Williams testified that, in April 2017, he was assisting with investigations at the Alexandria Police Department, and he had been asked to follow up on the girls' initial Kids Talk interviews. He did so by interviewing Dowling at the Alexandria police station. Without elaboration, Detective Williams testified, without objection, that he then submitted his "report, along with [Dowling's] criminal history, to the prosecutor's office" for its assessment of any prosecutorial merit from those interviews. *Id.* at 202. At the conclusion of Detective Williams's testimony, a juror submitted the following question: "Detective referenced [Dowling's] prior criminal history[. A]re we allowed to ask what that entails?" *Id.* at 209. Detective Williams responded, again, without objection: "I don't recall . . . what it was." *Id.*

[11] At the close of the trial, the jury found Dowling guilty of three counts of Level 1 felony child molesting. Following a sentencing hearing, the trial court sentenced Dowling as follows:

> The court is going to make findings of aggravation in that there are multiple counts and multiple victims. Surely, as pointed out by [the State], it is not the process that once you victimize a child you get to victimize the child again with impunity without additional consequence for that. And the fact that there is a concurrent time give[n] on two . . . counts does not [at] all mean that that was done with impunity. . . . Dowling did occupy a position of trust being allowed into this household, being allowed

> to have contact with these children, and he violated that in about as an extreme a way as possible. That is certainly another powerful aggravator. The court must . . . also acknowledge that there is mitigation present. The defendant did live until thirty-one . . . years of age with no delinquency and no other criminal conduct in his record. I am required, of course, to recognize that in the process and afford that[] a mitigating weight. When I take those factors into account and balance that aggravation against the mitigation, balance the particular harms which the victims in this case suffered, look at the circumstances of the defendant and the crimes that were committed . . . the following sentences are imposed: For Count I, Child Molesting, Level 1 Felony, the defendant is sentenced to the Department of Correction for forty-five . . . years. For Count II, Child Molesting, a Level 1 felony, defendant is sentenced to the Department of Correction for a period of forty-five . . . years. And under Count V, Child Molesting, a Level 1 Felony, sentenced to the Department of Correction[] for a period of thirty-five . . . years. Counts I and II will run concurrently with each other[;] Count V will run consecutive to Counts I and II[,] which results in an aggregate sentence of eighty . . . years [in] the Department of Correction[.]

Tr. Vol. 3 at 71-73. This appeal ensued.

Discussion and Decision

Issue One: Fundamental Error

[12] On appeal, Dowling first asserts two grounds of fundamental error. As our Supreme Court has explained:

> A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred. The fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of

> basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. This exception is available only in egregious circumstances.

Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010) (quotation marks and citations omitted). "To prove fundamental error," Dowling must show "that the trial court should have raised the issue *sua sponte* . . . ." *Taylor v. State*, 86 N.E.3d 157, 162 (Ind. 2017).

[13] Further, "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*. For example, our Supreme Court has explained that

> an error in ruling on a motion to exclude improperly seized evidence is not per se fundamental error. Indeed, because improperly seized evidence is frequently highly relevant, its admission ordinarily does not cause us to question guilt. That is the case here. The only basis for questioning [the defendant's] conviction lies not in doubt as to whether [he] committed these crimes, but rather in a challenge to the integrity of the judicial process. We do not consider that admission of unlawfully seized evidence *ipso facto* requires reversal. Here, there is no claim of fabrication of evidence or willful malfeasance on the part of the investigating officers and no contention that the evidence is not what it appears to be. In short, the claimed error does not rise to the level of fundamental error.

Brown, 929 N.E.2d at 207. Because fundamental error "is extremely narrow and encompasses only errors so blatant that the trial judge should have acted

independently to correct the situation," where "the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018).

[14] Here, Dowling first asserts that the trial court committed fundamental error when it permitted Detective Williams to testify that he had submitted Dowling's criminal history to the prosecutor's office following his review of the girls' initial interviews with Kids Talk. Dowling relies most notably on our opinion in *Perez v. State*, 728 N.E.2d 234, 237-38 (Ind. Ct. App. 2000), *trans. denied*, in which we stated that a detective's "volunteer testimony that another officer had told him that [the defendant] was a convicted felon" was "an evidentiary harpoon," even though we held that the error in admitting that testimony was harmless.

[15] But *Perez* is readily distinguishable. Here, Detective Williams did not identify Dowling as a "convicted felon." He merely said that he had submitted Dowling's "criminal history" to the prosecutor's office, and, when he was asked to elaborate, he stated that he could not recall any criminal history Dowling might have had. Tr. Vol. 2 at 208. Thus, any error here is less significant than the error in *Perez*, which also was not reversible error, and thus any error here is nowhere near fundamental error.

[16] Dowling also asserts that fundamental error occurred in the alleged "drumbeat repetition" of the girls' reports of Dowling's molestations. In particular,

Dowling asserts that the trial court committed fundamental error when it did not *sua sponte* prohibit Martin's testimony that L.H. had told her that "she had been raped by Chris Dowling," *id.* at 80; Officer Heath's testimony that he had been asked to investigate the girls' initial interviews with Kids Talk based on the allegations of "[i]nappropriate touching" and his testimony that K.H.'s initial Kids Talk interview "line[d u]p with the disclosures previously made by L.H.," *id.* at 181, 185; and Coon's testimony that L.H. "[g]raphically" described Dowling's molestations of her in the July 2020 interview and that K.H. had also "disclose[d] allegations of abuse," *id.* at 155.

[17] We have previously rejected claims of fundamental error in the admission of alleged drumbeat evidence:

> An attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can readily imagine any number of viable reasons why attorneys might not object. *Cf. Merritt*, 99 N.E.3d at 710 ("The risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not *sua sponte* by our trial courts."). Fundamental error in the erroneous admission of evidence might include a claim that there has been a "fabrication of evidence," "willful malfeasance on the part of the investigating officers," or otherwise that "the evidence is not what it appears to be." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). But absent an argument along those lines, "the claimed error does not rise to the level of fundamental error." *Id.*
>
> [The defendant] does not assert that the evidence against him was not what it appeared to be. Rather, his argument is simply that the purportedly erroneous admission of this evidence implicated his due-process rights because it made the State's

> evidence appear stronger than it might have actually been. But [the defendant's] argument on this issue would turn fundamental error from a rare exception to the general rule for appellate review. There are often tactical reasons for an attorney not to object to the admission of evidence or the questioning of witnesses, and, however discerning our trial courts may be, they are not expected or required to divine the mind of counsel. And, if a defense counsel lacks a tactical reason for not objecting to prejudicial evidence that would not have been admitted with a proper objection, the defendant has the post-conviction process available to him to pursue relief. Accordingly, we reject [the defendant's] argument on this issue and conclude that it fails to meet the high bar of fundamental error.

Nix v. State, 158 N.E.3d 795, 801-02 (Ind. Ct. App. 2020) (record citation omitted), *trans. denied*.

[18] So too here. Dowling does not assert that the evidence against him was not what it appeared to be. Rather, he simply asserts that the purported drumbeat evidence made the State's case appear stronger than it might have actually been. This is not a sufficient basis to demonstrate fundamental error. *Id.* Thus, we affirm Dowling's convictions.

Issue Two: Sentencing Discretion

[19] Dowling next asserts that the trial court abused its discretion when it sentenced him. As our Supreme Court has made clear:

> We have long held that a trial judge's sentencing decisions are reviewed under an abuse of discretion standard. 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.

McCain v. State, 148 N.E.3d 977, 981 (Ind. 2020) (cleaned up). Further:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind.), *clarified on other grounds on reh'g*, 875 N.E.2d 218 (2017).

[20] A person who commits a Level 1 felony shall be imprisoned for a fixed term between twenty and forty or fifty years, depending on the age of the victim, with an advisory sentence of thirty years. I.C. § 35-50-2-4 (2018). Here, the trial court sentenced Dowling to concurrent terms of forty-five years on Counts I and II and a consecutive term of thirty-five years on Count V, for a total aggregate term of eighty years. In doing so, the trial court found as aggravating circumstances that there were multiple offenses and victims and that Dowling was in a position of trust over the victims. The trial court found as a mitigating circumstance Dowling's lack of a criminal history.

[21] Dowling's only argument that the trial court abused its discretion in sentencing him is to assert that the facts do not support the trial court's finding that he was

in a position of trust over the girls when he molested them. Instead, he asserts, he was analogous to "a neighbor who occasionally borrowed things from [the victims] and casually conversed . . . when they would see each other," which is not sufficient for a finding of a position of trust. Appellant's Br. at 20 (quoting *Edgecomb v. State*, 673 N.E.2d 1185 (Ind. 1996).

[22] We cannot agree. As we have explained:

> The position of trust aggravator is frequently cited by sentencing courts where an adult has committed an offense against a minor *and there is at least an inference of the adult's authority over the minor*. Moreover, this aggravator applies in cases where the defendant has a more than casual relationship with the victim *and has abused the trust resulting from that relationship*. This is usually the case where the defendant is the victim's mother, father or stepparent. Consideration of this aggravator may be appropriate where the defendant is the victim's day care provider. *See e.g. Trusley v. State*, 829 N.E.2d 923, 926–27 (Ind. 2005). . . .

Rodriguez v. State, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007) (emphases added; some citations omitted).

[23] The logic and effect of the facts and circumstances before the trial court here support its finding that Dowling was in a position of trust over K.H. and L.H. when he molested them. He was their babysitter's boyfriend, and he was inside the residence with the permission of their babysitter, which is sufficient to support "at least an inference" of Dowling's authority over the girls. He was trusted to be left alone within the residence with the girls, and he abused the trust resulting from that relationship. He was also frequently at the girls'

residence—three or so nights per week—which was "more than [a] casual relationship" with them. *Id.* Thus, we cannot say that the trial court abused its discretion when it found Dowling to have been in a position of trust over K.H. and L.H. when he molested them.

Issue Three: Appellate Rule 7(B)

[24] Last, Dowling asserts that his eighty-year aggregate sentence is inappropriate in light of the nature of the offenses and his character. Indiana Appellate Rule 7(B) provides that "[t]he 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." This Court has held that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has explained that:

> The principal role of appellate review should be to attempt to leaven the outliers . . . but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), *as amended* (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[25] 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*, 895 N.E.2d at 1222. 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 facts 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).

[26] On appeal, Dowling asserts that he has no criminal history, yet he has effectively received a life sentence in prison; that "[t]here was no gratuitous brutality during the act[s] of intercourse"; and that "[t]here was nothing in this case which made it more serious than any other case involving actions with underage girls." Appellant's Br. at 25. We cannot agree.

[27] Dowling has not met his burden to show that his sentence merits our revision for inappropriateness. Regarding the nature of the offenses, he abused a position of trust over a then-twelve-year-old girl and a then-ten-year-old girl; he penetrated their vaginas with his penis; he attempted to force the younger child to perform oral sex on him and struck her when she did not; he "dragged" the younger child into multiple rooms during his molestations; and he held the younger child against the wall and choked her until she nearly blacked out

before he raped her. Tr. Vol. 1 at 101-03. L.H. twice attempted to commit suicide in the years following Dowling's molestations of her.

[28] Regarding his character, while he lacks a criminal history, he also molested multiple victims on multiple occasions. And he presents no evidence of "substantial virtuous traits or persistent examples of good character." *Stephenson*, 29 N.E.3d at 122. Thus, Dowling has not met his burden to show that his aggregate sentence of eighty years is inappropriate in light of the nature of the offenses and his character, and we therefore affirm his sentence.

Conclusion

[29] We affirm Dowling's convictions and sentence.

[30] Affirmed.

Bradford, C.J., and Bailey, J., concur.