MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Blake Green,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 23, 2021

Court of Appeals Case No. 21A-CR-226

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-1810-F1-12

Altice, Judge.

Case Summary

[1] In May 2019, a jury found Blake Green guilty as charged of Level 1 felony rape, Level 2 felony burglary, Level 3 felony criminal confinement, Level 6 felony strangulation, and Level 6 felony residential entry. The trial court reduced the level of two of the felonies on double jeopardy grounds and sentenced Green, who appealed. This court affirmed the convictions but found it was error to reduce the level of the two felonies, and it remanded for resentencing. *Green v. State*, No. 19A0CR-2791 (Ind. Ct. App. August 21, 2020). On remand, the trial court imposed a fifty-two-year aggregate sentence. Green now appeals, contending that (1) the trial court abused its discretion, based on two aggravators that it identified, and (2) the sentence is inappropriate in light of the nature of the offense and the character of the offender.

[2] We affirm.

Facts & Procedural History

[3] The facts underlying Green's convictions, as found in this court's memorandum decision, are that on the night of September 11, 2018, N.G. and her two children, ages seven and eight, were at their home and watching a movie in the living room. N.G. made sure the door was locked and fell asleep in the living room, where her children were also asleep. She woke up around 12:30 a.m. to find Green, who she had seen around town but did not know, standing and staring at her while holding a handgun.

[4] Green ordered N.G. to get up and not make any noise, and as she did so, N.G. noticed that Green had placed a beanbag chair over the children's heads, apparently to minimize what they could see and hear. Green ordered N.G. to her daughter's bedroom, where he ripped off her shirt, removed her pants, pushed her on the bed, and forced his penis in her mouth, so hard that at times she could not breathe. During the course of the attack, which occurred both in the bedroom and then in a bathroom, Green pointed the gun at N.G.'s temple, choked her when he believed she insulted him, forced vaginal intercourse at least twice, and unsuccessfully attempted anal intercourse. Green held the gun in his hand the entire time other than when it momentarily fell between the wall and the bed. As he was leaving around 3:30 a.m., he threatened N.G. that, if she contacted police, he would kill her brother and father, who he appeared to know by name, vehicle type, and residence location. He also threatened to return to kill her.

[5] N.G. contacted family, who in turn contacted authorities. A sexual assault nurse examiner performed an examination, which revealed, among other things, discoloration and bruising on N.G.'s neck and arm and a tear in her vaginal wall. She also had pain to her anus where he had attempted anal intercourse. N.G. and her children moved out of the residence for several months while increased security was installed.

[6] In October 2018, the State charged Green with Count I, Level 1 felony rape; Count II, Level 2 felony burglary; Count III, Level 3 felony criminal confinement; Count IV, Level 6 felony strangulation; and Count V, Level 6

felony residential entry. The jury found Green guilty as charged, but the trial court reduced the burglary to a Level 4 felony and reduced the criminal confinement conviction to a Level 6 felony, finding that the elevated convictions violated Indiana's prohibition against double jeopardy, and it vacated the residential entry conviction. In June 2019, the trial court sentenced Green to forty years on Count I, eight years with five years suspended to supervised probation on Count II, and two years each on Counts III and IV. It ordered that the sentences on Counts I, II and IV be served consecutively for an aggregate sentence of fifty years with five years suspended.

[7] Green appealed, and we affirmed his convictions but agreed with the State's cross-appeal that the trial court erred when it reduced the level of felony for Green's burglary and criminal confinement convictions. We remanded with instructions to enter the burglary conviction as a Level 2 felony and the criminal confinement conviction as a Level 3 felony and to enter a new sentencing order.

[8] On February 1, 2021, the court held the resentencing hearing. The trial court took judicial notice of both the trial record and the prior sentencing hearing, including the transcript, presentence investigation report, and attachments. The trial court noted that it recalled the jury trial and "the horrific details of this very, very violent rape." *Transcript Vol. 2* at 14. The court identified aggravators and mitigators:

> The aggravators were the overall serious, serious nature of the offense including repetitive sexual assaults upon the victim; the presence of the children during the offense; the harm, injury or

> loss suffered by the victim were far greater than necessary to prove the elements and I think that also included the, the impact it had on her and the fact that she and her family had to move out of the house and then eventually move back in and also the impact it had on her children; the Defendant's criminal history; Defendant failed to satisfy probation on three different occasions; he threatened harm to the victim's family if she reported the crime and threatened to return to the victim's home. . . . [M]itigating factors were: Long term incarceration would be hardship upon his children; that he did have a good employment history, . . . and that you had family and community support.

Id. at 15.

[9] The trial court sentenced Green to forty years on Count I (rape), a concurrent twenty-year sentence on Count II (burglary), a ten-year sentence on Count III (criminal confinement) to run consecutive to Count I, and a two-year sentence on Count IV (strangulation), which was to be served consecutive to Count I, for an aggregate fifty-two-year sentence. The court suspended seven years to supervised probation. Green now appeals.

Discussion & Decision

Abuse of Discretion

[10] Sentencing decisions rest within the sound discretion of the trial court and we review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). 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 drawn therefrom. *Id*. When reviewing the aggravating and mitigating circumstances identified by the trial court in its sentencing statement, we will remand only if "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." *Id*.

[11] So long as a sentence is within the statutory range, the trial court may impose it without regard to the existence of aggravating or mitigating factors. *Id.* at 489. If the trial court does find the existence of aggravating or mitigating factors, it must give a statement of its reasons for selecting the sentence it imposes. *Id.* at 490. However, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014), *trans. denied*.

[12] Green argues that the following two aggravating circumstances identified by the court were improper: (1) the "overall serious nature of the offense[,]" and (2) "the harm, injury[,] or loss suffered by the victim were far greater than necessary to prove the elements of the offenses." *Appellant's Brief* at 12. He asserts that both are "essentially [] a restatement of the court's interpretation that the offense was one of the most brutal attacks the court had ever seen" and are already "cooked into" the Level of felony and associated sentencing ranges. *Id.* at 12, 13. To the extent that Green's argument is that a fact which comprises a material element of a crime may not also constitute an aggravating

circumstance to support an enhanced sentence, *see Baumholser v. State*, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016), *trans. denied*, we reject his claim and find no error with the court's consideration of either challenged aggravating factor.

[13] With regard to the court's reliance on "the overall serious nature of the offense," our Supreme Court has held that the nature and circumstances of a crime can be a valid aggravating factor, but a trial court must give more than a generalized reference to the nature and circumstances. *See Sharkey v. State*, 967 N.E.2d 1074, 1078 (Ind. Ct. App. 2012). Here, the trial court explained that it viewed the offense as particularly brutal and serious given the "repetitive sexual assaults upon the victim" and the fact that N.G.'s children were present in the home at the time. *Transcript Vol. 2* at 15.

[14] And with regard to the second challenged aggravator concerning the harm or injury to the victim, our courts have found that "[t]he trial court may assign aggravating weight to the harm, injury, loss or damage suffered by the victim if such harm was significant and greater than the elements necessary to prove the commission of the offense." *Sharkey*, 967 N.E.2d at 1078. Here, the trial court addressed that, not only were N.G. and the children traumatized, she and her family had to move out for a time while they sought additional security for the home, and N.G. was physically injured as a result of the offenses. This was not an improper aggravator.

[15] Furthermore, even if we were to agree with Green that the court considered two improper aggravators, the trial court identified several other unchallenged

aggravating factors when it sentenced Green, and it is well settled that when a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. *Baumholser*, 62 N.E.3d at 417. The determinative question is whether we are confident the trial court would have imposed the same sentence even if it had not found the improper aggravator. *Id*. Here, we are confident that, even excluding the two challenged aggravators, the court would have imposed the same sentence. The trial court did not abuse its discretion when sentencing Green.

Inappropriate Sentence

[16] In addition to alleging an abuse of sentencing discretion, Green asks that we independently review his sentence under Ind. Appellate Rule 7(B). Under this rule, we "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." App. R. 7(B). The principal role of our review is to "attempt to leaven the outliers ... not to achieve a perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

[17] 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. We will revise the sentence only if there is "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). It is Green's burden to persuade us that a sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[18] As to the nature of the offense, the advisory sentence is the starting point the legislature has selected as an appropriate sentence of the crime committed. *Id.* at 1081. Green was convicted of Level 1 felony rape, Level 2 felony burglary, Level 3 felony criminal confinement, and Level 6 felony strangulation. The sentencing range for a Level 1 felony is between twenty and forty years, with a thirty-year advisory sentence. Ind. Code § 35-50-2-4(b). The sentencing range for a Level 2 felony is ten to thirty years, with an advisory sentence of seventeen and one-half years. I.C. § 35-50-2-4.5. The sentencing range for a Level 3 felony is between three and sixteen years, with an advisory sentence of nine years. I.C. § 35-50-2-5(b). The sentencing range for a Level 6 felony is between six months and two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). Rape and burglary are crimes of violence, which allow a court to impose those sentences consecutively. I.C. § 35-50-1-2(a)(10), (a)(15), (c)-(d). The trial court sentenced Green to an aggregate fifty-two years with seven suspended, while he faced well in excess of that.

[19] We have recognized, "[t]he nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Here, Green fails to present any cogent argument specifically addressing the nature of

the offense, and, therefore, any challenge to it is waived.[1] *See* Ind. Appellate Rule 46(A)(8). Regardless, the circumstances of this attack are particularly disturbing. Green broke into N.G.'s home in the night as she and her children were sleeping. While holding a handgun, Green pushed N.G. down the hall to her daughter's room and ripped off her clothes. He repeatedly forced her to perform oral sex, and he forcefully and repeatedly vaginally raped her, all while her two young children were nearby. He left bruising and discoloration on N.G.'s neck, where he choked her, and on her arm. He held the handgun for the entire time but for a few moments when it fell out of his grasp, and he held it to her temple at one point. Green threatened N.G. with her life if she told anyone. And he threatened to kill her brother and father, making sure to tell N.G. details about their homes and vehicles to illustrate that he possessed information about them. There is absolutely nothing about the nature of the offense that warrants revising Green's sentence.

[20] "The character of the offender is found in what we learn of the offender's life and conduct." *Croy*, 952 N.E.2d at 664. It is well settled that, when considering the character of the offender, one relevant fact is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The trial court may consider not only the defendant's adult criminal history but

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[1] At times, Green conflates the abuse of discretion standard with the inappropriateness standard. *See Appellant's Brief* at 15-16 (in arguing that his sentence was inappropriate, Green asserts that "two of the aggravating circumstances were invalid" and discusses mitigating circumstances identified by the trial court). The two standards are distinct and require separate analysis. *King v. State*, 894 N.E.2d 265, 266 (Ind. Ct. App. 2008).

also his juvenile delinquency record. *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017), *trans. denied.*

[21] Green concedes he has some criminal history but contends it is not significant, noting that he has no prior sexual offenses. Green has engaged in criminal activity since 2005 when he was adjudicated a delinquent child for what would be felony possession of a controlled substance if committed by an adult. He was unsuccessfully released from juvenile probation due to the commission of another offense. In 2006 he was convicted of felony burglary, and in 2009, he was convicted of misdemeanor theft, and his probation was revoked twice. Notably, Green burglarized N.G.'s home when he committed the instant offenses, indicating an escalation in the severity of his conduct. Green's history of criminal activity reflects poorly on his character, and we are unpersuaded that Green's character warrants a lesser sentence.

[22] "The question under App. R. 7(B) is 'not whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate.'" *Miller v. State*, 105 N.E.3d 194, 196 (Ind. Ct. App. 2018) (quoting *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008)). Green has failed to carry his burden of demonstrating that his sentence is inappropriate in light of the nature of the offense and his character.

[23] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.