MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Austin Stephen Bishop,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 27, 2021

Court of Appeals Case No. 21A-CR-953

Appeal from the Monroe Circuit Court

The Honorable Valeri Haughton, Judge

Trial Court Cause No. 53C02-1711-F1-1225

Altice, Judge.

Case Summary

[1] Austin Bishop pled guilty but mentally ill to Level 3 felony rape, and the trial court sentenced him to the maximum sentence of sixteen years executed. He contends that the court abused its discretion with regard to aggravators and mitigators and that the sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Facts & Procedural History

[3] In November 2017, Bishop and T.C., who were friends, lived in separate apartments in the same complex.[1] Around 5:00 p.m. on November 26, Bishop knocked on T.C.'s door and said he needed to talk to her. T.C., who is paralyzed from the waist down and utilizes a wheelchair, went with Bishop to his apartment, where he shut and locked the door behind them. Bishop revealed a knife and held it against T.C.'s throat. He pulled up T.C.'s wheelchair, causing her to fall to the floor, and told her to remove her clothing. She removed her bra and shirt, and Bishop ordered her to perform oral sex, and she refused. He undressed himself, finished undressing T.C., and then vaginally penetrated her. He again instructed her to perform oral sex and threatened that he would cut her if she screamed. She complied briefly and

[1] According to Bishop, the apartment complex is "specified housing sectioned for differently abled individuals." *Appellant's Brief* at 7.

then he penetrated her again. Thereafter, Bishop allowed T.C. to return to her apartment but told her not to call police. Bishop then called his mother and told her that he had raped T.C. His mother contacted authorities and directed them to Bishop's apartment.

[4] During police interviews, Bishop gave authorities an account that largely tracked T.C.'s version of events. He also told police that he had a prescription for several different medications, which included antipsychotics, but that he had been off his medications for several days and had "snapped." *Appendix* at 14. Bishop's mother also was interviewed and reported that Bishop had diagnoses of schizophrenia and PTSD.

[5] On November 27, 2017, Bishop was arrested, and the State charged him with two counts of Level 1 felony Rape and one count each of Level 3 felony criminal confinement and Level 4 felony sexual battery. On February 6, 2018, Bishop filed a motion for psychiatric examination to determine competence to stand trial and a notice of defense of mental disease or defect. Mental health evaluations were filed by Dr. Frederick Nolen and Dr. Anne Leach. Dr. Nolan's March 23, 2018 report found that Bishop was not competent to stand trial. Dr. Leach's May 10, 2018 report did not make an express finding as to competence, but reported that Bishop could list the charges against him, knew the name of his attorney, and knew that that the attorney's job was to defend him while the job of another attorney was to prove his guilt. On May 22, 2018, the trial court ordered a third mental health evaluation, and on July 18, Dr.

Rebecca Mueller filed her report finding that Bishop was not competent for trial.

[6] Following a competency hearing, the trial court on September 24, 2018, issued an order determining that Bishop was incompetent to stand trial at that time. The court committed Bishop to the Division of Mental Health and Addiction (the Division) and directed that the facility's superintendent was to submit a report to the court concerning the probability of Bishop attaining comprehension sufficient to understand proceedings. On March 25, 2019, the Division filed a competency evaluation finding that Bishop had attained the ability to understand the proceedings and assist in the preparation of his defense.

[7] About seven months later, on November 6, 2019, Bishop filed a renewed motion for psychiatric examination to determine competence to stand trial asserting that his mental health had deteriorated since the time that he had been found restored to competency. On January 8, 2020, Dr. Don Olive filed a report on January 8, 2020, finding that Bishop was incompetent for trial, and on January 23, 2020, Dr. Rebecca Mueller filed a report and likewise found that Bishop was incompetent to stand trial. Thereafter, on March 2, 2020, the trial court issued another order determining that Bishop was not competent for trial. Approximately six months later, on September 10, 2020, the Division filed a competency evaluation finding Bishop was now competent to stand trial, stating that Bishop "seems to have a very good understanding of the legal

process" and "gives wrong answers on purpose during legal classes." *Exhibits Vol.* at 7.

[8] Pursuant to plea negotiations, the State filed on April 21, 2021, an amended information adding Count 5, Level 3 felony rape. That same day, a change of plea hearing was held at which Bishop pled guilty but mentally ill to Count 5 and the remaining charges were dismissed pursuant to a plea agreement, which left sentencing open to the trial court. Also on that day, Bishop filed a sentencing memorandum providing the court with information about his youth and upbringing. It described that Bishop was born at a very low birthweight and had a low IQ, his mother had addiction issues, he lived in various arrangements including a group residential home, and, over the years, he received a number of mental health diagnoses including schizophrenia and depression. The memorandum urged the court to consider as mitigators his age, his limited history of criminal convictions, and his mental illness.

[9] After the plea hearing, the matter proceeded immediately to sentencing. No testimony was received but the State read T.C.'s written victim impact statement into the record and submitted a couple other exhibits including a May 3, 2019 jail offense report reflecting that Bishop attacked another inmate. Bishop submitted into evidence Dr. Nolan's March 2018 mental evaluation report and Dr. Mueller's July 2018 and January 2020 reports, which recognized Bishop as suffering from forms of schizophrenia.

[10] The State argued the existence of various aggravators including: the injury or harm suffered by T.C. was greater than the elements necessary to prove the offense; he was a friend and neighbor to T.C. and thus in a position of trust; she was in a wheelchair, which made her more vulnerable and unable to fight back; he has a history of criminal or delinquent behavior including two juvenile adjudications in 2010 for what would be Class B felony child molesting and Class D felony criminal confinement if committed by an adult; and he exhibited violent tendencies during his life and, after his arrest, attacked another inmate in jail. The State acknowledged that Bishop has mental illness, including a history of schizophrenia, but noted that "the Court [] had to order . . . him to [] take his medication while he's incarcerated" which suggested the likelihood that he would not take it "when he's out" and would not be a good candidate for probation due to violent tendencies. *Transcript* at 19. The State offered that "[o]bviously his age is a potential mitigator," but asked the court to "find heavily in regards to the aggravators" and impose the maximum sentence of sixteen years executed in the Indiana Department of Correction (DOC).

[11] In response, Bishop's counsel argued that Bishop had no prior adult offenses, he pled guilty, and he needs mental treatment that he is unlikely to receive at the DOC. He further highlighted that Bishop was born at around three pounds, which affected Bishop's IQ and decision-making capabilities. His counsel emphasized that Bishop's mental condition deteriorated while in jail and that Dr. Mueller "had to go into the jail on an emergency basis" because Bishop had "a schizophrenic break." *Id*. at 23. Bishop's counsel asked for a sentence at or

below the advisory sentence in the DOC but with an immediate transfer to the Division.

[12] The trial court began by expressing that it had given the matter of sentencing "some serious and considerable consideration." *Id*. at 25. It recognized that Bishop suffers from diagnosed mental illness but continued, "I also recognize that you've been restored to competency, that you're aware of your actions and that you have the ability to distinguish between right and wrong." *Id*. The court characterized the offense as "horrendous" and "vicious[.]" *Id*. It identified as aggravating that the victim was in a wheelchair, which "put [her] in a more vulnerable position," and that Bishop had a history of criminal behavior. *Id*. The court also noted that, since the date of the attack, Bishop continued to exhibit violence in jail and is "in a high risk to reoffend if . . . released to the community." *Id*. at 26. The trial court recognized that, although Bishop was "young," he was an adult, such that it did not "consider [age] as a mitigator that outweighs the aggravators." *Id.* The trial court sentenced Bishop to sixteen years, fully executed, in the DOC. Bishop now appeals.

Discussion & Decision

Abuse of Discretion

[13] Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218.

"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." *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." *Baumholser v. State*, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016) (citing *Anglemyer*, 868 N.E.2d at 490-91), *trans. denied*. We review the court's finding of aggravators and mitigators to justify a sentence, but we cannot review the relative weight assigned to those factors. *Id*.

Mitigators

[14] The finding of mitigating circumstances is not mandatory but is within the discretion of the trial court. *Page v. State*, 878 N.E.2d 404, 408 (Ind. Ct. App. 2007), *trans. denied*. One way a trial court abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied*. Bishop argues that the trial court "failed to address the significant mitigators identified by Bishop, leaving only an inference that these critical factors were not taken into consideration." *Appellant's Brief* at 13. His claim in that regard primarily concerns Bishop's history of mental health issues. Contrary to Bishop's assertion, however, the court expressly recognized that Bishop "suffers from diagnosed mental illness[.]" *Transcript* at 25. Later in the

hearing, the court, referring to Bishop's struggle with mental illness, stated, "I do hope [] that you will be able to get some treatment while you are in the [DOC]." *Id*. at 26. Thus, the court clearly considered Bishop's struggles with mental health.

[15] Indeed, although Bishop uses phrases such as "failed to address[,]" "omit[ed,]" and "overlook[ed]" with regard to Bishop's mental health history, *Appellant's Brief* at 13, 14, 16, his actual argument in substance is that the trial court "failed to afford it proper consideration" and failed to consider it as a substantial mitigator. *Id*. at 14. The Indiana Supreme Court has made clear "that we cannot review the relative weight assigned to" mitigating and aggravating factors. *See Baumholser*, 62 N.E.3d at 416 (citing *Anglemyer*, 868 N.E.2d at 491). That is, "[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors." *Anglemyer*, 868 N.E.2d at 491. Bishop has failed to establish that the trial court abused its discretion with regard to its consideration of Bishop's mental illness.

[16] Turning to other proffered mitigators, Bishop argues that the trial court "failed to comment on his lack of adult criminal history" and "did not take his guilty plea into account." *Appellant's Brief* at 20. However, a trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the same weight to a proposed mitigator as the defendant does. *Hunter v. State*, 72 N.E.3d 928, 935 (Ind. Ct. App. 2017),

trans. denied. Nor is the court required to explain why it did not find a factor to be significantly mitigating. *Page v. State*, 878 N.E.2d 404, 408 (Ind. Ct. App. 2007), *trans. denied*. Furthermore, with regard to his claim concerning his guilty plea, our Supreme Court has held:

> [A]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. And the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea.

Anglemyer, 875 N.E.2d at 221-22 (citations omitted). Here, Bishop received a substantial benefit pursuant to the plea agreement. He pled guilty but mentally ill to Level 3 felony rape, and, in exchange, the State dismissed two counts Level 1 felony Rape and one count each of Level 3 felony criminal confinement and Level 4 felony sexual battery. It was not an abuse of discretion for the trial court to not consider the guilty plea as a mitigating factor. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (recognizing that a guilty plea does not rise to the level of a significant mitigating circumstance where defendant received a substantial benefit from the plea), *trans. denied*.

Aggravators

[17] Turning to aggravators, Bishop claims that the trial court erred in finding Bishop's criminal history as an aggravating circumstance. The record reflects

that in 2010, when Bishop was thirteen years old, he had two juvenile adjudications. Specifically, he entered an admission to what would be, if committed by an adult, the following offenses: (1) Class D felony criminal confinement, with dismissal of a sexual battery and battery resulting in bodily injury counts, and (2) Class B felony child molesting, with dismissal of three other child molesting counts and one count of intimidation. Highlighting those adjudications were seven years prior to the current offense, Bishop argues that it was an abuse of discretion to consider his juvenile history as an aggravator. Although remoteness is relevant to the court's consideration, it does not preclude a court from considering it as an aggravating circumstance. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) (while chronological remoteness of a defendant's prior criminal history should be taken into account, remoteness in time, to whatever degree, does not render a prior conviction irrelevant). The trial court did not abuse its discretion when it considered Bishop's juvenile history, which included crimes of a sexual nature, as an aggravator when sentencing him to the rape conviction.[2] *See e.g. Haas v. State*, 849 N.E.2d 550, 556 (Ind. 2006) (finding that defendant's juvenile history of thefts warranted some weight as aggravators because it suggested a pattern of behavior that directly related to the decision to enter into conspiracy to commit burglary). In

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[2] Bishop also argues that, given the State's remark at sentencing that Bishop had a "history of sexually deviant behavior," the trial court may have mistakenly thought Bishop was "some kind of a career criminal, with a long history of convictions in all areas of the law." *Appellant's Brief* at 17; *Transcript* at 18. We find no merit to that assertion. The trial court's statements at the hearing reflected its specific awareness of Bishop's juvenile history, and there is no indication that it relied on dismissed charges or viewed him as a "career criminal."

sum, the trial court did not abuse its discretion in its consideration and treatment of aggravators and mitigators.

Inappropriate Sentence

[18] Bishop also contends that his sentence is inappropriate. Pursuant to Ind. Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find the sentence inappropriate in light of the nature of the offenses and the character of the offender. Indiana's flexible sentencing scheme allows trial courts to tailor a sentence to the circumstances presented, and 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). The principal role of appellate review should be 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). Bishop bears the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[19] As a threshold matter, the State asserts that Bishop fails to make arguments, separate from his claims concerning aggravators and mitigators, in support of his assertion that his sentence is inappropriate – i.e., he did not explain in what way his sentence was inappropriate based on the nature of the offense and Bishop's character – and, therefore, his claim is waived. The State is correct

that "inappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). Although we agree with the State that Bishop's arguments could have been more clearly defined in terms of nature of offense and character, we find his inappropriate sentence claim was sufficiently made to allow our review, and we proceed to address it on the merits.

[20] When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Baumholser*, 62 N.E.3d at 418. Bishop was convicted of a Level 3 felony, the sentencing range for which is three to sixteen years, with the advisory sentence being nine years. Ind. Code § 35-50-2-5. Here, the court sentenced Bishop to the maximum sixteen years. He urges that the maximum sentence was inappropriate, especially given that this was his first adult conviction and he "has a pervasive, debilitating mental illness." *Appellant's Brief* at 21.

[21] When reviewing the nature of the offense we look to the details and circumstances of the offense and the defendant's participation therein. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Here, Bishop knocked on the door of his friend T.C.'s apartment and suggested that they hang out and talk. After they got inside his apartment, he immediately locked the door behind them. He proceeded to topple T.C. from her wheelchair, ordered her to perform oral sex and penetrated her vaginally twice under the threat of cutting her with a knife. He ordered her not to scream and, at the end, told her not to call police. Bishop has failed to establish that the nature of the offense, which

the trial court characterized as "horrendous" and "vicious," warrants reduction of his sentence. *Transcript* at 25.

[22] We conduct our review of a defendant's character by engaging in a broad consideration of his or her qualities. *Madden*, 162 N.E.3d at 564. Character is found in what we learn of the offender's life and conduct. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). Criminal history is one relevant factor in analyzing character. *Madden*, 162 N.E.3d at 564. In urging us to reduce his sentence, Bishop argues that he has no adult criminal history and only two juvenile adjudications.

[23] The record before us reflects that Bishop had what would be two felonies if committed by an adult, namely child molesting and criminal confinement. Additionally, we observe that other juvenile charges of what would be sexual battery, child molesting, attempted child molesting, and intimidation were dismissed. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) ("[A]lthough a record of arrests by itself is not evidence of a defendant's criminal history, it is appropriate to consider such a record as a poor reflection on the defendant's character, because it may reveal that he or she has not been deterred even after having been subjected to the police authority of the State). Bishop's current conviction for rape reflects a disturbing pattern of escalating sexual violence. We are not persuaded that Bishop's character warrants revision of his sentence.

[24] Ultimately, we "do not look to see whether the defendant's sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is inappropriate." *Miller v. State*, 105 N.E.3d 194, 196 (Ind. Ct. App. 2018); *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Bishop has failed to carry his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.

[25] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.