MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Daniel R. Smith,
Appellant / Cross-Appellee / Defendant,

v.

State of Indiana,
Appellee / Cross-Appellant / Plaintiff.

July 18, 2023

Court of Appeals Case No. 23A-CR-128

Appeal from the Warrick Superior Court

The Honorable Kristina Hamby Weiberg, Judge

Trial Court Cause No. 87D01-1910-F1-497

Memorandum Decision by Judge Bradford
Judge Weissmann concurs.
Judges Riley dissents with separate opinion.

Bradford, Judge.

Case Summary

[1] Daniel Smith was convicted of two counts of Level 1 felony child molesting and two counts of Level 4 felony child molesting and was sentenced to an aggregate sixty-year sentence. On appeal, Smith contends that the trial court abused its discretion in admitting certain evidence and that his sixty-year sentence is inappropriate. We affirm.

Facts and Procedural History

[2] During the summer of 2018, then-eight-year-old L.B. lived in Folsomville with her mother ("Mother"), siblings, and Smith, who had been Mother's boyfriend at the time. L.B. referred to Smith as "dad." Tr. Vol. II p. 234. Smith would watch L.B. and her siblings while Mother was at work.

[3] On multiple occasions, when L.B. had been napping, Smith had come upstairs to L.B.'s bedroom and removed her from her bed. He had then taken her downstairs, had laid her in his bed, and had made her take off her clothes. Once L.B. had taken off her clothes, Smith had taken his clothes off before touching L.B. "in [her] private," rubbing her private "[w]ith his finger and his private." Tr. Vol. II p. 238. Smith's actions had made L.B. feel "really uncomfortable." Tr. Vol. II p. 239. On at least one occasion, Smith had also taken L.B. to his bedroom when she had come in from playing and had subjected her to the same type of touching. There had been multiple occasions when Smith had touched L.B. only with his fingers and multiple others when

he had touched her only with his "privates." Tr. Vol. II p. 245. On some of the occasions when Smith had been touching L.B., his fingers or "privates" had been "right on the outside" of her "private parts" and other times had been "in the crack." Tr. Vol. II pp. 245, 246. L.B. later testified that Smith had touched her "within the crack" about "five times" and indicated that it had "felt different than when he touched [her] on the outside." Tr. Vol. II p. 246. Smith had instructed L.B. "not to tell anybody or he could get in big trouble." Tr. Vol. II p. 246.

[4] L.B. did not initially tell anyone about her interactions with Smith. At some point "after Easter in 2018" but prior to August 3, 2018, L.B. gave Mother a note that said that Smith "had showed [sic] her his underwear." Tr. Vol. III p. 28. At the time, L.B. denied that anything else had happened and Smith denied that he had even shown L.B. his underwear.

[5] In 2019, after hearing a presentation by a representative of Holly's House, a local child advocacy center, L.B. "realized" that Smith's actions were "really wrong." Tr. Vol. II p. 246. She then disclosed the sexual abuse to both her teacher and her mother. Mother did not learn of the specific allegations about Smith touching L.B. until after L.B. had disclosed the sexual abuse at school.

[6] On October 18, 2019, the State charged Smith with three counts of Level 1 felony child molesting, three counts of Level 4 felony child molesting, and one count of Level 6 felony dissemination of matter harmful to minors. The matter proceeded to a jury trial on May 11 and 12, 2022.

[7] During the State's case-in-chief, Molly Rivers, a certified forensic interviewer for Holly's House, testified generally, over Smith's objection, that delayed disclosure of sexual abuse is common in cases involving child victims. Rivers further testified that she had not been the individual who had taught the presentation at L.B.'s school. She did not testify about L.B.'s case or give any opinion as to the truth or falsity of L.B.'s allegations. After the State closed its case-in-chief, Smith requested, and the trial court granted, judgment on the evidence as to the Level 6 felony dissemination charge. Trial continued, at the conclusion of which the jury found Smith guilty of two counts of Level 1 felony child molesting and two counts of Level 4 felony child molestation. The jury found Smith not guilty of the remaining counts. On June 22, 2022, Smith was sentenced to an aggregate sixty-year term of incarceration. Also on June 22, 2022, Smith filed a motion to set aside the judgment, which, following a December 19, 2022 hearing, was denied by the trial court on December 22, 2022.

Discussion and Decision

I. Cross-Appeal Issue

[8] At the outset, we note that the State contends on cross-appeal that Smith has "forfeited his right to appeal because he did not timely file his notice of appeal." Appellee's Br. p. 11. Specifically, the State argues that the time limitation for filing the instant appeal began to run when Smith was sentenced on June 22,

2022, and was not tolled until the trial court denied Smith's motion to set aside the judgment on December 22, 2022. However, given that the parties have fully briefed the merits of the issues before us, together with our preference for deciding cases on their merits, we elect to review the merits of Smith's arguments on appeal. *See Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005) (providing that the court of appeals prefers to decide issues on their merits when possible), *trans. denied*.

II. Smith's Appellate Claims

A. Admission of Evidence

[9] Smith contends that the trial court abused its discretion in admitting the testimony of Rivers, claiming that Rivers's testimony qualified as impermissible vouching testimony. "We typically review rulings on the admission of evidence for an abuse of discretion." *Baumholser v. State*, 62 N.E.3d 411, 414 (Ind. Ct. App. 2016), *trans. denied*. "An abuse of discretion occurred if the trial court misinterpreted the law or if its decision was clearly against the logic and effect of the facts and circumstances before it." *Id.*

[10] Evidence Rule 704(b) provides that a witness may not testify to "the truth or falsity of allegations [or] whether a witness has testified truthfully." We have previously concluded that a witness's testimony did not qualify as impermissible vouching when the witness did not offer an opinion about the facts of the case but testified generally about (1) why a victim of domestic violence might return to their abuser and (2) "the dynamics of domestic

violence, including economic abuse, emotional abuse, psychological abuse, denying, minimizing, and blaming." *Thevenot v. State*, 121 N.E.3d 679, 687 (Ind. Ct. App. 2019); *see also Iqbal v. State*, 805 N.E.2d 401, 410 (Ind. Ct. App. 2004) (providing that an expert who had not had personal knowledge of the case and had not counseled the victim had not crossed the line into impermissible vouching when the expert "merely educated the jury on the complexity of behavior of domestic violence victims"). We reached the same conclusion in *Baumholser*, concluding that general testimony regarding delayed disclosure by a child molestation victim did not amount to improper vouching when the forensic interviewer did not give an opinion as to the veracity of the child witness's testimony, but rather only testified that "most of the time [disclosure] is delayed in some way." 62 N.E.3d at 416.

[11] Smith attempts to distinguish the instant matter from *Baumholser*, asserting that "[t]his case is distinguishable from *Baumholser* because [Rivers's testimony] was expressly used to bolster the child's credibility, and the defense had not opened the door." Appellant's Br. p. 16. We cannot agree, however, that Rivers's testimony was "expressly used" to bolster L.B.'s testimony. Rivers made no reference to L.B. and gave no opinion as to the veracity of L.B.'s allegations. Rivers merely testified that delayed disclosure is common in cases involving child victims and gave some general reasons as to why.

[12] During the State's direct examination of Rivers, the following exchange occurred:

[The State]: … Were you trained in the process of disclosure?

[Rivers]: Yes.

[The State]: And could you describe to the jury what that is?

[Rivers]: So, disclosure is when a child is talking about what happened. Typically, disclosure is delayed in most cases. But, disclosure is also a process. It's not a singular event. At any given point, an individual can go through all five stages of disclosure or just one of them. And so there's five stages, the first being an accidental, and then there's attentative, and then there's an active, and then there's a recant or a reaffirm.

[The State]: All right. And based on your -- you said disclosure is a process. So, based on the two thousand forensic interviews you have conducted and your research, is it common to get a complete disclosure upon the first interview?

[Rivers]: Typically not.

[The State]: Out of the over two thousand interviews you have conducted, is it common for disclosure to be within the first forty-eight hours of an event happening?

[Rivers]: In the interviews I've conducted and nationally the research shows that typically delayed disclosure is more common. So, we say acute. So, within the first ninety-six hours is not very typical. It's usually months, years later.

[The State]: Based on your training and experience and the interviews that you have done and your continuing education, could you explain to the jury why a delayed disclosure may occur?

[Rivers]: So, there's multiple reasons. Some is just fear of telling. Some is confusion. If they've been threatened or asked

not to tell. Some is purely they care about the individual that this happened with, and they don't want them to get in trouble. They're in fear of getting in trouble. Also, if there's any type of familial relationship where their life would be turned upside down, they'd have to leave, or someone is going to get arrested, or -- there's a lot of things for a child to take on. So, typically it's easier for them just not to tell. And there's a lot of shame and embarrassment and guilt that can go along with the disclosure of abuse.

[The State]: What are precipitating events in terms of disclosure?

[Rivers]: So, I talked about a few of them. Some can be just a trigger. Somebody hears something that triggers them. They hear a word that sounds like something that happened to them. Sometimes it's that they've educated themselves about it. Sometimes it's that they've heard somebody else disclose. It can be a variety of different things that just trigger them to want to tell. The person is no longer in the home, so they feel safe to tell somebody else.

[The State]: All right. Does Holly's House provide education in schools?

[Rivers]: Holly's House has a school program called, Think First, Stay Safe, that's a prevention program that goes out to kindergarten through sixth grade….

[The State]: All right. Are you aware, based on that course and in your training and experience, ten years Holly's House, how often do kids come forward after those education classes?

[Rivers]: I would say typically, I mean, we would always get disclosures stemming from that. It wasn't an exorbitant number. But sometimes we would get disclosures once the staff had been in the school settings.

Tr. Vol. II pp. 225–28. On cross-examination, Rivers explained her role as a forensic interviewer, reiterating that she merely conducts the interview and does not evaluate "any type of truth or distruth about it." Tr. Vol. II p. 229.

[13] While Rivers's testimony regarding the common nature of delayed disclosure was undoubtedly more detailed than the testimony that had been discussed in *Baumholser*, the substance of Rivers's testimony, *i.e.*, that delayed disclosure is common, is largely the same. Rivers additionally testified about common triggers of a delayed disclosure, but this additional testimony was also general in nature. Similar to the witness described in *Iqbal*, Rivers merely educated the jury on the general reasons why delayed disclosure was common from child victims and common triggers leading to disclosure. *See Iqbal*, 805 N.E.2d at 410.

[14] In arguing that the trial court abused its discretion in admitting Rivers's testimony, Smith cites the Indiana Supreme Court's decision in *Sampson v. State*, 38 N.E.3d 985 (Ind. 2015). However, we find Smith's reliance on *Sampson* to be misplaced, as it is easily distinguished from the instant matter. In *Sampson*, Jenny Wood, a child forensic interviewer who had conducted a forensic interview of the child victim, testified that "she was trained to detect signs of coaching during a forensic interview and that she did not observe any signs that S.B. had been coached." 38 N.E.3d at 988. The *Sampson* Court found Wood's testimony to be impermissible vouching in that it effectively created the reasonable inference that S.B. had been telling the truth given that Wood had testified that she had been trained to detect signs of coaching and

observed no such signs with respect to the victim. *Id.* at 992. Unlike the situation in *Sampson*, however, review of Rivers's testimony shows that Rivers made no mention of L.B. and provided no opinion regarding the truth or veracity of L.B.'s testimony. Rivers's testimony would not be sufficient to support any inference regarding the truth or falsity of L.B.'s allegations and testimony.

[15] Furthermore, to the extent that Smith relies on our opinion in *Neal v. State*, 175 N.E.3d 1193 (Ind. Ct. App. 2021), *trans. denied*, we note that our opinion in *Neal* is also distinguishable from the instant matter. In *Neal*, one of the investigating officers testified to the changing nature of Neal's statement to police relating to his actions involving the child victim before further testifying that "child molesters, as part of their process, will progressively admit more and more facts without confessing to the actual crime." 175 N.E.3d at 1197–98. We concluded that the trial court had "erred in admitting" the officer's testimony because the testimony had invaded the province of the jury in determining what weight to place on a witness's testimony as it created the inference that Neal, who had been facing child molestation charges at trial, had behaved like a child molester, engaging in a child molester's so-called "process." *Id.* Unlike the officer's testimony in *Neal*, Rivers's testimony did not invade the province of the jury as it does not support any inference about Smith's guilt and, again, provided only general background information on child victims and no opinion regarding the truth or falsity of L.B.'s allegations.

[16] Despite Smith's reliance on *Sampson* and *Neal*, we conclude that the facts of this case are substantively similar to those at issue in *Baumholser*. As such, we find our decision in *Baumholser* to be instructive. Again, like the testimony at issue in *Baumholser*, Rivers's testimony did not relate to the truth or falsity of L.B.'s allegations. Rather, Rivers was making a statement about how victims of child molesting behave in general. Rivers's testimony was not improper vouching. *See Baumholser*, 62 N.E.3d at 415–16. The trial court, therefore, did not abuse its discretion in admitting Rivers's testimony into evidence.

B. Appropriateness of Sentence

[17] Smith also contends that his aggregate sixty-year sentence is inappropriate. Specifically, Smith argues that we "should find that the sentence in this case is an outlier" and that "[t]he nature of the offense and the character of the offender warrant a sentence reduction." Appellant's Br. p. 24. We disagree.

[18] Indiana Appellate Rule 7(B) provides that "The 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." In analyzing such claims, we "concentrate less on comparing the facts of [the case at issue] to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Paul v. State*, 888 N.E.2d 818, 825 (Ind. Ct. App. 2008) (internal quotation omitted), *trans. denied*. The defendant bears the

burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

[19] We agree with the State that the nature of Smith's offenses "was very serious." Appellee's Br. p. 21. Smith acted as a father-figure to L.B., but violated his position of trust by repeatedly molesting her. At the time the molestations occurred, L.B. was eight years old and Smith was dating L.B.'s mother. Smith's actions also resulted in a profoundly negative impact on L.B. and her family, with L.B. requiring therapy and L.B.'s younger sister, *i.e.*, the child of Mother and Smith, effectively losing her father. In addition, the trial court heard statements at sentencing which indicated that L.B. had "completely changed" after the molestations and had gone "from a happy and outgoing child that loved living in the sun to now living somewhat in the shadows." Tr. Vol. IV p. 101. L.B. had become afraid to be in public and was "always looking around to make sure" Smith was not there. Tr. Vol. IV p. 102. She also had become afraid to play outside "because she [was] afraid [Smith] might see her." Tr. Vol. IV p. 102.

[20] As for Smith's character, Smith had previously been convicted of Level 6 felony strangulation and placed on probation. Strangulation is a violent offense, the commission of which reflects poorly on Smith's character. *See generally, Denham v. State*, 142 N.E.3d 514, 518 (Ind. Ct. App. 2020) (providing that the gravity, nature, and number of prior violent offenses reflected poorly on Denham's character), *trans. denied*. In addition, Smith had begun his probation for his strangulation conviction "on 11/28/18 which is within the time range of

the instant offenses." Appellant's App. Vol. III p. 92. Smith was also assessed to be a "high" risk to reoffend. Appellant's App. Vol. III p. 91. While we acknowledge that Smith's family and friends provided statements of support at sentencing and claimed that he was of high character, Smith's repeated acts of molesting a child with whom he was in a position of trust, reflects poorly on Smith's character, to say the least. *See Heckard v. State*, 118 N.E.3d 823, 834 (Ind. Ct. App. 2019) (providing that violating a position of trust did not bode well for Heckard's character), *trans. denied*. Smith has failed to convince us that his aggregate sixty-year sentence is inappropriate.

[21] The judgment of the trial court is affirmed.

Weissmann, J., concurs.

Riley, J., dissents with opinion.

Riley, Judge dissenting.

[22] I respectfully dissent from the majority's decision to address the merits of Smith's appeal, as he forfeited his right to appeal by failing to file a timely notice of appeal. Pursuant to Indiana Appellate Rule 9(A)(1), an appellant must file a notice of appeal within thirty days of the noting of the entry of final judgment on the chronological case summary. Failure to do so normally forfeits the right to appeal. See Ind. Appellate Rule 9(A)(5); see also In re Adoption of O.R., 16 N.E.3d 965, 971 (Ind. 2014) (clarifying that, while the failure to file a timely notice of appeal does not deprive this court of jurisdiction, it will result in the forfeiture of the right to appeal unless "there are extraordinarily compelling reasons why this forfeited right should be restored").

[23] Here, the trial court's entry of final judgment was noted on the chronological case summary on June 28, 2022, making Smith's notice of appeal due on July 28, 2022. Smith did not file his notice of appeal until January 19, 2023, rendering his appeal untimely and resulting in the forfeiture of his appeal. App. R. 9(A)(1), (5). Smith filed a motion on June 22, 2022, which alleged juror misconduct. Although Smith styled his motion as one seeking to set aside the jury's verdicts pursuant to Indiana Trial Rule 50(A) ("Judgment on the Evidence (Directed Verdict)"), Trial Rule 50(A) motions only properly challenge the sufficiency of the evidence supporting the judgment or verdict. Therefore, Smith's motion, which he filed before entry of final judgment, was in substance a motion to reconsider. See Stephens v. Irvin, 730 N.E.2d 1271, 1277 (Ind. Ct. App. 2000) (concluding that a motion filed before entry of final

judgment and framed as a motion to correct error was truly a motion to reconsider). We have long held that the filing of a motion to reconsider does not toll the time limits for the filing of a notice of appeal. Johnson v. Estate of Brazill, 917 N.E.2d 1235, 1239 (Ind. Ct. App. 2009). In his briefs to this court, Smith does not present us with any "extraordinarily compelling reasons" as to why his appeal should not be deemed to have been forfeited. In re Adoption of O.R., 16 N.E.3d at 971. Therefore, I would have dismissed the instant appeal rather than address Smith's claims on the merits. For these reasons, I dissent.