MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Edward Cahill,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 31, 2022

Court of Appeals Case No. 21A-CR-2664

Appeal from the Posey Circuit Court

The Honorable Craig S. Goedde, Judge

Trial Court Cause No. 65C01-2011-F3-477

Tavitas, Judge.

Case Summary

[1] Edward Cahill appeals his sentence for sexual misconduct with a minor, a Level 4 felony. Cahill argues that the trial court abused its discretion in considering certain aggravators and that his eight-year sentence is inappropriate in light of the nature of the offense and the character of the offender. Finding that the trial court did not abuse its discretion when sentencing Cahill and that his sentence is not inappropriate, we affirm.

Issues

[2] Cahill raises two issues, which we restate as:

I. Whether the trial court abused its discretion by considering certain aggravating factors.

II. Whether Cahill's sentence is inappropriate in light of the nature of the offense and the character of the offender.

Facts

[3] In January 2020, forty-four-year-old Cahill began staying with a relative, D.R. Shortly thereafter, Cahill began having sexual intercourse with D.R.'s fifteen-year-old daughter ("Victim"). In November 2020, Victim informed D.R. that Victim was pregnant and that Cahill was the father. D.R. contacted law enforcement, and the State charged Cahill with rape, a Level 3 felony, and sexual misconduct with a minor, a Level 4 felony.

[4] At Cahill's initial hearing, he attempted to plead guilty as charged. When the State attempted to establish a factual basis for the rape charge, Cahill claimed that the sexual intercourse was "consensual" and that "[t[here never was force [or] anything. This happened on several occasion past the dates that she is saying . . . ." Tr. Vol. II p. 9. The trial court then entered a "preliminary plea of not guilty" for Cahill to both charges. *Id.* at 10.

[5] In November 2021, Cahill agreed to plead guilty to sexual misconduct with a minor, a Level 4 felony, and the State agreed to dismiss the rape charge. Under the plea agreement, Cahill's sentence was "open without recommendation . . . ." Appellant's App. Vol. II p. 14. During the sentencing hearing, the trial court noted: "You know, your age, her age, obviously are huge contributing factors to this Court[']s decision with regards to sentencing. Obviously it's a huge factor with regards to the plea that you took here today with regards to Count 2." Tr. Vol. II p. 29. After discussing the parties' proposed aggravators and mitigators, the trial court found Cahill's guilty plea as a mitigating factor. The trial court also found two aggravating factors: (1) the harm, injury, loss, or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense; and (2) Cahill's criminal history. The trial court then stated:

> You know, in this particular situation sir it is very difficult as a parent, not to put myself in the parent's position and to think of my now, seventeen (17) year old daughter in the position of being of fifteen (15) years old at the time I would allow a relative to stay in my home that would have taken advantage of her. You know, as a parent I don't know how you completely remove

> yourself from that mental picture, and I'm trying to do my best to be able to do that here today. But that just, quite frankly, as a parent would infuriate me. You know, whether or not you made it to Court or not, you know, that's one of those things. Parent's [sic] do strange things when they think their children are being harmed.

Id. at 31. The trial court found that an aggravated sentence was warranted and sentenced Cahill to eight years in the Department of Correction ("DOC"). Cahill now appeals.

Analysis

I. Sentencing Discretion

[6] Cahill first argues that the trial court abused its discretion when sentencing him. "[S]ubject to the review and revise power [under Indiana Appellate Rule 7(B)], 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), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). An abuse occurs only 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. *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019).

[7] A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported

by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Ackerman v. State*, 51 N.E.3d 171, 193 (Ind. 2016), *cert. denied*, 137 S. Ct. 475 (Ind. 2016). This Court presumes that a court that conducts a sentencing hearing renders its decision solely on the basis of relevant and probative evidence. *Schuler*, 132 N.E.3d at 905. "When an abuse of discretion occurs, this Court will remand for resentencing only if 'we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.'" *Ackerman*, 51 N.E.3d at 194 (quoting *Anglemyer*, 868 N.E.2d at 491).

A. Personal Philosophical Message

[8] Cahill first argues that the trial court sentenced him to an aggravated sentence because the trial court improperly considered its "personal philosophical message." Appellant's Br. p. 12. "[I]t is improper for a trial court to impose a harsh sentence on the basis of the trial court's desire to send a personal philosophical message about the general severity of an offense, rather than focusing upon facts that are peculiar to the particular defendant and offense." *Puckett v. State*, 956 N.E.2d 1182, 1188 (Ind. Ct. App. 2011) (citing *Scheckel v. State*, 655 N.E.2d 506, 510 (Ind. 1995)); *see also Beno v. State*, 581 N.E.2d 922, 924 (Ind. 1991) ("We do not believe, however, that a trial judge should be allowed to use the sentencing process as a method of sending a personal philosophical or political message. A trial judge's desire to send a message is not a proper reason to aggravate a sentence.").

[9] We find no indication, however, that the trial court based Cahill's sentence on the trial court's "personal philosophical message." The trial court made brief comments about its thoughts as a parent allowing a relative to stay in a home and then learning the relative took advantage of the parent's child. The trial court did specifically state that it was, "trying to do [its] best" not to consider those thoughts. Tr. Vol. II p. 31. The trial court then enumerated valid aggravating and mitigating circumstances unrelated to the "personal philosophical message." Under these circumstances, we cannot say the trial court abused its discretion. *See, e.g., McCain v. State*, 148 N.E.3d 977, 984 (Ind. 2020) (finding no abuse of discretion where the trial court made statements "clarifying he would filter out his personal feelings" and finding, "[w]hile this disclaimer is not a magic phrase inoculating the trial court from scrutiny, it weighs against a finding of bias").

B. Age Difference

[10] Cahill also argues that the trial court improperly considered the difference in age between Cahill and the Victim as an aggravating factor because the statute takes the ages of the defendant and victim into account by increasing the offense from a Level 5 felony to a Level 4 felony. We first note that the trial court did not specifically identify the age difference as an aggravating factor. The trial court stated: "You know, your age, her age, obviously are huge contributing factors to this Court[']s decision with regards to sentencing. Obviously it's a huge factor with regards to the plea that you took here today with regards to Count 2." Tr. Vol. II p. 29. The trial court later identified only

two aggravating factors: Cahill's criminal history and that the harm, injury, loss, or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense. Because the trial court did not formally identify the age difference as an aggravator, we cannot say the trial court abused its discretion.

[11] Moreover, even if the trial court did consider the significant age difference as an aggravator, we cannot say the trial court abused its discretion. Indiana Code Section 35-42-4-9(a) provides: "A person at least eighteen (18) years of age who knowingly or intentionally performs or submits to sexual intercourse . . . with a child less than sixteen (16) years of age, commits sexual misconduct with a minor, a Level 5 felony." The offense, however, is "a Level 4 felony if it is committed by a person at least twenty-one (21) years of age . . . ." I.C. § 35-42-4-9(a)(1). Cahill's conviction for sexual misconduct with a minor was a Level 4 felony, rather than a Level 5 felony, because the offense was committed by a person at least twenty-one years of age.

[12] "While it is well-settled that a trial court may not use elements of a crime to enhance a sentence, the trial court may find that the particularized circumstances of a crime were aggravating." *Gellenbeck v. State*, 918 N.E.2d 706, 712 (Ind. Ct. App. 2009) (internal citation omitted). Here, Cahill was forty-four years old, and the Victim was fifteen years old. Cahill's age far exceeded twenty-one years of age, and we cannot say the trial court abused its discretion if it considered the age disparity as an aggravator. *See id.* ("Gellenbeck's forty-two years far exceeded that minimum. As such, it was not

improper for the trial court to consider the disparity between Gellenbeck's and V.S.'s ages.").

[13] Even if Cahill could demonstrate an abuse of discretion from either of his contentions, our Supreme Court has held: "[e]ven when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist." *McCain*, 148 N.E.3d at 984. Our Supreme Court has repeatedly noted that "[a] single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences." *McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001). "When an improper aggravator is used, we remand for resentencing only 'if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances.'" *Id.* (quoting *McCann*, 749 N.E.2d at 1121). The trial court found two other proper aggravators—Cahill's criminal history and that the harm, injury, loss, or damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense—and one mitigator. Given Cahill's criminal history and the significant harm to Victim here, including the resulting pregnancy, we are confident that the trial court would have imposed the same sentence even without consideration of a personal philosophical message or the age disparity between Cahill and the Victim.

II. Appellate Rule 7(B)

[14] Next, Cahill contends that his eight-year sentence is inappropriate. The Indiana Constitution authorizes independent appellate review and revision of a trial

court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender."[1] Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[15] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain*, 148 N.E.3d at 985 (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id.* "Whether a sentence should be deemed inappropriate '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*. (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial

[1] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Tavitas, J., concurring in result).

court's sentence "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).

[16] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). Here, Cahill was convicted of sexual misconduct with a minor, a Level 4 felony. Indiana Code Section 35-50-2-5.5 provides: "A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years." The trial court sentenced Cahill to eight years in the DOC.

[17] Our analysis of the "nature of the offense" requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Cahill repeatedly had sexual intercourse with fifteen-year-old Victim after D.R. allowed Cahill to live in her home, and the Victim became pregnant with Cahill's child. At his initial hearing, Cahill admitted that he engaged in sexual intercourse with the Victim "on several occasion past the dates that she is saying . . . ." Tr. Vol. II p. 9.

[18] At the sentencing hearing, the Victim read a statement that "[g]oing to school with a baby is hard" and it is "just not something [she] ever wanted." *Id.* at 21.

The Victim stated that she fought Cahill and she "was always scared he was going to hurt [her];" that Cahill ripped her clothes off when she did not take them off herself; and that Cahill was a physically imposing person. *Id.* She further stated that Cahill's "actions have hurt [her] in so many ways." *Id.* The Victim's sister read a statement from D.R., who stated that Cahill also molested D.R. and her sister twenty-five years ago, that she allowed him into her home "because family is supposed to help and love each other," and that Cahill was "the reason for destroying [her] family." *Id.* at 22. The nature of the offense does not warrant a revision of Cahill's sentence.

[19] Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), trans. denied. "Even a minor criminal history is a poor reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*). Forty-four-year-old Cahill had eleven misdemeanor convictions and was sentenced to probation eight times. Two of the misdemeanor convictions were originally charged as felonies. Although the

prior convictions are not in the nature of his current offense, the sheer number of prior convictions does not reflect well on Cahill's character. Moreover, at the initial hearing, Cahill minimized his behavior by claiming that the fifteen-year-old Victim consented.

[20] Given the significant harm to the Victim and her family and Cahill's criminal history, we cannot say that his eight-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

[21] The trial court did not abuse its discretion when sentencing Cahill, and his eight-year sentence is not inappropriate. Accordingly, we affirm.

[22] Affirmed.

Riley, J., and May, J., concur.