## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

Andrew L. Himes,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

November 30, 2023

Court of Appeals Case No. 22A-CR-3011

Appeal from the Elkhart Superior Court

The Honorable Kristine A. Osterday, Judge

Trial Court Cause No. 20D01-2102-F3-8

**Memorandum Decision by Chief Judge Altice**
Judges May and Foley concur.

**Altice, Chief Judge.**

## Case Summary

[1] Andrew L. Himes appeals his conviction for rape, a Level 3 felony, claiming that the trial court's exclusion of evidence relating to the victim's participation in an internet game violated his right to present a defense and cross-examine witnesses. Himes further contends that the evidence was insufficient to support his conviction, that the trial court abused its discretion in sentencing him because it overlooked mitigating factors that were supported by the record, and that the thirty-six-year sentence imposed was inappropriate when considering the nature of the offense and his character.

[2] We affirm.

## Facts and Procedural History

[3] During the evening of June 29, 2020, seventeen-year-old M.M. and her friend, S.D., made plans to attend a bonfire in Middlebury. Prior to leaving S.D.'s home, M.M. purchased some marijuana from her next-door neighbor, thirty-two-year-old Himes. After arriving at the bonfire, M.M. drank alcohol and smoked marijuana. The pair left and returned to S.D.'s house around 12:30 a.m., where they continued to drink wine coolers.

[4] At approximately 2:00 a.m., M.M. and S.D. walked to Himes's residence and smoked more marijuana. The marijuana "hit M.M. pretty hard" and "took [her] wooziness to the next level[.]" *Transcript Vol. VII* at 145. Douglas Miller,

an occupant at Himes's residence, provided shots of vodka to the girls. M.M. felt pressured to drink because "[e]verybody was [telling her to] . . . drink, drink, drink." *Id.* at 145-46. After consuming several shots of vodka, M.M. felt extremely intoxicated, and she had difficulty standing. Around this time, Himes's young children entered the kitchen, whereupon Himes sent them back to their bedrooms.

[5] At some point, Donald Hicks escorted M.M. to Himes's bedroom and got in bed with her. Although M.M. said "no" and tried to resist, Hicks removed M.M.'s shorts, rolled her onto her stomach, and anally and vaginally penetrated M.M. with his penis. *Id.* at 156-59.

[6] Miller and Himes then entered the bedroom. Miller penetrated M.M. vaginally with his penis, while Hicks and Himes alternated putting their penises in M.M.'s mouth. M.M. unsuccessfully tried to resist. Himes then performed oral sex on M.M. and penetrated her vaginally with his penis. When M.M. was eventually allowed to leave the bedroom, she went back to S.D.'s house. M.M. reported the incident to the police and told the responding officers what had occurred. S.D.'s mother then drove M.M. to the hospital for a sexual assault examination.

[7] On February 25, 2021, the State charged Himes with three counts of Level 3 felony rape and alleged that he was a habitual offender. Hicks and Miller were also charged in connection with the assault. The trial court subsequently granted the State's request to join all three as codefendants for trial.

[8] On May 20, 2022, Himes filed a pretrial motion in limine requesting permission to present evidence about M.M.'s participation in an internet game entitled "Hot Girl Summer" (HGS). *Appellant's Appendix Vol. II* at 78-80. HGS is a game where players can purportedly earn points through kissing or participating in various sexual acts. M.M. posted on Instagram that she played the HGS game as "a joke," and testified that her participation in the game "played no role" in her decision to enter Himes's residence on June 29, 2020. *Transcript Vol. VIII* at 99-100. Himes alleged that excluding evidence about M.M.'s participation in the game would violate his right to present a defense and cross-examine witnesses. Following a hearing, the trial court denied Himes's request.

[9] Hicks, Miller, and Himes were tried together, and at the conclusion of the trial, the jury found Himes guilty of one count of rape and not guilty on the remaining two counts. Himes also admitted to being a habitual offender.

[10] At the sentencing hearing on December 15, 2022, the trial court noted that while it had excluded evidence at trial regarding the quantity of marijuana that police had discovered in Himes's children's bedroom,[1] it observed that the marijuana was of a "large quantity" and packaged in a manner suggesting that it would be sold. *Transcript Vol. IX* at 236-37.

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[1] Police officers went to Himes's residence and obtained consent from his "significant other" to search the house. *Transcript Vol. VI* at 57. The officers recovered a large quantity of marijuana in the ceiling above the children's bedroom.

[11] The trial court found no mitigating circumstances and identified as aggravating circumstances Himes's criminal history including four delinquent acts, three felonies, and seven misdemeanors, his failed attempts at rehabilitation, and his probation violations. The trial court also identified as aggravating the harm that Himes inflicted on M.M. and that the offenses occurred while his young children were at the residence. The trial court sentenced Himes to sixteen years for rape, enhanced by twenty years for being a habitual offender.

[12] Himes now appeals.

## Discussion and Decision

## I. Evidence of M.M.'s Participation in HGS

[13] Himes argues that his rape conviction must be reversed because the trial court abused its discretion in excluding evidence of M.M.'s participation in HGS. Specifically, Himes maintains that the evidence was relevant and that excluding such evidence violated his right to present a defense and cross-examine both M.M. and S.D.

[14] A trial court has broad discretion in ruling on the admission or exclusion of evidence. *Sims v. Pappas*, 73 N.E.3d 700, 705 (Ind. 2017). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We will reverse a trial court's ruling on the admissibility of evidence only when it constitutes an abuse of discretion. *McCoy v. State*, 193 N.E.3d 387, 390 (Ind. 2022).

[15] At the outset, we note that while a defendant has the right to present a defense, "the right to present relevant evidence is not unlimited and is subject to reasonable restrictions." *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998). To be sure, "rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, and those rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Id.* And the United States Supreme Court has found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate "only where it has infringed upon a weighty interest of the accused." *Id.* In *Holmes v. South Carolina*, it was explained that

> well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury [as well as] evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice [or] confusion of the issues.

547 U.S. 319, 326-27 (2006).

[16] Indiana's Rape Shield Statute, Ind. Code § 35-37-4-4, provides that in a prosecution for rape:

> (1) evidence of the victim's past sexual conduct;
>
> (2) evidence of the past sexual conduct of a witness other than the accused;

(3) opinion evidence of the victim's past sexual conduct;

(4) opinion evidence of the past sexual conduct of a witness other than the accused;

(5) reputation evidence of the victim's past sexual conduct; and

(6) reputation evidence of the past sexual conduct of a witness other than the accused;

may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter."

I.C. § 35-37-4-4(a).

[17] We conclude that Himes's proposed evidence—that M.M. had allegedly participated in a game that had a possible sexual dimension—violates the Rape Shield Statute. Additionally, we note that Ind. Evid. Rule 412(b)(1) provides that, in a criminal case, the victim's past sexual conduct or sexual predisposition is not admissible except when the evidence is covered by one of the following provisions:

(A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

> (C) evidence whose exclusion would violate the defendant's constitutional rights.

[18] This rule reflects the principle that

> [i]nquiry into a victim's prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense. Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles for reporting sex crimes.

*Williams v. State*, 681 N.E.2d 195, 200 (Ind. 1997).

[19] While Himes presents his issue as a constitutional claim, he seems to actually be arguing that evidence about HGS was admissible pursuant to Evid. R. 412(b)(1)(B) with regard to M.M.'s consent. The rule, however, prohibits Himes's proposed evidence about HGS for several reasons.

[20] For instance, nothing about M.M.'s participation in HGS amounted to "specific acts . . . with respect to the person accused of the sexual misconduct." Evid. R. 412(b)(1)(B). To be sure, there was no evidence suggesting that M.M. had engaged in consensual sex with Himes. Moreover, Himes presented no evidence in his offer of proof that he knew about M.M.'s participation in HGS or that M.M. wanted to "earn points" by having sex with him. Instead, the evidence was generalized, and it only showed that M.M. regarded HGS as a "joke," and she testified that her participation in the game played "no role" in her decision to enter Himes's residence. *Transcript Vol. VIII* at 100. Thus,

Himes has failed to meet his burden to show that evidence about HGS in any way proved that M.M. consented to sexual activity with him.

[21] As for Himes's claim that the excluded evidence denied him the opportunity to cross-examine M.M., we note that a defendant's right to cross-examine witnesses is not without limits, and a defendant is not entitled to cross-examine a witness "in whatever way, and whatever extent, that a defendant might wish." *Id.*

[22] In this case, Himes asserts that cross-examining M.M. about her participation in HGS would have tested her credibility, but he fails to suggest how her credibility would be impacted. M.M. did not deny that she had participated in HGS in general. And as discussed above, the proposed evidence did nothing to prove consent, and it did not discredit M.M.'s testimony that Himes had compelled her to have sex against her will. Thus, Himes has failed to meet his burden to show that there was a violation of his right to cross-examine M.M. *See, e.g., Watson v. State,* 134 N.E.3d 1038, 1044 (Ind. Ct. App. 2019), (holding that absent a showing of actual impingement of cross-examination, there is no violation of a defendant's right to confront and cross-examine witnesses), *trans. denied.*

[23] We further note that the exclusion of this evidence did not impinge on Himes's right to cross-examine S.D. During the offer to prove made outside the jury's presence, S.D. testified that she knew nothing about HGS and was not involved in the game. While Himes insists that he had a right to confront and cross-

examine S.D. about HGS to test her credibility, he cites no legal authority—and we have found no such authority—that supports a notion that otherwise inadmissible evidence must be admitted solely to test the credibility of a witness about that same evidence. Indeed, the jury never heard testimony from S.D. about HGS. Thus, there was no basis upon which to test her credibility on the subject. *See, e.g., Nasser v. State*, 646 N.E.2d 673, 681 (Ind. Ct. App. 1995) (observing that the general rule is that cross-examination must lie within the scope of the direct examination). For all these reasons, we reject Himes's claim that he was denied the opportunity to fully cross-examine M.M. and S.D.

## II. Sufficiency of the Evidence

[24] Himes argues that the evidence was insufficient to support his rape conviction. Specifically, Himes contends that the conviction must be set aside because the State failed to establish that "he had committed any actions against M.M. by way of force." *Appellant's Brief* at 26.

[25] Challenges to the sufficiency of the evidence warrant a deferential standard of review, in which we neither reweigh the evidence nor judge witness credibility. *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023). Those matters are reserved to the province of the finder of fact. *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018). We consider only probative evidence and reasonable inferences that support the judgment of the trier of fact and will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Hall v. State*, 177 N.E.3d 1183,

1191 (Ind. 2021). The uncorroborated testimony of the victim is sufficient to sustain a conviction for rape. *See Ives v. State,* 418 N.E.2d 220, 223 (Ind. 1981).

[26] In this case, Himes was charged with rape, a Level 3 felony. In accordance with Ind. Code § 35-42-4-1(a)(1), the State was required to prove that Himes knowingly or intentionally had sexual intercourse with M.M. when M.M. was compelled by force or imminent threat of force. The "force necessary to sustain a rape conviction need not be physical, but … it may be inferred from the circumstances." *Bryant v. State*, 644 N.E.2d 859, 860 (Ind. 1994). The presence or absence of force is determined from the victim's perspective, not the defendant's. *See Tobias v. State*, 666 N.E.2d 68, 72 (Ind. 1996).

[27] At trial, the evidence established that M.M. was sexually assaulted by three adult men in the room. M.M. testified that she told Himes "no" and tried to "squirm" away from him, but he ignored her pleas to stop, thwarted her attempts to resist him, and inserted his penis into her vagina. *Transcript Vol. VII* at 225-26. From this evidence the jury could reasonably conclude that Himes knowingly or intentionally had sexual intercourse with M.M. when M.M. was compelled by force or imminent threat of force. *See, e.g., Ives*, 418 N.E.2d at 222 (finding sufficient evidence of force when the victim attempted to pull away and

the defendant pinned down her arm). Thus, we conclude that the evidence was sufficient to support Himes's conviction for rape, a Level 3 felony.[2]

# III. Sentencing

## A. Abuse of Discretion

[28] Himes claims that the trial court abused its discretion in sentencing him because the trial court did not identify his admission to being a habitual offender, his completion of rehabilitative courses while incarcerated, and the hardship that incarceration would have on his children as mitigating factors.

[29] In general, sentencing decisions are left to the sound discretion of the trial court, and we review the trial court's decision only for an abuse of discretion. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). 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. *Anglemyer v. State,* 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A trial court may abuse its discretion by: (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;

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[2] As an aside, we reject Himes's claim that his conviction must be set aside because the jury found codefendant Miller not guilty of rape. Sufficient evidence is required for any verdict to stand, regardless of whether the verdict is inconsistent with another. *Beattie v. State*, 924 N.E.2d 643, 644, 648 (Ind. 2010). Inconsistent verdicts are permissible and not subject to appellate review. *Id.*

(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. *Id.* at 490-91.

[30] An allegation that the trial court failed to find a mitigating factor requires the defendant to establish that the mitigating evidence is significant and clearly supported by the record. *Healey v. State*, 969 N.E.2d 607, 616 (Ind. Ct. App. 2012), *trans. denied*. The trial court is not obligated to accept the defendant's contention as to what constitutes a mitigating circumstance. *Allen v. State,* 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000). We further note that while the trial court must review the presentence investigation report (PSI) and consider all aggravating and mitigating circumstances presented, the court is not required to comb through the PSI and present mitigating argument on behalf of the defendant when the defendant fails to do so. *Bryant v. State,* 984 N.E.2d 240, 252 (Ind. Ct. App. 2013), *trans. denied*. Finally, the trial court is not required to explain why it does not find a proffered factor to be mitigating. *Spears v. State,* 735 N.E.2d 1161, 1167 (Ind. 2000).

[31] Himes first argues that the trial court should have identified his admission to being a habitual offender as a mitigating factor. Notwithstanding this contention, the record establishes that Himes's decision to accept responsibility for being a habitual offender was a pragmatic one that was made after a lengthy jury trial, on a point that would have taken little effort for the State to prove. *See Anglemyer*, 875 N.E.2d at 221 (observing that a guilty plea may not be significantly mitigating when it does not actually demonstrate acceptance of

responsibility and is instead the result of pragmatism). Himes has failed to demonstrate that the trial court abused its discretion in declining to identify the admission to being a habitual offender as a mitigating factor.

[32] Similarly, we reject Himes's claim that the trial court abused its discretion in declining to afford mitigating weight to courses that Himes allegedly completed during his incarceration. In *Patterson v. State*, this court explained that trial courts are in the "best position to judge whether activities undertaken while incarcerated have had a positive effect on a defendant or whether the defendant was simply 'going through the motions' in an effort to receive a reduced sentence." 846 N.E.2d 723, 730 (Ind. Ct. App. 2006). Himes did not produce any official documentation regarding the courses that he finished during his incarceration. He provided only a self-generated list of programs in which he allegedly participated, and he did not show how he benefited from the courses. As a result, we conclude that the trial court did not abuse its discretion in declining to find that Himes's alleged completion of programs during his incarceration was a mitigating factor.

[33] Finally, we reject Himes's claim that the trial court abused its discretion in declining to identify as a mitigator the hardship that his incarceration would have on his children. Many persons convicted of serious crimes have one or more children and, absent special circumstances, courts are "not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). The evidence showed that Himes had worked "off and on" with a "sporadic" employment history, and his girlfriend was

"primarily responsible for financially supporting the family." *Appellant's Appendix Vol. II* at 200-01; *Transcript Vol. IX* at 241-42. As Himes has failed to advance any special circumstances regarding the hardship that his children might suffer while he is incarcerated, his abuse of discretion argument fails.

## B. Inappropriate Sentence

[34] Himes argues that his thirty-six-year aggregate sentence is inappropriate when considering the nature of the offense and his character. Our standard of review regarding inappropriate sentence claims is well-settled:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate.

*George v. State*, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020), *trans. denied*.

[35] Whether we regard a sentence as inappropriate turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. *Cardwell,* 895 N.E.2d at 1224. The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). More particularly, the defendant must show that the sentence is inappropriate with "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).

[36] 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). The sentencing range for Level 3 felony rape is from three to sixteen years with an advisory sentence of nine years. In this case, the trial court sentenced Himes to the maximum term of sixteen years and enhanced it by twenty years—the maximum enhancement allowed for being a habitual offender. *See* Ind. Code § 35-50-2-8(i)(1).

[37] When examining the nature of the offense, we look to the details and circumstances of the crime and the defendant's participation therein. *Id.* Our consideration of the nature of the offense recognizes the range of conduct that can support a given charge and the fact that the particulars of a given case may render one defendant more culpable than another charged with the same offense. *Hamilton v. State,* 955 N.E.2d 723, 727 (Ind. 2011).

[38] In this case, the evidence established that Himes illegally provided drugs and alcohol to M.M.—the seventeen-year-old victim—to the point that she could no longer stand or walk on her own. Himes was part of the effort to pressure M.M. to drink alcohol and smoke marijuana, and he permitted Hicks to rape M.M. in his bed. Himes then entered the bedroom and raped M.M.

[39] The evidence further showed that M.M. experienced immense pain when a genital examination was performed. M.M. contemplated suicide at one point, and she eventually moved out of state to "feel safe again." *Transcript Vol. VIII* at 4-6. Himes has failed to show that his sentence must be revised when considering the nature of the offense.

[40] Turning to Himes's character, we note that "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). We conduct our review of a defendant's character by engaging in a broad consideration of his qualities. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[41] A defendant's criminal history is relevant when considering a defendant's character under App. R. 7(B). *Connor v. State*, 58 N.E.3d 215, 221 (Ind. Ct. App. 2016). The significance of a defendant's contacts with the justice system "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006).

[42] Himes amassed juvenile adjudications for criminal mischief, battery resulting in bodily injury, and resisting law enforcement, all of which were criminal offenses had they been committed by an adult. The record further shows that after the juvenile court unsuccessfully attempted to provide Himes with less restrictive placements, Himes was placed in the Indiana Department of

Correction (DOC) because he continued to "engage in conduct that put those around him at risk." *Appellant's Appendix Vol. II* at 194-95.

[43] It was further established that Himes has three prior felony convictions and misdemeanor convictions for alcohol and drug-related offenses, conversion, and resisting law enforcement. Additionally, Himes was on probation for robbery when he raped M.M., and he violated his probation on four prior occasions.

[44] The record also shows that Himes had been storing a large quantity of marijuana in his children's bedroom, and the drug was packaged for dealing. The fact that Himes sold marijuana to M.M. supports the trial court's conclusion that he had packaged the marijuana for resale. Finally, we note that Himes's young children were at the residence when the rapes occurred, and they were exposed to heavy drinking, and drug usage.

[45] All these factors reflect poorly on Himes's character, and we conclude that Himes has failed to establish that the nature of the offense and his character warrant a revision of his sentence.

[46] Judgment affirmed.

May, J. and Foley, J., concur.