MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Darin Reynolds,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 20, 2022

Court of Appeals Case No. 21A-CR-2720

Appeal from the Vermillion Circuit Court

The Honorable Jill D. Wesch, Judge

Trial Court Cause No. 83C01-2008-F1-2

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Darin M. Reynolds (Reynolds), appeals his sentence following his guilty plea to child molesting, Level 4 felony, Ind. Code § 35-42-4-3(b).

[2] We affirm.

ISSUES

[3] Reynolds presents this court with two issues on appeal, which we restate as:

(1) Whether the trial court abused its discretion in failing to identify two mitigating factors; and
(2) Whether Reynolds' sentence is inappropriate in light of the nature of the offense and his character.

[4] On cross-appeal, the State presents us with one issue, which we restate as: Whether Reynolds waived his right to appeal his sentence.

FACTS AND PROCEDURAL HISTORY

[5] From August 2011 until May 2019, Reynolds was married and lived with J.R. and J.R.'s two children from a previous marriage. J.R.'s daughter, B.M.G.M., was six years old when her mother married Reynolds and thirteen when they divorced; J.R.'s son moved out of the residence in January 2018. For approximately one year, when B.M.G.M. was twelve years old, Reynolds repeatedly sexually abused B.M.G.M. while J.R. was at work.

[6] The abuse first started after B.M.G.M. came home from cross-country training and wanted her legs massaged. While Reynolds massaged her legs, his thumbs came very close to B.M.G.M.'s vaginal area. She told Reynolds to stop and he responded by "kiss[ing] her on the lips for a long time." (Appellant's App. Vol. II, p. 13). After this first incident, Reynolds developed a routine for his abuse. He would wait until B.M.G.M. went to bed, enter her bedroom, and massage and kiss her. During another incident, Reynolds exposed his penis to B.M.G.M. after she exited the bathroom. Reynolds was lying on the couch, with a blanket covering him, and beckoned B.M.G.M. towards him. When she was close, he "flipped the blanket off and asked her to squeeze his penis." (Appellant's App. Vol. II, p. 13). She refused, "so he squeezed it himself and told her that was what he wanted her to do." (Appellant's App. Vol. II, p. 13). When she again refused, Reynolds covered himself with the blanket. On yet another occasion, B.M.G.M. was naked in her bed with a blanket covering her when Reynolds gave her a massage. He lifted the blanket and told B.M.G.M. that he wanted "to try something." (Appellant's App. Vol. II, p. 13). Reynolds then licked and inserted his tongue in B.M.G.M.'s vagina, causing her pain.

[7] During the time Reynolds molested B.M.G.M., J.R. became concerned with Reynolds' behavior. Once she caught Reynolds "in her daughter's bedroom with his hand under the blankets massaging her legs." (Appellant's App. Vol. II, p. 12). On another occasion, she caught Reynolds "looking through a crack in the bathroom door" at her daughter, while B.M.G.M. was naked. (Appellant's App. Vol II, p. 12). J.R. became concerned enough to buy a lock

for B.M.G.M.'s bedroom door shortly before her daughter turned thirteen years old. The lock on the bedroom door helped stop the molestations.

[8] Reynolds moved out of the residence and filed for divorce approximately ten months after the abuse ended, in May 2019. On December 6, 2019, J.R. and B.M.G.M. were watching a documentary about a doctor who molested Olympic gymnasts when J.R. asked her if Reynolds "had ever done that to her." (Appellant's App. Vol. II, p. 14). B.M.G.M. then disclosed the abuse.

[9] On June 4, 2020, the State filed an Information, charging Reynolds with Level 1 felony child molesting and Level 4 felony child molesting. On July 23, 2021, Reynolds pleaded guilty to Level 4 felony child molesting and, in exchange, the State agreed to dismiss the remaining Count. The plea agreement left sentencing open to the trial court's discretion and, as a condition of his plea agreement, Reynolds agreed to waive the "right to appeal any sentence imposed by the [c]ourt that is within the range of penalties set forth in this plea agreement." (Appellant's App. Vol. II, p. 26). On October 13, 2021, during the change-of-plea hearing, the trial court inquired with Reynolds if he understood that "by pleading guilty here today" he would be giving up his right to appeal. (Transcript Vol. II, p. 5). Reynolds replied affirmatively and the trial court accepted the plea agreement. On November 4, 2021, the trial court sentenced Reynolds to eight years in the Department of Correction, with six years executed and two years suspended to probation. After pronouncing his sentence, the trial court informed Reynolds that he had the right to appeal his sentence.

[10] Reynolds now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Waiver of Right to Appeal Sentence*

[11] Because the State presents this court with a threshold challenge, we will first address the State's claim that Reynolds, as a condition of his plea agreement, waived his right to appeal his sentence, even though the plea agreement left sentencing to the trial court's discretion and the trial court informed Reynolds of his right to appeal his sentence at the conclusion of the sentencing hearing.

[12] In *Creech v. State*, 887 N.E.2d 73, 74 (Ind. 2008), our supreme court was faced with the exact same factual scenario: the defendant pleaded guilty, with sentencing left to the discretion of the trial court, and with a condition included in the plea agreement not to appeal his sentence. Yet after the trial court accepted the plea agreement and pronounced sentence, the trial court informed defendant of his right to appeal the sentence. *Id*. Our supreme court held that when entering a plea agreement knowingly and voluntarily, "a defendant may waive the right to appellate review of his sentence as part of a written plea agreement." *Id*. at 75. The court reasoned that by the time the trial court erroneously advised defendant of the possibility of appeal, defendant had already pleaded guilty and received the benefit of his bargain, and "[b]eing told at the close of the hearing that he could appeal presumably had no effect on that transaction." *Id*. at 77.

[13] Likewise here,[1] Reynolds' plea agreement left sentencing to the trial court's discretion, and explicitly stated that he waived the right to appeal any sentence imposed by the court that was within the range of penalties set forth in his plea agreement. At the change-of-plea hearing, the trial court confirmed that Reynolds was aware that he gave up his right to appeal the sentence. Reynolds did not receive a sentence outside the parameters of the agreement, nor does he now claim that he did not enter his plea agreement knowingly and voluntarily. Accordingly, in line with *Creech*, Reynolds' waiver is valid and binding. Nevertheless, even though Reynolds waived his right to appeal his sentence, we will address his sentence challenge on the merits.

II. *Mitigating Circumstances*

[14] Reynolds contends that the trial court abused its discretion by erroneously omitting his two proffered mitigators: lack of criminal history and guilty plea. 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 (2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of

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[1] Although Reynolds refers this court to *Merriweather v. State*, 151 N.E.3d 1281, 1285 (Ind. Ct. App. 2020), in which we held that defendant did not waive his right to appeal his sentence, notwithstanding the guilty plea waiver, where the trial court advised defendant at the guilty plea hearing that he had the right to appeal his sentence, we find *Merriweather* to be unavailing to the facts at hand. Whereas Merriweather was advised of his right to appeal at the guilty plea hearing, the trial court here advised Reynolds at the guilty plea hearing that he had waived his right to appeal and only made the erroneous remark at the conclusion of the sentencing hearing.

the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*. (quotations and citation omitted). A trial court may abuse its discretion by failing to enter a sentencing statement, entering findings of aggravating and mitigating factors unsupported by the record, omitting factors clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. *Id*. at 490–91. Our trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. *Id*. at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. "[R]emand for resentencing may be the appropriate remedy 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." *Id*. at 491.

[15] The record reflects that during the sentencing hearing on Reynolds' Level 4 felony child molesting, the trial court, after hearing argument from both parties, immediately entered Reynolds' sentence of eight years without including a sentencing statement or a finding of mitigating and aggravating circumstances supporting the trial court's imposition of the sentence. The sentencing order is equally silent as to the trial court's recitation of reasons for imposing the sentence. However, as we show below, we are confident that the trial court would have imposed the same sentence after properly including a sentencing statement, and therefore, we need not remand.

III. *Appropriateness of Sentence*

[16] Reynolds contends that his sentence is inappropriate in light of the nature of the offense and his character. Sentencing is primarily "a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Nevertheless, although a trial court may have acted within its lawful discretion in fashioning a sentence, our court may revise the sentence "if, after due consideration of the trial court's decision, [we] find[ ] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225. Ultimately, "whether we regard a sentence as appropriate 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 focus on "the length of the aggregate sentence and how it is to be served." *Id*. Our court does "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.'" *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Reynolds bears the burden of persuading our court that his sentence is inappropriate. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

[17] Reynolds pleaded guilty to Level 4 felony child molesting. The sentencing range for a Level 4 felony is two to twelve years, with the advisory sentence being six years. I.C. § 35-50-2-5.5. The trial court sentenced Reynolds to eight years, with six years executed and two years suspended to probation.

[18] While Reynolds concedes that his "offense was undoubtedly reprehensible," he maintains that "his lack of criminal history and the fact that he pleaded guilty supports the conclusion that his six-year sentence is inappropriate." (Appellant's Br. p. 10). We find nothing redeeming about the nature of the offense. Reynolds repeatedly abused his twelve-year-old stepdaughter by kissing her, massaging her legs, exposing himself, and performing oral sex on her. Reynolds forced himself on her and berated B.M.G.M. into submission. The abuse only stopped when a lock was purchased for her bedroom door.

[19] Turning to Reynolds' character, we note that Reynolds only has a prior Class C misdemeanor conviction besides the instant offense. While we agree that his criminal history is almost non-existent, the lack of prior convictions is not emblematic of his character. Rather, Reynolds preyed on his stepdaughter, whom he had known since she was six years old, and repeatedly molested her for nearly a year when she was twelve years old. He cajoled her into submission and escalated his molestations in severity over the course of that year. Based on the nature of the offense and Reynolds' character, we cannot conclude that a sentence that is two years above the advisory sentence, and which two years are suspended to probation, is inappropriate. *See Davidson v.*

State, 926 N.E.2d 1023, 1025 (Ind. 2010) (stating that a reviewing court may take into account whether a portion of the sentence is ordered suspended).

CONCLUSION

[20] Based on the foregoing, we hold that although Reynolds waived his right to appeal his sentence, the sentence imposed is not inappropriate in light of the nature of the offense and his character.

[21] Affirmed.

[22] May, J. and Tavitas, J. concur