## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

Alberto J. Gomez,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

May 4, 2023

Court of Appeals Case No. 22A-CR-2477

Appeal from the Marion Superior Court

The Honorable Angela D. Davis, Judge

Trial Court Cause No. 49D27-1908-F4-30883

**Memorandum Decision by Judge Mathias**
Judges May and Bradford concur.

**Mathias, Judge.**

[1] Alberto Gomez appeals his convictions for two counts of Level 4 felony child molesting following a jury trial. He presents two issues for our review:

> I. Whether the cumulative effect of alleged evidentiary errors amounted to fundamental error.
>
> II. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

[2] We affirm.

## Facts and Procedural History

[3] In 2007, Gomez and M.H. began a romantic relationship. At that time, M.H. had a daughter from a prior relationship, A.H., who was born in February 2006. During their relationship, Gomez and M.H. had three children together. A.H. considered Gomez to be her stepfather, even though he never married M.H.

[4] In July 2019, the home that Gomez shared with M.H. and the children flooded. The family went to stay with Gomez's mother for a few weeks. While there, then-thirteen-year-old A.H. slept in the living room by herself. During the night of July 18, A.H. woke to find Gomez lying on top of her. Gomez proceeded to slide his hand up the front of A.H.'s shirt, and he fondled her breasts and sucked on her nipples for approximately thirty minutes. A.H. pretended to be asleep until Gomez left the room.

[5] One week later, A.H. woke to find Gomez lying on top of her again. Gomez fondled A.H.'s breasts under her shirt and bra, and he rubbed his penis against

her hand for approximately ten minutes before ejaculating. After Gomez left the room, A.H. went into the room where her siblings were sleeping, and she "barricaded the door." Tr. Vol. 2, p. 200. Later that night, at approximately 12:16 a.m., A.H. went into the bathroom and texted her mother to tell her what had happened. M.H. responded by asking A.H. to come out of the bathroom to talk, and A.H. agreed. M.H. and A.H. decided that they would leave Gomez's mother's house with the other children and go to stay with family friends, which they did. Approximately one week later, A.H. reported the molestations to officers at the Beech Grove Police Department, and she reported the molestations to an assessment worker for the Indiana Department of Child Services ("DCS").

[6] The State charged Gomez with three counts of Level 4 felony child molesting. During the ensuing jury trial, M.H. testified, without objection, that Gomez had a history of drug abuse. And she testified that she had been planning to have an intervention to address Gomez's drug problem when A.H. told her that Gomez had molested her. During Gomez's testimony, the State cross-examined him regarding his drug abuse. In particular, and again without objection, the State asked Gomez about a drug test, administered by a DCS employee, which came back positive for marijuana, amphetamines, methamphetamines, and cocaine. Gomez disputed the results of that test and denied having consumed anything but marijuana.

[7] The jury found Gomez guilty as charged. The trial court entered judgment of conviction only on two counts of Level 4 felony child molesting and sentenced

Gomez to consecutive six-year terms, with six years suspended to probation. This appeal ensued.

***Issue One: Admission of Evidence***

[8] Gomez first contends that the cumulative impact of alleged evidentiary errors amounted to fundamental error. Specifically, Gomez alleges that the following evidence was unduly prejudicial and had no probative value: evidence that DCS tested him for illegal substances; the State's "barrage" of questions about those test results; and the State's suggestion that DCS had removed his children, which was not true. Appellant's Br. at 10. Gomez did not object to any of that evidence, and, thus, he alleges fundamental error on appeal.

[9] As our Supreme Court has explained,

> [a]n error is fundamental, and thus reviewable on appeal, if it "made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." These errors create an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal. This exception, however, is "extremely narrow" and encompasses only *errors so blatant that the trial judge should have acted independently to correct the situation*. At the same time, "if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error."

*Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (emphasis added, citations omitted). Further, our Supreme Court

> has been willing to assume[,] "for the sake of argument, that under some circumstances the cumulative effect of trial errors may warrant reversal even if each might be deemed harmless in isolation," but not where it has been "clear in light of the evidence of guilt that no prejudice resulted from any of the erroneous rulings, individually or cumulatively." *Hubbell v. State*, 754 N.E.2d 884, 895 (Ind. 2001).

*Inman v. State*, 4 N.E.3d 190, 203 (Ind. 2014).

[10] During trial, M.H. testified regarding Gomez's drug abuse and her efforts to organize an intervention to encourage him to get sober. On cross-examination of Gomez, the State asked him whether his drug abuse was a "source of the fighting" between him and M.H. in the time leading up to his arrest, and Gomez denied it. Tr. Vol. 3, p. 165. The trial court found that, with that denial, Gomez had given the jury the erroneous impression that he had not abused drugs, which "opened the door" to evidence about his drug abuse for impeachment purposes only. *Id.* at 166. The State then asked Gomez whether "one of the reasons that [his] children were removed from [his] home and from [him] *by DCS* was because of [his] drug use," and he replied, "No." *Id.* at 168 (emphasis added). Gomez added, "They were removed prior." *Id.* In fact, DCS did not remove Gomez's children from his care; M.H. did. In any event, the State asked Gomez whether he had had contact with "the DCS worker," to which Gomez replied, "Yes." *Id.*

[11] Gomez then offered that the DCS employee had "claimed that there was [sic] reports made of [him] being a drug dealer." *Id.* at 169. And he admitted that

DCS had drug tested him a few days after the second alleged molestation of A.H. This colloquy ensued:

> Q: Did [the DCS employee] provide you those results?
>
> A: She gave me some results but said it was full of everything. And I didn't even do anything at that time but smoke marijuana.
>
> * * *
>
> Q: So you -- and you -- so what -- how I'm characterizing your testimony right now is that you disagree with those results?
>
> A: Yeah.
>
> Q: And you disagree that one of the reasons DCS removed the children from your home in addition to the initial allegations that we're here for today was because of drug use?
>
> [Defense Counsel]: Judge, I'm just going to object just to the characterization of that. I think what my client's testimony has been is that [M.H.] already took the kids out of the house. So DCS didn't remove them.
>
> * * *
>
> [Gomez]: Correct.
>
> * * *
>
> THE COURT: I'll sustain the objection.
>
> Q: DCS -- you did not get care of your children again because of that?

A: I didn't get care again because they were placed on a no contact order. So I couldn't even be able to try to see them.

Q: It had nothing to do with drug use?

A: No.

*Id.* at 169-70. The State questioned Gomez specifically about each of the positive July 2019 drug test results, namely, marijuana, amphetamines, methamphetamines, and cocaine. Gomez denied having ingested anything other than marijuana during that time. In its closing statement, the State argued that Gomez's credibility was in doubt given his assertion that his drug test results were incorrect. The State did not otherwise refer to Gomez's drug abuse during its closing statement.

[12] Again, on appeal, Gomez contends that the State's questions to him regarding his drug abuse and DCS's investigation lacked probative value and were unduly prejudicial to him. Gomez does not argue that each alleged error, standing on its own, constituted fundamental error. Rather, he argues that the cumulative effect of those alleged errors made a fair trial impossible. We do not agree. Even assuming that the challenged evidence lacked probative value and prejudiced Gomez, to show fundamental error, Gomez must show that the alleged errors were "so blatant that the trial judge should have acted independently to correct the situation." *Durden*, 99 N.E.3d at 652. But Gomez does not argue on appeal that the trial court should have interjected itself over his counsel.

[13] In any event, it is well settled that "the improper admission of evidence is harmless error 'if there is substantial independent evidence of guilt and we are satisfied that there is no substantial likelihood the challenged evidence contributed to the conviction.'" *Rodriguez v. State*, 158 N.E.3d 802, 807 (Ind. Ct. App. 2020) (quoting *Laird v. State*, 103 N.E.3d 1171, 1178 (Ind. Ct. App. 2018), *trans. denied*). Here, even if the trial court erred in admitting the challenged evidence, the error was harmless given the substantial independent evidence supporting Gomez's convictions. In particular, sixteen-year-old A.H. gave clear and unequivocal testimony at Gomez's trial regarding the two incidents of molestation at her grandmother's house in July 2019. And there is ample evidence to corroborate that testimony, including contemporaneous text messages that A.H. had sent to her mother and to Gomez. In addition, M.H. testified that she discussed the molestations with A.H., in person, at that time, and A.H. gave consistent statements to law enforcement and to DCS within one week of the second alleged molestation.

[14] Gomez is "'entitled to a fair trial, not a perfect trial.'" *Inman*, 4 N.E.3d at 203 (quoting *Myers v. State*, 887 N.E.2d 170, 175 (Ind. Ct. App. 2008), *trans. denied*). Taken as a whole, the cumulative effect of the alleged evidentiary errors was "minor at best" and, thus, did not deprive Gomez of his right to a fair trial. *See id.* Because Gomez in no way suffered any prejudice from cumulative error, he is not entitled to a reversal of his convictions. *See id.*

***Issue Two: Sentence***

[15] Gomez also contends that his sentence is inappropriate in light of the nature of the offenses and his character. The trial court imposed the advisory sentence of six years on each count, to be served consecutively, with six years suspended to probation. *See* Ind. Code § 35-50-2-5.5 (2022).

[16] Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "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." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[17] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[18] With regard to the nature of the offenses, Gomez cites *Walker v. State*, where our Supreme Court held that the defendant's eighty-year aggregate sentence for two counts of child molestation involving "identical" conduct and "the same child" was manifestly unreasonable. 747 N.E.2d 536, 538 (Ind. 2001). Gomez argues that A.H. "was older than the [victim] in *Walker*. And like in *Walker*, each count of child molesting here was very similar and involved the same victim. Also, like *Walker*, the victim did not receive a physical injury." Appellant's Br. at 26. But Gomez ignores the fact that the "manifestly unreasonable" analysis in *Walker* is inapposite to our review under Appellate Rule 7(B). And, unlike the defendant in *Walker*, who received enhanced and consecutive sentences, Gomez received the advisory sentences, with six years suspended to probation.

[19] In any event, Gomez has not produced compelling evidence portraying in a positive light the nature of the offenses. Indeed, he was a father figure to A.H., and the molestations were a profound violation of that position of trust. And the lack of physical injury to A.H. is unpersuasive in light of her testimony that the molestations caused her to feel "anxious and sad" and that she continues to "struggle with being touched" by anyone, even her siblings. Tr. Vol. 2, p. 227-28. We cannot say that his sentence is inappropriate in light of the nature of the offenses.

[20] With regard to his character, Gomez emphasizes his lack of criminal history and record of steady employment. But those facts reflect only an average character. Gomez has not produced compelling evidence of "substantial

virtuous traits or persistent examples of good character." *See Stephenson*, 29 N.E.3d at 122. Again, Gomez violated his position of trust with A.H. when he molested her. We cannot say that his twelve-year sentence, with six years suspended to probation, is inappropriate.

## *Conclusion*

[21] For all these reasons, we affirm Gomez's convictions and sentence.

[22] Affirmed.

May, J., and Bradford, J., concur.