MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Scott P. Nail,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 18, 2023

Court of Appeals Case No. 23A-CR-499

Appeal from the Clinton Circuit Court

The Honorable Bradley K. Mohler, Judge

Trial Court Cause No. 12C01-2104-F5-422

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Scott P. Nail appeals his conviction for Sexual Misconduct with a Minor, as a Level 5 felony.[1] We affirm.

Issues

[2] Nail presents two issues for review:

I. Whether the denial of Nail's request to present surrebuttal testimony concerning his alibi deprived Nail of his right to present a defense as guaranteed by the Indiana Constitution; and

II. Whether his sentence is inappropriate.

Facts and Procedural History

[3] During the afternoon of September 27, 2020, fifteen-year-old K.P. was sitting on her front porch when Nail, a family acquaintance, pulled up on his moped and parked it. Nail came onto the porch and sat down beside K.P., who told him that no-one else was at home. Nail stated that "younger girls these days [are] so much better than back then" and touched K.P.'s thigh with his hand. (Tr. Vol. II, pg. 211.) Nail moved his hand upward until he touched K.P.'s vaginal area over her clothing. K.P. went into the house and Nail left.

[1] Ind. Code § 35-42-4-9.

[4] Five days later, Nail again showed up on his moped. When she saw Nail, K.P. hid in the back seat of her friend's vehicle and explained to her friend that she was doing so because of Nail's past conduct. K.P. and her friend informed K.P.'s parents of the earlier touching and the parents contacted the police.

[5] On April 22, 2021, Nail was charged with Sexual Misconduct with a Minor. He was brought to trial before a jury on January 30, 2023, and he was convicted as charged. On February 24, 2023, the trial court sentenced Nail to four years imprisonment, with one year suspended to probation. Nail appeals.

Discussion and Decision

Surrebuttal Testimony

[6] At trial, Nail testified that he had spent most of the day in question at his brother's house and that he had not "at all" been alone. (Tr. Vol. III, pg. 85.) During cross-examination, the prosecutor asked Nail if he had been at his brother's for only fifteen minutes before leaving and returning home, consistent with a recorded statement. Nail testified that the prosecutor's characterization was not correct.

[7] In rebuttal, the State elicited testimony from Detective Matthew Feterick that Nail had, during his police interview, claimed that he had gone to his brother's house "for a little bit, came back to the house, and stayed there for most of the day." (*Id.* at 91.) Detective Feterick testified that Nail had been referencing "his house." (*Id.*)

[8] To address concerns of confusion, the parties agreed to play an approximately two-minute portion of the recorded interview for the jury. This included Nail's statement that he went to his brother's home and "hung out with him" for approximately fifteen minutes before returning home to check in with his girlfriend. (St. Ex. 3 at 18:33.) In the interview, Nail vacillated between references to his girlfriend's comings and goings as well as his own, including going back to his house and going back to his brother's house for a couple of beers. He also referred to staying "there" all afternoon. (*Id.* at 18:58.)

[9] After the redacted recording was played, defense counsel cross-examined Detective Feterick, who confirmed that two separate locations had been referenced in the recorded interview and that which one was "down there" had not been "elaborated" upon. (Tr. Vol. III, pg. 100.)[2] Nail requested an opportunity to present surrebuttal evidence, which the trial court denied. In his offer of proof, Nail asserted that the phrase "stayed down there all day" or "down there" referenced his brother's house and not his own. (*Id.* at 105.)

[10] Nail now contends that he was denied his right to present a defense, in violation of Article 1, § 13 of the Indiana Constitution.[3] The right to present a defense is

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[2] Although the question posed to Detective Feterick included the word "down" preceding "there," Nail did not use the word "down" preceding "there" in his recorded interview. *See* State's Ex. 3.

[3] Article 1, § 13(a) provides: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

a fundamental element of due process of law. *Manigault v. State*, 881 N.E.2d 679, 690 (Ind. Ct. App. 2008). A defendant's right to present a defense includes the right to present his or her version of the facts. *Parker v. State*, 965 N.E.2d 50, 53 (Ind.Ct.App.2012). Although this right is of the utmost importance, it is not absolute. *Id*.

[11] In this case, Nail was not denied the opportunity to present his version of the facts. Indeed, Nail testified as to his whereabouts on the day in question. The parties agreed to have approximately two minutes of Nail's police interview played for the jury; after this, the detective who had interviewed Nail acknowledged that there were references to multiple locations and there could have been ambiguity. Had Nail been permitted to testify in surrebuttal that he had been referring to his brother's house as the place where he stayed all day, it would have been largely cumulative of his direct testimony that he had spent most of the day at his brother's house. Nothing in the record indicates that Nail was prevented from asserting a defense.

Sentence

[12] Nail contends that his sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) provides that "[t]he 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."

[13] The sentencing range for a Level 5 felony is one year to six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6(b). The trial court imposed upon Nail a sentence one year greater than the advisory sentence but suspended that year to probation. In so doing, the trial court considered as aggravating circumstances: Nail's criminal history (including twelve felony and eight misdemeanor convictions); his violation of probation on seven instances; his arrest for violating a no-contact order while on bond in this case; and the significant harm to K.P. which prompted her withdrawal from public school in favor of home schooling. In mitigation, the trial court recognized that Nail suffers from health issues making incarceration particularly difficult.

[14] This Court has observed that "[t]he advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed." *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017). And the Indiana Supreme Court has explained that:

> The principal role of appellate review should be to attempt to leaven the outliers … but not achieve a perceived "correct" result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Defendant has the burden to persuade us that the sentence imposed by the trial court is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind.), as amended (July 10, 2007), *decision clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Shoun v. State, 67 N.E.3d 635, 642 (Ind. 2017) (omission in original).

[15] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should

receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Whether we regard a sentence as inappropriate 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 facts that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] 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] As to the nature of the offense, Nail argues that he should have been given a lesser sentence because he did not use force and his victim was not physically harmed. Indiana Code Section 35-42-4-9(a)(2) provides for elevation of the offense of sexual misconduct with a minor to a Level 1 felony if the offense was committed by use or threat of force; however, Nail was not charged with an elevated offense. He was charged with Level 5 felony sexual misconduct in light of the absence of use or threat of force. Nail simply presents no argument attempting to portray that offense in a positive light.

[17] As for Nail's character, he has a significant criminal history, including twelve felony and eight misdemeanor convictions. He has violated the terms of his probation in several cases and was arrested upon an alleged violation of his bond in the instant case. Nail argues that his sentence is inappropriate because

he has significant medical issues. But this is not probative of his character. In short, Nail has identified no evidence portraying his character in a positive light. He has not demonstrated that his four-year sentence, with one year suspended to probation, is inappropriate.

Conclusion

[18] Nail was not deprived of his right under the Indiana Constitution to present a defense. Nail has not persuaded us that his sentence is inappropriate.

[19] Affirmed.

Tavitas, J., and Kenworthy, J., concur.