ATTORNEY FOR APPELLANT

R. Thomas Lowe
New Albany, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Benjamen P. Chastain,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 4, 2021

Court of Appeals Case No. 20A-CR-1553

Appeal from the Orange Circuit Court

The Honorable Steven L. Owen, Judge

Trial Court Cause No. 59C01-1602-FA-212

Tavitas, Judge.

Case Summary

[1] In this second appeal related to his conviction, Benjamen Chastain appeals his twenty-year sentence for his conviction for child molesting, a Class B felony.

After Chastain was convicted of one count of child molesting as a Class A felony and acquitted of another count, Chastain appealed. Because, in a previous opinion, we concluded that the trial court improperly admitted hearsay evidence of Chastain's age, we reversed the trial court and remanded with instructions to vacate Chastain's Class A felony conviction, enter a conviction of child molesting as a Class B felony, and resentence Chastain accordingly.

[2] The trial court then held another sentencing hearing, during which it considered Chastain's age, though unproven at trial, as a "significant" aggravating factor. The trial court further stated that it considered the unproven allegations of sexual misconduct as a "moderating factor" when giving weight to Chastain's lack of criminal history as a mitigating factor. The trial court then sentenced Chastain to the maximum twenty-year sentence, all of which was to be executed in the Department of Correction ("DOC"). Chastain appeals, arguing that: (1) it was an abuse of discretion to consider Chastain's age, when that fact was never determined by a jury; (2) it was an abuse of discretion to consider allegations for which Chastain was either acquitted or never tried; and (3) the sentence was inappropriate in light of the nature of the offense and Chastain's character. Despite our concerns with the trial court's consideration of allegations of misconduct for which Chastain was acquitted, we cannot say that it abused its discretion. Moreover, we cannot say that Chastain's sentence is inappropriate. Accordingly, we affirm.

Issues

[3] Chastain raises two issues, which we restate as:

I. Whether the trial court abused its discretion when sentencing Chastain.

II. Whether Chastain's sentence is inappropriate in light of the nature of the crime and his character.

Facts

[4] The facts of this case were detailed in Chastain's first appeal as follows:

> As a child, B.L. lived with her mother but spent about every other weekend with her father and stepmother, Angie. Chastain is married to Angie's sister, Amanda. B.L. often spent time with Chastain and Amanda when visiting her father.
>
> On one occasion when B.L. was eight or nine years old, B.L. spent the night with Chastain and Amanda in their trailer. Amanda was pregnant at the time with the couple's first child, who was born July 31, 1999. B.L. fell asleep with the couple in their bed but at some point, Amanda moved to the living room couch because she was not feeling well. Thereafter, B.L. was awakened by Chastain as he placed his hand inside her shorts. B.L. closed her legs together, but Chastain proceeded to put his hand inside B.L.'s underwear and then penetrate her vagina with his finger. B.L. immediately got up and ran into the living room with Amanda for safety. B.L. was unable to wake Amanda, so B.L. remained awake until the sun came up and then ran back to her father's trailer. B.L. was too scared to tell anyone about the incident and thought no one would believe her, so she remained quiet.

> Throughout the remainder of her childhood, B.L. made sure to never again be alone with Chastain, and she made it apparent to her family that she did not like Chastain.
>
> In December 2015, allegations arose regarding Chastain recently molesting B.L.'s eleven-year-old half-sister. This resulted in B.L. disclosing her own prior molestation by Chastain to her stepmother. B.L. and her half-sister gave statements to investigators with the Paoli Police Department. Another relative, L.B., also claimed to have been molested by Chastain on one occasion around 2001 or 2002 when she was five or six years old.
>
> On February 23, 2016, the State charged Chastain with two counts of Class A felony child molesting and one count of Class C felony child molesting. The Class A felony charges involved the allegations by B.L. and L.B., respectively, and the Class C felony involved B.L. No charges were filed by the State with respect to the allegations made by B.L.'s sister. The Class C felony count was later dismissed as being filed outside the statute of limitations.
>
> Chastain's jury trial on the two Class A felony counts commenced on April 16, 2019.
>
> The jury found Chastain guilty of the Class A child molesting count involving B.L. but not guilty of the count involving L.B. At the conclusion of the sentencing hearing on May 28, 2019, the trial court sentenced Chastain to forty years in prison with ten of those years suspended to probation.

Chastain v. State, 144 N.E.3d 732, 732-33 (Ind. Ct. App. 2020).

[5] On appeal, Chastain argued that inadmissible hearsay was used to establish Chastain's date of birth and elevate the offense from a Class B felony to a Class

A felony. The State conceded its error, and we reduced Chastain's conviction to a Class B felony and remanded for resentencing. We briefly addressed Chastain's claims regarding two of the aggravating factors because issues would likely arise on remand. In particular, we noted the following:

> [W]e agree with Chastain that the following aggravating factor found by the trial court is concerning:
>
> > There were other allegations of child abuse. Three victims came forward to accuse the defendant of child abuse. Abusing children appears to have been a pattern of behavior on behalf of the defendant. *See Lockard v. State*, 600 N.E.2d 985, 987-88 (Ind. Ct. App. 1992) (uncharged misconduct is a valid sentence aggravator). The Court gave significant weight to this factor.
>
> Appellant's Appendix at 120. *Lockard* is not applicable here because Chastain did not admit to molesting the other two children. *See Lockard*, 600 N.E.2d at 987-88 (holding that trial court did not abuse its discretion by considering defendant's admissions to repeatedly molesting his stepdaughters, though defendant only pled guilty pursuant to a plea agreement to other offenses involving the same victims). More importantly, the jury found Chastain not guilty of the allegations involving L.B., and, therefore, those allegations may not be considered in sentencing him for the molestation of B.L. *See McNew v. State*, 271 Ind. 214, 391 N.E.2d 607, 612 (1979). With respect to the third alleged victim, we observe that Chastain has not admitted to molesting her, and the State has not filed charges against him based on these allegations. Accordingly, on remand, the trial court should be cautious in its consideration of the uncharged allegations. *Cf. Wilkes v. State*, 917 N.E.2d 675, 692 (Ind. 2009) (holding that consideration of defendant's admitted sexual activity with child

> murder victim was not improper because "relevant evidence of another crime is admissible to rebut the defendant's claimed lack of criminal history even if that evidence may not be sufficient to support a conviction"), *cert. denied*.

Chastain, 144 N.E.3d at 734-35.

[6] On remand, the trial court held a new sentencing hearing. Chastain's mother and father both testified, as did Chastain's wife. The trial court also considered a series of some twenty letters that had been submitted on Chastain's behalf during the first sentencing hearing, including one from Chastain's pastor. The uncontested consensus among the witnesses and those submitting letters was that: (1) Chastain was consistently employed and provided for his wife and children; (2) Chastain was active in his church; (3) life had become significantly more difficult and stressful for Chastain's wife and children since Chastain's incarceration; and (4) Chastain had no formal criminal history. Chastain himself testified that he had not received any disciplinary reports since his incarceration, and the trial court further noted that Chastain's behavior had been impeccable during his approximately three-year-period of pre-trial release.

[7] In explaining its reasons for imposing its sentence, the trial court asserted the following:

> I think that the evidence is that the defendant has no prior history of delinquency or criminal activity that has been charged and that the defendant has led a seemingly law abiding life for a substantial period before the commission of the crime. Now my caveat to that however would be that this is an isolated conviction but there has [sic] certainly been other allegations of

> sexual and improper misconduct and I know that the [Appellate] Court didn't believe that that could be an aggravating circumstance. So[,] I am following the [Appellate] Court's orders but the Court can't ignore that as maybe offsetting somewhat this affirmation of no prior history, no prior history of delinquency or criminal activity. So[,] what is I am going to do is use those allegations that have been made, certainly the jury found one allegation as not guilty. But let's be perfectly honest, the determination of guilt, it's not guilt or innocence. It's not guilty or guilty and whether there was sufficient evidence to [ ] whether the State provided sufficient evidence to overcome the burden of proof which is beyond a reasonable doubt and the jury found that it didn't. But certainly it was an allegation about when she was five or six, my recollection was that her testimony was sparse at times and had difficulty remembering things. So[,] we have to abide by the jury's verdict and evaluation of that and I don't have any, but what I'm saying, I'm trying to explain to you Mr. Chastain is that what the Court is going to do is look at those other allegations, because there was another allegation by B.L.'s sister also that wasn't pursued, but certainly, if one is, has a tendency or a propensity to commit a crime such as this, a child molesting crime is, on its face is somewhat [ ] a covert operation for lack of a better word. Many people that commit crimes involving child molesting have clean records and don't have prior criminal history and have law abiding lives and go to church. It's the nature of that type of offense. So[,] I will recognize that in fact you do not have any prior criminal history or delinquency or criminal history and it does seem like you've led a law abiding life. However[,] the Court is going to take into consideration is that you had three individuals who have made allegations of sexual improprieties against you. So[,] before I gave that great weight I'm going to now just give it moderate weight. So[,] I'm going to use those allegations as a moderating factor as opposed to being an aggravating factor in themselves.

Tr. Vol. II pp. 42-43.

[8] In its sentencing order, the trial court listed the following mitigating and aggravating factors:

> That the Mitigating Circumstances in this case were:
>
> a) The Defendant has no history of delinquency or criminal activity, and the Defendant appears to have led a law-abiding life for a substantial period before commission of the crime. However, there have been three individuals who have alleged that the defendant had on numerous occasions and over a period of years, molested them as children. Although the jury found the defendant not guilty on one of those charges, and the defendant has maintained his innocence on all the remaining allegations, the Court cannot ignore these reports from victims of sexual abuse. Thus[,] the Court believes that given the covert nature of this crime, and the conviction in this case and the many other allegations (most that were not heard by a jury), that the Defendants [sic] history of no criminal history is not as strong. The Court gives this factor moderate weight.
>
> b) The Defendant has done well and has had no violations while being on pretrial release. The Court gives this factor moderate weight.
>
> a) [sic] The character and attitudes of the person indicate that the person is unlikely to commit another crime. He appears to be a hard worker, a good father and husband, and a religious man. The Court gives this factor great weight.
>
> That the Aggravating Circumstances in this case were:
>
> a) The age of the victim is less than 12 years (IC. 35-38-1-7.1 (a)(3). The testimony at trial established that the age of the

victim (B.L.) was either 8 years old or the victim had just turned nine. This tender age is substantially less than the statutory age of 14 years. Even though the age of the victim constitutes a material element of the crime of Child Molesting, the Court believes that there are particularized circumstances justifying this fact as an aggravator.

a. The molestation of a prepubescent child by someone, whom she considered an uncle, was a shock to this understandably naïve and immature child. As the victim testified previously, this was an event that had a drastic negative affect [sic] on her development as a young woman. She suppressed disclosure of her molestation by the defendant until her sister made a similar allegation, and she, B.L., had grown to adulthood.

b. Additionally, an eight/nine[-]year[-]old is emotionally and developmentally very different from that of a 13/14[-] year[-]old. An 8/9[-] year[-] old is in grade school. She plays with dolls, is learning how to write in cursive, and she is very dependent upon adult guidance and supervision. She is a child.

c. A 13/14[-]year[-]old girl is in middle school (normally located at the high school facility), wears make-up, goes to school dances, is learning a foreign language; possibly taking alegebra [sic], and has gone through sexual education classes. She is a teenager.

d. An 8/9[-] year[-]old child needs a babysitter (such as in the facts of this case). However, a child of 13/14 might indeed be given the responsibility of being the babysitter.

e. Even though either age group certainly can be victimized, an 8/9[-]year[-]old child is a much more vulnerable victim, particularly to the crime of Child Molesting. Such a child lacks the experience, education, and the skills necessary to avoid, defend, or handle this type of situation. Because of this enhanced vulnerability, the effects on her may be more devastating and long lasting.

f. The Court gives great weight to this factor.

b) The Age of the Defendant.

a. I.C. 35-42-4-3 reads as follows:

(a) A person who, with a child under fourteen (14) years of age, knowingly or intentionally performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:

(1) it is committed by a person at least twenty-one (21) years of age;

(2) it is committed by using or threatening the use of deadly force or while armed with a deadly weapon;

(3) it results in serious bodily injury;

(4) the commission of the offense is facilitated by furnishing the Victim, without the Victim's knowledge, with a drug (as

defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the Victim's knowledge;

b. A Class A Felony carried a potential penalty of 20-50 years. A Class B Felony penalty range is 6 years-20 years.

c. It is an undeniable truth, that the Defendant's age was over twenty-one at the time the offense was committed. The Defendant has stated repeatedly, at practically every Court hearing that he attended since January 1, 2017 (including today's hearing) that his birthdate is January 12, 1976. The Defendant appears on the information, affidavit of probable cause, and in the Pre-Sentence Investigation Report. The offense occurred, according to testimony, in the summer of 1999. This Court is 100% sure of that [sic] the Defendant was over the age of 21 in the summer of 1999.

d. The Indiana Legislature and the laws of the State of Indiana hold that the fact that the Defendant was over 21 when the offense occurred is an aggravating factor of enormous proportion. It has the same effect as the use of a deadly weapon while committing the act, or the victim sustaining bodily injury, or using drugs to alter the state of mind of the child victim. It is a fact that is not contained within a Class B Child Molestation conviction, so it indeed is an enhancing factor when sentencing an individual for such an offense. According to our laws, this factor more than doubles the penalty range that the laws punish the offender. Such a factor exists in this case and cannot be

> ignored. The Court assigns the greatest weight to this factor.

Appellant's App. Vol. II pp. 181-84.

[9] The trial court then found that the aggravating factors outweighed the mitigating factors and sentenced Chastain to the maximum twenty-year sentence for a Class B felony, all executed in the DOC. Chastain now appeals.

Analysis

I. Abuse of Discretion

[10] Chastain challenges the trial court's use of his age as an aggravator and the trial court's use of other child molesting allegations to diminish his mitigators. Before addressing Chastain's arguments, we note that our Supreme Court has held that we must apply the sentencing scheme in effect at the time of the defendant's offense. *See, e.g., Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007) ("Although Robertson was sentenced after the amendments to Indiana's sentencing scheme, his offense occurred before the amendments were effective so the pre-*Blakely* sentencing scheme applies to Robertson's sentence.") (citing *Gutermuth v. State*, 868 N.E.2d 427, 432 n. 4. (Ind. 2007)). Chastain's offense occurred in 1999, and he was charged in 2016 and tried in 2019. At the time of Chastain's offense in 1999, we reviewed sentences under the following standard:

> Sentencing decisions rest within the discretion of the trial court, and we review such decisions only for an abuse of discretion.

> The trial court has discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors.
>
> When enhancing a sentence, a trial court is required to state its specific reasons for doing so. Accordingly, the court's sentencing statement must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reason why each circumstance is aggravating or mitigating, and (3) demonstrate that it balanced the aggravating and mitigating circumstances in reaching its sentence.

Monegan v. State, 756 N.E.2d 499, 501 (Ind. 2001) (internal citations omitted).

A. Chastain's Age as an Aggravator

[11] Chastain argues the trial court violated his Sixth Amendment rights when the trial court used his age as an aggravator, but the aggravator was not found by a jury beyond a reasonable doubt. At the time of this offense, in 1999, the presumptive sentencing scheme was in effect instead of the current advisory sentencing scheme. Indiana's presumptive sentencing system, however, was found to "run[ ] afoul of the Sixth Amendment" pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), "because it mandates both a fixed term and permits judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term." *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005). Under *Blakely*, therefore:

> a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the

> defendant has waived *Apprendi* [*v. New Jersey*, 530 U.S. 466, 490 (2000)] rights and consented to judicial fact[-]finding.

Robertson, 871 N.E.2d at 286 (emphasis added).

[12] In 2005, our Supreme Court held:

> First, as a new rule of constitutional procedure, we will apply *Blakely* retroactively to all cases on direct review at the time *Blakely* was announced. Second, a defendant need not have objected at trial in order to raise a *Blakely* claim on appeal inasmuch as not raising a *Blakely* claim before its issuance would fall within the range of effective lawyering. Third, those defendants who did not appeal their sentence at all will have forfeited any *Blakely* claim.

Smylie, 823 N.E.2d at 690-91.

[13] Subsequently, Indiana amended its sentencing scheme to the advisory sentencing scheme "apparently. . . to resolve the Sixth Amendment problem *Blakely* presented." *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007). The new sentencing scheme still requires trial courts to enter sentencing statements which identify the aggravating and mitigating factors that led to imposition of a particular sentence. *See id.* at 490.

[14] Turning to the present case, at the time of Chastain's crime, the prior sentencing scheme was in effect and, therefore, applied to Chastain. Chastain argues that he was entitled to have a jury determine whether his age should have constituted an aggravating factor pursuant to *Blakely*'s application to the prior sentencing scheme. Under *Blakely*, "a trial court in a determinate

sentencing system such as Indiana's may enhance a sentence based" upon facts "admitted by a defendant." *Robertson*, 871 N.E.2d at 286.

[15] Chastain admitted his date of birth at the sentencing hearing. *See Trusley v. State*, 829 N.E.2d 923, 926 (Ind. 2005) (holding that a "statement by counsel [was] sufficient to constitute an admission by Trusley that [the victim] was under twelve at the time of his death"); *Sullivan v. State*, 836 N.E.2d 1031, 1036 (Ind. Ct. App. 2005) ("This court has held that if a defendant confirms the accuracy of a presentence report when given an opportunity to contest it, such confirmation amounts to an admission of information contained in the report for *Blakely* purposes."). Accordingly, the trial court did not err by using Chastain's age at the time of the offense as an aggravator.

[16] Moreover, we note that the State argues Chastain waived this argument because Chastain did not object at the time of sentencing. Although cases such as *Smylie* have allowed defendants to raise the *Blakely* issue for the first time on direct appeal, Chastain, unlike the defendants in those cases, was sentenced many years after *Blakely* was handed down, and these exceptions do not apply. Chastain's first sentencing hearing occurred approximately fifteen years after *Blakely*, and his second sentencing hearing occurred approximately sixteen years after *Blakley*. If Chastain wanted the jury to determine the aggravating factors, he should have objected at sentencing. Having failed to do so, Chastain has forfeited his ability to appeal on these grounds. *See Muncy v. State*, 834 N.E.2d 215, 218 (Ind. Ct. App. 2005) ("Muncy did not object on Sixth Amendment grounds during his sentencing hearing and thereby 'forfeited [his]

ability to appeal [his] sentence on *Blakely* grounds.'") (quoting *Smylie*, 823 N.E.2d at 689).

B. Other Allegations

[17] Next, Chastain argues that the trial court abused its discretion by considering the uncharged allegations against B.L.'s sister and the allegations related to L.B., for which Chastain was acquitted. The trial court used these allegations to diminish the weight of Chastain's mitigating factor that he had no prior history of delinquency or criminal history and that he led a seemingly law-abiding life for a substantial period of time.

[18] We begin by discussing the use of the uncharged allegations related to B.L.'s sister. In Chastain's first appeal, we held:

> [O]n remand, the trial court should be cautious in its consideration of the uncharged allegations. *Cf. Wilkes v. State*, 917 N.E.2d 675, 692 (Ind. 2009) (holding that consideration of defendant's admitted sexual activity with child murder victim was not improper because "relevant evidence of another crime is admissible to rebut the defendant's claimed lack of criminal history even if that evidence may not be sufficient to support a conviction"), *cert. denied*.

Chastain, 144 N.E.3d at 734-35.

[19] We have held that allegations of prior criminal activity may be considered during sentencing even if the defendant has not been convicted of an offense related to the activity. *See also Harlan v. State*, 971 N.E.2d 163, 170 (Ind. Ct. App. 2012) ("Allegations of prior criminal activity need not be reduced to

conviction before they may be properly considered as aggravating circumstances by a sentencing court.") (citing *Beason v. State*, 690 N.E.2d 277, 281 (Ind. 1998)). The trial court here used the uncharged allegations related to B.L.'s sister to diminish the weight of the lack of criminal history mitigator. We cannot say the trial court abused its discretion by doing so.

[20] As for the allegations related to L.B., we note that Chastain was acquitted of that charge. In Chastain's first appeal, we held: "[T]he jury found Chastain not guilty of the allegations involving L.B., and, therefore, those allegations may not be considered in sentencing him for the molestation of B.L. *See McNew v. State*, 271 Ind. 214, 391 N.E.2d 607, 612 (1979)." *Chastain*, 144 N.E.3d at 734-35; *see also Watson v. State*, 784 N.E.2d 515, 522 (Ind. Ct. App. 2003) ("Watson contends that because he was acquitted of the charge relating to the burn incident, the trial court may not consider this charge as an aggravating circumstance. We agree with Watson's contention that the trial court may not consider the burn incident.").

[21] On remand, despite our clear directive, the trial court again considered the allegations related to L.B., for which Chastain was acquitted, to diminish the weight of the lack of criminal history mitigator. That was improper.

[22] Nevertheless, our Supreme Court has repeatedly noted that "[a] single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences." *See, e.g., McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001). "[W]e will remand for resentencing 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.* The one improper consideration was used, along with other proper considerations, to diminish the weight of the lack of criminal history mitigator. The trial court, here, found several valid aggravators and several other mitigators. Under these circumstances, we can say with confidence that the trial court would have imposed the same sentence, even without the improper consideration that was used to diminish the weight of the mitigator. The trial court, therefore, did not abuse its discretion in sentencing Chastain.

II. Inappropriate Sentence

[23] Chastain next argues that his sentence was inappropriate in light of the nature of his crime and his character.[1] 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." 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 [ ]

[1] Prior to January 1, 2003, we reviewed a sentence to see if it was "manifestly unreasonable."; however, the Indiana Supreme Court amended Ind. Appellate Rule 7(B), effective January 1, 2003. Both parties used the inappropriate sentence analysis rather than the manifestly unreasonable analysis. Accordingly, we apply the inappropriate sentence analysis here.

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) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[24] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (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 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).

[25] The presumptive sentence for Class B felony child molesting at the time of Chastain's offense was ten years, "with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code. § 35-50-2-5 (1998). The trial court sentenced Chastain to the maximum available sentence, and, accordingly,

stated its reasons for doing so during the sentencing hearing in accordance with the prevailing law at that time. *See, e.g., Wilson v. State,* 679 N.E.2d 1333 (Ind. Ct. App. 1997). Indiana Code Section 35-38-1-7.1, as it stood in 1999 when Chastain committed his crime, detailed a series of statutory aggravators and mitigators under subsections (b) and (c), but also held that: "The criteria listed in subsections (b) and (c) do not limit the matters that the court may consider in determining the sentence."

[26] With respect to the nature of the offense, we 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*. Chastain, who was over the age of twenty-one, was in a position of power, trust, and care over B.L., as he was B.L.'s uncle. Chastain abused this position of trust by molesting B.L. when she was either eight or nine years old, an age significantly below the statutorily significant age of fourteen. B.L. testified during the first sentencing hearing that she has suffered long-term harm as a result of the molestation, especially because the crime was unreported for many years.

[27] With respect to Chastain's character, the evidence submitted on his behalf was largely positive. We recognize that Chastain had no formal criminal record prior to this case and that he appears to have led a law-abiding life for a substantial period leading up to this conviction. We are troubled by the allegation of misconduct that was uncharged, and we agree with the trial court's approach of using those uncharged allegations to moderate the weight afforded to Chastain's lack of criminal history. We further note that Chastain appears to

have the support of many family members and other members of his community, appears to have been consistently gainfully employed, and appears to have been active in his religious community. Chastain's conduct during his pre-trial release, as well as during his incarceration pending appeal, appears to be unblemished. Finally, Chastain's overall risk assessment in his pre-sentence investigation report puts him in the "low" risk category to re-offend.

[28] Nevertheless, when considering the nature of the offense, Chastain's age at the time of his offense, as well as his position of care and trust relative to the victim, we must find that, on balance, Chastain's sentence is not inappropriate in light of the nature of his offense and his character.

[29] Finally, we note that "in analyzing a claim under Appellate Rule 7(B), we are not limited to the mitigators and aggravators found by the trial court." *Brown v. State*, 10 N.E.3d 1, 4 (Ind. 2014). Our analysis is more holistic. We note that Chastain benefitted as a result of the State's misstep in failing to establish Chastain's time-of-offense age during the trial. There is no question that Chastain was over the age of twenty-one at the time of his crime, and, had the State effectively demonstrated that fact, Chastain would have been convicted of a Class A felony. The trial court originally sentenced Chastain to forty years with ten years suspended to probation. Even at the maximum twenty-year sentence resulting from the second sentencing hearing, Chastain has still received a benefit due to the State's mistake. Under the totality of the aforementioned circumstances, we simply cannot say that Chastain's sentence

is inappropriate in light of the nature of his offense and his character. We therefore affirm the judgment of the trial court.

Conclusion

[30] The trial court did not abuse its discretion in sentencing Chastain. Moreover, the twenty-year sentence is not in appropriate in light of the nature of the offense and Chastain's character. We affirm.

[31] Affirmed.

Bailey, J., and Robb, J., concur.