MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Danny K. Peet, Sr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 30, 2021

Court of Appeals Case No. 20A-CR-2111

Appeal from the Elkhart Superior Court

The Honorable Kristine Osterday, Judge

Trial Court Cause No. 20D01-1911-F1-18

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Danny Peet (Peet), appeals his conviction and sentence for Level 3 felony rape, Ind. Code § 35-42-4-1(a)(1)(3); Level 1 felony rape, I.C. § 35-42-4-1(b)(1); two Counts of Level 6 felony strangulation; I.C. § 35-42-2-9-(c), Level 6 felony intimidation I.C. § 35-42-4-1(a)(1); and Class A misdemeanor domestic battery, I.C. §35-42-2-1.3(a)(1).

[2] We affirm.

ISSUES

[3] Peet raises three issues on appeal, which we restate as the following:

(1) Whether the trial court abused its discretion by admitting certain evidence;

(2) Whether one of Peet's rape convictions violated the Indiana Double Jeopardy Clause; and

(3) Whether his sentence is inappropriate in light of the nature of the offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] Sometime in 2018, Peet and T.E. began dating. At the start of their relationship, Peet was friendly and affectionate, however, over time, their relationship deteriorated. Peet became more controlling about whom T.E. could talk, and at one point, he told T.E. that she did not need friends. In

December 2018, T.E. moved from Ohio and into Peet's apartment in Goshen, Indiana.

[5] On Saturday July 13, 2019, at around 1:30 p.m., T.E. and Peet were at Peet's apartment, and an argument ensued between the two after Peet saw T.E. on her phone. During the argument, Peet sat on T.E.'s lap and knocked her phone out of her hand. After Peet stood up, T.E. began looking for her phone, but she was unable to find it. She asked Peet if he had it, which he denied. As T.E. continued to search for her phone, Peet went outside to make a phone call using his phone. When he re-entered the apartment, T.E. again asked him about seeing her phone, and she followed him to the bedroom. T.E. continued to question Peet about the whereabouts of her phone, and at that point, Peet raised his arm and pushed T.E. against the window. T.E. began to leave the room, but Peet grabbed T.E. by her shirt and bra, ripping both. T.E. freed herself from Peet's hold and made her way to the living room. Peet followed T.E. there and began choking her. As he choked T.E., Peet told her that she deserved "everything" he was "going to give" her and at one point he stated, "just die, just die." (Transcript. Vol. IV, p. 32). Peet eventually released T.E., and she sat back on the couch. Throughout the next few hours, Peet would grab T.E. by her hair, and he would then force her to be next to him. Peet also put a recliner in front of the front door to prevent T.E. from exiting.

[6] At around 11:30 p.m. that same day, T.E. attempted to walk past Peet who was lying down on the couch. Peet grabbed T.E.'s pants and pulled her down on the couch. Peet then fondled T.E.'s breast, to which T.E. told him stop. Peet

was not deterred, instead, he got up from the couch and forced T.E. to the ground. While on the floor, Peet pressed his forearm across T.E.'s throat, pulled down T.E.'s pants, and attempted to pry her legs open with his hands while she begged him to stop. Despite T.E.'s pleas for him to stop and her attempt to squeeze her legs together, Peet used his knee to pry her legs open. With his forearm still across her throat, Peet began to forcibly penetrate T.E.'s vagina with his penis. Once he loosened the pressure from T.E.'s neck, T.E. screamed out in pain, and she told Peet that he was hurting her knee. At that point, Peet removed himself from T.E., brought her clothes to her, and he gave her an icepack for her knee. When T.E. requested that he call for an ambulance, Peet responded, "You know I can't do that. You know I'll go to jail." (Tr. Vol. IV, p. 51).

[7] Approximately 30 minutes later, Peet went into the bedroom leaving T.E. in the living room by herself. While only wearing a t-shirt and underwear, T.E. climbed over the recliner that was placed in front of the door and ran out of the apartment to find help. When Peet heard T.E. escape, he ran after her. As she ran, T.E. told Peet to leave her alone, and she screamed for help, however, nobody in the neighborhood came to her aid. Peet eventually caught up with T.E., and he dragged her back into the apartment. Once inside, Peet threw T.E. against the couch, and began choking her.

[8] Between 1:30 a.m. and 2:00 a.m., Peet grabbed T.E. by her hair and dragged her into the bedroom. Peet undressed T.E. and forced her onto the bed. Peet produced T.E.'s diabetic insulin needle and asked her how much he would have

to give her in order to kill her. Two hours after raping her in the living room, Peet grabbed T.E.'s leg, and again, forcefully penetrated her vagina with his penis while she sobbed. Throughout that night, Peet forcibly penetrated T.E.'s vagina with his penis multiple times. Eventually, both T.E. and Peet fell asleep.

[9] Throughout the following day, Sunday July 14, 2019, Peet had the recliner blocking access to the front door, and T.E. remained in the apartment afraid to leave. On Monday, July 15, 2019, prior to leaving for work, Peet instructed T.E. not to call the police and he threatened to hurt her if she did so. Fifteen minutes after Peet left for work, T.E. exited the apartment, and saw Jody Mishler (Mishler) walking down the street and instructed him to call the police. Mishler observed that T.E. seemed sad and observed bruises on her arm.

[10] At around 1:30 p.m. Officer Robert Wartsler of the Goshen Police Department (Officer Wartsler), arrived and spoke to Mishler, who in turn, directed him to T.E.'s and Peet's apartment. After contacting T.E., Officer Wartsler observed that she was visibly upset, and T.E. proceeded to report Peet's actions to Officer Wartsler. T.E. was subsequently transported to the hospital where a sexual assault examination was performed. During the examination, the sexual assault nurse observed bruises on T.E.'s arms, neck, and legs and other injuries consistent with strangulation such as a hoarse throat, swollen neck, and petechiae.

[11] On July 19, 2019, the State filed an Information, charging Peet with one Count of Level 3 felony rape, one Count of Level 6 felony criminal confinement, two

Counts of Level 6 felony strangulation, one Count of Level 6 felony intimidation, and one Count of Class A misdemeanor domestic battery. On August 7, 2019, the State amended the charging Information, adding Level 1 felony rape. Prior to his jury trial, pursuant to Evidence Rule 404(b), Peet filed a motion in *limine*, in which he requested the suppression of any reference of his criminal history or any prior contacts with law enforcement.

[12] Beginning on September 22, 2020, the trial court conducted a four-day jury trial. During opening remarks, Peet's counsel attacked T.E.'s credibility by arguing that her testimony was unbelievable because she offered inconsistent statements to the police, and during her deposition regarding her account of all the offenses. When Officer Wartsler was asked if he responded to a lot "of calls in the neighborhood," Peet's counsel interjected and requested to approach the bench. (Tr. Vol. II, p. 62). A side conference occurred away from the jury's presence. Peet's counsel then argued that the State's line of questioning would violate the motion in *limine*. The State argued that it expected that Peet was going to attack T.E.'s credibility and that nobody in the neighborhood heard her yelling for help in the middle of the night when she first escaped from Peet's apartment after the first rape. The State further claimed that it was establishing a foundation which it would be able "to argue later that people really [kept] to themselves because it is a neighborhood that does not like the police." (Tr. Vol. II, p. 62). Over Peet's relevance objection, the trial court allowed the questioning so long as the State did not question Officer Wartsler on Peet's prior contacts with law enforcement. Officer Wartsler then testified that he was

familiar with the area, and he further added that the area was a high crime area due to several drug houses. Officer Wartsler related as well that residents in that area kept to themselves and did not always cooperate with the police.

[13] T.E. testified and gave an account of all the offenses that occurred on that July 2019 weekend. During closing arguments, the State illustrated the timeline of the weekend and explained each Count to the jury. With respect to the Level 1 felony rape charge, the State argued that Peet raped T.E. in the living room while he had his forearm across her throat and forcibly penetrated her vagina with his penis. The State then argued that the Level 3 felony rape occurred between 2:00 a.m. and 7:00 a.m. when Peet continuously penetrated T.E.'s vagina with his penis. At the close of the evidence, the jury found Peet guilty as charged.

[14] On October 21, 2020, the trial court conducted a sentencing hearing. After hearing arguments concerning double jeopardy, the trial court declined to enter judgment of conviction on the criminal confinement charge but found no other double-jeopardy concerns based on the evidence presented at trial. The trial court then sentenced Peet to thirty-five years with five years suspended for the Level 1 felony rape, ten years with three years suspended for the Level 3 felony rape, two years on each of the three Level 6 felonies (one Count of intimidation and two Counts of strangulation), and one year for the Class A misdemeanor domestic battery. The trial court ordered consecutive sentences on both the Level 1 felony and Level 3 felony rape Counts, but concurrent sentences on all

other Counts, for a total of forty-five years, with eight years suspended to probation.

[15] Peet now appeals. Additional information will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of the Evidence*

[16] Peet argues that the trial court abused its discretion when it admitted Officer Wartsler's testimony that the neighborhood was a high crime area and that the residents kept to themselves and did not cooperate with police. The State argues that the testimony was relevant pursuant to Evidence Rule 403 and had no prejudicial impact on Peet's trial.

[17] Our standard of review for the admissibility of evidence is well-established. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Timberlake v. State*, 690 N.E.2d 243, 255 (Ind. 1997), *reh'g denied*, *cert. denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse if "the error is inconsistent with substantial justice" or if "a substantial right of the party is affected." *Timberlake*, 690 N.E.2d at 255. Any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other

evidence appropriately admitted. *Stephenson v. State*, 742 N.E.2d 463, 481 (Ind. 2001), *cert. denied*.

[18] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. Evid. R. 403. The balancing of the probative value against the danger of unfair prejudice must be determined with reference to the issue to be proved by the evidence. *Bryant v. State*, 984 N.E.2d 240, 249 (Ind. Ct. App. 2013), *trans. denied*. Evaluation of whether the probative value of an evidentiary matter is substantially outweighed by the danger of unfair prejudice is a task best performed by the trial court. *Baer v. State*, 866 N.E.2d 752, 763 (Ind. 2007), *reh'g denied, cert. denied*, 552 U.S. 1313 (2008). While all relevant evidence is prejudicial in some sense, the question is not whether the evidence is prejudicial, but whether the evidence is unfairly prejudicial. *Wages v. State*, 863 N.E.2d 408, 412 (Ind. Ct. App. 2007), *trans. denied*.

[19] In his brief, Peet argues that

> [I]t was entirely possible for the jury to conclude from the beginning that because Peet lived in a high crime neighborhood, that he likely had a character defect that made him more likely to commit the crimes in question. The admission of this irrelevant testimony was error on the part of the trial court, highly prejudicial, and Peet should be entitled to a new trial.

(Appellant's Br. p. 14). In this case, during opening remarks, Peet's counsel attacked T.E.'s credibility by arguing that her testimony was unbelievable because she ran out in the middle of the night screaming for help and nobody heard her or came out to help her. At trial, the State questioned Officer Wartsler about how familiar he was with the area. A sidebar occurred and after finding proper basis for Officer Wartsler's testimony, the trial court allowed the State to question Officer Wartsler so long as it did not elicit testimony relating to Peet or about prior police reports pertaining to Peet. Officer Wartsler proceeded to testify that the area he was responding to was a high-crime area due to several drug houses, and that the residents in that area mostly kept to themselves and did not always cooperate with officers.

[20] We agree with the State's argument that the challenged testimony was offered in anticipation of T.E.'s later testimony that after the first rape, she ran out of the apartment only wearing a t-shirt and underwear screaming for help and nobody came to her aid. The fact that this happened in a neighborhood where the residents typically kept to themselves, supported T.E.'s later testimony that no one called the police or an ambulance despite her screaming for help. Officer Wartsler's testimony was relevant given that Peet, in his opening statement, claimed that T.E.'s testimony could not be believed. Given that Peet attacked T.E.'s credibility, it was important for the jury to understand why T.E. did not receive help from her neighbors when she ran outside and Peet dragged her back inside the apartment. Therefore, we hold that the trial court did not abuse its discretion when it admitted Officer Wartsler's testimony.

[21] The State argues that even if the trial court did err, any error in the admission of Officer Wartsler's testimony was harmless. The improper admission is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction. *Turner v. State*, 953 N.E.2d 1039, 1058 (Ind. 2011). We find that Peet's convictions were supported by independent evidence of guilt that did not implicate Officer Wartsler's testimony that the area was known as a high crime area. Specifically, Peet's convictions were based on T.E.'s testimony and other physical corroborating evidence that he raped, strangled, and battered her numerous times while he confined her in his apartment for about two days. Therefore, even if the trial court did err, any error in the admission of Officer Wartsler's testimony was harmless.

II. *Double Jeopardy*

[22] Peet claims that his two convictions for rape, one as a Level 1 felony and one as a Level 3 felony, violate Indiana's Double Jeopardy Clause.

[23] Article 1, section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." The Indiana supreme court has determined that two or more offenses constitute the same offense for double jeopardy purposes "if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to obtain convictions, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Frazier v. State*, 988 N.E.2d 1257, 1262 (Ind. Ct.

App. 2013) (citation omitted). Whether convictions violate double jeopardy is a question of law which we review *de novo*." *Id*. *Vermillion v. State*, 978 N.E.2d 459, 464 (Ind. Ct. App. 2012).

[24] In 2020, the framework for addressing double jeopardy claims was overhauled. In *Wadle v. State*, 151 N.E.3d 227, 247 (Ind. 2020), our supreme court noted that "[s]ubstantive double jeopardy claims come in two principal varieties: (1) when a single criminal act or transaction violates a single statute but harms multiple victims, and (2) when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims." In *Powell v. State*, 151 N.E.3d 256, (Ind. 2020), the court addressed the first variety, while *Wadle* addressed the second. Here, the second variety is implicated. In *Wadle*, our supreme court wrote: "[W]e expressly overrule the *Richardson* constitutional tests in resolving claims of substantive double jeopardy. Going forward, and with a focus on statutory interpretation, we adopt an analytical framework that applies the statutory rules of double jeopardy." *Wadle*, 151 N.E.3d at 235. Accordingly, we apply the analytical framework set forth in *Wadle*.

[25] The *Wadle* test begins by examining the statutory language of the statutes defining the crimes at issue:

> If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether

> the charged offenses are the same. *See* [Ind. Code] § 35-31.5-2-168. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions only. But if the defendant's actions prove otherwise, a court may convict on each charged offense.

Wadle, 151 N.E.3d at 253. Level 3 felony rape required the State to prove beyond a reasonable doubt that Peet knowingly or intentionally had sexual intercourse with another person or knowingly or intentionally caused another person to perform or submit to other sexual conduct when the other person was compelled by force or imminent threat of force. I.C. §35-42-4-1(a)(1). The offense is elevated to a Level 1 felony rape if it is committed by using, or threatening to use deadly force. I.C. §35-42-4-1(b)(1).

[26] Applying the *Wadle* test here, we first observe that the statute for rape does not permit multiple punishments either expressly or by unmistakable implication. *See* I.C. § 35-42-4-1. With no statutory language clearly permitting multiple convictions, we proceed to the second part of the statutory analysis. Specifically, we must apply our included-offense statutes to determine the statutory intent. *Wadle*, 151 N.E.3d at 247-48. A trial court may not enter judgment of conviction and sentence for both an offense and an included offense. I.C § 35-38-1-6.

[27] An "included offense" is an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

I.C. § 35-31.5-2-168. If none of the offenses are included offenses of the others (either inherently or as charged), then there is no double jeopardy violation. *Wadle*, 151 N.E.3d at 248. But if one offense is a lesser-included offense, then substantive double jeopardy is violated where "the defendant's actions were so compressed in terms of time place, singleness of purpose, and continuity of action as to constitute a single transaction." *Id*. at 248-49. "If the facts show two separate and distinct crimes, there is no violation of substantive double jeopardy, even if one offense is, by definition, 'included' in the other." *Id*. at 249.

[28] Peet argues that if the State wanted to make the Level 3 felony rape and Level 1 felony rape "separate and distinguishable crimes," it could have "made the dates more specific in the charging [I]nformation." (Appellant's Br. p.18). He continues to argue that

> For example, [the State] could have alleged that [the Level 3 felony rape] occurred on or about July 13, 2019[,] and [the Level 1 felony rape] occurred on or about July 14, 2019. It did not. Because the evidence deduced at trial detailed events "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor must have charged the offenses as alternative sanctions only.

(Appellant's Br. p. 18). While the State concedes that Level 3 felony, by definition, is a lesser included offense to the Level 1 felony rape, it argues that Peet's rape convictions do not violate Indiana Double Jeopardy Clause because the facts show two separate and distinct crimes.

[29] For the Level 1 felony rape, the State presented evidence that on July 13, 2019, around 11:30 p.m. in Peet's living room, Peet pressed his forearm across T.E.'s throat, pried open her legs with his hands and knees, and forcefully penetrated her vagina with his penis as she begged him not to do so. The State clarified this in its closing arguments when it stated "[t]he first rape of the weekend that the State has charged in Count 7. This is when [Peet] rapes her with his forearm across her throat, choking her as he tries to insert his penis into her vagina while. . . she's clenching her legs together." (Tr. Vol. V, pp. 74-75). The deadly force used to establish the Level 1 felony was from Peet placing his arm across T.E.'s throat while he forcefully penetrated her vagina with his penis. As for the Level 3 felony rape, the State presented evidence that Peet repeatedly raped T.E. in the bedroom in the early morning hours of July 14, 2019. T.E. testified that approximately two hours later, which was after she had attempted

to escape after the first rape incident, Peet pulled her into the bedroom by her hair and he repeatedly raped her for several hours.

[30] The foregoing facts show that the two rape incidents occurred on two different days. The first rape incident, the Level 1 felony, was marked with deadly force and occurred on July 13, 2019, around 11:30 p.m. The second rape incident occurred on July 14, 2019, around 2:00 a.m. Based on the evidence, we find that Peet's crimes were not so compressed in time, place, singleness of purpose, and continuity of action that his convictions for both crimes violate double jeopardy. Accordingly, we hold that there is no double jeopardy violation with Peet's rape convictions.

III. *Sentencing*

[31] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The principal role of a Rule 7(B) 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 v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation marks and citation omitted), *reh'g denied*. Whether a sentence is inappropriate turns on "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.

[32] When deciding whether a sentence is inappropriate, we acknowledge that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. For the Level 1 felony rape conviction, the sentencing range is twenty to forty years, with the advisory sentence being thirty. I.C. § 35-50-2-4. For the Level 3 felony rape conviction, the sentencing range is three to sixteen years, with the advisory sentence being nine. I.C. § 35-50-2-5. As for his Level 6 felonies (two Counts of strangulation and one Count of intimidation), Peet faced a sentencing range of six months to two and one-half years, with the advisory sentence being one year. I.C. § 35-50-2-7. Finally, for his domestic battery Class A misdemeanor, Peet faced a fixed sentence of not more than one year. I.C. § 35-50-3-2.

[33] The trial court sentenced Peet to thirty-five years with five years suspended for the Level 1 felony rape, ten years with three years suspended for the Level 3 felony rape, two years on each of the three Level 6 felonies (one Count of intimidation and two Counts of strangulation), and one year for the Class A misdemeanor domestic battery. The trial court ordered consecutive sentences on both the Level 1 felony and Level 3 felony rape Counts, but concurrent sentences on all other Counts for a total of forty-five years with eight years suspended to probation.

[34] As for the nature of his crimes, other than to recognize he confined T.E. for two days in his apartment form July 13, 2019, through July 15, 2019, Peet concedes that T.E.'s testimony established that "she was raped, strangled, confined, and struck" by him during that time, and he makes no argument that the nature of his offenses should justify reducing his sentence. (Appellant's Br. p. 20).

[35] When considering the character of the offender, one relevant fact is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). The presentence investigation report reveals that at the time of sentencing in the present case, Peet's criminal history included two Class C felony convictions for burglary, and misdemeanor convictions for operating while intoxicated, resisting law enforcement, and check deception. Additionally, Peet has violated the terms of his probation and pre-trial diversion program several times, and he also has a history of not appearing in court.

[36] Peet, who was sixty-four years old at the time of sentencing, argues that his lengthy sentence would result in undue hardship given his age, and that he is at a low risk to reoffend. When ordering his sentence, the trial court considered that a lengthy prison sentence would result in undue hardship due to Peet's age. Additionally, while categorized as a low risk to reoffend, Peet has failed to take advantage of prior alternative sanctions, such as probation and pre-trial diversion programs. Peet's forty-five year sentence, which consists of concurrent and suspended time, is far from the maximum sentence he could have received.

[37] We reiterate that our task on appeal is not to determine whether another sentence might be more appropriate; rather, the inquiry is whether the imposed sentence is inappropriate. *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Peet has failed to carry his burden of establishing that his aggregate forty-year sentence is inappropriate in light of the nature of the offenses and his character.

CONCLUSION

[38] Based on the foregoing, we conclude that the trial court did not abuse its discretion by admitting Officer Wartsler's testimony, Peet's rape convictions do not violate Indiana's Double Jeopardy Clause, and Peet's sentence is not inappropriate in light of the nature of the offenses and his character.

[39] Affirmed.

[40] Mathias, J. and Crone, J. concur