

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Elias Jose Costello,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 20, 2021

Court of Appeals Case No.
20A-CR-2342

Appeal from the Lake Superior
Court

The Honorable Samuel L. Cappas,
Judge

Trial Court Cause No.
45G04-1807-F1-17

Altice, Judge.

Case Summary

- [1] Elias Jose Costello pled guilty to Level 1 felony rape, Level 2 felony burglary, and Level 5 felony intimidation, and the trial court sentenced him to sixty years in the Indiana Department of Correction (DOC). He appeals, asserting that his sentence is inappropriate because he was age eighteen at the time of the offense and suffers from mental illnesses.
- [2] We affirm.

Facts & Procedural History

- [3] On July 16, 2018, at around 9:45 a.m., officers with the Lake County Police Department responded to a report of a home invasion and rape. Costello later admitted that he and two other males, each masked and wearing gloves, entered the home of L.L., intending to steal various items including jewelry, money, and electronics. L.L.'s daughter F.H., age nineteen, was asleep on a couch when they entered. The three intruders took turns holding F.H. at gunpoint with a shotgun, while two of the men raped her and one forced her to perform oral sex on him. Costello acted in concert with the other two, sometimes holding down F.H., slapping her on the buttocks, and encouraging the other two to rape her. Also home at the time was F.H.'s teenage brother, A.H., who was hiding in his upstairs bedroom. Costello threatened to shoot A.H. if he did not open his door.
- [4] Subsequent investigation revealed that Costello's girlfriend, who was L.L.'s stepdaughter, had provided Costello with the key to the home, as well as a floor

plan of the home's interior, and that, during the incident, she was waiting outside in the driver's seat of a car. She knew that F.H. and A.H. were inside at the time Costello and the others entered the home. Security camera footage showed that the home invasion lasted twenty-two minutes with the men running out as police arrived.

[5] On July 18, 2018, the State charged Costello with five counts: Level 1 felony rape; Level 2 felony burglary; Level 3 felony armed robbery; Level 3 felony criminal confinement; and Level 4 felony sexual battery. The State filed an amended information on February 15, 2019, adding another seven counts: Level 3 felony rape; Level 4 felony burglary; Level 5 felony intimidation; Level 6 felony theft; Level 6 felony criminal confinement; Level 6 felony residential entry; and Level 6 felony intimidation. It also added an enhancement to the criminal confinement charge for use of a firearm.

[6] On August 21, 2020, Costello entered into a plea agreement with the State in which he agreed to plead guilty to Level 1 felony rape, Level 2 felony burglary, and Level 5 felony intimidation. The plea agreement provided that the trial court would have the discretion to impose a sentence of twenty to sixty years. The State agreed to dismiss the remaining counts. The court accepted the plea, and the matter was set for a sentencing hearing.

[7] The November 13, 2020 sentencing hearing was a combined hearing for Costello and his three co-defendants. F.H., A.H., and L.L. each read a victim impact statement. L.L. described that, while at work on the date and time in

question, she saw video footage from a surveillance camera inside the home of her daughter being raped as a gun was held to her head. L.L. called 911 and, when the police began arriving at the house, Costello and the others ran out.

[8] Detective Adam Clark, who was involved in the investigation, and Sergeant Delano Scaife, employed at the Lake County Jail, testified for the State. Sgt. Scaife testified that, on September 15, 2020, personnel at the jail found a hole in Costello's cell window that he had been using to smuggle drugs and other contraband into the jail. Costello was then moved to another part of the jail, and on October 29, 2020, security discovered that Costello had created another hole in a window and was again smuggling in contraband. Items found in his cell included a jail-made crack pipe, pills, and a pulley system used to shuttle items from the ground to the hole in the window. Costello's Lake County Jail records and the home's security camera video, among other things, were admitted into evidence at the sentencing hearing.

[9] Costello's father, Raymond Costello (Raymond), testified on behalf of Costello. He stated that Costello came to live with him around age fourteen, via a CHINS proceeding, and, at that time, Costello was taking a number of medications for mental health issues, including schizophrenia. Raymond testified that those had been paid for through Medicaid but that, about a year after Costello started living with Raymond, Medicaid stopped paying for the medications, and Raymond was unable to afford the cost of Costello's medications. Raymond explained that he tried to find coverage for Costello's medications, but a period of six months to a year went by when Costello did

not take his medications due to the expense. It was during this time that Costello got in trouble with the law and eventually went to the Indiana Boys School for four to eight months. Raymond stated that he had attempted to secure a court order requiring that Costello would receive his medications at the Boys School but that Costello was placed without an order and did not receive medications while there. After Costello's release, Raymond took Costello for an assessment at Regional Mental Health Center, but because Costello had reached eighteen years of age, Regional refused to treat him without insurance. About ninety days later, the current incident occurred.

[10] The State argued that the offense was premeditated, harrowing, and resulted in lifelong trauma to the victims. The State described Costello as “extremely violent, morally depraved, and an absolute predator in every sense of the word and as dangerous as they come.” *Transcript Vol. 2* at 115. Costello argued that he did not deserve the maximum sentence permitted under the plea agreement because he did not rape F.H., accepted responsibility by pleading guilty, has a juvenile record of delinquency but not a criminal record, and has “serious mental health issues.” *Id.* at 129.

[11] The trial court expressed that the video showed F.H. being “brutally raped in a very callous and casual manner”, which reflected “horrible” depravity. *Id.* at 137. The court considered Costello “to have been the ringleader of the trio[.]” *Id.* at 138. The court found that “what makes it more insidious is the fact that [Costello] knew the family[.]” *Id.* While the court recognized that Costello pled guilty, he faced twelve charges and an enhancement filed against him and,

“because everything was caught on videotape[,]” it “would have been almost impossible” for him to have been found not guilty and thus, he had “substantial incentive to plead guilty.” *Id.* at 139.

[12] The court sentenced Costello to thirty-five years for the rape conviction, twenty-five years for burglary, and three years for intimidation. The court ordered the sentences for rape and burglary to be served consecutive to each other, and the sentence for intimidation to be served concurrent to the other two, resulting in an aggregate sentence of sixty years. Costello now appeals.

Discussion & Decision

[13] Costello argues that his aggregate sixty-year sentence is inappropriate because he “was just eighteen” when he committed the offenses and had diagnosed mental illnesses that were untreated. *Appellant’s Brief* at 4. He asks us to revise his sentence to twenty years.

[14] Pursuant to Ind. Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, we find the sentence inappropriate in light of the nature of the offenses and the character of the offender. Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and 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). The principal role of appellate review should be to attempt to leaven the outliers, “not to achieve a perceived ‘correct’ result in each case.” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Costello bears the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[15] As to the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. *Id.* at 1081. Costello was convicted of Level 1 felony rape, Level 2 felony burglary and Level 5 felony intimidation. The sentencing range for a Level 1 felony is twenty to forty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4(b). The sentencing range for a Level 2 felony is ten to thirty years, with the advisory sentence being seventeen and one-half years. I.C. § 35-50-2-4.5. The sentencing range for a Level 5 felony is one to six years, with the advisory sentence being three years. I.C. § 35-50-2-6. Without the plea agreement’s cap of sixty years, Costello faced up to seventy-six years for the three convictions; the trial court sentenced him to an aggregate term of sixty years.

[16] We have recognized, “[t]he nature of the offense is found in the details and circumstances of the commission of the offense and the defendant’s participation.” *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Costello recognizes that the facts of the case “are disturbing,” but suggests that such is the case with “most, if not all, cases of rape,” and he emphasizes that, while he acted in concert with the other two, he did not vaginally penetrate

F.H. *Appellant's Brief* at 14. We are entirely unpersuaded by this argument. The evidence at the sentencing hearing showed that the offense was planned and premeditated, that the three intruders terrorized F.H., and that Costello appears on video to be the one who initiated the sexual assault: He positioned her, slapped her buttocks and groped her, and then held her at gunpoint and motioned for other men to rape her. Costello also threatened to shoot A.H. The nature of the offenses in no way warrants reduction of Costello's sentence.

[17] “The character of the offender is found in what we learn of the offender’s life and conduct.” *Croy*, 952 N.E.2d at 664. It is well settled that, when considering the character of the offender, “‘one relevant fact is the defendant’s criminal history,’ and ‘[t]he significance of criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense.’” *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017) (quoting *Garcia v. State*, 47 N.E.3d 1249, 1251 (Ind. Ct. App. 2015), *trans. denied*), *trans. denied*. The trial court may consider not only the defendant’s adult criminal history but also his juvenile delinquency record in determining whether his criminal history is significant. *Id.*

[18] Costello has engaged in criminal activity since 2012 with juvenile adjudications for what would be, if committed by an adult, misdemeanor criminal mischief in 2013, misdemeanor resisting law enforcement in 2015, and two Level 4 felony burglaries in 2017. He also had a number of instances involving illegal drug activity over the years and previously reported himself to be a Latin King gang member. At the time of sentencing, Costello was facing burglary and theft

charges that were alleged to have occurred less than two weeks before he committed the instant offenses. Also, when Costello was initially held in jail for the present case, he smuggled contraband into the jail on multiple occasions. After Costello was released on bond in December 2018, his bond was revoked following his arrest for Level 6 felony escape and Class A misdemeanor theft. Costello's history of criminal behavior and arrests reflect poorly on his character.

[19] Costello does not address his history of delinquent and criminal conduct, and, instead, focuses on his youth and diagnosed mental illnesses, asserting these are critical factors in assessing his character.¹ With regard to his age, Costello urges that it is well settled that juveniles are generally less culpable than adults based on fundamental differences in the minds of juveniles and adults, with juveniles having a lack of maturity and underdeveloped sense of responsibility, which leads to recklessness and impulsivity. He notes that juveniles are more vulnerable to negative influences and pressures from peers and suggests, “[s]ixty years is essentially a life sentence for this youngster.” *Appellant’s Brief* at 10. Costello, however, was not a juvenile at the time of the offense; he was eighteen. He had by then already accumulated a considerable number of

¹ We note that Costello’s inappropriate sentence analysis contains references to abuse of discretion analysis. See *Appellant’s Brief* at 8 and 11 (asserting that Costello’s “youth is a significant mitigating factor” and his “mental illness is also a mitigating factor”). Inappropriate sentence claims and abuse of discretion claims are distinct claims and are to be analyzed separately. *Chastain v. State*, 144 N.E.3d 732, 734 (Ind. Ct. App. 2020).

encounters with law enforcement and had already been charged with felonies as an adult. He continued to commit crimes while in jail.

[20] As to mental health, our Supreme Court has observed that there is a “possibility that the role of a defendant’s mental illness in the commission of a crime may, in exceptional and extraordinary circumstances, be considered in a Rule 7(B) appellate sentence review[.]” *Helsley v. State*, 43 N.E.3d 225, 229 (Ind. 2015). Here, Costello’s father testified in general terms that Costello has diagnosed mental illnesses and needed medications that the father could not afford and that were not provided when Costello went to the Boys School. The presentence investigation report (PSI) reflects that Costello self-reported that he had been diagnosed with attention deficit disorder, attention deficit hyperactivity disorder, oppositional defiant disorder, schizophrenia, and depression “but [Costello] did not know where or who diagnosed him” and believed he was diagnosed at age four. *Appellant’s Appendix Vol. II* at 122. Costello reported that, beginning around age eleven, he had been to Franciscan Mental Health Hospital in Dyer, Indiana on seven occasions, including once in 2014 for a six-week stay. He also reported residential treatment at some point at Campagna Academy in Schererville, Indiana. He reported that, in the past, he had been prescribed twelve medications and recalled that he last took the medications in 2015 or 2016, when his Medicaid expired.

[21] Although the above is not necessarily in dispute, Costello presented no medical records or other documentary evidence regarding his mental illnesses to the trial court. Moreover, there was no evidence concerning how Costello’s mental

illnesses affected his ability to control his behavior or of any nexus between the disorders and the commission of the crimes. Costello thus has not established what role, if any, his mental illnesses played in his commission of the present crimes. *See Anderson v. State*, 961 N.E.2d 19, 34 (Ind. 2012) (“While we acknowledge his history of mental illness, there is insufficient evidence in the record connecting Anderson’s mental illness to his commission of this murder.”). We are unpersuaded that Costello’s character warrants a lesser sentence.

[22] The question under App. R. 7(B) is not “whether another sentence is more appropriate” but rather “whether the sentence imposed is inappropriate.” *Miller v. State*, 105 N.E.3d 194, 196 (Ind. Ct. App. 2018); *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*. Costello has failed to carry his burden of establishing that his sentence is inappropriate in light of the nature of the offenses and his character.

[23] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.