

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Kirby R. McPhearson,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

June 28, 2023

Court of Appeals Case No.  
22A-CR-2994

Appeal from the Madison Circuit  
Court

The Honorable Mark K. Dudley,  
Judge

Trial Court Cause No.  
48C06-2004-F1-941

**Memorandum Decision by Judge Bailey**  
Judges Tavitas and Kenworthy concur.

**Bailey, Judge.**

## Case Summary

- [1] Kirby McPhearson appeals his convictions for two counts of Child Molesting, as Level 1 felonies,<sup>1</sup> and his aggregate thirty-five-year sentence. We affirm.

## Issues

- [2] McPhearson presents two issues for review:
- I. Whether his convictions are supported by sufficient evidence; and
  - II. Whether the trial court abused its sentencing discretion by recognizing the multiple counts as an aggravator.

## Facts and Procedural History

- [3] In 2010, McPhearson began dating his now-wife, Melissa. Shortly thereafter, he moved in with Melissa and her five children, one of whom is T.H. (born in 2004). McPhearson became a “father figure” to T.H., and she began to call him “Dad.” (Tr. Vol. 1, pg. 195). After a few years, the family moved into a residence on 13<sup>th</sup> Street in Elwood.
- [4] At that residence, when T.H. was eleven years old, McPhearson began coming into T.H.’s room routinely – every night or every other night – and “do[ing] whatever he felt he wanted to do in that moment.” (*Id.* at 198.) McPhearson

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<sup>1</sup> Ind. Code § 35-42-4-3(a)(1).

penetrated T.H.'s vagina with his fingers and with his penis. He placed his penis in T.H.'s mouth and made T.H. touch his penis. He touched T.H.'s vagina with his mouth. McPhearson also performed anal intercourse with T.H.

[5] These activities continued, but became less frequent, after Melissa's friend, Brandy Heath, moved in and T.H.'s bed was moved to a non-private bedroom. McPhearson threatened to kill Melissa if T.H. disclosed the molestations. T.H. was also fearful because she "knew how mean [McPhearson] was" and she "saw other things that went on in the house." (*Id.* at 201.)

[6] In September of 2018, Melissa was arrested for battering her eldest son and the Department of Child Services removed all the children from the home. T.H. was placed with a family friend, Jeannette Thompson, who initially supervised visits between T.H. and Melissa. When Thompson advised T.H. that McPhearson would be joining a visit, T.H. began "hysterically crying" and asked that she not be required to go to the visit. (Tr. Vol. II, pg. 46.) T.H. did not offer a reason for her request.

[7] Approximately one year later, T.H. was placed in the custody of her maternal grandmother, Stephanie Martin, in Georgia. At night, T.H. would scream out in her sleep "don't let him get me." (Tr. Vol. I, pg. 185.) Martin, who had raised four children, considered the episodes atypical "night terrors" that were "unreal" and akin to "something in a horror movie." (*Id.*) Eventually, T.H. disclosed to her therapist that McPhearson had molested her. The therapist encouraged T.H. to tell her grandmother, and she did so.

- [8] Martin decided to drive T.H. to Indiana to follow up on the disclosure. Martin contacted Thompson, who then contacted Indiana police. T.H. participated in a forensic interview and underwent a physical examination. On April 22, 2020, the State charged McPhearson with two counts of Child Molesting.
- [9] On October 25, 2022, a jury found McPhearson guilty as charged. On November 18, 2022, McPhearson was sentenced to concurrent terms of thirty-five years and declared a credit-restricted felon. He now appeals.

## Discussion and Decision

### **Sufficiency of the Evidence**

- [10] To convict McPhearson of Child Molesting, as a Level 1 felony, as charged, the State was required to prove beyond a reasonable doubt that McPhearson, a person over the age of twenty-one, knowingly or intentionally performed or submitted to sexual intercourse or other sexual conduct with T.H., a child under fourteen years of age. I.C. § 35-42-4-3(a)(1); Appendix Vol. II, pg. 25. Other sexual conduct is an act involving a sex organ of one person and the mouth or anus of another person, or the penetration of the sex organ or anus of a person by an object. I.C. § 35-31.5-2-221.5.
- [11] Our standard of review of the sufficiency of the evidence is well-settled.

When an appellate court reviews the sufficiency of the evidence needed to support a criminal conviction, it neither reweighs evidence nor judges the credibility of witnesses. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). The appellate court only

considers “the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* (quoting *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008)). A conviction will be affirmed if there is substantial evidence of probative value supporting each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Bailey*, 907 N.E.2d at 1005. A verdict of guilt may be based upon an inference if reasonably drawn from the evidence. *See Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007).

*Tin Thang v. State*, 10 N.E.3d 1256, 1258 (Ind. 2014).

[12] T.H. testified that McPhearson placed his mouth on her vagina and penetrated her vagina with his fingers and with his penis. T.H. additionally testified that McPhearson compelled her to touch his penis and inserted his penis into her mouth. Finally, T.H. testified that McPhearson penetrated her anus with his penis. The State presented evidence to establish that McPhearson was over age twenty-one and that T.H., born in 2004, was eleven and twelve years old at the time of the charged offenses. Accordingly, the State presented sufficient evidence to support McPhearson’s convictions for Child Molesting as Level 1 felonies.

[13] McPhearson attempts to undermine T.H.’s credibility by focusing upon the delay in disclosure. He also points to testimony from Melissa and Heath suggesting that McPhearson lacked an opportunity to molest T.H. We reject McPhearson’s blatant request that we assess credibility of witnesses and reweigh the evidence presented to the jury. *Bailey*, 907 N.E.2d at 1005.

## Abuse of Sentencing Discretion

- [14] Upon his conviction for each Level 1 felony, McPhearson faced a potential sentence of twenty years to forty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4. In sentencing McPhearson to concurrent terms of imprisonment five years above the advisory, the trial court found four aggravators and no mitigators. The aggravators consisted of: McPhearson's criminal history; his violation of a position of trust; the nature and circumstances of the offenses were greater than that necessary to establish the elements of the charged crimes; and there were multiple counts. McPhearson challenges the inclusion of the latter as an aggravator.
- [15] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind.), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Among the ways in which a sentencing court may abuse its discretion is to consider reasons for a sentence that are not supported by the record or are improper as a matter of law. *Id.* at 490-91. An abuse of discretion occurs if a decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions drawn therefrom." *Id.* at 491 (internal quotation omitted).
- [16] McPhearson directs our attention to the trial court's commentary at the sentencing hearing. Apparently, the trial court perceived the prosecutor's decision to file multiple charges involving a single victim as an atypical practice. That said, the evidentiary record is replete with testimony of McPhearson's multiple offenses against T.H. And McPhearson does not argue that the trial

court's consideration of the multiple offenses was improper as a matter of law. Nor could he prevail. *See Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008) (observing that “additional criminal activity directed to the same victim should not be free of consequences”).

- [17] And had the trial court abused its sentencing discretion, remand would be necessary only if this Court could not say with confidence that the trial court would have imposed the same sentence upon proper consideration of reasons supported in the record. *Ackerman v. State*, 51 N.E.3d 171, 194 (Ind. 2016). McPhearson has a criminal history consisting of seven felonies and two misdemeanors. He repeatedly molested a young child who called him Dad. He secured her silence by threatening to kill her mother. T.H. experienced night terrors and participated in mental health therapy years after McPhearson perpetrated his offenses upon her. On this record, we find no abuse of discretion and no necessity for remand.

## Conclusion

- [18] Sufficient evidence supports McPhearson's convictions. The trial court did not abuse its sentencing discretion.
- [19] Affirmed.

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