MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Gregory L. Fumarolo
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Anthony J. South, II,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 30, 2021

Court of Appeals Case No. 21A-CR-158

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-1909-F1-18

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Anthony J. South, II (South), appeals his conviction for child molesting, a Level 1 felony, Ind. Code § 35-42-4-3(a)(1).

[2] We affirm.

ISSUES

[3] South presents this court with two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion in denying South's motion to withdraw his guilty plea; and
(2) Whether South's sentence is inappropriate in light of the nature of the offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] In 2017, South, who was over the age of twenty-one, knowingly and intentionally inserted a finger into the anus of K.W., who was around seven years old, while her family was staying at South's residence. On one occasion, South pulled down K.W.'s pants and underwear and placed his fingers in her anus. K.W. also indicated that South had shown her pornography on his cellphone and that he had molested her on another occasion in the basement of his home while her family was asleep in the residence.

[5] On September 17, 2019, the State filed an Information, charging South with Count I, Level 1 felony child molesting; Count II, Level 4 felony child

molesting; and Count III, Level 6 felony dissemination of matter harmful to minors. On September 24, 2019, South posted a surety bond. On September 9, 2020, the State filed a petition to revoke South's bond, which was granted by the trial court. At a pretrial conference on September 24, 2020, the parties confirmed that the trial would commence on October 27, 2020.

[6] Five days prior to the start of trial, on October 22, 2020, South entered into a plea agreement with the State, in which he agreed to plead guilty to Count I, Level 1 child molesting, in exchange for the dismissal of the remaining Counts, with the executed portion of his sentence being capped at twenty-five years. During the guilty plea hearing, the trial court informed South of his rights and the sentencing range for a Level 1 felony. South affirmed that he understood his rights and his potential sentence, and that he wished to plead guilty. He informed the trial court that he had read the plea agreement before signing it and that he did not have any questions. He advised the court that he was entering the guilty plea freely and voluntarily and stated that he was satisfied with his attorney's representation. After taking the guilty plea under advisement, the trial court scheduled South's sentencing hearing for December 7, 2020. However, after South's counsel withdrew and another attorney entered his appearance, the trial court rescheduled South's sentencing hearing for December 29, 2020. On December 23, 2020, South filed a verified motion to withdraw his guilty plea. On December 29, 2020, the trial court conducted a hearing on South's motion. South testified that prior to signing the plea agreement he did not have an opportunity to review the discovery materials his

previous attorney had received. South stated that on the day of his guilty plea hearing, his attorney informed him that his understanding of his plea was incorrect and that he was subject to a non-suspendable twenty-year sentence. He added that he did not realize he would be credit-restricted until that issue was discussed between the trial court and his attorney during the guilty plea hearing. He advised the court that if he had more time, he would not have signed the plea agreement. After hearing evidence, the trial court denied South's motion and proceeded to sentencing. The trial court imposed a sentence of twenty-five years in the Department of Correction.

[7] South now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Guilty Plea*

[8] South contends that the trial court abused its discretion when it denied his motion to withdraw his guilty plea. After a guilty plea is entered, but before a sentence is imposed, a defendant may move to withdraw his guilty plea for fair and just reasons unless the State has been substantially prejudiced by its reliance upon the plea. I.C. § 35-35-1-4(b). A defendant must prove by a preponderance of the evidence that the withdrawal is necessary to correct a manifest injustice. *Smallwood v. State*, 773 N.E.2d 259, 264 (Ind. 2002). A trial court's ruling on a motion to withdraw a guilty plea "arrives in this [c]ourt with a presumption in favor of the ruling." *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995). We will reverse the trial court only for an abuse of discretion. *Id.* In determining

whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, we examine the statements made by the defendant at his guilty plea hearing to decide whether his plea was offered "freely and knowingly." *Id.*

[9] At the time of the plea agreement, South was thirty-six-years old, with a GED from St. Petersburg College, Florida, and studies in web design and internet services at a technical college in Florida. He was not a novice with the criminal justice system as he had previously been convicted of two Counts of 3rd degree felony battery in Florida. During the guilty plea hearing, South confirmed that he had reviewed and signed the plea agreement and did not have any questions with respect to its provisions. He was present when the trial court and his attorney discussed the potential sentence in the following colloquy:

> [TRIAL COURT]: On Level 1 [f]elony, the sentencing range is anywhere from twenty (20) years to forty (40) years, with an advisory, or starting point of thirty (30) years. For every three (3) days in jail you'd serve, you'd earn one (1) additional day of jail credit meaning you would serve
>
> [DEFENSE COUNSEL]: Your Honor, I'm very sorry to interrupt. This is a credit restricted case, so it's twenty (20) to fifty (50).
>
> [TRIAL COURT]: Your lawyer is correct, it's actually twenty (20) to fifty (50) years is the possible sentence, granted the cap is twenty-five (25) executed. For every three (3) days in jail you'd serve you'd earn one (1) additional day of jail credit. It's seventy-five percent (75%) of the sentence you would actually serve. The maximum fine is ten thousand.

> [DEFENSE COUNSEL]: Judge, again, he's credit restricted, it's eighty-five percent (85%), not seventy-five percent (75%).
>
> [TRIAL COURT]: He's right. It's eighty-five percent (85%) not seventy-five percent (75%) on the credit restricted.

(Transcript pp. 7-8). Following this exchange, South affirmed that he understood the possible penalties.

[10] South now claims that he did not realize until the day of his guilty plea hearing that the mandatory minimum sentence was twenty years executed, nor that he would be a credit-restricted felon. However, despite his argument, the evidence clearly reflects that South elected to plead guilty after learning of the sentence implications without raising any questions or concerns. *See Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000) ("The answers Johnson gave while pleading guilty belie his later assertion that the only reason he entered a guilty plea is because his counsel pressured him."). Accordingly, we cannot say that the trial court abused its discretion in denying his motion to withdraw his guilty plea. *See Smith v. State*, 596 N.E.2d 257, 259 (Ind. Ct. App. 1992) ("The existence of a possible defense for a defendant based only on his own testimony, taken together with the absence of prejudice to the State and the fact that the court had not yet formally accepted [the defendant's] plea, fails to carry [the defendant's] burden to prove that the withdrawal of his plea is necessary to correct a manifest injustice.").

[11] As a secondary argument, South claims that he did not have the opportunity to review discovery evidence received by his counsel prior to his plea of guilty. Our review of the evidence reveals that on September 24, 2020, during a hearing approximately one month prior to the guilty plea hearing, South appeared with his counsel and his counsel advised the trial court that depositions and discovery had been completed and plea negotiations were on-going. At no point during this proceeding did South raise any concern or issue. Likewise, at no point during the guilty plea hearing did South mention to the trial court that he had not seen the discovery or had not been apprised thereof by his counsel. In fact, South expressed satisfaction with his attorney's representation. Therefore, it can be inferred that if counsel had been called to testify during the hearing on South's motion to withdraw his guilty plea, his attorney would have rebutted South's allegations. *See Coomer*, 652 N.E.2d at 63 (although defendant claimed his trial counsel "was not prepared to mount a vigorous defense" and "was instead bent on striking a plea bargain[,]" defendant did not call his former lawyer as a witness during the hearing on his motion to withdraw his guilty plea and the "trial court was entitled to infer that counsel would have testified otherwise had he been called."); *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989) (where trial counsel is not called to testify in support of a defendant's allegations, a court may infer that trial counsel would not have corroborated defendant's claims.).

[12] Based on the evidence before us, we conclude that South failed to establish that the trial court abused its discretion. Before accepting his guilty plea, the trial

court apprised South of his rights and explained the potential penalties. In response, South affirmed that he understood. At no point did he ask questions or raise any concerns. Accordingly, South entered into his plea agreement knowingly and voluntarily.

II. *South's Sentence*

[13] South contends that the trial court's sentence of twenty-five years for Level 1 felony child molesting is inappropriate in light of the nature of the offense and his character. A sentence authorized by statute can be revised where it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Appellate Rule 7(B) analysis is not to determine "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). It is not a matter of second guessing the trial court's sentence. Sentence review under Appellate Rule 7(B) is very deferential to the trial court. *Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007). The burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Therefore, when reviewing a sentence, our principal role is to "leaven the outliers" rather than necessarily achieve what is perceived as the "correct" result. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

[14] A Level 1 felony child molesting offense carries a sentence between twenty and fifty years, with the advisory sentence being thirty years. I.C. § 35-50-2-4(c).

South's plea agreement reduced the sentence the trial court could impose and capped it at twenty-five years. The trial court elected to impose the full twenty-five years as an executed sentence.

[15] Looking at the nature of the offense, it should be noted that Indiana has established a policy to protect the welfare of children. *Cowart v. State*, 756 N.E.2d 581, 584 (Ind. Ct. App. 2001). "Crimes against children are contemptible. Therefore, Indiana supports a public policy that protects children and punishes child abusers." *Id.* The probable cause affidavit indicates that South molested K.W. when she was about seven years old and while she was staying at South's residence with her family. On one occasion, South pulled down her pants and underwear and placed his finger in her anus. He also exposed K.W. to pornography on his cellphone and molested her on another occasion in the basement while her family was asleep in the residence. We cannot find anything in the nature of South's actions indicating that his sentence is inappropriate.

[16] Turning to South's character, we reach a similar result. This was not South's first involvement with the criminal justice system. His criminal history reflects that he was previously convicted of two Counts of 3rd degree felony battery in Florida in 2009. While the present case was pending, he was arrested for Class B misdemeanor voyeurism. Based on South's prior convictions, his violation of his pretrial release, and his molestation of a young girl in the present case, we cannot conclude that his sentence is inappropriate.

CONCLUSION

[17] Based on the foregoing, we hold that the trial court properly denied South's motion to withdraw his guilty plea. In addition, we conclude that South's sentence is not inappropriate in light of the nature of the offense and his character.

[18] Affirmed.

[19] Najam, J. and Brown, J. concur