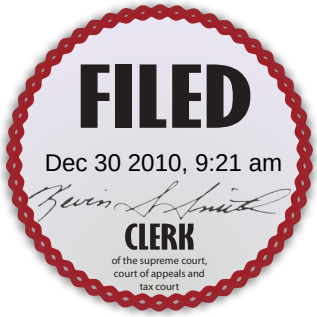

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IN THE COURT OF APPEALS OF INDIANA

BILLY R. CASE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 40A01-1004-CR-230
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0803-FA-72

December 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Billy Case appeals his sentence for Class B felony sexual misconduct with a minor.[1] He also appeals the trial court's restitution order. We affirm.

FACTS AND PROCEDURAL HISTORY

During the summer of 2007, Case was at his ex-wife's house with his daughter, son, and his daughter's friend, fourteen-year-old K.P. At some point in the evening, Case and K.P. were in a room separate from Case's children. Case testified that at that time K.P. smelled of alcohol. Case had sexual relations with K.P., and told K.P. he would kill her if she told anyone about the incident.

About a month later, K.P. told her mother Case had raped her. Case was charged with Class A felony rape,[2] Class A felony sexual misconduct with a minor,[3] and was alleged to be an habitual offender.[4] He agreed to plead guilty to Class B felony sexual misconduct with a minor, and was sentenced to eighteen years incarcerated and ordered to pay K.P.'s mother $4998.75 as restitution.

DISCUSSION AND DECISION

1. Sentencing

Even if a trial court acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007),

[1] Ind. Code § 35-42-4-9 (a)(1).
[2] Ind. Code § 35-42-4-1(b)(4).
[3] Ind. Code § 35-42-4-9 (a)(2).
[4] Ind. Code § 35-50-2-8.

clarified on reh'g by 875 N.E.2d 218 (Ind. 2007). This appellate authority is implemented through Ind. Appellate Rule 7(B), which provides a reviewing court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, it finds the sentence inappropriate in light of the nature of the offense and the character of the offender. *Id*. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offense, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 491. The advisory sentence for a Class B felony is ten years[5] and Case was sentenced to eighteen. Case, who was forty-two years old at the time of the offense, performed and submitted to oral sex with the fourteen year old victim; he engaged in this behavior while his two children were in another room; he testified K.P. "smelled like she had a little you know alcohol on her at the time," (Tr. at 48); he threatened to kill K.P. if she told anyone what had happened; and K.P. has attempted suicide three times since the incident and requires extensive counseling and medication.

When considering the "character of the offender," one relevant fact is the defendant's criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The significance of a criminal history in assessing a defendant's character varies based on the

[5] Ind. Code § 35-50-2-5.

gravity, nature, and number of prior offenses in relation to the current offense. *Id*. Case has an extensive criminal history, dating back over twenty years. He has been convicted of four felonies, seven misdemeanors, and has had his probation revoked six times. Case notes he expressed remorse and pleaded guilty in an effort to spare the victim the trauma of testifying. However, he received some benefit from his plea to Class B felony sexual misconduct with a minor, as he was initially charged with Class A felony rape, Class A felony sexual misconduct of a minor, and was alleged to be an habitual offender. *See Anglemyer*, 875 N.E.2d at 221 (guilty plea is not significantly mitigating when the defendant receives a substantial benefit in return for the plea).

Based on the nature of the offense, that Case performed sexual acts with a fourteen-year-old child who was possibly under the influence of alcohol, and Case's character, specifically his extensive criminal record, Case's eighteen year sentence was not inappropriate.[6]

2. Restitution

The trial court ordered Case to pay K.P.'s mother $4998.75 in restitution for missed work hours and a medical deductible. An order of restitution is a matter within the trial court's discretion, and we reverse only on a showing of abuse of that discretion. *Little v. State*, 839 N.E.2d 807, 809 (Ind. Ct. App. 2005). An abuse of discretion occurs when the

[6] Case additionally argues the trial court improperly considered that he cut off his electronic monitoring bracelet, which resulted in a violation of his probation in 2002. However, "even if the trial court is found to have abused its discretion in the process used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate." *Mendoza v. State*, 869 N.E.2d 546, 556. As we have held Case's sentence is not inappropriate, we need not address if the trial court improperly considered this aggravator.

order is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*.

We first note Case did not object to the amount of restitution during his sentencing hearing. "When a defendant does not properly bring an objection to the trial court's attention so that the trial court may rule upon it at the appropriate time, he is deemed to have waived that possible error." *Mitchell v. State*, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000), *trans. denied*. Because Case did not make a timely objection, he has waived review of his claim. *See id.* (although trial court erred by entering a restitution order where there was no evidence to support such order, the defendant waived review of that claim because he failed to object to the order).

However, we typically will review a restitution order even where the defendant did not object. This is because a restitution order is part of the sentence, and it is our duty to "bring illegal sentences into compliance." *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), *trans. denied*. A restitution order must be supported by sufficient evidence of actual loss sustained by the victim of a crime. *Id*. The amount of loss is a factual matter that can be determined only on presentation of evidence. *Id*.

During the sentencing hearing, K.P.s' mother testified she lost $4498.75 in wages. She based her calculation on "the number of hours that I missed from work and that I didn't count the vacation days that I used on the days that I you know, went to work because I used all my vacation days before I used by FMLA[.]" (Tr. at 25.) She indicated in a statement provided for the Pre-Sentence Investigation Report that she had paid a $500 deductible for

K.P.'s medical expenses not covered by insurance.

A restitution order is not an abuse of discretion if there is evidence to support it. *Jenkins v. State*, 909 N.E.2d 1080, 1084 (Ind. Ct. App. 2009). As there was testimony from K.P.'s mother regarding lost wages and K.P.'s mother provided a statement of incurred medical expenses, the trial court did not abuse its discretion when ordering Case to pay K.P.'s mother $4998.75 in restitution.

CONCLUSION

As Case's eighteen-year sentence was not inappropriate based on his character and the nature of the offense, and there was evidence to support the restitution order, we affirm.

Affirmed.

ROBB, J., and VAIDIK, J., concur.