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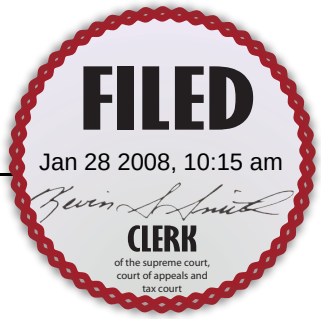

IN THE COURT OF APPEALS OF INDIANA

SHANE LOCKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 06A01-0707-CR-291
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No.06D01-0601-FB-10

January 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Shane Locker appeals his eight-year sentence for child molesting, a Class C felony. Locker argues that this maximum sentence is inappropriate given his character and the nature of the offense. Concluding the sentence is inappropriate, we reverse and remand with instructions that the trial court enter a four-year sentence.

Facts and Procedural History

On August 4, 2005, Locker picked up R.A., whom he had befriended through Locker's work, and took her to his home. At this time, Locker was eighteen years old and knew that R.A. was twelve years old. At some point, Locker instructed R.A. to disrobe and touched R.A.'s vagina and breasts with the purpose of arousing or satisfying his own or R.A.'s sexual desires.

On January 19, 2006, the State charged Locker with child molesting, a Class B felony. On April 5, 2007, Locker and the State entered into a plea agreement under which Locker agreed to plead guilty to child molesting, a Class C felony, and the State agreed to not seek any additional charges arising out of the incident. Both parties retained the right to argue sentencing before the trial court.

The trial court accepted Locker's guilty plea at the sentencing hearing on May 11, 2007. Following testimony, victim impact statements, and argument, the trial court made the following statement explaining the factors considered in arriving at an eight-year sentence, with four years executed.

> One, the defendant was eighteen years of age having graduated from high school in 2006. Two, the defendant has no prior criminal record as an adult

> and no prior juvenile record. Three, the defendant expresses remorse and pled guilty. These are mitigating factors. The lack of criminal history is entitled to substantial weight and the Court so considers this factor. Remorse and the plea of guilty are tempered considerably by two things. First, this plea is to a lesser included offense of that originally charged. Second, the statement contained in the PSIR and the Defendant's remorseful statements in court do not seem to comprehend the full extent of the injury the Defendant has done. The Court perceives that the Defendant feels bad that he is being punished but it is less clear to the Court that the Defendant is truly empathizing with the victim or the victim's mother. He says that he put the victim in an awkward position. That seems to show a lack of true understanding. . . . The Court also considers other factors which aggravate. One, the circumstances surrounding the crime show a high degree of deception. This adult defendant, young though he was for an adult, transported the victim to his home late at night for what he indicates in his statement to the Probation Department was an attempt to counsel this victim who was having problems with her parents. He befriended the victim at work but what this appears to the Court to be is simply a successful effort to groom this known twelve year old for sexual activity. He took advantage of an innocent and particularly vulnerable child under a pretext that he was trying to help her. Put another way this victim placed trust in the Defendant by confiding in him and he violated that trust when he molested her. Two, less than enhanced sentence would depreciate the seriousness of the crime. Each of the witnesses for the Defendant testified that they did not condone sexual activity with adults, even young ones, with children. Neither will this Court. Three, it is clear to the Court that this crime has had a substantial impact upon the victim. She has required counseling. Even nearly two years later she is emotionally distraught. This victim requires unusual medical care as a result. This – the impact is substantial and is beyond that which would normally occur and is ordinarily foreseeable. It was also within the Defendant's foresight. He knew and had reason to know having a sister of the same age what the impact of sexual activity by the victim would be.

Sentencing Transcript at 54-56. The trial court then found the aggravating circumstances outweighed the mitigating circumstances and sentenced the defendant to the maximum term of eight years, with four years suspended to probation. Locker now appeals.

Discussion and Decision

When reviewing a sentence imposed by the trial court, we "may revise a sentence

authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Locker to eight years, the maximum sentence for a Class C felony.[1] Ind. Code § 35-50-2-6. We recognize that maximum sentences should generally be reserved for the worst offenses and offenders. See Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997). However, as we have explained,

> If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about

[1] We recognize that the trial court suspended four years of this sentence. However, Locker still received a maximum sentence, as "[a] suspended sentence is one actually imposed but the execution of which is thereafter suspended." Drakulich v. State, 877 N.E.2d 525, 534 n.10 (Ind. Ct. App. 2007) (quoting Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring in result)).

the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

I. Nature of the Offense

Locker argues that the trial court improperly considered that a "less than enhanced sentence would depreciate the seriousness of the crime." However, our supreme court has held that "it is not error to enhance a sentence based upon the aggravating circumstances that a sentence less than the enhanced term would depreciate the seriousness of the crime committed." Mathews v. State, 849 N.E.2d 578, 590 (Ind. 2006).[2]

In its sentencing statement, the trial court indicated it considered the harm caused to R.A. Although we used to allow trial courts to consider the devastating emotional impact of molestation on the victim, e.g., Yoder v. State, 574 N.E.2d 929, 932 (Ind. Ct. App. 1991), trans. denied; Durham v. State, 510 N.E.2d 202, 204 (Ind. Ct. App. 1987), we have since switched course, albeit without explicitly overruling prior caselaw. We now allow such impact to serve as an aggravating circumstance only where the impact on the victim is different than that usually caused by the crime. McElroy v. State, 865 N.E.2d 584, 590 (Ind. 2007). In applying this rule, we have held that a trial court erroneously found this aggravator where evidence indicated that the victim of molestation was in need of counseling and had nightmares regarding the molestations because we could not distinguish these harms from

[2] As no evidence indicates the trial court was considering less than an advisory sentence, it would have been improper for the trial court to consider that a reduced sentence would depreciate the seriousness of the crime. Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997). We admit that this distinction is largely semantic, but it is a distinction nonetheless.

those caused to other molestation victims. Simmons v. State, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), trans. denied. We have also found the emotional impact on the victim to be an improper aggravator where the trial court failed to explain "how the defendant's actions had an impact of a destructive nature that is not normally associated with the commission of the offense of child molesting, or how this impact was foreseeable to [the defendant]." Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), trans. denied; see also Leffingwell v. State, 793 N.E.2d 307, 310 (Ind. Ct. App. 2003). The rationale of these decisions is that the legislature was apparently aware of the emotional harm caused by child molestation and considered it when it classified the crime as a Class C felony. Cf. Davenport v. State, 689 N.E.2d 1226, 1232-33 (Ind. 1997) (noting that the emotional impact of murder "is accounted for in the presumptive sentence"), clarified on reh'g, 696 N.E.2d 870.

We recognize and share the trial court's concern for the harm caused to R.A. However, given the current state of the law in Indiana – where child molestation carries an advisory sentence of four years and trial courts may not consider the fact that such molestation causes the victim emotional harm requiring counseling and resulting in nightmares – we conclude that the harm to R.A. does not distinguish this offense or render it worthy of a sentence of more than four years.

The trial court also noted the crime's "high degree of deception" and opined that R.A. was "innocent and particularly vulnerable." Sentencing Tr. at 54-55. We agree that the record clearly demonstrates that R.A. was an innocent and vulnerable victim and that Locker used deception to lure her to his home. However, the child molestation statute inherently

recognizes that all children under the age of fourteen are vulnerable to sexual exploitation by those older than them. Cf. C.D.H. v. State, 860 N.E.2d 608, 612 (Ind. Ct. App. 2007) ("[T]he child molestation statute's purpose is to prohibit the sexual exploitation of children by those with superior knowledge or experience who are therefore in a position to take advantage of children's naivety."), trans. denied. As we have previously noted, "the crime of child molesting is often perpetrated by persuasion and trickery." Ward v. State, 528 N.E.2d 52, 54 (Ind. 1988). Indeed, it is because of the nature by which molesters perpetrate their crimes that child molesting is criminal regardless of whether the victim "consented" to the inappropriate touching.[3] See C.D.H., 860 at 612 (recognizing that "consent is irrelevant for purposes of the child molestation statute"). In short, deception of an innocent and vulnerable victim is at least typical of, if not inherently included in, the crime of child molestation. These circumstances do not distinguish Locker's offense from other molestations or render appropriate any sentence above the advisory.

II. Character of the Offender

As the trial court noted, Locker expressed remorse from this crime, thereby commenting favorably on his character. However, the effect of this remorse is reduced, as the trial court noted that his expressions of remorse demonstrated that Locker did not fully

[3] Also, the crime of child molestation is elevated to a Class A felony if "it is committed by using or threatening the use of deadly force." Ind. Code § 35-42-4-3(b)(1). We note that there is no statutory provision enhancing the crime if it is accomplished by mere force or threat of force. Thus, molestation accomplished by using or threatening to use force not amounting to deadly force carries the same penalty as molestation accomplished without the use of force. The legislature may or may not wish to address this circumstance.

comprehend the harm done, and indicated more that Locker was sorry he was in legal trouble than that Locker was sorry for the harm caused. See Evans v. State, 727 N.E.2d 1072, 1083 (Ind. 2000) ("It is within the sentencing court's discretion to determine whether remorse should be considered as a 'significant' mitigating factor."); Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005) ("[W]ithout evidence of some impermissible consideration by the trial court, a reviewing court will accept its determination as to remorse."), trans. denied.

Likewise, we conclude the fact that Locker pled guilty is tempered somewhat by the benefit he received in return. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"), trans. denied. Locker argues that the trial court was not permitted to consider the fact that the State dropped the charge of child molesting as a Class B felony. However, the law is clear that where a defendant has already received a benefit in exchange for a guilty plea, the mitigating weight of the plea may be reduced. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999); Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. We decline Locker's invitation to revisit this well-established principle.

However, we do find it significant that Locker has no criminal history,[4] a factor that generally comments favorably on a defendant's character as it indicates the defendant had

[4] The State points out in its brief that Locker has multiple traffic violations. Such violations are not criminal. State v. Hurst, 688 N.E.2d 402, 405 (Ind. 1997) ("[A]lthough traffic violations may once have been criminal offenses, traffic violations are now civil proceedings."), overruled on other grounds, Cook v. State, 810 N.E.2d 1064 (Ind. 2004); Schumm v. State, 866 N.E.2d 781, 792 (Ind. Ct. App. 2007), clarified on reh'g, 868 N.E.2d 1202.

been leading a law-abiding life for a significant amount of time before committing the instant offense. See Ind. Code § 35-38-1-7.1(b)(6) (the court may consider that the defendant had been leading a law-abiding life as a mitigating circumstance). By identifying the lack of criminal history as a statutory mitigating circumstance, our legislature "appropriately encourages leniency toward defendants who have not previously been through the criminal justice system." Biehl v. State, 738 N.E.2d 337, 339 (Ind. Ct. App. 2000), trans. denied. Also, as our sentencing scheme is founded upon principles of reformation, and not vindication, see Ind. Const. art. I § 18, courts should attempt to distinguish offenders with no or minor criminal histories from those with extensive criminal histories, see Bluck v. State, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999); cf. Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997) (where defendant's criminal history consisted of a public intoxication charge and an A.W.O.L. from the service, and trial court did not find defendant's lack of criminal history to be a mitigating circumstance, supreme court remanded for a new sentencing hearing). In Sherwood v. State, 749 N.E.2d 36, 40 (Ind. 2001), our supreme court reversed maximum consecutive sentences for murder and conspiracy to commit robbery and instead ordered the defendant to serve concurrent, presumptive sentences, where the only mitigating factor was the defendant's lack of significant criminal history, and the only aggravating factor was the heinous nature of the offense.

We also recognize that Locker was eighteen years old at the time of the offense, and that a defendant's youth may be considered in mitigation. See Brown v. State, 720 N.E.2d 1157, 1159 (Ind. 1999), habeas corpus denied, 2006 WL 1547081 (S.D. Ind. 2006).

In sum, despite the inherently and harmful nature of child molestation, nothing in the nature of Locker's offense distinguishes it from the typical molestation, a crime for which our legislature has prescribed an advisory sentence of four years. Likewise, Locker's character, as evidenced by his complete lack of criminal history, indicates that the advisory sentence is more appropriate than a maximum sentence. Although Locker's act was monstrous, standing alone it does not "demonstrate a character of such recalcitrance or depravity' that [it] justif[ies] a [maximum sentence]." Hollin v. State, 877 N.E.2d 462, 465-66 (Ind. 2007) (revising defendant's sentence for burglary to the advisory sentence) (quoting Frye v. State, 837 N.E.2d 1012, 1015 (Ind. 2005)). We are unable to conclude that Locker is one of the worst offenders with respect to child molestation. See Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007). We conclude a maximum sentence is inappropriate, and remand with instructions that the trial court enter a sentence of four years, with two years suspended to probation.

Conclusion

We conclude Locker has demonstrated that his sentence is inappropriate given his character and the nature of the offense. Instead, we conclude a sentence of four years is appropriate.

Reversed and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.