MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Levi Conrad Hale,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

November 1, 2021

Court of Appeals Case No. 21A-CR-704

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2002-F1-4

Robb, Judge.

Case Summary and Issues

[1] Following a jury trial, Levi Hale was convicted of child molesting, a Level 1 felony. The trial court sentenced Hale to forty years in the Indiana Department of Correction ("DOC") with four years suspended to probation. Hale now appeals, raising multiple issues for our review, which we restate as: (1) whether the State presented sufficient evidence to support his conviction of child molesting; (2) whether the trial court abused its discretion in identifying aggravating circumstances; and (3) whether his sentence is inappropriate in light of the nature of the offense and his character. Concluding there was sufficient evidence to support his conviction, the trial court did not abuse its discretion in determining aggravating circumstances, and Hale's sentence was not inappropriate, we affirm.

Facts and Procedural History

[2] In November 2019, Hale lived with Amanda Smith, his wife of five years.[1] They lived together with Smith's children, including Smith's thirteen-year-old daughter S.C. who had recently moved back in with them.[2] Smith worked the nightshift so Hale would watch the children while she worked. One night while Smith was at work, Hale had sex with S.C.

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[1] Smith testified that she had known Hale since they were both five years old.

[2] S.C. had only lived with Hale and Smith for a short period of time prior to the offense, *see* Transcript, Volume 2 at 133; however, the record is unclear as to why.

[3] On January 4, 2020, S.C. vomited and experienced stomach pain. After speaking with S.C., Smith purchased multiple pregnancy tests. S.C. took the tests, and they came back positive. S.C. then informed Hale that she was pregnant. Initially, S.C. told Smith that "some kid from school" had gotten her pregnant; however, she later told Smith that Hale had impregnated her. Transcript, Volume 2 at 130. S.C. testified that Hale had instructed her to lie to Smith regarding the cause of her pregnancy.

[4] Smith took S.C. to the hospital to arrange for S.C. to get a medically induced abortion and then contacted the police. On January 9, 2020, the passing of the "products of conception" occurred and the fetal remains were given to authorities for DNA testing. *Id.* at 140-43. Subsequently, Hale's DNA was collected, and a paternity test was conducted. The test revealed that the probability of paternity for Hale was 99.9999%. Confidential Exhibit, Volume 2 at 7.

[5] The State charged Hale with child molesting, a Level 1 felony. At trial, Hale argued that he was unaware of S.C.'s exact age:

> Now remember, the State's got to prove to you beyond a reasonable doubt that there was knowing intentional sex with someone under the age of fourteen years old. There's no testimony about that.
>
> Yes, we got a date of birth of [S.C.]. But that doesn't mean that Mr. Hale had any idea what date she was born. In fact, she wasn't even living in the household for most of his married life with [Smith]. . . . It wasn't his biological daughter. And so what

> you've got is testimony of [S.C.] that she went into the bedroom, that they had intercourse and no other evidence that Mr. Hale had any idea that . . . she was under fourteen years of age.

Tr., Vol. 2 at 170. However, the jury concluded Hale was guilty as charged.

[6] On April 14, 2021, the trial court conducted a sentencing hearing. As aggravating circumstances the trial court found: Hale has a significant criminal history; Hale has had four petitions to revoke probation filed against him; Hale has been unsuccessfully discharged from probation in the past; Hale was on probation at the time of the offense; Hale is wanted on warrants out of the state of Kentucky; Hale has a history of failing to appear; the harm, injury loss, or damage suffered by S.C. was significant and greater than the elements necessary to prove the commission of the offense; Hale was in a position of having care, custody, or control of S.C.; and Hale was placed in segregation at the county jail while this case was pending. *See* Appellant's Appendix, Volume II at 13-14; Tr., Vol. 2 at 196-97.

[7] As for mitigating circumstances, the trial court found: Hale's substance abuse issues[3]; Hale's family support; and Hale's expressed remorse. *See* Appellant's App., Vol. II at 14; Tr., Vol. 2 at 194-96. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court

[3] Hale stated that illegal substances were not a factor in this offense.

sentenced Hale to forty years to be served in the DOC with four years suspended to probation. Hale now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

[8] Our standard of reviewing a sufficiency claim is well-settled: we do not reweigh the evidence or assess the credibility of the witnesses. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). Instead, we consider only the evidence most favorable to the verdict and the reasonable inferences supporting it. *Id.* Therefore, the evidence need not overcome every reasonable hypothesis of innocence. *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007). "[W]e will affirm the conviction unless no reasonable trier of fact could have found the elements of the crime beyond a reasonable doubt." *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011).

B. Child Molesting

[9] Hale argues that the State failed to present sufficient evidence to support his child molesting conviction. To convict Hale of child molesting by sexual intercourse as a Level 1 felony, the State was required to prove beyond a reasonable doubt that Hale, being at least twenty-one years old, with a child under fourteen years of age, knowingly or intentionally performed or submitted to sexual intercourse. Ind. Code § 35-42-4-3(a)(1).

[10] Hale contends that the State "is required to present some evidence to demonstrate Hale's knowledge that S.C. was younger than fourteen years of age - but failed to do so."[4] Brief of Appellant at 11. Hale relies on the fact that S.C. had only lived with him and Smith for a short period of time to support his contention that the State failed to show he knew her age. However, the State presented evidence that S.C. lived with them at the time of the offense and Hale watched S.C. while Smith worked. Further, Hale had been married to Smith for five years and had known her since they were five years old. We expect jurors to draw upon their own personal knowledge and experience in assessing credibility and deciding guilt or innocence. *See Lamar v. State*, 514 N.E.2d 1269, 1271 (Ind. 1987). Therefore, we conclude that because S.C. lived with Hale and Hale was married to Smith for a significant period of time, a reasonable juror could conclude that Hale knew S.C. was under fourteen years old.

II. Abuse of Discretion in Sentencing

A. Standard of Review

[11] Sentencing determinations are within the trial court's discretion and will be reversed only for an abuse of discretion. *Harris v. State*, 964 N.E.2d 920, 926 (Ind. Ct. App. 2012), *trans. denied.* An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the

[4] The State contends that Indiana Code section 35-42-4-3(a)(1) does not require that Hale knew S.C.'s age. However, because we conclude that the State presented sufficient evidence for a jury to determine that Hale was aware of S.C.'s age, we need not address this argument.

court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citation omitted), *trans. denied.* Examples of how a trial court may abuse its sentencing discretion include if it: (1) fails "to enter a sentencing statement at all"; (2) enters "a sentencing statement that explains reasons for imposing a sentence - including a finding of aggravating and mitigating factors if any - but the record does not support the reasons"; (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration"; or (4) considers reasons that "are improper as a matter of law." *Anglemyer v. State,* 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007).

B. Aggravating Circumstances

[12] Hale contends that the trial court abused its discretion by finding that "the damage suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense" was an aggravating circumstance. Br. of Appellant at 18.

[13] First, other aggravating circumstances identified by the trial court and not challenged by Hale are sufficient to support Hale's maximum sentence. The trial court found a multitude of aggravating circumstances including Hale's lengthy criminal history and that Hale was in a position of having care, custody, or control of S.C. *See Singer v. State,* 674 N.E.2d 11, 14 (Ind. Ct. App. 1996) (stating that "[a]busing a 'position of trust' is, by itself, a valid aggravator

which supports the maximum enhancement of a sentence for child molesting."). These valid aggravating circumstances support the enhancement of Hale's sentence. *See Pickens v. State,* 767 N.E.2d 530, 535 (Ind. 2002) (holding that "[e]ven when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist.").

[14] Second, although Hale correctly points out that a court may not use an element of the offense itself to enhance a sentence, *see Gomillia v. State*, 13 N.E.3d 846, 852-53 (Ind. 2014), the trial court did not do so in this case. The trial court stated:

> For this Court, that is the most significant of all aggravators . . . the harm and the injuries suffered by this girl because of your actions were significant and more than what's necessary to prove the elements of the crime.

Tr., Vol. 2 at 193. The harm and injury suffered by the victim is not an element of the offense. However, we have stated, "the emotional and psychological effects of a crime are inappropriate aggravating factors *unless* the impact, harm, or trauma is greater than that usually associated with the crime." *Thompson v. State*, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003) (emphasis added). S.C.'s pregnancy and subsequent abortion created harm or trauma greater than that usually associated with child molesting. Therefore, we conclude that trial court did not abuse its discretion in identifying aggravating circumstances.

III. Inappropriate Sentence

A. Standard of Review

[15] Hale also argues that the trial court imposed an inappropriate sentence given the nature of the offense and his character. Indiana Appellate Rule 7(B) permits us to revise a sentence "if, after due consideration of the trial court's decision, [we] find[ ] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing is "principally a discretionary function" of the trial court to which we afford great deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character[.]" *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[16] The defendant carries the burden of persuading us that the sentence imposed by the trial court is inappropriate, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors appearing in the record in making such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). The question under Rule 7(B) is "not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). "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*, 895 N.E.2d at 1225.

B. Nature of the Offense

[17] Our analysis of the "nature of the offense" portion of the appropriateness review begins with the advisory sentence. *Clara v. State*, 899 N.E.2d 733, 736 (Ind. Ct. App. 2009). The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081.

[18] Hale was convicted of child molesting as a Level 1 felony. A person convicted of a Level 1 felony "shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years." Ind. Code § 35-50-2-4(b). Hale was sentenced to forty years to be served in the DOC with four years suspended to probation.

[19] The nature of the offense is found in the details and circumstances of the offenses and the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). When considering a sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*.

[20] Here, Hale's conduct was far more egregious than the typical offense accounted for by the legislature. Hale was S.C.'s stepfather and responsible for her care while her mother worked. *See Mise v. State*, 142 N.E.3d 1079, 1089 (Ind. Ct.

App. 2020) (observing that the defendant "committed his offenses against two young girls with whom he shared a father-daughter relationship. He abused his position of trust with these girls and robbed them of their youthful innocence when he molested them."), *trans. denied*. Hale's molestation of S.C. resulted in her getting pregnant. Hale then instructed S.C. to lie to her mother about how she was impregnated. Further, S.C. needed to get an abortion. The nature of Hale's offense permits an enhanced sentence.

C. Character of the Offender

[21] We conduct our review of a defendant's character by engaging in a broad consideration of his or her qualities. *Moyer*, 83 N.E.3d at 143. A defendant's life and conduct are illustrative of his or her character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. And a defendant's criminal history is one relevant factor in analyzing his or her character, the significance of which varies based on the "gravity, nature, and number of prior offenses in relation to the current offense." *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). However, "[e]ven a minor criminal record reflects poorly on a defendant's character[.]" *Reis*, 88 N.E.3d at 1105.

[22] Hale contends that his criminal history "is not significant to the instant charge of child molesting." Br. of Appellant at 21. Hale was on probation when he committed the current offense. Hale's criminal history includes juvenile adjudications for criminal trespass and battery, disorderly conduct, possession of marijuana, and attempted theft. *See* Appellant's App., Vol. II at 124-27. As

an adult, Hale has misdemeanor convictions for public intoxication, criminal mischief, operating a vehicle without ever receiving a license, criminal trespass, and operating a vehicle while intoxicated. *See id.* at 127-30. Hale also has felony convictions of fleeing or evading the police, receiving stolen property, and battery on a law enforcement officer. *See id*. Further, Hale has had four petitions to revoke probation filed against him. Although Hale's prior offenses are not similar in gravity or nature to the instant offense, they are still a poor reflection on his character. *See Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013) (finding that although defendant's "criminal history is not significantly aggravating, it is still a poor reflection on his character."). Further, in *Boling*, we found that while criminal history was a consideration,

> [m]ore significant, however, is that [defendant] was [victim's] father, in a position of trust which he violated not only by touching her inappropriately, but by trying to place the blame on her afterwards, and by threatening to spank her if she did not blame her brother. This failure to act as a father should is an extremely poor commentary on [defendant's] character.

Id. at 1060-61. This case is analogous to *Boling*. There is nothing about Hale's character that renders his sentence inappropriate.

[23] In sum, Hale has failed to carry his burden of proving that his sentence for child molesting is inappropriate in light of the nature of the offense and his character.

Conclusion

[24] We conclude that the State presented sufficient evidence to support Hale's conviction, the trial court did not abuse its discretion in determining the aggravating circumstances, and Hale's sentence was not inappropriate in light of the nature of the offense and his character. Accordingly, we affirm.

[25] Affirmed.

Bradford, C.J., and Altice, J., concur.