MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Adam Lee Jones,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 17, 2021

Court of Appeals Case No. 21A-CR-833

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-1904-F1-6

Shepard, Senior Judge.

[1] Adam Jones appeals his convictions of several counts of child molesting. We affirm.

Facts and Procedural History

[2] The facts favorable to the verdict follow. Jones molested three girls: K.J., C.M., and J.L. From 2009 to 2017, Jones resided with K.J.'s grandparents. During those years, the girls spent time together at the home of K.J.'s grandparents. Jones also babysat K.J.

[3] Eventually, C.M. advised her mother of Jones' inappropriate touching. The State charged Jones, and he was subsequently tried on charges of child molesting as a Level 1 Felony,[1] three counts of child molesting as Level 4 felonies,[2] and child molesting as a Class A felony.[3] A jury found Jones guilty on all counts. At sentencing, the court merged one count of Level 4 child molesting into the Level 1 child molesting and sentenced Jones to an aggregate sentence of seventy-eight years, five of those suspended to house arrest and probation.

Issues

[4] Jones presents three issues, which we restate as:

I. Whether the trial court erred by not granting separate trials;

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[1] Ind. Code § 35-42-4-3 (2007), (2014), (2015).

[2] *Id.*

[3] *Id.*

II. Whether the evidence is sufficient to support Jones' conviction of Level 1 child molesting; and

III. Whether Jones' sentence should be revised.

Discussion and Decision

I. Separate Trials

[5] Jones' pretrial request to sever the offenses was denied, and he now contends that was error. However, he failed to renew his motion at trial as required by Indiana Code section 35-34-1-12(b) (1981). Consequently, the State correctly argues he has waived the matter for appeal. *See Ennik v. State*, 40 N.E.3d 868 (Ind. Ct. App. 2015) (issue of defendant's request for separate trial was waived on appeal where his pretrial motion for severance was denied, and he failed to renew motion during trial), *trans. denied*. Waiver notwithstanding, we address his claim on the merits.

[6] Indiana Code section 35-34-1-9(a) (1981) provides that two or more offenses may be joined in the same information when the offenses:

> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

However, if the offenses are joined under Subsection 9(a)(1) *solely* because they are of the same or similar character, a defendant is entitled to severance as a matter of right. Ind. Code § 35-34-1-11(a) (1981). Otherwise, a court may grant a severance when it determines that severance is appropriate to promote a fair

determination of guilt or innocence, considering: (1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. *Id.*

[7] The degree of deference owed to a trial court's ruling on severance depends on the basis for joinder. If a defendant is entitled to severance as a matter of right under Section 35-34-1-11(a), the trial court has no discretion to deny such a motion, and we will review its decision de novo. *Pierce v. State*, 29 N.E.3d 1258 (Ind. 2015). But, where the offenses have been joined under Section 35-34-1-9(a)(2) because the defendant's underlying acts are connected, we review the trial court's decision for an abuse of discretion. *Id.* Here, Jones alleges he was entitled to severance as a matter of right, and, if not, the trial court abused its discretion by denying severance.

[8] While Subsection 9(a)(1) refers to the nature of the charged offenses, Subsection 9(a)(2) refers to the operative facts underlying the offenses. *Id.* In some instances, offenses that are of the same or similar character may also be based on a series of connected acts. *Id.* Because a defendant is not entitled to severance as of right if Subsection 35-34-1-9(a)(2) is met, *see id.*, we begin there. To determine if offenses warrant joinder under Subsection 9(a)(2), we look to see if the operative facts establish a pattern of activity beyond mere satisfaction of the statutory elements. *Id.* For instance, offenses can be connected by a defendant's efforts to take advantage of a special relationship with the victims. *See Ennik*, 40 N.E.3d 868 (finding child molestation charges were connected

together where defendant was babysitter of three young victims). In some cases, a common relationship between the defendant and the victims may result in an interconnected police investigation into the crimes, producing overlapping evidence. *See Philson v. State*, 899 N.E.2d 14 (Ind. Ct. App. 2008) (finding crimes were linked where defendant committed sexual acts against his siblings in same house over same time period and allegation as to one sibling surfaced during investigation into molestation of other sibling), *trans. denied* (2009).

[9] The incidents here share more than their criminal category. Jones is a cousin of K.J.'s mother, and he lived with K.J.'s family for a time and then with K.J.'s grandparents for many years. During that time, he cared for K.J., her siblings, and her friends J.L. and C.M. when the grandparents went out to dinner and on the weekdays for the entire summer while K.J.'s parents were at work. Jones exploited his position as a family member and caretaker of these three young girls to whom he had unrestricted access and who were entrusted to his care.

[10] Jones' offenses are also linked by an interrelated investigation. Once K.J. was interviewed at a child advocacy center and talked with investigators, it came to light that, on at least one occasion of touching, she had been at her grandparents' house with her friends. Further investigation revealed, and the girls testified at trial to, a series of acts by Jones connected by overlapping time periods, locations, and common method. The girls testified to acts occurring from about 2009 to 2015 either at K.J.'s home or at the home of her grandparents. When the girls were younger, there were similar incidents of Jones picking up two of the girls by cupping his hand in between their legs in

their genital area. While K.J. testified to additional incidents when she was awake, J.L. and C.M. testified to touchings while they were asleep during sleepovers. Jones' method was consistent. He would put his hand and fingers between their legs on their genitals, many times touching the inside of their thighs first and working his way up toward the genital area. C.M. testified, "It happened a lot. It would happen when I slept on K.J.'s couch. I would feel him going up my thigh. It [also] happened when I slept in the bunk beds [in K.J.'s room]." Tr. Vol. 2, p. 162. Accordingly, joinder was proper under Subsection 9(a)(2), and thus Jones was not entitled to severance as a matter of right.

[11] Moreover, the trial court did not err by denying a discretionary severance. The State's case was an uncomplicated presentation of evidence with little risk of juror confusion about the different victims and the various offenses. Therefore, we have confidence in the jury's ability to distinguish the evidence and apply the law intelligently to each offense.

II. Sufficiency of the Evidence

[12] Jones challenges the sufficiency of the evidence of his Level 1 molesting conviction. In reviewing such challenges, we neither reweigh the evidence nor judge the credibility of the witnesses. *Sandleben v. State*, 29 N.E.3d 126 (Ind. Ct. App. 2015), *trans. denied*. Instead, we consider only the evidence most favorable to the verdict and any reasonable inferences drawn therefrom. *Id.* If there is substantial evidence of probative value from which a reasonable factfinder

could have found the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed. *Labarr v. State*, 36 N.E.3d 501 (Ind. Ct. App. 2015).

[13] To convict Jones of the Level 1 felony, the State had to prove beyond a reasonable doubt that Jones was at least twenty-one years old and knowingly or intentionally performed an act that involved the penetration of the sex organ of J.L., a child under fourteen, by an object. *See* Ind. Code §§ 35-42-4-3(a)(1), 35-31.5-2-221.5 (2014); *see also* Appellant's App. Vol. II, p. 139. Jones claims the evidence is insufficient to demonstrate penetration of J.L.'s sex organ.

[14] J.L. testified that she was asleep in the recliner at K.J.'s house when Jones touched her. The direct examination of J.L. proceeded as follows:

> Q What part of your body does he touch?
> A My vagina.
> Q Your vagina. Is this over or under your clothes?
> A Under.
> Q Were you wearing underwear ---
> A Yeah.
> Q --- underneath your pajamas?
> A Yes.
> Q And did he touch you over or under the underwear?
> A Under.
> Q So did he touch bare skin?
> A Yes.
> Q Can you describe, was this with his hand or something else?

A His finger.

Q His finger. Do you know what finger?

A I'm not sure.

Q What did his finger do?

A It went inside a little bit.

Q I'm sorry?

A It went inside a little bit.

Q Inside your vagina?

A No ---

Q Pardon?

A No, not like . . . . like in the lips of it.

Q Okay, so in like the folds?

A Yeah.

Tr. Vol. 2, pp. 127-28.

[15] It is well established that a finger is an object for purposes of the child molesting statute. *Seal v. State*, 105 N.E.3d 201 (Ind. Ct. App. 2018), *trans. denied*. Further, in *Boggs v. State*, 104 N.E.3d 1287, 1288 (Ind. 2018), our Supreme Court granted transfer "to provide guidance on the meaning of 'penetration' for purposes of 'other sexual misconduct'" as that term is used in Indiana Code section 35-31.5-2-221.5. There, the Court held that "proof of the slightest penetration of the sex organ, including penetration of the external genitalia, is sufficient to demonstrate a person performed other sexual misconduct with a child." *Id.* at 1289 (affirming Boggs' conviction of child molesting for engaging in other sexual misconduct where victim testified Boggs put his finger in the folds of her vagina and touched her clitoris).

[16] Applying the meaning set out in *Boggs* to J.L.'s testimony, we conclude the evidence is sufficient to sustain Jones' conviction for a Level 1 felony. J.L.'s testimony that Jones' finger went "in the lips" of her vagina provided ample evidence of a probative nature from which the jury could determine that Jones had penetrated J.L.'s sex organ by inserting his finger into her external genitalia.

[17] Jones makes a cursory assertion that the jury could not make a determination concerning penetration of the female sex organ without knowing the definition of the term "sex organ." "When determining whether an element of an offense has been proven, the jury may rely on its collective common sense and knowledge acquired through everyday experiences—indeed, that is precisely what is expected of a jury." *Clemons v. State*, 83 N.E.3d 104, 108 (Ind. Ct. App. 2017), *trans. denied*. Although the term "sex organ" is not statutorily defined, the jury here could reasonably rely on its common sense and knowledge to conclude that the lips of a vagina are part of the female sex organ. *See, e.g.*, *Scott v. State*, 771 N.E.2d 718 (Ind. Ct. App. 2002) (affirming sufficiency where victim's testimony that defendant put his finger in her "private," and she used "private" to go to restroom, provided sufficient information upon which jury could determine defendant penetrated victim's external genitalia and thus her sex organ), *trans. denied*, *disapproved on other grounds by Louallen v. State*, 778 N.E.2d 794, 797 n.3 (Ind. 2002). We decline Jones' invitation to invade the jury's province, and we thus reject his sufficiency claim.

III. Sentence

A. Aggravating Circumstances

[18] Jones alleges the trial court erred in determining the aggravating circumstances. Particularly, he takes issue with the court's findings that the harm suffered was greater than necessary to prove the offenses, that there were repetitive offenses, and that there were multiple victims.

[19] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the 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.*

[20] When a defendant commits the same offense against multiple victims, enhanced and consecutive sentences seem necessary to substantiate the fact that there were separate harms and separate acts against more than one person. *Serino v. State*, 798 N.E.2d 852 (Ind. 2003). Jones has not shown that the aggravator of multiple victims is clearly against the logic and effect of the facts and circumstances that were before the court. Moreover, because Jones concedes the propriety of other aggravators found by the court and because we find this aggravating circumstance to be proper, we need not address the remaining two aggravating factors lifted up by Jones. *See Edrington v. State*, 909 N.E.2d 1093 (Ind. Ct. App. 2009) (even if court improperly applies aggravator,

sentence enhancement may be upheld when there is another valid aggravating circumstance), *trans. denied*.

B. Inappropriate Sentence

[21] Finally, Jones claims his sentence is inappropriate given the nature of his offenses and his character. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Thompson v. State*, 5 N.E.3d 383 (Ind. Ct. App. 2014). However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The principal role of appellate review under Rule 7(B) is to attempt to leaven the outliers, not to achieve a perceived "correct" result in each case. *Garner v. State*, 7 N.E.3d 1012 (Ind. Ct. App. 2014). The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

[22] To assess whether the sentence is inappropriate, we look first to the statutory range established for the offenses. The advisory sentence for a Class A felony was thirty years, with a minimum of twenty and a maximum of fifty. Ind. Code § 35-50-2-4(a) (2014). Similarly, the advisory sentence for a Level 1 felony is thirty years, with a minimum of twenty and a maximum of forty years.

Ind. Code § 35-50-2-4(b). The advisory sentence for a Level 4 felony is six years, with a minimum of two and a maximum of twelve years. Ind. Code § 35-50-2-5.5 (2014).

[23] The court sentenced Jones to thirty-five years on both the Level 1 and Class A felonies and to eight years on each of the two Level 4 felonies, which is just slightly above the advisory for all counts. The court paired the Level 1 with one of the Level 4 felonies for a consecutive sentence of forty-three years. It then paired the remaining Level 4 with the Class A felony for a concurrent sentence of thirty-five years, which the court made consecutive to the forty-three years for an aggregate sentence of seventy-eight years. Finally, the court suspended five years, two of those on house arrest, followed by three years on supervised probation.

[24] As for the nature of the offenses, Jones molested three young girls on several occasions over a span of several years.

[25] As to the character of the offender, Jones' criminal history consists of three misdemeanor convictions: trespass, criminal mischief, and possession of marijuana, in addition to a violation of probation and a failure to appear. Jones committed the present offenses against his young cousin and two of her friends when he was in a position of trust with them and their families and many times when he was the caretaker of the girls.

[26] In sentencing Jones, the court found no mitigating circumstances and several aggravating factors, including Jones' criminal history and the fact that he

committed the same offense against several victims. Generally, committing the same offense against multiple victims properly supports enhanced *and* consecutive sentences. *Serino*, 798 N.E.2d 852. The deference shown to a trial court's sentencing should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character). *Stephenson v. State*, 29 N.E.3d 111 (Ind. 2015). Jones has not met this burden.

Conclusion

[27] We conclude Jones was not entitled to separate trials, and the trial court did not abuse its discretion by denying his motion to sever. Further, the evidence was sufficient to support Jones' conviction of Level 1 child molesting, the court did not abuse its discretion as to aggravators, and Jones' sentence is not inappropriate.

[28] Affirmed.

Najam, J., and Mathias, J., concur.