MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David Alconedo Barrera,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 21, 2021

Court of Appeals Case No. 21A-CR-1550

Appeal from the Tippecanoe Circuit Court

The Honorable Sean M. Persin, Judge

Trial Court Cause No. 79C01-1910-F1-10

Brown, Judge.

[1] David Alconedo Barrera appeals his sentence for child molesting as a level 3 felony and asserts his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] On September 22, 2019, Barrera, who was born on July 10, 1988, was at the home of a woman and her four-year-old daughter. In the evening, Barrera went to go sleep in a room and ended up on a bed with the child. At some point, he placed his finger between her labia and penetrated her external genitalia.

[3] On appeal, Barrera cites to his statement to a detective in which he asserted:

> On Saturday the 21st of September, 2019 around 8PM is when I arrived at [I.C.'s] Trailer. She invited me to have dinner and drinks. We sat down and had dinner and drinks, then stayed at the table talking, singing, watching videos on the phone for about four hours. Afterwards, I was tired and went to lay down. I don't really remember the events thereafter, but I assume at some point while I was sleeping her daughter came in and laid down. While laying there I turned, thinking I was next to [I.C.], the mother. Then I decided to put my hand down her pants and feel the lips/labia. I then realized what I was doing, reacted, and moved my hand out. At this point, I was scared and I panic[k]ed, so I then decided to leave. Eventually I called and talked to the detective to try to explain myself and the events.

Appellant's Appendix Volume II at 124.

[4] On October 1, 2019, the State charged Barrera with child molesting as a level 1 felony. On January 22, 2021, Barrera and the State filed a plea agreement in which Barrera agreed to plead guilty to an amended count of child molesting as a level 3 felony, any remaining counts would be dismissed, and he would

receive a sentence that the court deemed appropriate after hearing any evidence or argument.

[5] On January 29, 2021, the court held a hearing. When asked if he was a United States citizen, Barrera answered: "No, I'm a resident." Transcript Volume II at 11. Barrera's counsel stated that Barrera had indicated he was a green card holder and permanent resident and asserted that "more likely than not based off of the trend over the last few years this will result in deportation not being able to come back to the United States losing his green card status . . . ." *Id.* at 12. When asked by the court if he understood that there was a "pretty good chance" he would be deported if he pled guilty, Barrera answered affirmatively. The court asked the prosecutor if Barrera would be ineligible for community corrections, and the prosecutor stated that he would be ineligible and "depending on what any immigration court decides to do that may affect any suspended sentence. Although this proves for the possibility of community corrections like house arrest I don't think you would be eligible for community corrections. Do you understand that?" *Id.* at 15. Barrera answered affirmatively. The court stated in part that Barrera acknowledged that, if he is not a United States citizen or a legal resident, the conviction could cause him to be deported and that he "would not be eligible for community corrections or placement on probation" and asked Barrera if that was true. *Id.* at 18. Barrera answered affirmatively and pled guilty. The court found a sufficient factual basis and took the plea under advisement until sentencing.

[6] On April 23, 2021, the court held an initial sentencing hearing and continued the hearing in order to allow the State additional time to obtain documentation regarding an adjudication mentioned in the presentence investigation report ("PSI"). On May 20, 2021, the State filed a supplemental sentencing memorandum which attached a Sex or Violent Offender Registration Form referencing a California offense.

[7] On June 21, 2021, the court continued the sentencing hearing. Barrera's counsel stated that "[w]e know that there was an adjudication" and "[w]e know that he was required to register for 10 years," but "we just don't know exactly what the adjudication was." *Id.* at 33-34. The prosecutor stated that "[w]e know that it was a sex offense." *Id.* at 34. After some discussion, the court stated: "I think it's sufficient to say there's a prior juvenile adjudication for a sex offense. They required him to register as a sex offender. We know some general underlining [sic] facts of the case that he was roughly 17 years of age when he had sex with a cousin who was roughly 11 or 12 years of age." *Id.* at 40.

[8] Barrera stated that he was sorry, regretted what he did to the victim, and was responsible. The prosecutor requested a sentence of sixteen years executed in the Department of Correction ("DOC"), which was the sentence recommended by the probation officer preparing the PSI. The court asked the prosecutor why it should accept the plea agreement "which goes from level 1 down to a level 3" and "[i]s it the obvious factor that he's going to be deported?" *Id.* at 47. The prosecutor answered: "Actually, that wasn't – it was more about the fact that I

have a 4 now 5 year old that the state and the defense wanted to spare from having to testify." *Id.* Defense counsel requested a sentence "something closer to the advisory sentence." *Id.*

[9] The court stated: "I'm only finding 2 aggravating factors being the prior adjudication and a child being 4 years of age." *Id.* It found Barrera's remorse, guilty plea, and his acceptance of responsibility as mitigating factors, but observed that Barrera had "minimized some of what occurred here by saying it was just an accident at times." *Id.* The court also stated "[l]ong term incarceration and deportation will result in a hardship and so I will include long term incarceration will be a hardship on your children, but it's tempered by the fact that's [sic] going to be deported anyhow." *Id.* at 52. The court found that the aggravators outweighed the mitigators and sentenced Barrera to fifteen years in the DOC.

[10] On June 21, 2021, the court entered a sentencing order which found Barrera's criminal history, the fact the victim was four years old, and that Barrera "was a person required to register as a sex offender at the time of the offense" as aggravating factors. Appellant's Appendix Volume II at 179. The court found Barrera's remorse and guilty plea as mitigating factors. It found the aggravating factors outweighed the mitigating factors and sentenced Barrera to the DOC for fifteen years.

Discussion

[11] The issue is whether Barrera's sentence is inappropriate in light of the nature of the offense and his character. Barrera argues that he was heavily under the influence of alcohol at the time of the offense and could not remember anything that he did and that, while he fled the scene, he made numerous attempts to contact the investigating detective. He contends that he led a law-abiding life for a substantial period of time and that his character and attitude demonstrated that he was unlikely to commit another crime. He requests that his sentence be revised to the advisory with a provision for placement with the Tippecanoe County Community Corrections or probation.[1]

[12] Ind. 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 find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

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[1] Barrera also asserts that his sentence is inconsistent because the trial court's verbal statements expressed an intent to include only two aggravating factors and the sentencing order contained a third aggravating circumstance, and because the trial court's verbal statements indicated it intended to include his incarceration as a hardship to his children but this was omitted from the sentencing order. In reviewing the court's sentencing decision, we may consider both the written and oral sentencing statements. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). We also note the trial court imposed a fifteen-year sentence at the sentencing hearing as well as in the sentencing order. We cannot say that reversal is warranted on this basis.

[13] Ind. Code § 35-50-2-5 provides that a person who commits a level 3 felony shall be imprisoned for a fixed term of between three and sixteen years, with the advisory sentence being nine years.

[14] Our review of the nature of the offense reveals that Barrera, who was born on July 10, 1988, was at the home of a woman and her four-year-old daughter and, while he was on the bed with the child, placed his finger between her labia and penetrated her external genitalia.[2] The PSI indicates that, when asked why he decided to commit the offense, Barrera answered: "Had several drinks, was tired and went to bed. I wasn't in the right mindset at the time and I wasn't thinking clearly about my actions."[3] Appellant's Appendix Volume II at 115.

[15] Our review of the character of the offender reveals that Barrera pled guilty to child molesting as a level 3 felony as an amended count more than fifteen months after the State initially charged him with child molesting as a level 1 felony. He also expressed remorse. The PSI indicates that Barrera was alleged to have committed two counts of lewd or lascivious acts with a child under fourteen years old as felonies with respect to acts occurring on July 7, 2005, in California. With respect to those acts, it states: "The Defendant was

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[2] The PSI states: "This Officer notes the Affidavit of Probable Cause indicates [Barrera] was in a relationship with [I.C.], the mother of the victim, at the time of the commission of the instant offense(s). [Barrera] denied ever being [in] a relationship with [I.C.]." Appellant's Appendix Volume II at 113.

[3] The PSI indicates that Barrera acknowledged consuming one to two beers per week between the ages of twenty-two and thirty and, when asked what role drugs or alcohol played in the instant offense, he answered: "Yes – three (3) beers at the time." Appellant's Appendix Volume II at 114.

adjudicated a delinquent child on Counts I and II with the following disposition: 1) Serve 180 days in Juvenile Hall. 2) Formal probation. 3) Complete unspecified programs. 4) Payment of restitution. 5) Payment of a fine, fees, and costs." *Id.* at 111. It also notes: "This case was confirmed by NCIC only." *Id.* The PSI further indicates that Barrera was alleged to have committed delinquent acts of lewd or lascivious acts with a child under fourteen years old and sodomy as felonies in California with respect to acts occurring on July 8, 2005, and states: "No disposition available." *Id.* The State's May 20, 2021 supplemental sentencing memorandum attached a Sex or Violent Offender Registration Form for the Tippecanoe County, Indiana Sheriff's Office which referenced a California offense and indicated that the victim was Barrera's eleven-year-old cousin. The exhibits volume contains the Sex or Violent Offender Registration Form as well as a Crime-Arrest Report from Santa Ana, California. As an adult, Barrera was convicted of operating a motor vehicle without ever receiving a license as a class C misdemeanor in 2009. In 2015, the State charged Barrera with battery resulting in bodily injury, but the case was dismissed.

[16] The PSI indicates that Barrera has two children and he reported having contact with his children "often/as much as possible" and had been ordered to pay $200 per week in child support, but it was placed on hold due to his incarceration and was not in arrears. *Id.* at 113. The PSI indicates that Barrera was employed as a hydro-blaster until his arrest. Barrera's overall risk

assessment score using the Indiana Risk Assessment System placed him in the low risk to reoffend category.

[17] After due consideration, we conclude that Barrera has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.[4]

[18] For the foregoing reasons, we affirm Barrera's sentence.

[19] Affirmed.

May, J., and Pyle, J., concur.

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[4] To the extent Barrera argues the court abused its discretion by considering the age of the victim as an aggravating circumstance, we need not address this issue because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate"), *trans. denied*), *trans. denied*. Even if we were to address Barrera's abuse of discretion argument, we would not find it persuasive in light of the record, including the amended charging information, which alleged that the victim was under fourteen years old, and the trial court's comments regarding the four-year-old victim. *See Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003) (holding that that the trial court did not err in considering the victim's age as an aggravating circumstance where it noted that a four or five-year-old child is extremely vulnerable to sexual predation because of her tender years) (citing *Buchanan v. State*, 767 N.E.2d 967, 971 (Ind. 2002)), *reh'g denied*, *trans. denied*; *see also Reyes v. State*, 909 N.E.2d 1124, 1128 (Ind. Ct. App. 2009) ("[A] trial court may consider age as an aggravator only if the youth of the victim is extreme.").