MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Elon Edgar Howe,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

October 11, 2023

Court of Appeals Case No. 22A-CR-2171

Appeal from the Porter Superior Court

The Honorable Mary A. DeBoer

Trial Court Cause No. 64D05-1908-F3-8037

Memorandum Decision by Chief Judge Altice
Judges May and Foley concur.

Altice, Chief Judge.

Case Summary

[1] Following a jury trial, Elon Edgar Howe was convicted of Level 3 felony rape and Level 5 felony incest, for acts committed against his severely intellectually disabled adult daughter, C.H. The trial court then imposed consecutive sentences of fifteen years for rape and five years for incest, all to be served in the Indiana Department of Correction (DOC).

[2] Howe presents the following restated issues on appeal:

1. Did the trial court abuse its discretion by admitting certain hearsay statements under Ind. Code § 35-37-4-6, commonly known as the Protected Person Statute?

2. Do Howe's convictions for rape and incest violate Indiana's prohibition against double jeopardy?

3. Was it an abuse of the trial court's discretion to impose consecutive sentences?

4. Is Howe's aggregate sentence of twenty years in the DOC inappropriate in light of the nature of his offenses and his character?

[3] We affirm.

Facts & Procedural History

[4] C.H. was born to Howe and his wife, Lori, in 1986. She has had developmental and cognitive delays since infancy and began experiencing grand mal seizures around the age of 18 with increasing frequency over time. C.H.

has a Full Scale IQ of 48, placing her in the "severe range" of intellectual disability and in the lowest 1% of the population. *Transcript Vol. 7* at 227. She never made it past seventh grade, which she repeated four or five times. As a result of her disabilities, C.H. remained in the care of her parents through adulthood.

[5] The Howe family attended Fairhaven Baptist Church in Chesterton, Indiana, where they were active members for more than two decades. Lori and C.H. were volunteers on Sunday mornings in the church nursery, which was divided into classes by age. Around 2015, C.H. began regularly helping Rosa Chavez in the two-year-old room. Lori was next door watching younger children.

[6] Over the years, Chavez developed a "fellowship" with C.H. in the nursery, playing with the children and talking together about their week. *Exhibits Vol. 9* at 69. Chavez "knew that [C.H.'s] mind wasn't right" and that she would often "talk nonsense." *Id*. at 73. But Chavez never believed that C.H. was "making something up." *Id*. at 70. Chavez described C.H. as "always a peaceful girl." *Id*. at 76.

[7] In the spring of 2019, Chavez noticed changes in C.H. – she was not as talkative, became upset on occasion with the children, and appeared to be losing weight and not taking care of her hygiene. Chavez was also aware that C.H.'s seizures had increased to multiple times a week by June 2019.

[8] On July 7, 2019, while together in the nursery, C.H. initially seemed fine, and the two started discussing birthdays, as it was Lori's birthday as well as

Chavez's son's birthday. When Chavez shared that her daughter's birthday was coming up on August 29, C.H. responded, "That's my birthday." *Transcript Vol. 7* at 100. C.H. appeared to be sad, so Chavez encouraged C.H that her age did not matter. C.H. was about to be thirty-three years old. Chavez stated, "Well, [C.H.], be happy. No matter what age you are, you're still your daddy's baby." *Id*. at 101. C.H., still sad and looking down, responded, "No. I am not my daddy's baby." *Id*. Chavez reiterated, "It doesn't matter how old you are. You can still be your daddy's girl." *Id*. C.H. then stated, "No, I am not, because my dad, he plays his sex games on me." *Id*.

[9] C.H.'s unexpected disclosure shocked Chavez, who initially responded with "a cold silence" before asking C.H. to repeat herself, which C.H. did. *Id*. Chavez was "surprised and scared," and she told C.H. that C.H. needed to tell Lori. *Id*. C.H. refused, indicating that would "damage their marriage" and that Lori did not need to know. *Id*. As Chavez urged that this was "so wrong" and that C.H. had to tell, C.H. stated, "He cleans me when he's done." *Id*. at 102. Chavez warned C.H. that she could become pregnant, which appeared to scare C.H., and "something clicked." *Id*. at 103. C.H. then agreed to tell Lori. They prayed together before Chavez called for Lori to come to the room.

[10] When Lori came, C.H. told her, "I'm sorry, Mom." *Id*. Then C.H. said, "I'm sorry that I have been bouncing the bed with – dad…. Remember when you were not home? When you go to work?" *Id*. at 104. C.H. also told Lori that when Howe was bouncing her on the bed, "it hurt." *Id*. at 146. They then agreed to wait and talk about the matter at home after finishing in the nursery.

[11] Once at home, Lori did not seek additional information from C.H., and they went on about their day celebrating Lori's birthday with Howe and one of their other adult daughters. Later, before Lori and C.H. left for the evening church service without Howe, Lori told him that C.H. was "talking at church," and he responded, "Oh, no." *Id*. at 161. Upon their return, Howe told Lori that "he'd try to be a better father." *Id*. at 149. While he did not provide details, Howe acknowledged to Lori that he would wait for her to leave for work in the morning before going into C.H.'s room.[1] Lori did not pursue the matter further.

[12] In the meantime, Chavez felt she needed to do more to protect C.H., so, after finishing in the nursery that morning, she looked for Pastor Steve Damron's wife, Rebecca. She learned that Rebecca had already left, so Chavez told Pastor Damron that she believed C.H.'s was being abused by her father. Pastor Damron responded in surprise, "Do you know [C.H.] is not in her mind?" *Id*. at 113. Chavez agreed but still asked to speak with Rebecca. The women met the next day and then, on July 10, Pastor Damron, Rebecca, and Chavez contacted the Porter Police Department (PPD) and made reports.

[13] Sargeant Tawni Komisarcik, a detective with the PPD, went to the Howe home on July 11 and spoke briefly with Lori, who told Sgt. Komisarcik that she had no details other than C.H.'s statements on July 7 that Howe "bounced her,

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[1] In April 2019, Lori received a promotion at work and began leaving before 5:00 a.m. each day.

cleaned her up, and it hurt." *Id*. at 164. Lori added that Howe "never said that he was specifically having sex with [C.H.]" *Id*. Lori agreed to bring C.H. to a forensic interview, which occurred on July 12 at a local child advocacy center. Lori and C.H. moved out of their home that same day and into a dormitory at the church.

[14] On July 13, Jeremiah Mitchell called Howe on behalf of the church and indicated that due to "serious allegations" made against him, the church was considering revoking his membership. *Id*. at 86. Howe was then offered an opportunity to come in and speak with Pastor Darmon and the church lawyer to share his side of things. Howe responded, "I'm guilty, Jerry." *Id*. at 87. Howe also stated that he "probably should" come in to talk with them. *Id*. Sgt. Komisarcik learned of this conversation on July 23, during interviews with Mitchell and Pastor Darmon.

[15] On July 26, Howe contacted Sgt. Komisarcik to arrange an interview, which they scheduled for July 29. During his video recorded interview at the PPD, Howe made incriminating statements. He began by explaining that there had been a gradual buildup to the physical relationship with C.H. and that the biggest contributors were his inadequate sexual relationship with Lori and him needing to massage C.H. after her seizures, sometimes while she was naked in the bathtub. He explained that seeing a naked woman "starts to work on a guy." *Exhibit 26* at 5:50. Howe added that C.H. "liked attention." *Id*. at 7:10.

[16] Eventually, Howe started having C.H. lie naked on the bed, where he would kiss her breasts and rub her body. He would also have C.H. "kiss on [his] penis," which he had her refer to as "the Big." *Id*. at 15:15, 25:20. Howe admitted that for about the last year, he had been trying to put his penis in C.H.'s vagina, which he described as "so tiny." *Id*. at 18:05. He stated, "I might have penetrated her once, but that was it. No ejaculations." *Id*. at 7:40. He explained that when he tried to penetrate: "She always would kind of like stiffen up, and I'd ask her, 'Am I hurting you?, she'd say, 'yes,' and I'd say, 'do you want me to stop?' she'd say, 'yes' and that was it." *Id*. at 7:45. Howe referred to "vibrating her," which he described as "my penis trying to find the hole, the vagina." *Id*. at 10:30. He indicated, "there wasn't no, you know, depth, like in-out depth" and that he would just "jiggle, jiggle, jiggle." *Id*. at 18:00. Sgt. Komisarcik clarified, "couldn't go in very far," and he responded, "Yeah. She – it's – she would tense up and it'd start to hurt her." *Id*. at 19:00. He would then stop and finish in the bathroom by masturbating himself and ejaculating into the toilet or sink. Howe noted that sometimes C.H. would be in the bathroom too and he would have her help by putting her lips on his penis. Afterwards, Howe would always clean her up with a washcloth and soap.

[17] Howe reported that, recently, these incidents had been occurring more often, about once a week, and that he did not believe C.H. had ever had sexual experiences with anyone else. Howe acknowledged that he directed C.H., at least once in the beginning, not to tell anyone about what they did together.

[18] Near the end of his interview, it became clear that Howe believed, incorrectly, that the legal definition of sexual intercourse required both penetration and ejaculation inside the other individual. When Sgt. Komisarcik clarified that penetration alone was sufficient under Indiana law, Howe responded, "It's time for me to go." *Id*. at 34:16. Seemingly dejected, Howe indicated that he did not know that was the law and that Lori would leave him if he went to jail. According to Howe, all he wanted was to have Lori back as his wife.

[19] On August 13 and 17, Dr. John Heroldt, a clinical and forensic psychologist, evaluated C.H. to determine whether she had the mental capacity to consent to sexual activity. Dr. Heroldt administered an IQ test and General Sexual Knowledge Questionnaire (GSKQ). C.H.'s scores on both fell within the bottom 1% of the population. With a Full Scale IQ of 48, C.H. was in the severe intellectual disabled range, and her score on the GSKQ indicated "[v]ery limited knowledge" about sex. *Transcript Vol. 7* at 217. Ultimately, Dr. Heroldt concluded, within a reasonable degree of medical certainty, that C.H. did not have the capacity to consent to a sexual relationship. He explained at trial, "I don't believe that she has any concept of sex. Mechanics, consequences, pregnancy. Any of it." *Transcript Vol. 8* at 10.

[20] On August 22, 2019, the State charged Howe with Level 3 felony rape and Level 5 felony incest. On May 12, 2022, a pretrial hearing was held to address the admissibility, under the Protected Person Statute, of C.H.'s forensic interview and her statements to Chavez and Lori. After testimony by Dr. Heroldt and Lori, C.H. was questioned briefly on the witness stand. Thereafter,

the parties and the court agreed that C.H. would be unavailable to testify at trial because she was incapable of understanding the nature and obligation of an oath. As a result, it was also agreed that C.H.'s forensic interview was not admissible at trial because it was testimonial in nature and C.H. could not be effectively cross-examined. The focus then turned to the reliability of the statements C.H. made to Lori and Chavez on July 7, 2019. The hearing was continued to allow the defense to depose Lori, Chavez, and C.H. regarding the statements. The matter was then revisited at a pretrial hearing on June 9, 2022, with the parties submitting the three deposition transcripts for the trial court to review before determining whether C.H.'s statements to Lori and Chavez were sufficiently reliable. The next day, the trial court entered an order in which it determined, after examining several factors, that C.H.'s statements to Lori and Chavez were reliable and would be admissible at trial pursuant to the Protected Person Statute.

[21] Howe's first trial ended in a mistrial when an exhibit that had not been admitted into evidence was inadvertently sent back to the jury during deliberations. His second trial was held from July 20 to July 22, 2022, and the jury found Howe guilty as charged. Thereafter, the trial court entered judgment of conviction on both counts and sentenced him to consecutive, executed sentences of fifteen years for rape and five years for incest.

[22] Howe now appeals. Additional information will be provided below as needed.

Discussion & Decision

1. Admissibility of Evidence

[23] Howe argues that the trial court abused its discretion when it admitted into evidence C.H.'s out-of-court statements to Chavez and Lori. While he does not dispute that C.H. qualified as a protected person under the Protected Person Statute, Howe contends that her statements were not admissible because they lacked sufficient indicia of reliability.

[24] The decision whether to admit evidence is within the trial court's sound discretion and is afforded great deference on appeal. *Perryman v. State*, 80 N.E.3d 234, 241 (Ind. Ct. App. 2017). "The trial court abuses its discretion by ruling in a way clearly against the logic and effect of the facts and circumstances before it, or by misinterpreting the law." *Id.* Our Supreme Court, however, has cautioned that the Protected Person Statute "impinges upon the ordinary evidentiary regime" requiring trial courts to exercise "a special level of judicial responsibility." *Carpenter v. State*, 786 N.E.2d 696, 703 (Ind. 2003).

[25] The Protected Person Statute allows for the admission of otherwise inadmissible hearsay statements under specifically defined circumstances involving children and individuals with certain disabilities. Relevant here is the statutory requirement that the trial court, after a hearing, find "that the time, content, and circumstances of the statement … provide sufficient indications of reliability." I.C. § 35-37-4-6(f). In making the reliability determination, a trial court may consider, among other things, "the time and circumstances of the

statement, whether there was significant opportunity for coaching, the nature of the questioning, whether there was a motive to fabricate, use of age appropriate terminology, and spontaneity and repetition." *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997); *see also Perryman*, 80 N.E.3d at 242.

[26] Here, in determining that C.H.'s statements to Chavez and Lori bore sufficient indicia of reliability, the trial court made detailed findings. First, the court found that C.H. had no motive to lie, explaining:

> Chavez worked with [C.H.] on numerous occasions in the daycare center and never knew [her] to say things that were not true or to "make something up." In fact, [C.H.] did not want [] anyone to know what she shared with Chavez – even [Lori].
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> Lori has never known [C.H.] to lie or to make up stories.

Appendix Vol. 2 at 49, 50 (citations to depositions omitted). On appeal, Howe does not address this finding or suggest that C.H. had any motive to lie.

[27] Second, the trial court found no reason to question C.H.'s general character, noting that she "faithfully volunteered at her church daycare," despite her "severe health issues," and had been described as "a peaceful girl." *Id*. at 49. Regarding character, the court's findings also included:

> She couldn't drive a car, she does not have a cell phone, computer or tablet, she watched DVDs such as NCIS, Mash and High School Musical, and she occasionally participated in youth fellowship at her church. [C.H.], with a very low IQ, is almost childlike in the way she carries herself and presents in the

> courtroom. With what the Court has read and witnessed of [C.H.], the Court cannot say there are any issues with her general character that would lead the Court to find her statements unreliable.

Id. at 50-51 (record citations omitted). Again, Howe does not directly challenge this finding on appeal.

[28] Third, the trial court found that more than one person heard the statements, as "Chavez immediately located [C.H.'s] mother so [C.H.] could tell her mother what had been going on." *Id*. at 49. When C.H. made her statements to Lori, in Chavez's presence, Lori quickly ended the discussion, indicating that the family would talk at home. Howe apparently has no quarrel with this finding.

[29] Fourth, the court found that the statements were spontaneous and came "out of the blue" during a discussion with Chavez about birthdays. *Id*. The court observed: "Given the context of the conversation, it is apparent that [C.H.] did not create an opportunity to reveal the alleged abuse, but rather blurted out the facts to Chavez." *Id*. at 49-50. Additionally, the court noted that Lori and C.H. had not discussed anything on the drive to church that morning. The spontaneity of C.H.'s statement is clearly supported by the record, and Howe does not suggest otherwise.

[30] Finally, the trial court considered the timing of the statements and the relationship between C.H. and the witnesses, finding that the statements were made "within a short window of time after the alleged abuse occurred," that C.H. and Chavez had a good fellowship having worked together in the nursery

for some time, and that Lori was not only C.H.'s mother but had cared for her since her birth in 1986. On appeal, Howe challenges this finding, arguing that there was no evidence indicating that the July 7 statements were made close in time to the alleged misconduct, as the charges alleged a period between April 1 and July 7 and, according to Howe, "[t]he evidence at trial did not provide any more certainty as to the specific date of the misconduct." *Appellant's Brief* at 23.

[31] Howe likens this case to *Carpenter*, 786 N.E.2d 696, in which the Supreme Court addressed the admissibility under the Protected Person Statute of hearsay statements made by a three-year-old alleged victim, A.C., who was incompetent to testify at trial because she did not understand the difference between a truth and a lie. In that case, A.C. made statements to her mother on May 19, 2000, that were indicative of the child being sexually abused by her father, who also lived in the home. The child gave consistent statements in a forensic interview later that same day and to her grandfather several days later.

[32] The Supreme Court held that the trial court erred by admitting the statements into evidence at trial. *Id*. at 704. Pivotal to the Court's holding was the lack of evidence regarding when the alleged molestation occurred:

> [H]ere there is no evidence at all as to when the alleged molestation occurred. That is, while the evidence supports a conclusion that the mother sought both medical attention and the intervention of law enforcement after her conversation with A.C. on May 19, *there is absolutely nothing of record to tie the alleged molestation to May 19 or any other date*. Indeed by alleging in its charging information that the offense occurred "on or before April 1, 2000 and May 19, 2000," the State effectively concedes

> there was a period exceeding six weeks during which the alleged molestation could have taken place.

Id. at 703 (emphasis added). And the subsequent statements from the forensic interview and to the grandfather were concerning to the Court because the "intervening delay created the potential for an adult to plant a story or cleanse one." *Id*. "Added to these difficulties," the Court noted the child's inability to understand the difference between the truth and a lie. *Id*. at 704. The Court made clear, however, that a protected person's inability to understand the nature and obligation of an oath does not, alone, preclude admission of their statements if the statutory requirements are met. *See id.*

[33] Ultimately, the Court found insufficient indicia of reliability based on the combination of the following circumstances:

> there was no indication that A.C.'s statements were made close in time to the alleged molestations, the statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing, and A.C. was unable to distinguish between truth and falsehood.

Id. Further, the Court held that the admission of this improper evidence was not harmless because without the hearsay statements, "there was a complete absence of evidence." *Id*.

[34] We agree with the State that this case is easily distinguishable from *Carpenter*. Most notably, the record is not silent on when the alleged abuse of C.H. occurred. Howe himself admitted in his videotaped confession that the sexual

activity with C.H. had been occurring approximately once a week since Christmas 2018, with it becoming more frequent in the months leading up to C.H.'s disclosure. This included regularly trying to put his penis in C.H.'s vagina and stopping only when she would tense up and tell him that it hurt. Thus, the evidence presented at trial ties the alleged abuse of C.H., at least the most recent abuse, to a period close in time to the challenged statements. Further, unlike in *Carpenter*, only a matter of minutes separated the initial disclosure to Chavez and C.H.'s statement to Lori in Chavez's presence.

[35] The circumstances of the initial disclosure are also noteworthy. C.H.'s statement to Chavez – someone familiar to but unrelated to C.H. – was made completely spontaneously, at church during a conversation about birthdays, and it clearly shocked Chavez. There is no indication in the record of coaching or even questioning by Chavez that might have elicited such a statement. And there is no suggestion that anyone – Chavez, Lori, or C.H. – had a motive to fabricate allegations of abuse against Howe. Indeed, Lori did not even act on the disclosures made by C.H. except to warn Howe that C.H. had been talking at church.

[36] It is undisputed that C.H. could not comprehend the nature and obligation of an oath, and she was known to get off track often during conversations. But the record shows that she was not prone to make up stories. Though a woman by chronological age, her severe cognitive disability made her present more like a naïve child. The content of C.H.'s statements to Chavez and Lori reflected that

child-like nature, as the details were fleeting and not directly targeted at incriminating Howe.

[37] After considering the totality of the circumstances, we cannot say that the trial court abused its discretion by finding sufficient indicia of reliability and admitting the statements into evidence at trial.

2. Double Jeopardy

[38] Howe contends that his convictions for rape and incest violate Indiana's prohibition on substantive double jeopardy.[2] He frames his challenge under both common law double jeopardy principles and the statutory prohibition set out in *Wadle*.

[39] We begin by rejecting the portion of Howe's argument that relies on the common law. Aside from two early outliers, this court has consistently held that common law double jeopardy jurisprudence did not survive *Wadle*. *See, e.g., Rice v. State*, 199 N.E.3d 815, 820 (Ind. Ct. App. 2022) ("In light of the development of the case law applying *Wadle* and our supreme court's reaction to that case law, we must conclude that it intended for *Wadle* to clear away both *Richardson* and the common law double jeopardy jurisprudence that developed following *Richardson*."), *trans. denied*; *Morales v. State*, 165 N.E.3d 1002, 1007 (Ind. Ct. App. 2021) (stating "*Wadle* engulfed all [substantive] double jeopardy

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[2] "Substantive double jeopardy" refers to multiple convictions or punishments for the same offense in a single trial. *Wadle v. State*, 151 N.E.3d 227, 239 (Ind. 2020).

claims”), *trans. denied*; *Jones v. State*, 159 N.E.3d 55, 61 (Ind. Ct. App. 2020) (stating *Wadle* “swallowed statutory and common law to create one unified framework for substantive double jeopardy claims”), *trans. denied*.

[40] We now turn to the merits of Howe’s double jeopardy claim made within the *Wadle* three-part framework. Where, as Howe alleges here, a single act or transaction is charged under multiple statutes, we must first review the charging statutes to determine “[i]f either statute clearly permits multiple punishment, whether expressly or by unmistakable implication.” *Wadle*, 151 N.E.3d at 253. The parties agree that neither the rape statute, Ind. Code § 35-42-4-1, nor the incest statute, Ind. Code § 35-46-1-3, clearly permits multiple punishment.

[41] Accordingly, we proceed to the second step, which requires that we “apply our included-offense statutes to determine whether the charged offenses are the same.” *Wadle,* 151 N.E.3d at 253. “If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy,” and the analysis ends without reaching step three. *Wadle,* 151 N.E.3d at 253. In other words, only “if one offense **is** included in the other (either inherently or as charged)” do we proceed to an examination of “the facts underlying those offenses, as presented in the charging instrument and as adduced at trial.” *Id*. (emphasis in original).

[42] Relevant here, Ind. Code § 35-31.5-2-168(1) defines “included offense” as an offense that “is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense

charged." Howe, correctly, does not contend that incest is an inherently included offense of rape. He claims, rather, that the incest charge was factually included in the rape charge because both charges generally alleged sexual intercourse or other sexual conduct during the same period and "the State's evidence of sexual encounters between Mr. Howe and C.H. did not distinguish between the Rape count and the Incest count." *Appellant's Brief* at 27. Howe's argument misses the mark.

[43] "An offense is 'factually included' when 'the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense.'" *Wadle,* 151 N.E.3d at 251 n. 30 (quoting *Young v. State*, 30 N.E.3d 719, 724 (Ind. 2015)). Here, Howe was charged with rape as follows:

> On or between April 1, 2019 and July 7, 2019, … ELON EDGAR HOWE did knowingly or intentionally have sexual intercourse with [C.H.], or knowingly or intentionally caused [C.H.] to perform or submit to other sexual conduct when [C.H.] is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given ….

Appendix Vol. 2 at 44. And the incest charge alleged:

> On or between April 1, 2019 and July 7, 2019, … ELON EDGAR HOWE, being a person eighteen (18) years or older, did engage in sexual intercourse or other sexual conduct with another person, knowing that the other person was biologically related as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, to-wit: engaged in sexual intercourse with [C.H.] knowing that [C.H.] was his daughter ….

Id. The facts alleged in the rape count do not establish incest, as there is no allegation that C.H. is Howe's biological daughter, and the factual predicate of the incest count does not indicate that C.H. lacked capacity to consent, as required to establish the rape as charged.

[44] Again, I.C. § 35-31.5-2-168(1) states that our legislature intends an offense to be "included" if the offense is "established by proof of the same material elements or less than all the material elements" of the greater offense. The charge of incest requires the State to establish not the "same" or "less" than the rape charge – it requires the State to establish something else, namely, that the defendant "knows that the [victim] is related to the [defendant] biologically" within a certain degree. I.C. § 35-46-1-3. And nothing about the proof of that biological relationship speaks to Howe's conviction for rape based on C.H.'s inability to consent to sexual intercourse or other sexual conduct due to her intellectual disability. *See* I.C. § 35-42-4-1(a)(3).

[45] Because Howe's incest charge is not included in the rape charge, either inherently or factually as charged, there is no violation of double jeopardy. *See Wadle,* 151 N.E.3d at 253.

3. Consecutive Sentences

[46] Howe contends that the trial court abused its discretion by imposing consecutive sentences.

> Sentencing decisions rest within the sound discretion of the trial court, and as long as a sentence is within the statutory range, it is

> subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or the reasonable, probable, and actual deductions to be drawn therefrom.
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> One of the ways in which a trial court may abuse its discretion in sentencing is by relying on reasons that are improper as a matter of law. "Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491. When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence may still be upheld.

Moyer v. State, 83 N.E.3d 136, 140-41 (Ind. Ct. App. 2017) (some citations omitted), *trans. denied*. Further, to impose consecutive sentences, the trial court must find at least one aggravating circumstance, and consecutive sentences are improper when aggravators and mitigators are in equipoise. *Hoeppner v. State*, 918 N.E.2d 695, 699 (Ind. Ct. App. 2009); *see also Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) ("A single aggravating circumstance may be sufficient to support the imposition of consecutive sentences."), *trans. denied*.

[47] Here, the trial court gave a lengthy statement at the hearing, which it supplemented with a written sentencing order. Much of the court's focus was on the particular depravity of the crimes, which included sexual penetration and oral sex and were well planned as he preyed on his "very, very vulnerable daughter," with the abuse occurring at least weekly "over a period of at least 3

months." *Transcript Vol. 8* at 156; *Appendix Vol. 2* at 152. The court noted Howe's complete lack of empathy or concern for C.H. during his interview with Sgt. Komisarcik, in which he seemed concerned only about saving his marriage and staying out of jail. The court observed, "I have no doubt, Mr. Howe, that you felt like you were one upping everybody involved by not ejaculating on [or in] her. You could see it all over in your face in that statement." *Transcript Vol. 8* at 160. Further, the court noted that Howe blamed his actions on the fact that his wife did not give him enough sex and that he was somehow aroused by seeing C.H. "seizing in the bathtub naked." *Id*. at 159.

[48] The court found additional aggravating factors too.[3] For the rape, it found that Howe was in a position of trust with C.H., with him being her father and having care, custody, and control of C.H. while abusing her. For incest, the court found aggravating that C.H. is severely intellectually disabled: "The victim has an IQ of 48, and has virtually no comprehension of the act, nature or consequences of [Howe] engaging in sexual relations with her." *Id*. at 163.

[49] Howe does not challenge the above aggravators except to suggest that the evidence did not establish that he preyed on C.H. any specific number of times over the three months listed in the charges. On the contrary, Howe himself

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[3] As an aggravator, the trial court also found that probation or a suspended sentence would minimize the seriousness of the crime. This was not used as a basis for ordering the sentences to be served consecutively.

acknowledged that the sexual activity had been occurring since about Christmas of 2018 and that, more recently, it had been happening about weekly.

[50] Additionally, Howe argues that the trial court erred by relying on his IRAS score as an aggravating factor. *See J.S. v. State*, 928 N.E.2d 576, 578 (Ind. 2010) (holding that "offender recidivism risk assessment instruments do not function as aggravating or mitigating circumstances for the purpose of determining the length of sentence appropriate for each defendant"). The trial court found in this regard:

> The Defendant's overall IRAS score puts him in the HIGH risk category to reoffend because of the nature of the offenses, his lack of empathy for others, his rationalization of his conduct and his general feeling that he lacks control over the events of his life. The Court notes that the Defendant[] demonstrated his "rationalization" of his sexual abuse of the victim by indicating in his recorded statement to the police that his wife was not providing him with enough/any sex which prompted him to be sexually attracted to his daughter. He assisted his daughter when she experienced seizures while bathing and these moments fueled his inappropriate attraction to his daughter.

Appendix Vol. 2 at 152. The court's statement reveals that it did not rely on the risk assessment score alone but rather discussed it along with the court's own evaluation of the other sentencing evidence. *See J.S.*, 928 N.E.2d at 578 (While the scores "do not in themselves constitute, and cannot serve as aggravating and mitigating circumstances," they "may be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence."). Moreover, to the extent the trial court improperly considered the

risk assessment, we find the error harmless because we are confident, based on the quantity and quality of the other aggravating factors, against the lone mitigating factor of Howe's lack of criminal history, that the trial court would have imposed consecutive sentences without it.

4. Appropriateness of the Sentence

[51] Finally, Howe argues that his sentence is inappropriate in light of the nature of the offenses and his character. Pursuant to Ind. Appellate Rule 7(b), this court may 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 character of the offender. Sentencing review under App. R. 7(b) is deferential to the trial court's decision, and we avoid merely substituting our judgment. *Golden v. State*, 862 N.E.2d 1212, 1218 (Ind. Ct. App. 2007), *trans. denied*. "Such deference 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, 122 (Ind. 2015).

[52] The principal role of App. R. 7(b) review is to "attempt to leaven the outliers" and to "identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve the perceived 'correct' result in each case." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). The question is not whether another sentence is more appropriate; the question is whether the sentence imposed is inappropriate. *King v. State*, 894

N.E.2d 265, 268 (Ind. Ct. App. 2008). Further, Howe bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[53] The sentencing range for a Level 3 felony is three to sixteen years, with an advisory sentence of nine years. Ind. Code § 35-50-2-5(b). The range for a Level 5 felony is one to six years, with an advisory sentence of three years. I.C. § 35-50-2-6(b). The trial court imposed one year shy of the maximum sentence on each count and ordered them to be served consecutively, for an aggregate sentence of twenty years.

[54] Howe argues that the nature of his offenses supports concurrent sentences at the advisory level. We cannot agree, as the offenses – two distinct crimes – were particularly egregious in this case. The evidence established that C.H. was not just severely intellectually disabled, in the bottom one percent of the population, but also regularly suffered from seizures. She relied on Howe and Lori to care for her even into adulthood. Howe, in turn, took his position of trust and used it to sexually abuse C.H. on a regular basis – by his own account about weekly in the months leading up to C.H.'s disclosure and at a time when C.H.'s seizure activity was increasing, likely due to stress. His repeated attempts to penetrate C.H.'s vagina caused her pain, which she verbalized to him on multiple occasions. Howe also warned C.H. not to tell anyone about their sexual activities, which he referred to as giving attention to C.H.

[55] As detailed by the trial court, Howe rationalized his behavior by blaming his wife for not having sex with him, which he claimed was causing him to become impotent. And Howe described becoming aroused while seeing his naked daughter during or after a seizure. He believed that he could avoid criminal liability if he did not ejaculate inside of C.H., instead choosing to do so in the bathroom, sometimes with the assistance of C.H. by having her place her mouth on his penis. Howe's actions were calculated and would have continued if not for the spontaneous disclosure to Chavez, who then took steps to protect the vulnerable, innocent, child-like C.H.

[56] Howe's character also does not render the sentence inappropriate. Like the trial court, we acknowledge that Howe had a complete lack of criminal history before the instant charges. The trial court, however, aptly found, as reflected in Howe's recorded statement, that he lacked empathy for others, was "an absolute narcissist," and never once considered how his actions impacted C.H. *Transcript Vol. 8* at 158. After his abuse of C.H. came to light, Howe's concerns turned to staying out of jail so that Lori would not leave him. Further, although Howe essentially confessed to the alleged crimes during his recorded interview, he did so unknowingly because he misunderstood the state of the law, and he attempted to rationalize his behavior.

[57] App. R. 7(B) is meant to leaven the outliers. Howe's aggregate twenty-year sentence for rape and incest – offenses he committed on multiple occasions against C.H. – is not an outlier that warrants revision.

[58] Judgment affirmed.

May, J. and Foley, J., concur.