MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Jason N. Barkley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 28, 2023

Court of Appeals Case No. 23A-CR-184

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-2101-F3-4

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

Altice, Chief Judge.

Case Summary

[1] Jason N. Barkley appeals the eighteen-year aggregate sentence that was imposed following his convictions for attempted rape, a Level 3 felony, incest, a Level 5 felony, and sexual battery, a Level 6 felony. Barkley contends that the trial court abused its discretion in sentencing him because it failed to find various mitigating factors that were supported by the record, and that the sentence is inappropriate.

[2] We affirm.

Facts and Procedural History

[3] On September 14, 2020, at approximately 6:00 p.m., twenty-eight-year-old C.S. was walking to her Fort Wayne home following a meeting with her new employer. At some point, C.S. decided to see if Barkley, her uncle, would drive her home. C.S. walked to Barkley's nearby residence and when she arrived, she discovered that Barkley was not able to drive because he had been drinking.

[4] Barkley invited C.S. into his home for a drink and to celebrate her new job. After drinking six or eight "shots" of liquor, C.S. felt "drunk and tired." *Transcript Vol. I* at 218. Barkley told C.S. that she could "crash" in an extra bedroom because his children were away. *Id.* C.S. went into the bedroom, closed the door, and fell asleep on the bed fully clothed.

[5] At some point, C.S. woke up and noticed that Barkley had removed her leggings and was on top of her. Although C.S. did not open her eyes, she felt that her legs had been "spread open." *Id.* at 221. C.S. felt pressure on her vagina and heard Barkley say, "come on." *Id.* at 222. C.S. then lost consciousness.

[6] Sometime thereafter, C.S. woke up in Barkley's bathtub wearing no pants. C.S. immediately texted a friend about what had occurred and to contact the police. C.S. put on her leggings and ran from Barkley's residence. While C.S. was walking down the street, several police officers stopped and interviewed her about the incident. C.S. then went to a friend's house where she spent the night.

[7] A rape kit was performed the next day at the local Sexual Assault Treatment Center. The DNA profiles indicated it was at least one trillion times more likely that the DNA collected in the swabs originated from C.S. and Barkley than from C.S. and an unknown, unrelated individual.

[8] On January 21, 2021, the State charged Barkley with two counts of attempted rape, a Level 3 felony, incest, a Level 5 felony, and two counts of sexual battery, a Level 6 felony. Following a jury trial on December 9, 2022, Barkley was found guilty on all counts.

[9] The presentence investigation report indicated that Barkley's contacts with the criminal justice system began in 1984, when he was placed on a program of informal adjustment by the juvenile court when he was fourteen years old. In

1994, Barkley was convicted of a misdemeanor for property damage and resisting law enforcement in Wisconsin and was sentenced to three years of probation. In 2000, Barkley was convicted of Class A misdemeanor operating while intoxicated in Indiana, served executed time, and was ordered to complete an alcohol treatment program. The probation department also calculated a risk assessment score (IRAS) regarding Barkley's potential to reoffend. Barkley was placed in the low-risk category to reoffend.

[10] At the sentencing hearing on December 29, 2022, C.S. testified that Barkley "took my sanity, my ability to be a mother, to function out in society. I have never even felt safe since that day, not with anyone." *Transcript Vol. II* at 199-200. C.S. also informed the trial court that she had experienced homelessness after becoming addicted to fentanyl as a means of "escape" from the reality of Barkley's conduct. *Id.* at 200.

[11] The trial court found Barkley's employment and military history as mitigators. It then identified Barkley's criminal history, the violation of his position of trust, and the impact that his offenses had on C.S., as aggravating factors. The trial court merged the attempted rape counts, as well as the two counts of sexual battery, and sentenced Barkley to twelve years for attempted rape, four years for incest, and two years for sexual battery. It ordered the sentences to run consecutively for an executed eighteen-year aggregate sentence.

[12] Barkly now appeals.

Discussion and Decision

I. Abuse of Discretion

[13] Barkley contends that the trial court abused its discretion when it failed to find certain mitigating factors that were supported by the record. More particularly, Barkley argues that the trial court failed to identify his alleged minimal criminal history, the low risk that he would reoffend, the hardship that incarceration would have on his two minor children, and his previous efforts at rehabilitation, as mitigating circumstances.

[14] In general, sentencing decisions are left to the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). 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 to be drawn therefrom. *Anglemyer v. State,* 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A trial court may abuse its discretion by: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91.

[15] It is well settled that the finding of mitigating circumstances is within the trial court's discretion. *Rascoe v. State,* 736 N.E.2d 246, 248-49 (Ind. 2000). An allegation that the trial court failed to find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 249. The trial court is not obligated to accept the defendant's contention as to what constitutes a mitigating circumstance. *Id.* We further note that while the trial court must review the presentence investigation report and consider all aggravating and mitigating circumstances presented in it, the court is not required to comb through it and present mitigating argument on behalf of the defendant when the defendant fails to do so. *Bryant v. State,* 984 N.E.2d 240, 252 (Ind. Ct. Ap. 2013), *trans. denied*. The defendant's failure to present a mitigating circumstance to the trial court waives consideration of the circumstance on appeal. *Id.*

[16] Barkley first argues that the trial court should have identified his alleged "minimal" criminal history as a mitigating circumstance. *Appellant's Brief* at 11. The record shows that Barkley became involved with the juvenile justice system when he was fourteen that resulted in his placement "on a program of informal adjustment." *Appellant's Appendix Vol. II* at 106. Barkley also has three prior misdemeanor convictions, including a conviction for driving while intoxicated. Moreover, it was established that Barkley's prior rehabilitative efforts including probation, incarceration, and alcohol counseling and programs, had failed. Given these circumstances, we reject Barkley's assertion that his criminal history was minimal and should have been deemed a mitigating circumstance.

Moreover, inasmuch as Barkley had a prior alcohol-related offense, his current offenses involved the use of alcohol, and prior rehabilitation measures were not successful, we likewise conclude that the trial did not abuse its discretion in not identifying Barkley's criminal history as a mitigating factor and, instead, finding that it was an aggravating circumstance.

[17] Barkley next claims that the trial court abused its discretion in not identifying his low risk to reoffend as a mitigating factor in light of his low IRAS. While trial courts may employ risk assessment scores "in formulating the manner in which a sentence is to be served," those scores "are not intended to serve as aggravating or mitigating" factors. *Malenchik v. State,* 928 N.E.2d 564, 575 (Ind. 2010).

[18] The record shows that Barkley went without a criminal conviction for nearly twenty years before committing the instant offenses. Barkley's prior offenses, however, involved the use of alcohol, and his continued criminal conduct involving alcohol defeats his claim that a period of time without a criminal conviction should be considered mitigating. Put another way, Barkley's alleged low likelihood of reoffending is contradicted by his prior alcohol related convictions and his alcohol consumption associated with the commission of the instant offenses. In short, we cannot say that the trial court abused its discretion when it declined to identify his alleged low risk to reoffend as a mitigating factor.

[19] As for the hardship that Barkley's children face because of his incarceration, it is the defendant's burden to show that his incarceration would cause an "*undue hardship*" to his family. *Nicholson v. State,* 768 N.E.2d 443, 448 n.13 (Ind. 2002) (emphasis added). Indeed, many persons convicted of serious offenses have children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship to the offender's children. *Dowdell v. State,* 720 N.E.2d 1146, 1154 (Ind. 1999).

[20] In this case, it was established that Barkley's two minor children reside with their mother, and he does not pay support. Aside from Barkley's assertion that he has two children, he presented no evidence demonstrating that the hardship to his children would be any worse than that normally suffered by children of an incarcerated relative. Thus, Barkley's abuse of discretion argument fails. *See id.*

[21] As for Barkley's contention that the trial court should have identified his treatment for alcohol abuse as a mitigating circumstance, he did not present that issue at sentencing. Thus, the contention is waived. *See Anglemyer,* 868 N.E.2d at 493 (holding that the trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing). Waiver notwithstanding, we note that Barkley informed the probation department that he began drinking alcohol two to three times per week when he was nineteen. Barkley was ordered to complete an alcohol abuse program following his conviction for driving while intoxicated in 2000. He continued to abuse alcohol, and there is no evidence that he began to address his alcohol issues

until after the charges were filed in this case. Moreover, the trial court is not required to consider alleged mitigating factors that are not supported by sworn testimony or evidence. *Hampton v. State,* 719 N.E.2d 803, 808 (Ind. 1999). In light of these circumstances, we cannot say that the trial court abused its discretion in declining to identify Barkley's late rehabilitation efforts as a mitigating circumstance.

[22] For all these reasons, we conclude that Barkley has failed to show that the trial court abused its discretion in sentencing him.

II. Inappropriate Sentence

[23] Barkley argues that his eighteen-year aggregate sentence is inappropriate when considering the nature of the offenses and his character in accordance with Ind. Appellate Rule 7(B). He contends that this cause should be remanded with instructions that the trial court enter an aggregate sentence of nine years.

[24] Our standard of review regarding inappropriate sentence claims is well-settled:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record.

George v. State, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020), *trans. denied*.

[25] Whether we regard a sentence as inappropriate turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. *Cardwell,* 895 N.E.2d at 1224. The defendant has the burden of persuading us that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). More particularly, the defendant must show that the sentence is inappropriate with "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).

[26] The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). When a sentence 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." *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[27] The sentencing range for attempted rape, a Level 3 felony, is from three to sixteen years with an advisory sentence of nine years. The sentencing range for incest, a Level 5 felony, is between one and six years with an advisory sentence of three years, and the range for sexual battery, a Level 6 felony, is from six months to two and one-half years with an advisory sentence of one year. In this

case, the trial court sentenced Barkley to twelve years for attempted rape, four years for incest, and two years for sexual battery, with those sentences to run consecutively.

[28] When examining the nature of the offense, we look to the details and circumstances of the crime and the defendant's participation therein. *Id.* Our consideration of the nature of the offense recognizes the range of conduct that can support a given charge and the fact that the particulars of a given case may render one defendant more culpable than another charged with the same offense. *Hamilton v. State,* 955 N.E.2d 723, 727 (Ind. 2011).

[29] Barkley contends that his sentence was inappropriate because there was no evidence that the nature of his offenses "was more egregious than any other offense of its type." *Appellant's Brief* at 16. To the contrary, the evidence shows that C.S. trusted Barkley—her uncle. Barkley encouraged C.S. to drink heavily and once she became intoxicated, Barkley sexually battered her, removed her leggings, and attempted to rape her. Barkley's actions resulted in C.S's abuse of fentanyl, which was the only way that C.S. "could sleep and escape" from the reality of Barkley's conduct. *Transcript Vol. II* at 199-200. Barkley's conduct in taking advantage of C.S.'s intoxication to sexually abuse her all resulted in a devastating effect on C.S. All these circumstances demonstrate the particularly egregious nature of Barkley's offenses. In short, Barkley has failed to present compelling evidence portraying the nature of his offenses in a positive light necessary to show that his sentence is inappropriate.

[30] Turning to Barkley's character, we note that "character is found in what we learn of the offender's life and conduct." *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). We conduct our review of a defendant's character by engaging in a broad consideration of his qualities. *Madden*, 162 N.E.3d at 564. A defendant's life and conduct are illustrative of character. *Id.*

[31] A defendant's criminal history, including prior contact with the criminal justice system, is relevant when considering character under Appellate Rule 7(B). *Connor v. State*, 58 N.E.3d 215, 221 (Ind. Ct. App. 2016) (finding that the defendant's juvenile adjudication reflected poorly on his character). The significance of a defendant's contacts with the justice system "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006).

[32] Here, the evidence showed that Barkley has amassed a juvenile adjudication and three misdemeanor convictions that included a conviction for driving while intoxicated. Barkley has continued to abuse alcohol and has failed to adequately treat his alcohol problem. Barkley's criminal history, along with his failure to comply with rehabilitative treatments that have resulted in severe criminal conduct reflect poorly on his character. *See, e.g., Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). (observing that the defendant's molestation of his daughter was a violation of trust and "an extremely poor commentary on [his] character").

[33] In sum, Berkley has failed to persuade us that his eighteen-year aggregate sentence is inappropriate.

[34] Judgment affirmed.

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