MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Donald K. Ingram,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 25, 2023

Court of Appeals Case No. 23A-CR-838

Appeal from the Morgan Superior Court

The Honorable Sara Dungan, Judge

Trial Court Cause No. 55D03-2106-F1-821

Memorandum Decision by Judge Riley.
Judges Crone and Mathias concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Donald K. Ingram (Ingram), appeals his conviction and sentence for child molesting, a Level 4 felony, Ind. Code § 35-42-4-3(b).

[2] We affirm.

ISSUES

[3] Ingram presents this court with two issues on appeal, which we restate as:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to support the trial court's conclusion that Ingram fondled M.I. with the intent to arouse or satisfy sexual desires; and

(2) Whether Ingram's sentence is inappropriate in light of the nature of the offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] In 2020 and 2021, M.I., then ten or eleven years old, lived with her parents in a home down the street from her grandparents, Joyce Ingram and Ingram, who would frequently pick M.I. up from school and care for her at their home until M.I.'s parents were done with work for the day. M.I. was often the only child present at her grandparents' home.

[5] When M.I. was approximately nine years old, Ingram started to make inappropriate sexual remarks to her while they were in the car. These conversations made M.I. uncomfortable. When M.I. was ten or eleven years old, M.I. and Ingram were in Ingram's vehicle when Ingram started to rub the

left side of M.I.'s thigh, close to her hip. On another occasion, Ingram and M.I. were near the car outside Ingram's residence, when Ingram touched M.I. on her thigh, kissed her collarbone, and rubbed his penis over his clothing in front of M.I. M.I. walked away from Ingram when she noticed him rubbing his penis.

[6] On a separate occasion, when M.I. was at her grandparents' home, she walked into Ingram's bedroom to ask him if he wanted carryout. Ingram was sitting on the bed, and, instead of responding to M.I.'s question, he asked M.I. for a hug. While M.I. gave Ingram a hug, Ingram kissed M.I.'s collarbone. M.I. tried to push him away unsuccessfully. Ingram continued to hug her and, while laying down, pulled M.I. on top of him. Ingram then reached under M.I.'s clothes and began to rub the private part that she uses "for peeing" with his hand. (Transcript Vol. II, p. 84). M.I. "jammed" her knee into Ingram's shoulder and ran outside. (Tr. Vol. II, p. 86). She could not remember if his hand went into her private part.

[7] M.I. did not inform an adult as to what had happened because Ingram had "threatened [that] if [she] said anything he was going to hurt [her] family." (Tr. Vol. II, p. 87). M.I. did tell her best friend, A.M. A.M. had been to Ingram's house once and would Facetime with M.I. while she was at her grandparents' home. While at Ingram's home, A.M. and M.I. "mostly just stayed away from [Ingram] the whole time. We were outside a lot." (Tr. Vol. II, p. 63). A.M. remembered that, while on Facetime with M.I., she overheard Ingram saying "[d]on't tell anyone I did that," and "to delete the messages." (Tr. Vol. II, pp. 63-64). M.I. and A.M. are the same age, and A.M. remembered these instances

happening when she was about eleven or twelve years old. A.M. told her mother, who in turn, notified M.I.'s parents.

[8] M.I. was interviewed at Susie's Place, a child advocacy center. Just when M.I. completed her interview, M.I.'s father, who is Ingram's son, received a voicemail from Ingram, in which he admitted that he tried to pinch M.I. on the butt while they were playing around and his hand when down her pants but he denied being "like that." (State's Exh. 10).

[9] On June 15, 2021, the State filed an Information, charging Ingram with child molesting, a Level 1 felony, and child molesting, a Level 4 felony. On January 21, 2023, after Ingram waived his right to a jury trial, the trial court conducted a bench trial. At the time of trial, M.I. was thirteen years old and Ingram was seventy-three years old. At the conclusion of the evidence, the trial court found Ingram guilty of child molesting, as a Level 4 felony and not guilty of child molesting, as a Level 1 felony. Ingram's presentence investigation report reflected that, in addition to traffic violations, Ingram had convictions for "unlawful use" in 1967 and for operating a vehicle while intoxicated in 1981. (Appellant's App. Vol. II, p. 22). In 2020, he was arrested on criminal mischief charges which were later dismissed.

[10] On March 24, 2023, the trial court conducted a sentencing hearing. Ingram testified that he had a number of medical issues controlled by medication, and that being incarcerated had not affected these medical issues. After his arrest, he and his wife divorced and he had been staying in a motel prior to

incarceration. He informed the trial court that he did not have a place where he could live post-incarceration, believing that he would be "dead by then." (Tr. Vol. II, p. 127). Ingram also testified that he "did touch my granddaughter, but it wasn't on purpose . . . she believes it so it must be true in her head. Well in my head, it was done accident [sic] and I didn't mean it. We were playing, and tossing her stuff, and that's how it happened." (Tr. Vol. II, p. 129). M.I. made a victim impact statement and informed the court that she "cannot look at [her]self and tell [her]self I'm pretty." (Tr. Vol. II, p. 128).

[11] The trial court identified as aggravating factors Ingram's threats to harm M.I. or her family if she told anyone, the age of the victim, Ingram's criminal history, Ingram's violation of his position of trust and caretaker within the family and the trust of his grandchild, his refusal to take responsibility for his actions, and his statement that this was an accident. As sole mitigating factor, the trial court considered Ingram's age. At the close of the sentencing hearing, the trial court sentenced Ingram to twelve years at the Department of Correction.

[12] Ingram now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

[13] Ingram contends that the State failed to present sufficient evidence beyond a reasonable doubt to establish that he committed the act of child molesting, as a Level 4 felony. It is well-established that when we review the sufficiency of the evidence to support a conviction, we consider only the probative evidence and

reasonable inferences supporting the verdict. *Holden v. State*, 149 N.E.3d 612, 616 (Ind. Ct. App. 2020). It is not our role as an appellate court to assess witness credibility or to weigh the evidence. *Id*. We will affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id*. A person commits Level 4 felony child molesting when that person, with a child under fourteen years old, "performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person[.]" I.C. § 35-42-4-3(b). The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points. *Kress v. State*, 133 N.E3d 742, 748 (Ind. Ct. App. 2019). In addition, "[t]he testimony of a sole child witness is sufficient to sustain a conviction for molestation." *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012).

[14] The State presented evidence that Ingram started grooming M.I. when she was about nine years old by engaging her in inappropriate sexual conversations. When she was ten or eleven, he started touching her. M.I. testified that Ingram and M.I. were near the car outside Ingram's residence, when Ingram touched M.I. on her thigh, kissed her collarbone, and rubbed his penis over his clothing in front of M.I. It can be inferred from the natural and usual sequence of Ingram rubbing his penis after touching M.I. that the rubbing was done with the intent to arouse or gratify his sexual desires. *See Kress*, 133 N.E.3d at 748.

[15] Ingram's arguments that the State failed to establish how long the touching occurred, that there was no evidence that Ingram was making any noise or any evidence of physical arousal of Ingram or M.I., and that there was no evidence the touching occurred over or under clothing are all unavailing. To support his conviction, evidence of a single touching with intent to arouse is sufficient; the statute does not require any audible sounds nor does it include the explicit mandate that the touch needs to occur under clothing. *See* I.C. § 35-42-4-3(b). Although Ingram attempts to separate his act of rubbing on his penis in time from when he touched M.I.'s thigh and characterize them as two separate events, Ingram ignores M.I.'s own testimony that places both of Ingram's action within the same time frame when both she and Ingram were standing by the car when it was parked near the residence. Furthermore, Ingram's reliance on M.I.'s testimony that she could not remember whether she was ten or eleven years old at the time is equally unpersuasive as M.I. was always under the statutory age of fourteen. "It is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases. The exact date becomes important only in limited circumstances, including the case where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). Accordingly, as we conclude that the State presented sufficient evidence to support Ingram's conviction for Level 4 felony child molesting, we affirm the trial court.

II. *Appropriateness of Sentence*

[16] Ingram contends that the trial court's imposition of a twelve-year sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) states that a "Court may revise a sentence . . . if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Indiana's sentencing scheme allows trial courts to tailor appropriate sentences based on the circumstances presented; accordingly, the trial court's judgment should receive "considerable deference" and our role upon appellate review is to attempt to "leaven the outliers." *Cardwell v. State*, 895 N.E.2d 1219, 1223, 1225 (Ind. 2008). Our review may include the aggravators and mitigators identified by the trial court, in addition to any other pertinent factors in the record, such as the "sense of the culpability of the defendant, the severity of the crime, [and] the damage done to others." *Id*. at 1224. We will not revise a sentence in the absence of compelling evidence that portrays 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). Furthermore, we do not probe whether the defendant's sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence imposed is inappropriate. *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2008). Thus, revision under Rule 7(B) is proper only in "exceptional cases." *Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). The defendant bears the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[17] Ingram was convicted of Level 4 felony child molesting. The sentencing range for a Level 4 felony is between two and twelve years with the advisory sentence being six years. I.C. § 35-50-2-4.5. By sentencing Ingram to twelve years, the trial court imposed the maximum sentence.

[18] In considering whether Ingram's twelve year sentence is inappropriate in light of the nature of the offense, we compare the elements of the offense to the "details and circumstances of the commission of the offense." *Townsend v. State*, 45 N.E.3d 821, 831 (Ind. Ct. App. 2015), *trans. denied*. Here, Ingram's actions essentially amounted to a two-prong violation of trust. First, he groomed his granddaughter at the age of nine by engaging in sexual conversations with her and then advanced to touching her thigh in the car and rubbing his penis in front of her when she was ten or eleven, to the point she "cannot look at [her]self and tell [her]self I'm pretty." (Tr. Vol. II, p. 128). What should have been an innocent hug between a grandparent and grandchild turned into an odious sexual touching when Ingram's hand moved into M.I.'s pant and touched her genitalia. He escalated this violation of trust by threatening M.I. and her family if she told anyone. Second, he violated the trust instilled in him by M.I.'s parents who entrusted him with their daughter in order to keep her safe and well-cared for.

[19] Turning to Ingram's character, we note that a defendant's criminal history is part of our consideration of his character under Appellate Rule 7(B). *Pelissier v. State*, 122 N.E.3d 983, 990 (Ind Ct. App. 2019), *trans. denied*. And it is well-settled that a defendant's criminal history varies in significance based upon the

"gravity, nature and number of prior offenses as they relate to the current offense." *Smith v. State*, 889 N.E.2d 261, 263 (Ind. 2008). Although Ingram's criminal history is minimal, happened mostly in the past, and is not related to the instant offense, even a limited criminal history reflects poorly on an individual's character. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Here, Ingram took advantage of his young granddaughter and, when caught, failed to show any remorse, but instead claimed it was all in M.I.'s "head" and that he did not touch her on purpose, that they were just "playing." (Tr. Vol. II, p. 129). Even though this was Ingram's first child molesting offense, Indiana's risk assessment system placed Ingram at a high risk to reoffend.

[20] Based on the evidence before us, we cannot say that Ingram presented "compelling evidence portraying in a positive light the nature of the offense" or his character. *Stephenson*, 29 N.E.3d at 112. Accordingly, we affirm Ingram's twelve-year sentence.

CONCLUSION

[21] Based on the foregoing, we hold that the State presented sufficient evidence beyond a reasonable doubt to support Ingram's conviction and that his sentence is not inappropriate in light of the nature of the offense and his character.

[22] Affirmed.

Crone, J. and Mathias, J. concur