MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Timothy Glen Bryan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 20, 2023

Court of Appeals Case No. 23A-CR-944

Appeal from the Hendricks Superior Court

The Honorable Stephenie LeMay-Luken, Judge

Trial Court Cause No. 32D05-2011-FC-1

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Timothy Bryan appeals his sentence for child molesting, a Class C felony. Bryan argues that: (1) the trial court abused its discretion in finding an aggravating factor and failing to find his lack of criminal history as a mitigating factor; and (2) his sentence is inappropriate. We find Bryan's arguments without merit, and accordingly, we affirm.

Issues

[2] Bryan raises two issues, which we restate as:

I. Whether the trial court abused its discretion in its findings of aggravating and mitigating factors.

II. Whether Bryan's sentence is inappropriate.

Facts

[3] Bryan is the father of R.C., and R.C. is the mother of E.C., who was born in 2005. In June 2014, nine-year-old E.C. spent the night alone for the first time with Bryan and his wife, Becky.[1] During the evening, Becky left to get dinner. Bryan and E.C. were sitting on the couch watching a movie. Bryan put E.C.'s hand on his penis, and she felt a "bulge." Tr. Vol. III p. 24. Bryan then touched E.C.'s thigh and reached under E.C.'s skirt to touch her vagina over her underwear. Bryan also kissed E.C. with his mouth open and put his tongue

[1] Becky is R.C.'s step-mother.

in her mouth. Bryan asked E.C. if she "wanted more," and she said "no." *Id.* at 26. Bryan then told E.C. "don't tell Nanna," meaning Becky. *Id.*

[4] As E.C. got older, she realized that Bryan "told [her] not to tell for a reason. Because what he did was not right." *Id.* at 28. E.C. also began to dislike being touched by anyone. In October 2020, E.C. reported the allegations to R.C., who reported the allegations to the Department of Child Services. In November 2020, the State charged Bryan with child molesting, a Class C felony.[2] A jury found Bryan guilty as charged.

[5] At the sentencing hearing, Bryan's sister, K.U., testified that Bryan began molesting her when she was approximately nine years old and Bryan was approximately fifteen years old. Although K.U. told their mother, their mother did not believe K.U. and said, "If [K.U.] told this story ever again, people who needed Jesus would not come to [their] church and get saved and, therefore, it would be [K.U.'s] fault when they burn in hell for an eternity." Tr. Vol. III p. 117.

[6] R.C., Bryan's daughter, testified that Bryan began molesting her when she was seven years old. When R.C. reported Bryan's behavior, she "was the one sent to the church alter for prayer as if [she] was the perpetrator." *Id.* at 131. R.C.

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[2] At the time of the offense, Indiana Code Section 35-42-4-3(b) provided: "A person who, with a child under fourteen (14) years of age, 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, commits child molesting, a Class C felony."

testified that Bryan can "manipulate situations and people" and is "truly a sick man." *Id.* at 132.

[7] E.B., another of Bryan's granddaughters, testified that Bryan "French kiss[ed]" her in Kentucky when she was six years old and that he did the same later in Indiana.[3] *Id.* at 127.

[8] E.C. testified that Bryan's molestation of her resulted in her diagnosis of "PTSD, depression and anxiety." *Id.* at 133. E.C. stated: "On the surface, he seems like an honest, caring man who's giving of himself. In actuality, he is quick to manipulate you for his gain and behind closed doors, you see an entirely different side of him." *Id.*

[9] Regarding the offense, Bryan stated during his presentence investigation that E.C. was having "abdominal discomfort" and that Bryan offered to hold her. He claimed that his "shorts rode up" and "[s]he puckered to kiss [him]." Appellant's Conf. App. Vol. II p. 98. Bryan reported that E.C. made the allegation because she "craves attention from her dad and he's very busy with his career." *Id.* at 100.

[10] The trial court found the following aggravators: (1) Bryan's lack of remorse; (2) Bryan was in a position of trust; and (3) R.C., E.B., K.U. were also Bryan's

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[3] Bryan was earlier acquitted of charges related to E.B. In sentencing Bryan, the trial court specifically did not consider Bryan's alleged actions that formed the basis of that charge. E.B. testified regarding actions that were not part of the earlier charges.

victims.[4] The trial court found no mitigating factors and sentenced Bryan to eight years in the Department of Correction. Bryan now appeals.

Discussion and Decision

I. Sentencing Discretion

[11] Bryan first argues that the trial court abused its discretion in sentencing him. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse occurs only 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." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[12] A trial court abuses its discretion in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a

[4] The trial court did not consider allegations of other sexual misconduct raised at the sentencing hearing because those alleged victims did not testify.

> sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91). Even when an abuse of discretion occurs, "[w]e will not remand for resentencing if we can say with confidence the trial court would have imposed the same sentence had it not considered the purportedly erroneous aggravators." *Owen v. State*, 210 N.E.3d 256, 269 (Ind. 2023).

A. Aggravating Factors

[13] Bryan argues that the trial court abused its discretion by considering uncharged allegations of misconduct as an aggravating factor. The trial court here considered the testimony of multiple other female family members that Bryan had molested them as an aggravating factor. We have held that allegations of prior criminal activity may be considered during sentencing even if the defendant has not been convicted of an offense related to the activity. *Chastain v. State*, 165 N.E.3d 589, 599 (Ind. Ct. App. 2021), *trans. denied*; *see also Harlan v. State*, 971 N.E.2d 163, 170 (Ind. Ct. App. 2012) ("Allegations of prior criminal activity need not be reduced to conviction before they may be properly considered as aggravating circumstances by a sentencing court."). The trial court specifically considered only allegations where the alleged victim testified at the sentencing hearing, and the trial court did not consider allegations for which Bryan had been earlier acquitted. Under these circumstances, we cannot say the trial court abused its discretion by considering this aggravating factor.

B. Mitigating Factor

[14] Next, Bryan argues that the trial court abused its discretion by failing to consider his lack of a criminal history as a mitigating factor. The trial court "'is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does.'" *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015) (quoting *Wilkes v. State*, 917 N.E.2d 675, 690 (Ind. 2009), *cert. denied*), *cert. denied*. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

[15] Our Supreme Court has held that "[u]ncharged crimes may be considered in assessing 'lack of criminal history' as a claimed mitigating circumstance." *Wilkes*, 917 N.E.2d at 692. "Similarly, relevant evidence of another crime is admissible to rebut the defendant's claimed lack of criminal history even if that evidence may not be sufficient to support a conviction." *Id.* Although Bryan does not have a formal criminal history, multiple female family members testified at the sentencing hearing regarding Bryan's molestations of them. The evidence demonstrated that, despite his lack of a criminal history, Bryan did not lead a law-abiding life. *See, e.g.*, *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (trial court did not err in failing to give substantial weight to defendant's lack of criminal history due to defendant's uncharged use of controlled substances and months-long sexual relationship with a fifteen-year-

old child). Bryan's proposed mitigator was not significant or clearly supported by the record. Accordingly, we conclude that the trial court did not abuse its discretion when it did not consider Bryan's lack of criminal history as a mitigating factor.

[16] Further, we note that our Supreme Court has held that "[a] single aggravating circumstance may be sufficient to support an enhanced sentence." *Hayko v. State*, 211 N.E.3d 483, 487 n.1 (Ind. 2023). The trial court here found two other significant aggravating factors—Bryan's lack of remorse and his position of trust with E.C. Bryan does not challenge those aggravators. Given Bryan's lack of remorse, as evidenced by his statements during his presentence investigation, and his position of trust as E.C.'s grandfather, we are confident the trial court would have imposed the same sentence had it not considered the uncharged molestations and if it considered Bryan's lack of criminal history as a mitigator. Accordingly, we cannot say the trial court abused its discretion when it sentenced Bryan.

II. Inappropriate Sentence

[17] Next, Bryan argues that his eight-year sentence is inappropriate. The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when it is "inappropriate in light of the nature of the offense

and the character of the offender."[5] Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice*, 6 N.E.3d at 946). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[18] "'The principal role of appellate review is to attempt to leaven the outliers.'" *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is "not to achieve a perceived correct sentence." *Id.* "Whether a sentence should be deemed inappropriate 'turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.'" *Id.* (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court's sentence "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

[5] Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g.*, *State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Ind. Ct. App. 2021) (Tavitas, J., concurring in result).

character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[19] When determining whether a sentence is inappropriate, 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). Here, Bryan was convicted of child molesting, a Class C felony. Indiana Code Section 35-50-2-6(a) provides: "A person who commits a Class C felony (for a crime committed before July 1, 2014) shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." The trial court sentenced Bryan to eight years in the Department of Correction.

[20] Our analysis of the "nature of the offense" requires us to look at the nature, extent, heinousness, and brutality of the offense. *See Brown v. State*, 10 N.E.3d 1, 5 (Ind. 2014). We may also consider whether the offender "was in a position of trust" with the victim. *Pierce v. State*, 949 N.E.2d 349, 352 (Ind. 2011). The nature of the offense is that Bryan violated his position of trust and molested his nine-year-old granddaughter. Bryan put E.C.'s hand on his penis, touched E.C.'s thigh and vagina over her underwear, kissed E.C., and put his tongue in her mouth. Bryan then asked E.C. if she "wanted more" and told her "don't tell Nanna." Tr. Vol. III p. 26. Bryan's actions caused E.C. significant trauma, and she did not reveal his actions for many years. As a result of the molestation, E.C. has been diagnosed with PTSD, depression, and anxiety.

[21] Our analysis of the character of the offender involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See Harris v. State*, 165 N.E.3d 91, 100 (Ind. 2021); *McCain*, 148 N.E.3d at 985. Seventy-three-year-old Bryan does not have a formal criminal history. He has not lived a law-abiding life, however, as multiple female family members testified at the sentencing hearing that he also molested them over the past decades. Bryan contends that several witnesses testified and vouched for his character. E.C., however, testified: "On the surface, he seems like an honest, caring man who's giving of himself. In actuality, he is quick to manipulate you for his gain and behind closed doors, you see an entirely different side of him." Tr. Vol. III p. 133. In fact, in his presentence investigation report, Bryan blamed E.C. and claimed that nine-year-old E.C. "puckered" up to kiss him. Appellant's App. Vol. II p. 98. The trial court correctly noted that Bryan preyed upon the "people [he was] supposed to love and care for and protect." Tr. Vol. III p. 155. Under these circumstances, we are not persuaded that Bryan's eight-year sentence is inappropriate in light of the nature of his offense or his character.

Conclusion

[22] The trial court did not abuse its discretion when sentencing Bryan, and his eight-year sentence is not inappropriate. Accordingly, we affirm.

[23] Affirmed.

Pyle, J., and Foley, J., concur.