MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Shawn Lee Herring,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 25, 2024

Court of Appeals Case No.
23A-CR-695

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

Trial Court Cause No.
49D30-2006-F1-19897

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

[1] A jury found Shawn Lee Herring guilty of five counts of child molesting and one count of sexual misconduct with a minor. The trial court sentenced him to over 100 years for the offenses, which he committed against his adopted foster daughter K.C. On appeal, Herring asserts that the trial court abused its discretion in excluding evidence about K.C.'s sexual history and that his sentence is inappropriate in light of the nature of the offenses and his character. We conclude that Herring has waived his evidentiary argument and that his sentence is not inappropriate. Therefore, we affirm.

Facts and Procedural History

[2] K.C. was born in 2005. When she was five years old, she and her older sisters D.S. and K.H. were removed from their biological family and placed in foster care. K.C. and D.S. were initially placed in the same foster home, but they were later placed in separate homes and lost touch with each other. In 2014, when K.C. was nine, she was placed in her fifteenth foster home with Herring and his wife, Pam Cook, who at that time were caring for two other foster children and Herring's biological son.

[3] A couple months later, when K.C. was still nine, she was sitting on the living room floor watching a movie with Herring, his son, and a foster child, who were sitting on a couch. K.C. became uncomfortable sitting on the floor and tried to sit on the edge of the couch, but that was "too small[,]" so she sat back

down on the floor. Tr. Vol. 2 at 204. Herring told K.C. that she did not have to sit on the floor and "motioned [her] over and [she] sat on his lap." *Id*. Herring placed a blanket "on top of" him and K.C. and "started to touch" her "vagina" with his hands "under [her] clothes." *Id*. at 205, 206. He stopped touching her when the movie ended.

[4] Herring and Cook adopted K.C. in February 2017. They divorced in December 2018, but Herring remained in the home.

[5] When K.C. was twelve years old, she put on her pajamas and tried to watch a DVD in her bedroom. The DVD would not play, so she asked for help. Herring fixed the problem and watched the DVD with K.C. He fondled her breasts and her leg and exposed his penis. He told K.C. to "lay down[,]" touched her vagina, and then inserted his penis in her vagina. *Id*. at 210. K.C. told Herring that "it hurt[,]" but he did not respond. *Id*. Herring ejaculated, "wiped it up with a towel[,]" and left the room. *Id*. at 213.

[6] When K.C. was thirteen years old, she was in her bedroom when Herring told her "to put [her] mouth around his penis and suck. And so [she] did." *Id*. at 212. He then inserted his penis in her vagina and "turned [her] around and stuck it in [her] butt[,]" causing it to bleed. *Id*.

[7] When K.C. was fourteen years old, she was getting ready to do laundry in the laundry room when Herring came up behind her and started rubbing her back. As she bent over to put clothes in the washer, he touched her vagina over her

clothes. He fondled and licked her breasts, "pulled down [her] pants and underwear[,]" and "stuck his penis in [her] vagina." *Id*. at 221-22.

[8] On another occasion when K.C. was fourteen years old, she came home from school and found Herring in the home office watching something on TV that he said was "not for kids." *Id*. at 226. He touched her leg and touched her vagina under her clothes. He then "unzipped his pants and stuck his penis in" her mouth and in her vagina. *Id*. at 227.

[9] Herring's molestations of K.C. "happened frequently[.]" Tr. Vol. 3 at 6. Herring told K.C. not to tell anyone about the abuse because "he might go to jail and … it might break up the family." Tr. Vol. 2 at 233. K.C. did not tell Cook about the abuse because she "didn't want to disrupt anything" and "wanted everything to be okay and … was tired of moving around." *Id*. at 234. K.C. believed that if she told Cook, Cook would "get mad at [her] or kick [her] out or something or that she [would] get mad at [Herring] and that would make everything worse." *Id*. Herring and Cook had installed several cameras in their home to monitor their foster children, but there were no cameras in K.C.'s bedroom, the laundry room, or the home office.

[10] When K.C. was fifteen years old and auditioning for a high school play, she was reunited with her sister D.S., who was auditioning for the same play. Over the next few weeks, K.C. reconnected with other biological relatives, including K.H., who lived in Texas. On May 24, 2020, approximately a month or two after their reunion, K.C. attended D.S.'s eighteenth birthday party at their

grandmother's house. At first, K.C. appeared to be "having a good time[,]" but "the closer it got time for her to leave[,]" her "tone changed." *Id*. at 179, 181. K.C. and D.S. participated in a video call with K.H. At that point, K.C. "felt safe" to disclose that Herring "was touching [her]" because "[n]obody in [her] adopted family was there to … make [her] feel uncomfortable or make [her] feel like [she] couldn't tell, and … [she] was around people who had kinda had the same experiences as [her] as far as going in the System and stuff like that." *Id*. at 232, 235. After K.C. disclosed the abuse, K.H. called 911. When police responded to the call, K.C. was "very frantic and emotional" and "crying." *Id*. at 185.

[11] On June 1, 2020, Indianapolis Metropolitan Police Department Sergeant Nicolle Flynn conducted a forensic interview of K.C., who told her that Herring started abusing her when she was nine and that the last incident occurred when she was fifteen. On June 19, 2020, Sergeant Flynn conducted a recorded interview with Herring. She advised him of his *Miranda* rights. Initially, Herring denied engaging in any improper conduct with K.C. He later admitted to touching K.C.'s vagina and penetrating her vagina with his penis, but he claimed that she instigated the encounters.

[12] The State charged Herring with four counts of level 1 felony child molesting (for performing two acts of other sexual conduct, i.e., oral and anal intercourse, and two acts of sexual intercourse with K.C. when she was under age fourteen), one count of level 4 felony child molesting (for fondling or touching K.C. with the intent to arouse or satisfy his or her sexual desires when she was under age

fourteen), and two counts of level 4 felony sexual misconduct with a minor (for performing one act of other sexual conduct and one act of sexual intercourse with K.C. when she was at least fourteen but less than sixteen years of age). A jury trial was held in February 2023. K.C., D.S., Cook, and Sergeant Flynn testified for the State, and the recording of Herring's interview with the sergeant was played for the jury. The jury found Herring guilty on all counts except the sexual misconduct count involving sexual intercourse.

[13] A sentencing hearing was held in March 2023. The trial court found as aggravating circumstances that "the harm, injury, loss or damage suffered … was significantly greater than the elements necessary to prove the offense"; that Herring threatened to "break up the family"; and, as "the worst aggravator in this situation[,]" that K.C. "was excited to be in a house where someone loved and cared for her and then [Herring] took advantage of that situation." Tr. Vol. 3 at 147-48. The court found as a mitigating circumstance that Herring had "led a law-abiding life for a substantial period before the commission of the crime[s]" and that his minimal criminal history was not entitled to either aggravating or mitigating weight. *Id*. at 147.

[14] The court then imposed a thirty-five-year executed sentence on each of the level 1 felony convictions, with all but one to run consecutive. The court also imposed a five-year suspended sentence, with three years on sex offender probation, on each of the level 4 felony convictions, to run concurrent with each other but consecutive to the sentence on the remaining counts, for an aggregate sentence of one hundred five years executed and three years of

probation. Herring now appeals his convictions and sentence. Additional facts will be provided below.

Discussion and Decision

Section 1 – Herring waived any claim of error regarding the trial court's exclusion of evidence about K.C.'s sexual history.

[15] Herring's first issue involves Indiana Evidence Rule 412, which reads in pertinent part as follows:

> **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> (1) evidence offered to prove that a victim or witness engaged in other sexual behavior; or
>
> (2) evidence offered to prove a victim's or witness's sexual predisposition.
>
> **(b) Exceptions.**
>
> (1) *Criminal Cases.* The court may admit the following evidence in a criminal case:
>
> (A) evidence of specific instances of a victim's or witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's or witness's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

….

(c) Procedure to Determine Admissibility.

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least ten (10) days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing.* Before admitting evidence under this rule, the court must conduct an *in camera* hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing is confidential and excluded from public access in accordance with the Rules on Access to Court Records.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Our supreme court has stated that "Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and

unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes." *Williams v. State*, 681 N.E.2d 195, 200 (Ind. 1997).

[16] In September 2022, Herring's counsel filed a notice of intent to offer Rule 412 evidence regarding K.C.'s deposition statement "that she was molested by several of her previous foster 'fathers.'" Appellant's App. Vol. 2 at 205. The trial court held a hearing on the motion in October 2022, and after some discussion regarding the admissibility of that evidence, Herring's counsel withdrew the notice.

[17] At trial, when cross-examining K.C., Herring's counsel requested a sidebar and stated,

> I wanna ask [K.C.] a question, but I wanna head off a mistrial (indiscernible) they object. She only has two older sisters and there's, in the reports, that this older sister, the one she called in Texas, also previously molested her. So she was asked repeatedly about how she felt safe disclosing -- safe disclosing, 'cause these were family, nothing else. And yet, this older sister, she has said in the past molest[ed] her.

Tr. Vol. 2 at 247. The prosecutor objected on the basis that such evidence would be inadmissible under Evidence Rule 412. Herring's counsel argued that the prosecutor's questions regarding why K.C. felt safe disclosing Herring's abuse to her sisters "open[ed] the door" to asking about K.H.'s alleged abuse. *Id*. at 248. The trial court pointed out that K.H. was in Texas when K.C. disclosed Herring's abuse, and it sustained the prosecutor's objection.

[18] Shortly thereafter, K.C. testified that she did not "recall the first time [Herring] actually put his penis in [her] vagina[.]" Tr. Vol. 3 at 3. Herring's counsel requested another sidebar and stated,

> Just for purposes of making my record, I would wanna ask -- [K.C.] says in her statement to the police that she remembers she was 13 the first time it happened, which was in the laundry room, and she knows that because that's the same time … that she lost her virginity to somebody else.… I feel like now she says she doesn't remember, then I can say, well, you said in here that specifically you were 13, first time was in the laundry room and you remember that because it was the same time you lost your virginity to …. someone else[.]

Id. at 4. The trial court remarked that such evidence was "100 percent 412" and ruled that it was "not gonna allow [Herring's counsel] to ask the question." *Id*. at 5.

[19] On appeal, Herring argues that the trial court erred in excluding the foregoing evidence. "The decision to admit or exclude evidence at trial is within the trial court's discretion, and we afford it great deference on appeal." *Gee v. State*, 193 N.E.3d 1036, 1039 (Ind. Ct. App. 2022). "We review the trial court's decision regarding the admissibility of evidence for an abuse of discretion." *Id*. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*. "We will affirm the trial court's evidentiary ruling on any basis supported by the record." *Carr v. State*, 106 N.E.3d 546, 554 (Ind. Ct. App. 2018), *trans. denied*.

[20] The State argues that Herring waived this issue by failing to comply with Rule 412(c)'s procedural requirements. Herring asserts that the State's argument is waived because it did not object on this basis at trial. We agree with the State. *See Johnson v. State*, 6 N.E.3d 491, 499 (Ind. Ct. App. 2014) (agreeing with State's argument that defendant waived challenge to exclusion of evidence regarding rape victim's sexual conduct because he "did not follow Rule 412's procedural requirements," notwithstanding that prosecutor objected only on relevancy grounds at trial); *Carr*, 106 N.E.3d at 554 (stating that evidentiary ruling may be affirmed on any basis supported by record); *Porter Hosp., LLC v. TRK Valpo, LLC*, 212 N.E.3d 683, 689 n.3 (Ind. Ct. App. 2023) (noting that "our Supreme Court has held that a prevailing party, typically the appellee, may defend the trial court's ruling on any grounds, including grounds not raised at trial") (citing *Drake v. Dickey*, 12 N.E.3d 875, 875 (Ind. 2014) (per curiam)).

[21] Waiver notwithstanding, we also agree with the State that any error in the exclusion of the evidence was harmless. "Errors in the admission or exclusion of evidence are considered harmless unless they affect the substantial rights of a party. To determine whether an error in the admission of evidence affected a party's substantial rights, we assess the probable impact of the evidence on the

jury." *Whiteside v. State*, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006) (citation omitted).[1]

[22] First and foremost, we reiterate that the jury watched Sergeant Flynn's interview with Herring, in which he admitted that he touched K.C.'s vagina and penetrated it with his penis. Herring's admissions corroborated K.C.'s damning trial testimony. Regarding the evidence that K.C. was molested by her sister K.H., Herring argues that he "did not offer K.C.'s statement to prove K.C. engaged in other sexual behavior or to prove K.C.'s sexual predisposition. Rather, he offered this statement to impeach K.C.'s testimony that she felt safe disclosing to K.H. at the party." Appellant's Br. at 17. As the trial court correctly observed, however, K.H. was in Texas when K.C. disclosed Herring's abuse. Moreover, K.H. called 911 after K.C.'s disclosure, and thus K.C.'s trust in her sister was not misplaced.

[23] And as for the evidence that K.C. lost her virginity to someone other than Herring when she was thirteen, Herring claims that he offered it to "impeach her credibility by using her claimed lack of memory" about when Herring first engaged in sexual intercourse with her. *Id*. at 18. If anything, K.C.'s memory lapse was potentially advantageous for Herring, and refreshing her memory

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[1] Herring argues that the exclusion of the evidence violated his Sixth Amendment right of cross-examination. Because he did not raise this argument below, it is waived. *See State v. Allen*, 187 N.E.3d 221, 228 (Ind. Ct. App. 2022) ("Arguments raised for the first time on appeal, even ones based upon constitutional claims, are waived for appeal."), *trans. denied*. Accordingly, we do not use the "harmless beyond a reasonable doubt" standard put forward by the State, which is applicable to constitutional errors. *Ramirez v. State*, 174 N.E.3d 181, 192 (Ind. 2021).

could have yielded additional evidence tending to show that he committed level 1 felony child molesting, rather than level 4 felony sexual misconduct with a minor, by performing sexual intercourse with K.C. when she was under age fourteen. In sum, the probable impact of the exclusion of the foregoing evidence was negligible. Consequently, we affirm Herring's convictions.

Section 2 – Herring has failed to establish that his sentence is inappropriate.

[24] Herring asks us to reduce his sentence pursuant to Indiana Appellate Rule 7(B), which provides, "The Court may revise a sentence authorized by statute 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." Herring has the burden of establishing that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

[25] When reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is perceived as the correct result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. "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). 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)).

[26] As we assess the nature of the offense and character of the offender, "we may look to any factors appearing in the record." *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). Ultimately, 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." *Cardwell*, 895 N.E.2d at 1224. "When considering the appropriateness of a sentence, we consider all aspects of the penal consequences imposed by the trial judge in sentencing, including whether a portion of the sentence is ordered suspended." *Mise v. State*, 142 N.E.3d 1079, 1088-89 (Ind. Ct. App. 2020) (citation and quotation marks omitted), *trans. denied*. "[E]valuation of a defendant's sentence may include consideration of the defendant's credit time status because this penal consequence was within the contemplation of the trial court when it was determining the defendant's sentence." *Sharp v. State*, 970 N.E.2d 647, 651 (Ind. 2012). Herring asserts, and the State does not dispute, that he "is in credit class B and will serve a minimum of 76.57 years at the Department of Correction." Appellant's Br. at

25 (citing Ind. Code §§ 35-50-6-3.1, -4). Thus, Harris, who is currently forty-nine years old, "will be 125 years old before he is eligible for release." *Id*.

[27] Regarding the nature of the offense, "the advisory sentence is the starting point the Legislature selected as appropriate for the crime committed." *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for level 1 felony child molesting committed by a person at least twenty-one years of age is between twenty and fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(c). The sentencing range for a level 4 felony is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The trial court imposed thirty-five-year executed sentences on Herring's level 1 felony convictions and ran three of them consecutive, on top of which it imposed concurrent five-year suspended sentences, with three years of probation, on the level 4 felony convictions, for an aggregate sentence of 105 years executed plus three years of probation.

[28] Herring argues that his most serious offenses are "deplorable just like every Level 1 felony child molestation is deplorable" and that "[n]othing about these molests make[s] them particularly brutal or heinous." Appellant's Br. at 25. Herring is sorely mistaken. K.C. was an especially vulnerable victim, having been shuffled among fourteen foster homes before being placed with Herring and his wife. Within a few months, Herring abused his position of trust by fondling nine-year-old K.C. while sitting on a couch with his son and another foster child. And at approximately the same time that Herring adopted K.C., he engaged in sexual intercourse with his twelve-year-old daughter and was

unmoved when she told him that "it hurt." Tr. Vol. 2 at 210. He later subjected her to oral and anal intercourse, which caused her to bleed.

[29] Herring avoided detection by molesting K.C. in rooms that did not have surveillance cameras, and he told K.C. not to disclose the abuse because "he might go to jail and … it might break up the family." *Id*. at 233. K.C. felt that she could not tell Cook about Herring's depravity because she was "tired [of] moving around" and was worried that Cook would "get mad at [her] or kick [her] out[.]" *Id*. at 234. According to Cook's victim impact statement, which the prosecutor read aloud at the sentencing hearing, K.C. has "suffered recurrent night terrors" and "experiences anxiety and panic attacks because of the assault." Tr. Vol. 3 at 135. K.C. also "struggles to maintain friendships and relate to family members." *Id*. The reprehensible nature of Herring's conduct, which occurred repeatedly and has had a devastating effect on his adopted daughter, does not warrant a reduction of his far-from-maximum sentence. *See Ludack v. State*, 967 N.E.2d 41, 49-50 (Ind. Ct. App. 2012) (noting that multiple acts committed against same victim "should not be free of consequences" in affirming child molester's consecutive maximum sentences) (quoting *Cardwell*, 895 N.E.2d at 1225).

[30] We assess a defendant's character by engaging in a broad consideration of his qualities. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). An offender's character is shown by his "life and conduct." *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). A typical factor that we consider when examining a defendant's character is criminal history. *McFarland v. State*, 153

N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied* (2021). Herring has no juvenile history and two misdemeanor convictions (carrying a handgun without a license in 1997 and possession of a firearm on school property in 2018), for which he successfully completed probation.[2] He notes that he is a high school graduate and was employed at the time of his arrest, that his current wife offered supportive testimony at the sentencing hearing, that he did not report any substance issues, and that his Indiana Risk Assessment System score puts him in the low risk category to reoffend.

[31] Be all that as it may, it is impossible to ignore the trial court's remark that K.C. "was excited to be in a house where someone loved and cared for her and then [Herring] took advantage of that situation." Tr. Vol. 3 at 148.[3] He did so repeatedly for half a decade, and he warned K.C. that the household could be torn asunder if she told anyone about the abuse. When Sergeant Flynn confronted Herring with K.C.'s accusations, he initially denied that anything happened, and then he blamed K.C. for initiating the sexual contact. Herring

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[2] The State asserts that Herring "twice violated the conditions of bond [in this case] by violating a no-contact order and by visiting a gun shop." Appellee's Br. at 26. Herring points out that the trial court made no findings on the record that he violated his bond conditions.

[3] As indicated above, the trial court found this to be the "worst aggravator in this situation[,]" Tr. Vol. 3 at 148, and it was clearly the primary factor in the court's decision to impose consecutive sentences that were only slightly above the advisory term. For that reason, we are unpersuaded by Herring's reliance on *Harris v. State*, 897 N.E.2d 927 (Ind. 2008), and *Monroe v. State*, 886 N.E.2d 578 (Ind. 2008), in which our supreme court reduced the defendants' sentences because the trial courts did not sufficiently explain why the aggravating circumstances justified consecutive sentences rather than concurrent sentences. The State notes that the sentences in *Harris* were "consecutive, maximum sentences[.]" Appellee's Br. at 27.

has failed to establish that his loathsome character merits a reduced sentence, and thus he has failed to establish that his sentence is inappropriate.

[32] Herring also argues that the trial court abused its discretion in considering certain aggravating and mitigating sentencing factors. However, it is well settled 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." *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007), *trans. denied*. Because we have concluded that Herring's sentence is not inappropriate, we do not address this argument, other than to say that the trial court was not obligated to explain why it did not find Herring's proffered mitigating factors to be mitigating. *Kedrowitz v. State*, 199 N.E.3d 386, 406 (Ind. Ct. App. 2022), *trans. denied* (2023). Accordingly, we affirm his sentence.

[33] Affirmed.

Bailey, J., and Pyle, J., concur.

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