MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Daniel A. Hobbs,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 2, 2024

Court of Appeals Case No.
23A-CR-1092

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No.
02D05-1806-F1-8

Memorandum Decision by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

[1] Daniel Hobbs appeals his convictions for two counts of child molesting, Level 1 felonies; attempted child molesting, a Level 1 felony; and child molesting, a Level 4 felony. He also appeals his sentence of 132 years. Hobbs argues that: (1) the trial court abused its discretion by admitting testimony regarding the victim's pretrial statements; and (2) his sentence is inappropriate. Although we do not find that the trial court abused its discretion by admitting the challenged testimony and, thus, affirm Hobbs's convictions, direction from our Supreme Court compels us to revise Hobbs's sentence. Accordingly, we affirm in part, reverse in part, and remand.

Issues

[2] Hobbs raises several issues on appeal, which we consolidate and restate as:

I. Whether the trial court abused its discretion by admitting testimony regarding the victim's pretrial statements.

II. Whether Hobbs's sentence is inappropriate.

Facts

[3] In the summer of 2017, K.H. and her two brothers were approved for a trial home placement with Hobbs, their father. The children had been living with Kristi Schaden and her daughter, Erika, in foster care due to an unrelated

Department of Child Services ("DCS") matter. K.H. was six or seven years old at the time.

[4] In approximately September of that year, when K.H. was showering in the bathroom, Hobbs entered and began "looking" at her, which made her "uncomfortable." Tr. Vol. III p. 163. K.H. tried to leave the bathroom, but Hobbs would not let her. Hobbs removed his clothes and "pulled" K.H. into the shower, where he "started humping" her and "put his private on [her] private." *Id*. at 163, 168. His "private" "[s]tayed on the outside" of K.H.'s "private." *Id*. at 169-70. Hobbs later "put his private in [K.H.'s] mouth . . . ." *Id*. at 163.

[5] K.H.'s mother, Laura Hobbs, arrived at the residence around this time, and Hobbs took K.H. into his bedroom. K.H. fell asleep and awoke several hours later to Hobbs on top of her "trying to get [her] pregnant" again. *Id*. at 169. Hobbs then took K.H. back into the bathroom and "put[] his private on [her] private" again. *Id*. Hobbs told K.H. that, if she told anybody about the inappropriate touching, "he would go to jail and he would hurt [her]." *Id*. at 164.

[6] On September 13, 2017, during a supervised visit conducted by Jenna Mendez, K.H. reported that Hobbs "would pull her pants down and white stuff would come out" of him. Tr. Vol. IV pp. 4-5. K.H. was moved to Laura's house. On September 20, 2017, DCS family case manager ("FCM") Morgan Enterline visited K.H. to follow up on the allegations, and K.H. again reported

inappropriate touching by Hobbs. K.H. also reported that Laura and Hobbs told her not to report the allegations, so FCM Enterline had K.H. and her brothers placed back in foster care with their previous foster family, the Schadens. On September 27, 2017, FCM Enterline conducted a forensic interview with K.H.; however, K.H. did not repeat the allegations because she felt scared about "foster care and that her father would go to jail." Tr. Vol. III p. 228.

[7] On November 3, 2017, K.H. again disclosed inappropriate touching by Hobbs to FCM Shonna Leas. K.H. told FCM Leas, "My dad shows me his pee-pee and I don't know why." Tr. Vol. IV p. 12. K.H. then participated in a second forensic interview, which occurred on November 15, 2017, and was conducted by Lorrie Freiburger. K.H. went "into a lot of detail" regarding the allegations against Hobbs. *Id*. at 28. Specifically, K.H. alleged that Hobbs was "sucking on [her] pee-pee" and "squeezing [her] butt cheeks" at some point during the touching in the bathroom. *Id*. at 29, 30. After the interview, K.H. was taken for a forensic examination by Nurse Angela Mellon, a sexual assault nurse examiner. K.H. again reported the allegations but then "began to sob" and asked to end the examination early. *Id*. at 70. Nurse Mellon gave K.H. a "nursing diagnosis of . . . post-trauma syndrome" and recommended counseling. *Id*. at 75.

[8] The State ultimately charged Hobbs with four counts: Count I: child molesting, a Level 1 felony; Count II: child molesting, a Level 1 felony; Count III: attempted child molesting, a Level 1 felony; and Count IV: child molesting, a

Level 4 felony. Count I alleged that Hobbs caused K.H. to "place her mouth on his penis"; Count II alleged that Hobbs "place[d] his mouth on the female sex organ" of K.H.; Count III alleged that Hobbs "attempt[ed] to perform sexual intercourse" with K.H.; and Count IV alleged that Hobbs performed or submitted to "fondling or touching" of K.H. "with the intent of arousing or satisfying the sexual desires" of K.H. or Hobbs. Appellant's App. Vol. II pp. 36-42. The State alleged that the conduct all occurred when K.H. was under the age of fourteen.

[9] The trial court held child hearsay hearings on November 15 and December 18, 2019, to determine whether K.H.'s pretrial statements would be admissible at trial pursuant to the Protected Persons Statute; K.H. did not testify at either hearing. The November 15 hearing concerned only K.H.'s statements to Freiburger because Freiburger was unavailable for the December 18 hearing. Defense counsel did not object to this arrangement.

[10] During the November 15 hearing, Freiburger testified regarding K.H.'s allegations during her forensic interview. During this hearing, it is unclear if K.H. was present, but defense counsel did not seek to ask K.H. any questions. As for the December 18 hearing, Mendez, FCM Leas, Kristi Schaden, Erika Schaden, Nurse Mellon, and FCM Enterline all testified regarding the allegations, but Laura did not appear. K.H. was present in the courthouse during the December 18 hearing, and defense counsel again did not seek to question K.H. The trial court determined that K.H. was a protected person and

that her statements to Freiburger, Mendez, FCM Leas, Kristi, Erika, and Nurse Mellon[1] were sufficiently reliable to be admissible at trial.

[11] After several continuances, the jury trial was held in March 2022, when K.H. was age twelve. K.H. testified regarding her allegations against Hobbs; however, she denied reporting the allegations to Mendez and could not recall speaking with Nurse Mellon. K.H. explained that she did not disclose the allegations during the first interview because she was afraid Hobbs would "hurt" her but that she felt "safe" during the second interview. Tr. Vol. III p. 175. K.H. also denied that Hobbs ever "put his mouth on [her]." *Id*. at 170.

[12] Mendez testified regarding K.H.'s statement that Hobbs "would pull her pants down and white stuff would come out" of Hobbs, to which Hobbs did not specifically object. Tr. Vol. IV pp. 4-5. FCM Leas testified that K.H. told her, "My dad shows me his pee-pee and I don't know why." *Id*. at 12. Hobbs objected to this testimony as "hearsay," which the trial court overruled based upon its ruling that K.H.'s statements were admissible pursuant to the Protected Persons Statute. *Id*. at 10.

[13] Prior to Freiburger's testimony, the State sought to admit the video recording of K.H.'s second interview as a recorded recollection, which the trial court denied. The trial court, however, determined that the transcript of the portion of the

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[1] Although FCM Enterline testified at the child hearsay hearings, the State did not file a notice of intent to use K.H.'s statements to FCM Enterline at trial, and the trial court did not rule thereon. This issue is not raised by the parties.

interview in which K.H. disclosed that Hobbs performed oral sex on her would be admissible because K.H. denied that fact during her testimony. Hobbs lodged a continuing objection to "questions about the oral sex" based upon the trial court's earlier ruling that the video of the interview was not admissible as well as Hobbs's "right to confront and cross examine witnesses," which the trial court overruled. *Id*. at 14, 15.

[14] Freiburger then testified regarding her interview with K.H. According to Freiburger, K.H. provided "sensory details" and physical demonstrations, which corroborated her allegations. *Id*. at 27. Freiburger also read the portions of the transcript of the interview in which K.H. disclosed the oral sex allegations, and the trial court noted Hobbs's continuing objection thereto.

[15] Nurse Mellon testified regarding her examination of K.H. and that K.H. understood that a nurse is "[s]omebody that checks me." Ex. Vol. p. 18; Tr. Vol. IV p. 68. She further testified regarding her diagnosis of "post-trauma syndrome" and counseling recommendation. Tr. Vol. IV p. 75. Nurse Mellon did not testify regarding the details of K.H.'s allegations; however, her notes from the examination contained the same allegations K.H. presented during K.H.'s testimony, and these notes were admitted into evidence. Hobbs objected to Nurse Mellon's testimony and notes on the grounds that the statements "were not made for any medical diagnosis or treatment" and "there was no full and complete exam done," which the trial court overruled. *Id.* at 52, 69-70.

[16] Laura testified that K.H. disclosed the allegations against Hobbs to Laura in September 2017, but Laura did not testify regarding the details of the allegations. Kristi and FCM Enterline similarly testified but did not discuss the details of any of K.H.'s allegations, and Erika did not testify. Hobbs testified in his own defense and denied the allegations.

[17] The jury found Hobbs guilty as charged. The trial court held a sentencing hearing on April 14, 2023, and entered judgments of conviction on all counts. The trial court sentenced Hobbs to three consecutive sentences of forty years for the Level 1 felony child molesting and attempted child molesting convictions and a consecutive sentence of twelve years for the Level 4 felony child molesting conviction, for a total sentence of 132 years. Hobbs now appeals.

Discussion and Decision

I. Abuse of Discretion—Protected Persons Statute

[18] Hobbs first argues that the trial court abused its discretion by admitting K.H.'s pretrial statements to "Freiburger, Mendez, [FCM] Leas, [Kristi], and [Nurse] Mellon" pursuant to the Protected Persons Statute.[2] Appellant's Br. p. 12. Hobbs has not carried his burden of persuasion.

[2] Hobbs does not mention any challenge to the admission of K.H.'s statements to Laura and FCM Enterline in his Appellant's Brief.

A. Standard of Review

[19] We review challenges to the admission of evidence for an abuse of the trial court's discretion. . We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. . "The effect of an error on a party's substantial rights turns on the probable impact of the impermissible evidence upon the jury in light of all the other evidence at trial." . "'The improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.'" (quoting), *trans. denied*. "The erroneous admission of evidence may also be harmless if that evidence is cumulative of other evidence admitted."

[20] Hobbs challenges K.H.'s pretrial statements as hearsay. "Hearsay" is defined as a statement that "is not made by the declarant while testifying at the trial or hearing" and "is offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c).[3] Hearsay is generally inadmissible unless the Rules of Evidence "or other law" provides otherwise. Evid. R. 802. The Protected Persons Statute is one such law and "allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are

[3] The State does not contest that K.H.'s pretrial statements constitute hearsay, so we will proceed under the assumption that all such statements are hearsay.

deemed 'protected persons.'" . At the time of Hobbs's offenses, the applicable version of the Protected Persons Statute provided, in relevant part:

> (a) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) . . . :
>
> (1) Sex crimes (IC 35-42-4).
>
> * * * * *
>
> (c) As used in this section, "protected person" means:
>
> (1) a child who is less than fourteen (14) years of age;
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> * * * * *
>
> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
>
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
>
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> (1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person in person . . . ;

that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial . . . .

* * * * *

(effective July 1, 2016, to June 30, 2020).[4]

[21] Hobbs does not challenge the trial court's determination that K.H. qualified as a protected person under the Protected Persons Statute. Rather, Hobbs makes two other arguments: (1) K.H.'s statements to Freiburger were inadmissible under the Protected Persons Statute because, according to Hobbs, K.H. was not "present and available for cross-examination" during the November 15, 2019 child hearsay hearing, Appellant's Br. p. 13; and (2) none of K.H.'s pretrial statements were admissible under the Protected Persons Statute because K.H. testified during the trial. We are not persuaded by these arguments.

A. Challenge based upon K.H.'s availability for cross-examination during the child hearsay hearings

[22] First, we reject Hobbs's argument that K.H.'s statements to Freiburger were inadmissible because K.H. was not "present and available for cross-

[4] The Protected Persons Statute has since been amended; however, the amendments do not affect our analysis.

examination" during the November 15, 2019 child hearsay hearing. *Id*. Hobbs never objected at trial to any of the testimony on the grounds that K.H. was insufficiently available for questioning during the protected person hearings, so this argument is waived. , *trans. denied*.

[23] Waiver notwithstanding, Hobbs's argument would not succeed on the merits. The applicable version of the Protected Persons Statute required that K.H. "attend[]" the child hearsay hearing. (effective July 1, 2016, to June 30, 2020). Here, the child hearsay hearings took place on two dates, November 15 and December 18, 2019, because Freiburger was unavailable on December 18. Defense counsel never objected to splitting up the hearing in this manner and, on the contrary, appears to have consented to this arrangement.

[24] Further, although it is not clear whether K.H. was available during the November 15 hearing, K.H. was present during the December 18 hearing. This is sufficient. *Cf.* (holding that Protected Persons Statute did not require child victim "to attend every minute of the child hearsay hearing" when child attended one of four of such hearings). During the hearings, Hobbs never indicated that he wished to question K.H., nor did he object at the hearings on the grounds that K.H. was insufficiently available for such questioning. Rather, at the December 18 hearing, defense counsel stated that he "agree[d]" with the State that K.H. was "available for questioning by either party, so . . . the statutory requirement[] that she attend" the hearing was met. Tr. Vol. II p. 50; *cf.* (rejecting defendant's argument that victim was unavailable for cross-examination at child hearsay hearing when defense counsel "did not interpose

an objection at the hearing or ask to examine [the victim] before the next witness was called").

B. Challenge based upon K.H.'s trial testimony

[25] We also reject Hobbs's argument that none of K.H.'s pretrial statements were admissible because K.H. testified at trial. To begin, Hobbs fails to present a "cogent" argument because he does not direct us to any specific testimony that he claims is inadmissible. App. R. 46(A)(8)(a) (requiring that arguments be supported by "cogent reasoning" and be supported by "parts of the Record on Appeal relied on"); *see, e.g.*, (holding defendant waived challenge to admissibility of evidence regarding prior crimes by making only "general references" to the evidence and failing to "identify the specific evidence which [he] claim[ed] was erroneously admitted").

[26] Waiver notwithstanding, Hobbs's argument would not succeed on the merits. Our analysis turns on our Supreme Court's decision in . Although the Protected Persons Statute expressly permits the admission of the child victim's pretrial statements under certain circumstances, even when the child testifies at trial, ,[5] the Court in held that such statements are not admissible if the child testifies and the pretrial statements are "consistent" with the child's trial testimony and not otherwise "authorized under the Rules of Evidence." .

[5] This pertinent language is codified at subsection (e) in the version of the Protected Persons Statute that applies to this proceeding.

[27] In , the defendant was charged with sex crimes against five children, and the trial court admitted the testimony of all five children as well as videotaped interviews of three of the children. . The defendant challenged the admission of the three videotaped interviews, and the Court held that "if the statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the [Protected Person Statute], but not both except as authorized under the Rules of Evidence." .

[28] In reaching this holding, the Court balanced the goal of the Protected Persons Statute in "spar[ing] children the trauma of testifying in open court" against the defendant's federal and state constitutional rights to a fair trial and to confront witnesses, the concerns underlying the general prohibition against the admission of hearsay, and issues regarding the susceptibility of children to suggestion. . The Court further noted that admitting a child's pretrial statements when the child is able to testify at trial "does not serve the statutory purpose of protecting the child from the burden of testifying." . Additionally, the Court held that evidence admitted pursuant to the Protected Persons Statute was "subject to the overall balancing of prejudice and probative value required by Evidence Rule 403" and that repetition of the child's pretrial statements can be prejudicial and of "minimal probative value." The Court ultimately held that the trial court erred by admitting the children's videotaped interviews but that the error was harmless because the "prejudicial effect" was "not significant in the face of the consistent live testimony of all five children."

[29] Relying upon *Tyler*, a panel of this Court later decided , *trans. denied*. In , we acknowledged that "[t]he *Tyler* decision itself provides little guidance" regarding the standard to apply when determining whether the pretrial statement and the child's testimony are "consistent for purposes of the application of *Tyler*." . We, however, found guidance in the principles governing the use of inconsistent statements for impeachment purposes, stating:

> Our supreme court has acknowledged that the determination of whether a prior statement is inconsistent for impeachment purposes is not an exact science. . A prior statement may be deemed to be insufficiently inconsistent to be impeaching where it is not directly inconsistent and the prior statement does not "foreclose the possibility" of the witness's trial testimony. . We have also observed that a prior statement may not be used for impeachment if it and the trial testimony are "reconcilable with each other[.]" (quotation omitted), *trans. denied*. For a statement to be admissible non-hearsay as a prior consistent statement, it "need not be completely consistent" with trial testimony; rather it is enough if the two statements are "essentially the same." . Put another way, "[m]inor inconsistencies between trial testimony and prior statements do not necessarily render the prior statements inadmissible" as a prior consistent, non-hearsay statement.

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[30] We went on to hold that the trial court erred by admitting the child's recorded interview along with the child's testimony in Rosenbaum's trial for child molesting offenses because the recording and the testimony were consistent. . The recording was consistent with the testimony because, while the recording showed the child using a "digging motion with her hand" to demonstrate the

offense during the interview, the child also demonstrated the offense using two fingers during the interview, as she did when demonstrating the offense at trial. Accordingly, the differences between the demonstrations were "minor in that they essentially describe[d] the same act." We found, however, that the error was harmless.

1. Testimony of Freiburger and Mendez

[31] Turning to the instant case, several of the statements admitted at trial clearly do not invoke the rule announced in *Tyler* because they were inconsistent with K.H.'s trial testimony. Freiburger testified regarding K.H.'s allegations of oral sex performed by Hobbs, which K.H. denied on the stand. K.H. also denied speaking with Mendez at all. Freiburger's and Mendez's testimony, therefore, was admissible pursuant to the Protected Persons Statute.

2. Testimony of Nurse Mellon

[32] Next, as for K.H.'s statements to Nurse Mellon, these statements were not inadmissible under *Tyler* because they are separately admissible under Evidence Rule 803(4), the hearsay exception for statements made for the purpose of "seeking medical diagnosis or treatment." Evidence Rule 803(4) excludes from the rule against hearsay a statement that:

> (A) is made by a person seeking medical diagnosis or treatment;
>
> (B) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
>
> (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

[33] Discussing Evidence Rule 803(4), this Court has explained:

> "There is a two-step analysis for determining whether a statement is properly admitted under : (1) whether the declarant is motivated to provide truthful information in order to promote diagnosis and treatment; and (2) whether the content of the statement is such that an expert in the field would reasonably rely upon it in rendering diagnosis or treatment."

(quoting) (internal quotation marks omitted). The first prong:

> can generally be inferred from the fact a victim sought medical treatment. (citing), *trans. denied*. However, when young children are brought to a medical provider by their parents, the inference of the child's motivation may be less than obvious, as the child may not understand the purpose of the examiner or the relationship between truthful responses and accurate medical treatment. (citing). In such situations, "evidence must be presented to show the child understood the medical professional's role and the importance of being truthful." . "Such evidence may be presented 'in the form of foundational testimony from the medical professional detailing the interaction between [her] and the declarant, how [she] explained [her] role to the declarant, and an affirmation that the declarant understood that role.'" *Id.* (quoting .

. As for the second prong, "'[s]tatements made by victims of sexual . . . molestation about the nature of the . . . abuse—even those identifying the perpetrator—generally satisfy the second prong of the analysis because they assist medical providers in recommending potential treatment for sexually transmitted disease, pregnancy testing, psychological counseling, and discharge instructions.'" (quoting).

[34] Here, K.H. reported the allegations to Nurse Mellon, a sexual assault nurse examiner, and K.H. indicated that she understood that a nurse is "[s]omebody that checks me." Ex. Vol. p. 18. Nurse Mellon diagnosed K.H. with "post-trauma syndrome" and recommended counseling. Tr. Vol. IV p. 75. At trial, Hobbs objected to the admission of Nurse Mellon's testimony under Evidence on the grounds that, based upon the length of time between the alleged offenses and the examination, the statements "were not made for any medical diagnosis or treatment" and because "no full and complete exam was done." Tr. Vol. IV pp. 52, 69-70. Nothing in the language of Evidence , however, requires that the person to whom the statements are made conduct a full, complete examination. And although Hobbs raised this objection at trial, and the State discussed the relevant hearsay exception at trial and in its Appellee's Brief, Hobbs nowhere mentions this exception on appeal. Accordingly, we cannot say that Nurse Mellon's testimony and notes were inadmissible. *Cf.* (holding that nurse's testimony and notes regarding child's allegations were admissible under Evidence even if they were inadmissible under the Protected Persons Statute pursuant to *Tyler*).[6]

[6] In , we noted that the length of time between the forensic interview and sexual assault examination is relevant to the child's motive to tell the truth to the nurse examiner. . Hobbs, however, never argues that K.H. was not motivated to tell the truth to Nurse Mellon.

3. Testimony of FCM Leas and Kristi

[35] Lastly, as for the testimony of FCM Leas and Kristi, even if the trial court erred by admitting their testimony, which we do not decide, any error would be harmless. FCM Leas testified that K.H. told her, "My dad shows me his pee-pee and I don't know why." Tr. Vol. IV p. 12. Kristi testified that K.H. made allegations against Hobbs; however, she did not discuss the details of those allegations. The testimony was cumulative of K.H.'s testimony, and K.H. was subject to cross-examination regarding her pretrial statements. In light of the testimony offered by: (1) Freiburger, Mendez, and Nurse Mellon, which was admissible; (2) Laura and FCM Enterline, which Hobbs does not challenge; and (3) K.H.'s own testimony—we are not persuaded that there is a "substantial likelihood" that any prejudice from the remaining testimony impermissibly swayed the jury. ; *see* (finding the erroneous admission of child's pretrial statements was harmless error when the child was subject to cross-examination at trial regarding "any inconsistencies" between her pretrial statements and her trial testimony and the prosecutor's questioning of the witnesses was "carefully tailored" to avoid having the witnesses repeat the substance of their conversations with the child and reports of the child's allegations). Accordingly, the trial court did not abuse its discretion by admitting the challenged testimony of Freiburger, Mendez, and Nurse Mellon; and, to the extent the trial court abused its discretion by admitting the testimony of FCM Leas and Kristi, any error was harmless.

II. Inappropriate Sentence

[36] Hobbs also argues that his sentence is inappropriate. Although it is rare that an offender's sentence warrants reduction, our Supreme Court directs us to do so because of the unique facts of this case.

[37] The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* ; . Our Supreme Court has implemented this authority through , 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."[7] Our review of a sentence under Appellate is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. (citing). We exercise our authority under Appellate only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" (per curiam) (quoting).

[38] "'The principal role of appellate review is to attempt to leaven the outliers.'" (quoting). The point is "not to achieve a perceived correct sentence." "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.'" (quoting). Deference to the trial court's sentence "should prevail

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[7] 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.*, (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); ; *see also* (Tavitas, J., concurring in result).

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)." .

[39] 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. . A person who commits a Level 1 felony "shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years," (b), and a person who commits a Level 4 felony "shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years," . In the case at bar, the trial court sentenced Hobbs to three consecutive sentences of forty years for the Level 1 felony child molesting and attempted child molesting convictions and a consecutive sentence of twelve years for the Level 4 felony child molesting conviction, for a total sentence of 132 years.

[40] First, we do not find that Hobbs's character warrants a revision of his sentence. Our analysis involves a broad consideration of a defendant's qualities, including the defendant's age, criminal history, background, past rehabilitative efforts, and remorse. *See* ; . The significance of a criminal history in assessing a defendant's character and an appropriate sentence vary based upon the gravity, nature, proximity, and number of prior offenses in relation to the current offense. . "Even a minor criminal history is a poor reflection of a defendant's character."

[41] Here, Hobbs's criminal history includes: (1) misdemeanor convictions for battery resulting in bodily injury and disorderly conduct from 2007 and invasion of privacy from 2018; and (2) felony convictions for dealing in methamphetamine from 2012 and aggravated battery and battery resulting in serious bodily injury from 2017. Hobbs committed the instant offenses when he was either on or recently released from probation and when DCS was attempting to reunite the family. Further, although Hobbs claims that he suffered from abuse during his childhood and uses substances to cope, Hobbs fails to establish "any nexus linking his history of mental health issues or his childhood trauma to the instant offense." , *trans. denied*. Lastly, Hobbs fails to direct us to any evidence of positive character traits.

[42] Although Hobbs's character does not warrant revision of his sentence, we are compelled to revise his sentence based upon the nature of the offense. Our analysis considers the nature, extent, heinousness, and brutality of the offense. *See* . We also consider that Hobbs "was in a position of trust" with the victim. . In two incidents on one day, Hobbs molested his young daughter in multiple ways and threatened to hurt her if she told anyone. There is no question that the nature of Hobbs's offense is heinous.

[43] Yet we must revise Hobbs's sentence because of guidance from our Supreme Court. Hobbs's sentences were all ordered to be served consecutively, yet our Supreme Court has consistently cautioned against consecutive sentences when the offenses all involve the same victim. *See, e.g.*, ; . Further, when comparing the duration and details of the abuse here with the sentences in similar child

molestation cases, we are left with the conclusion that Hobbs's sentence is unusually high and an outlier. *See* (noting that we may compare sentences "among those convicted of the same or similar crimes" (citation omitted)).

[44] We find our Supreme Court's ruling in , instructive here regarding our duty under Appellate . In that case, the defendant was convicted of four counts of child molesting, three as Class A felonies and one as a Class C felony. Pierce molested his girlfriend's daughter "approximately every other weekend for a year" and engaged in "intercourse, oral sex, and fondling." . He was sentenced to forty years on each of the three Class A felonies, one of which was enhanced by ten years based on his status as a repeat sexual offender, and four years on the Class C felony, with ten years suspended, all to be served consecutively, for a total sentence of 134 years.[8] On transfer, although our Supreme Court noted that Pierce violated his position of trust with the victim and molested her on numerous occasions, the Court also noted that the offenses all involved the same victim, which undercut the propriety of consecutive sentences for each offense. . Accordingly, the Court revised Pierce's sentence to presumptive thirty-year sentences on two of the Class A felony convictions, to be served concurrently with the four-year sentence on the Class C felony conviction and consecutive to each of the remaining portions of the sentence, for a total sentence of eighty years. ; *see also* (revising sentence of teacher who had

[8] Pierce's ten-year enhancement was originally ordered to be served concurrently; however, on appeal, a panel of this Court ordered that the enhancement be served consecutively. .

intercourse with twelve-year-old student on more than twenty occasions from ninety to sixty executed years).

[45] Mindful of our role in leveling the "outliers," , we feel compelled to revise Hobbs's sentence here. Although heinous, Hobbs's offenses all involved the same victim. Additionally, the evidence did not strongly demonstrate an ongoing pattern of abuse that took place over a period of days or that the abuse involved intercourse. Rather, at least two of the offenses occurred close together in time when Hobbs molested K.H. in the bathroom. The other offenses all occurred after K.H. went to sleep and awoke several hours later. *See* (revising sentences for two counts of child molesting to be served concurrently for a total sentence of fifty years when offenses all occurred several days apart). And Hobbs's criminal history does not include prior convictions for child molesting, as was the case in .

[46] We do not minimize Hobbs's heinous acts against his own daughter. We cannot say, however, that his offenses are among the "worst of the worst" this Court has unfortunately seen. *See* (noting that the harshest sentences should be reserved for the worst offenders). We, thus, revise Hobbs's sentences as follows: (1) Hobbs's forty-year sentence on Count I, child molesting, a Level 1 felony, and twelve-year sentence on Count IV, child molesting, a Level 4 felony, shall be served concurrently; and (2) his forty-year sentences on Counts II and III, child molesting, Level 1 felonies, shall be served concurrently. Hobbs's concurrent sentences for Count I and Count IV shall be consecutive to his concurrent sentence for Count II and Count III, for an aggregate sentence of

eighty years. We remand with instructions that the trial court resentence Hobbs accordingly.

Conclusion

[47] The trial court did not abuse its discretion by admitting the testimony of Freiburger, Mendez, and Nurse Mellon, and any error in admitting the testimony of FCM Leas and Kristi was harmless. Accordingly, we affirm Hobbs's convictions. As for Hobbs's sentence, however, we reverse and remand with instructions that the trial court resentence him based upon our revision above. Accordingly, we affirm in part, reverse in part, and remand.

[48] Affirmed in part, reversed in part, and remanded.

Mathias, J., and Weissmann, J., concur.

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