MEMORANDUM DECISION

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IN THE

Court of Appeals of Indiana

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Indiana Supreme Court
Court of Appeals
and Tax Court

Xavier R. Garcia,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

May 2, 2024

Court of Appeals Case No.
23A-CR-1544

Appeal from the Adams Circuit Court

The Honorable Chad E. Kukelhan, Judge

Trial Court Cause No.
01C01-2203-F1-2

Memorandum Decision by Judge Brown
Judge Foley concurs.
Judge Riley concurs in part, dissents in part, with separate opinion.

Brown, Judge.

[1] Xavier R. Garcia appeals his convictions and sentence for four counts of child molesting as level 1 felonies, four counts of sexual misconduct with a minor as level 4 felonies, and one count of child solicitation as a level 5 felony. Garcia raises multiple issues, which we revise and restate as:

I. Whether the trial court abused its discretion in denying his motion to sever;

II. Whether the court abused its discretion in denying his request to strike a potential juror for cause;

III. Whether the court abused its discretion in admitting certain evidence;

IV. Whether the court abused its discretion in denying his motion for mistrial;

V. Whether the evidence is sufficient to support his convictions; and

VI. Whether his sentence is inappropriate.

We affirm.

Facts and Procedural History

[2] When C.Z. was fourteen or fifteen years old, Garcia picked her up to bring her to his residence to help babysit his children. Garcia turned onto a gravel road, parked his vehicle in a wooded area, started to unbuckle his pants, and "asked [C.Z.] to give him 'head.'" Transcript Volume III at 140. C.Z. refused, Garcia

asked multiple times, she continued to refuse, and Garcia drove her to his residence.

[3] T.H. met Garcia through her friend K.K. and K.K.'s mother. The mother of Garcia's children was friends with K.K.'s mother and was frequently at her house, and sometimes Garcia was there. T.H. and K.K. visited Garcia's apartment on a regular basis and used marijuana provided by Garcia. About one week before she turned fifteen years old, T.H. snuck out of K.K.'s house, went with Garcia in his vehicle to a wooded area, and had sexual intercourse with him. Garcia and T.H. had sexual intercourse on three additional occasions in his apartment.

[4] C.B., a thirteen-year-old, met Garcia at K.K.'s house and began exchanging messages with him. Garcia took C.B. to a hotel, and they had sexual intercourse. Garcia and C.B. had sexual intercourse "lots of times" including in Garcia's vehicle while parked in a wooded area and on at least two occasions at a residence in Decatur. Transcript Volume III at 82.

[5] In March 2022, the State charged Garcia with: sexual misconduct with a minor as level 4 felonies under Counts 1 through 5; child molesting as level 1 felonies under Counts 6 through 15; sexual misconduct with a minor as a level 4 felony under Count 16; child solicitation as a level 5 felony under Count 17; and possession of child pornography as level 6 felonies under Counts 18 through 20. In October 2022, Garcia filed a motion to sever charges arguing that allowing a jury to hear allegations relating to three unrelated victims and a fourth

unrelated set of offenses under Counts 18 through 20 prevented him from having a fair determination of his guilt or innocence. The court denied the motion.

[6] In April 2023, the State filed a motion to amend the information to allege: sexual misconduct with a minor as level 4 felonies under Counts 1 through 4 (Minor Victim 1); child molesting as level 1 felonies under Counts 5 through 8 (Minor Victim 2); child solicitation as a level 5 felony under Count 9 (Minor Victim 3); and possession of child pornography as level 6 felonies under Counts 10 through 12. The court noted there was no objection by Garcia and granted the motion. The State later moved to amend Count 9 to allege the offense occurred between May 1, 2018, and May 31, 2019, rather than between May 1, 2018, and May 31, 2018, and the court granted the motion. Garcia filed a motion to suppress evidence seized from his cell phone, and the court denied the motion.

[7] During voir dire, Garcia requested that a prospective juror be removed for cause, and the court denied the request. During trial, Garcia requested a mistrial arguing there was a concern of one or more jurors regarding the confidentiality of their personal information, and the court denied the request. The jury found Garcia guilty on Counts 1 through 9 and not guilty on Counts 10 through 12. At sentencing, the court noted the significant harm to the victims, Garcia's criminal history, his violation of probation and community corrections placement, and his high risk to reoffend. The court stated: "You got let out of prison, and then you go out and commit more crimes. Worse. Worse

than the ones you were in there for. . . . You . . . picked these little kids, took advantage of them, you were 30 years old. It's sad. Very sad." Transcript Volume IV at 11-12. The court sentenced Garcia to ten years for each of his convictions under Counts 1 through 4, thirty-five years for each of his convictions under Counts 5 through 8, and five years under Count 9. The court ordered: "Counts 1 and 2 are to run concurrent; Counts 3 and 4 are to run concurrent; Counts 5 and 6 are to run concurrent; Count 7 and 8 are to run concurrent. Each concurrent 'grouping' is to run consecutive with each other and Count 9. Total sentence is 95 years." Appellant's Appendix Volume III at 134.

Discussion

I.

[8] Garcia argues that he was entitled to a severance of charges as a matter of right and that, even if he had no right to a severance, the trial court abused its discretion in denying his motion to sever. He argues "the crimes involved three separate victims and occurred in varying locations at separate times over a period of multiple years." Appellant's Brief at 24. He argues "[t]he number of charges likely made it difficult for the jury to absorb the story of each victim independently" and "[t]his is a case where many different events, victims, and timelines converged in a single trial, which may have confused the jury and, moreover, likely prejudiced Garcia in the eyes of the jury." *Id*. at 26.

[9] The degree of deference owed to a trial court's ruling on a motion for severance depends on the basis for joinder. *Pierce v. State*, 29 N.E.3d 1258, 1264 (Ind. 2015). Where the offenses have been joined solely because they are of the same or similar character, a defendant is entitled to severance as a matter of right. *Id.* The trial court thus has no discretion to deny such a motion, and we will review its decision de novo. *Id.* "But where the offenses have been joined because the defendant's underlying acts are connected together, we review the trial court's decision for an abuse of discretion." *Id*.

[10] Ind. Code 35-34-1-11(a) provides:

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
>
> (2) the complexity of the evidence to be offered; and
>
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

[11] In *Pierce*, the Indiana Supreme Court held:

> [E]stablishing the defendant's unique method of committing the crimes is not the exclusive way of showing his acts are connected together. Offenses can also be linked by a defendant's efforts to

take advantage of his special relationship with the victims. *E.g., Turnpaugh v. State*, 521 N.E.2d 690, 692 (Ind. 1988) (finding child molestation charges were connected together where the victims were two young sisters who were overnight guests of the defendant); *Booker v. State*, 790 N.E.2d 491, 495 (Ind. Ct. App. 2003) (finding child molestation charges were connected together where the defendant was hired to care for the two young victims)[, *trans. denied*]. Our Court of Appeals found such a connection where a Child Protective Services caseworker met two teenage boys through his work. *Heinzman v. State*, 895 N.E.2d 716, 719 (Ind. Ct. App. 2008)[, *trans. denied*]. The defendant forced one of the boys to perform oral sex, and he inappropriately touched the other, resulting in various sex offenses. *Id.* He had no right to separate trials because the offenses were joined on the basis that he "abused his position as a caseworker to perpetuate his child molesting scheme." *Id.* at 721.

A common relationship between the defendant and the victims may even result in an interconnected police investigation into the crimes, producing overlapping evidence. *Blanchard v. State*, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004) (finding crimes were connected where the death of one of defendant's sons was discovered during the investigation into the neglect of the other). In *Philson v. State*, for instance, the defendant was charged with various offenses for molesting his younger brother in a bathroom and raping his older sister in a closet. 899 N.E.2d 14, 16 (Ind. Ct. App. 2008)[, *trans. denied*]. Although the crimes were committed in different ways against different victims, they were connected together because both were "against his siblings in the same house over the same period, 2005-2006" and the "allegation with respect to the rapes of [his sister] surfaced in the course of the investigation into the molestations of [his brother]." *Id.* at 17.

29 N.E.3d at 1266. On appeal, a defendant must show that in light of what actually occurred at trial, the denial of a separate trial subjected him to prejudice. *Brown v. State*, 650 N.E.2d 304, 306 (Ind. 1995).

[12] The record reveals that Garcia's offenses were connected by his victims, his method, and his motive. T.H. and C.B. met Garcia through K.K. and her family. C.Z. lived with her family near Garcia's residence, her mother socialized with Garcia, and C.Z. helped babysit his children. The crimes against the victims were part of the same investigation. Further, although there were multiple charges, the evidence presented was not overly complex and included each victim's testimony. The charges for sexual misconduct with a minor as level 4 felonies related to T.H., the charges for child molesting as level 1 felonies related to C.B., and the charge for child solicitation as a level 5 felony related to C.Z. During closing argument, the prosecutor discussed the evidence supporting the charges related to each victim. The evidence as to each victim was easily distinguishable. We conclude Garcia was not entitled to severance as a matter of right and the trial court did not abuse its discretion in denying his severance request. *See Vasquez v. State*, 174 N.E.3d 623, 631 (Ind. Ct. App. 2021) (holding the trial court did not abuse its discretion in denying the defendant's motion for severance of ten charges involving two victims where the evidence as to each victim was easily distinguishable), *trans. denied*.

II.

[13] Garcia argues the trial court abused its discretion in denying his request to strike a potential juror for cause. He argues that he "brought to the trial court's attention the casual social connection between a prospective juror and a local law enforcement officer" and "[t]he trial court dismissed [his] concerns—asserting that 'we all know police officers'—and refused to strike the juror." Appellant's Brief at 36 (citing Transcript Volume II at 111).

[14] The purpose of voir dire is to ascertain whether prospective jurors can render an impartial verdict based upon the law and the evidence. *Gibson v. State*, 43 N.E.3d 231, 238 (Ind. 2015). A juror should be excused for cause if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id*. at 239 (citation omitted). "Because such biases can be difficult to ascertain on a paper record, we pay considerable deference to the trial judge, who has the unique opportunity to 'assess the demeanor of prospective jurors as they answer the questions posed by counsel.'" *Id*. (citing *Oswalt v. State*, 19 N.E.3d 241, 245 (Ind. 2014), *reh'g denied*). We thus review the court's ruling on a for-cause challenge for an abuse of discretion. *Id.* "[O]n appeal, we afford substantial deference to the trial judge's decision . . . and will find error only if the decision is illogical or arbitrary." *Oswalt*, 19 N.E.3d at 245 (citation omitted). Further, "parties preserve appellate review of error for denial of a challenge for cause when they '*used a peremptory challenge to remove the challenged juror* or had already exhausted [their] allotment of peremptories.'" *Id*. at 248 (citing *Whiting v. State*, 969

N.E.2d 24, 30 (Ind. 2012)). "Failure to comply with the exhaustion rule results in procedural default." *Id*. at 246.

[15] The record reveals that, during voir dire, the trial court asked Garcia if he had "any for cause strikes." Transcript Volume II at 111. Garcia identified a prospective juror, and the court granted his request. The following discussion then occurred:

> COURT: Okay. Very good. Okay. Go ahead.
>
> DEFENDANT GARCIA: 579.
>
> COURT: Okay.
>
> DEFENDANT GARCIA: She [sic] related to Adams County Sheriff or (inaudible)
>
> COURT: Is that from the sheet? Is that from the juror . . . . (INAUDIBLE)
>
> COURT: What else do you have besides that she just knows people?
>
> DEFENDANT GARCIA: (inaudible-speaking to[o] low)
>
> COURT: Okay. I would say that we all know police officers, and you know police officers, maybe not all of them, maybe we don't like them, but she hasn't indicated anything like that, like that she has somebody . . . .
>
> (INAUDIBLE)
>
> COURT: Yeah, so. I'll deny that for cause. Okay.

Id. at 111-112.

[16] After discussing other prospective jurors, Garcia argued "I feel like it would be bias towards me and prejudicial that these jurors are related or close friends with law enforcement due to the charge, I feel like I won't have a fair and impartial trial on my behalf because they're related to or friend with law enforcement." *Id*. at 128-129. The prosecutor argued "he had the chance to ask those questions," "[t]hey were appropriate things to touch on with respect to the prospective jurors, and he had the chance to exert or use any preemptor [sic] strikes" and "[t]he record is clear, he had several left so, he elected not to strike anybody he's talking about." *Id*. at 129. The court stated: "He also neglected to ask the questions." *Id*. The prosecutor argued "I think that issue[']s been waived." *Id*. The court stated that "[t]he Court will show a waive[r] on that issue" and that Garcia "failed to ask the jurors questions regarding that and the responses by the jurors did not make the Court feel as though any of them could be bias[ed] towards the defendant or the State for that matter." *Id*.

[17] The record does not establish that Garcia used a peremptory challenge to remove prospective juror 579 or that he had already exhausted his allotment of peremptories. Accordingly, he has waived his claim that the court erred in denying his challenge for cause. *See Oswalt*, 19 N.E.3d at 246. Even if Garcia had preserved his claim, reversal would not be warranted. While he states there was a "casual social connection between a prospective juror and a local law enforcement officer," Appellant's Brief at 36, Garcia does not argue the prospective juror had a connection with a law enforcement officer involved in his case and does not point to the record to show that he questioned the

prospective juror regarding whether any relationship she may have had with the law enforcement officer would have impaired the performance of her duties as a juror. The court did not abuse its discretion in denying Garcia's request to strike for cause. *See Andrews v. State*, 529 N.E.2d 360, 363 (Ind. Ct. App. 1988) (trial court properly denied challenge for cause of a prospective juror whose brother-in-law was a deputy sheriff and noting there was no evidence that the brother-in-law was investigating the case and the prospective juror's link to the sheriff's department was too remote to support a presumption of bias), *trans. denied*, *cert. denied*, 110 S. Ct. 281 (1989).

III.

[18] Garcia asserts the trial court erred in denying his motion to suppress and the search warrant granting law enforcement access to his phone was overly broad. Further, he argues, "[b]ecause the State appeared to introduce Exhibit 30 as evidence of misconduct or criminal activity that [he] was not charged with, its prejudicial value outweighs its probative value." Appellant's Brief at 37.

[19] To the extent Garcia originally challenged the admission of the evidence taken from his phone through a motion to suppress, he now challenges the admission of the evidence at trial. Thus, the issue is appropriately framed as whether the trial court abused its discretion in admitting the evidence at trial. *See Jefferson v. State*, 891 N.E.2d 77, 80 (Ind. Ct. App. 2008), *trans. denied.* We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id*.

[20] Garcia argues on appeal that the search warrant granting access to his phone was overly broad. Before the trial court, he argued that law enforcement's actions of placing the phone with the police department, removing the SIM card, attempting to place it in airplane mode, and connecting it to power at the police department constituted an attempt to search without a warrant. As a general rule, a party cannot argue on appeal an issue that was not properly presented to the trial court. *Newland Res., LLC v. Branham Corp.*, 918 N.E.2d 763, 770 (Ind. Ct. App. 2009). *See White v. State*, 772 N.E.2d 408, 411 (Ind. 2002) ("A party may not object on one ground at trial and raise a different ground on appeal"). Garcia has waived his argument that the warrant was overly broad.

[21] To the extent Garcia argues the court abused its discretion in admitting State's Exhibit 30, that exhibit contained seven screenshots of messages exchanged using a messaging application and discovered on Garcia's phone. The messages are between a user who stated he or she was fourteen years old and a user who stated he or she was a twenty-two-year-old modeling agent. Ind. Evidence Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Rule 404(b)(2) provides: "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." The standard for assessing the admissibility of Rule 404(b) evidence is: (1) the court must determine that the

evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403.[1] *Boone v. State*, 728 N.E.2d 135, 137-138 (Ind. 2000), *reh'g denied*. If evidence has some purpose besides behavior in conformity with a character trait and the balancing test is favorable, the trial court can elect to admit the evidence. *Id*. at 138.

[22] In addition, Ind. Appellate Rule 66(A) provides:

> No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.

[23] The Indiana Supreme Court held:

> When an appellate court must determine whether a non-constitutional error is harmless, Rule 66(A)'s "probable impact test" controls. Under this test, the party seeking relief bears the burden of demonstrating how, in light of all the evidence in the case, the error's probable impact undermines confidence in the outcome of the proceeding below. *See Mason v. State*, 689 N.E.2d 1233, 1236-1237 (Ind. 1997); [Edward W. Najam, Jr. & Jonathan B. Warner, *Indiana's Probable-Impact Test for Reversible Error*, 55 Ind. L. Rev. 27,] 50-51 [(2022)]. Importantly, this is not a review

[1] Ind. Evidence Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

> for the sufficiency of the remaining evidence; it is a review of what was presented to the trier of fact compared to what should have been presented. And when conducting that review, we consider the likely impact of the improperly admitted or excluded evidence on a reasonable, average jury in light of all the evidence in the case. *See Tunstall v. Manning*, 124 N.E.3d 1193, 1200 (Ind. 2019). Ultimately, the error's probable impact is sufficiently minor when—considering the entire record—our confidence in the outcome is not undermined.

Hayko v. State, 211 N.E.3d 483, 492 (Ind. 2023), *reh'g denied*, *cert. denied*, 144 S. Ct. 570 (2024).

[24] We cannot say that State's Exhibit 30 was not relevant or that the probative value of the exhibit was substantially outweighed by the danger of unfair prejudice. Further, the probable impact of any error in admitting the exhibit, in light of all the evidence in the case, is sufficiently minor so as not to affect Garcia's substantial rights. Reversal is not required on this basis.

IV.

[25] Garcia argues the trial court abused its discretion in denying his motion for mistrial and that "even one juror's fear of retaliation by [him] compromised his right to have a fair trial." Appellant's Brief at 34. "The granting of a mistrial lies within the sound discretion of the trial court, and we reverse only when an abuse of discretion is clearly shown." *Davis v. State*, 770 N.E.2d 319, 325 (Ind. 2002), *reh'g denied*. "The remedy of mistrial is 'extreme,' *Warren v. State,* 757 N.E.2d 995, 998-999 (Ind. 2001), strong medicine that should be prescribed only when 'no other action can be expected to remedy the situation' at the trial

level, *Gambill v. State,* 436 N.E.2d 301, 304 (Ind. 1982)." *Lucio v. State*, 907 N.E.2d 1008, 1010-1011 (Ind. 2009). We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Alvies v. State*, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), *trans. denied*. To prevail on appeal from the denial of a motion for a mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Id.* We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. *Id.*

[26] During trial, defense counsel stated "yesterday morning we were made aware that at least one or more jurors had issues about, did Mr. Garcia, who at the time was proceeding Pro-Se, [] did he have access still to the jury questionnaires that would give addresses, and phone numbers, and personal information." Transcript Volume III at 171. Defense counsel argued "[d]o [sic] that fear that if they rule one way or the other, [] that they're [sic] be some type of retribution," "to me, that's created an inherent bias," "I don't see how we have a fair trial," and "I believe the remedy is to declare a mistrial." *Id*. The court denied the motion for mistrial and stated "the jury instructions are their guide," "the selection of the jury was done in a fair and impartial manner," and "[a]ll those things protect against the kinds of things that the defense is raising." *Id*. at 173. The court also referred to its opening remarks and stated "I say, 'Hey,

we're protecting your information.'" *Id*. The court instructed the prospective jurors:

> Personal information relating to you not disclosed in open court is and shall remain confidential, other than for the use of parties and counsel. The Court will maintain the confidentiality of the information to the extent consistent with the constitutional and statutory rights of the parties. If any of you have concerns or questions that you would feel embarrassed to speak about in open court, please let the Bailiff know by writing your concern down and giving [it] to the Bailiff.

Transcript Volume II at 65.

[27] Based on the record, including the extensive and detailed testimony regarding Garcia's crimes, and in light of the court's comments regarding the confidentiality of the jurors' personal information, we conclude that Garcia did not demonstrate the jury's decision was affected by concerns related to the confidentiality of their information or that he was placed in a position of grave peril on this basis. The trial court did not abuse its discretion in denying Garcia's request.

V.

[28] Garcia argues the evidence is insufficient to support his convictions. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied.* We look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* The conviction will be

affirmed if there exists evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id*. A conviction can be sustained on only the uncorroborated testimony of a single witness, even when that witness is the victim. *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012).

A. *Counts 1 through 4*

[29] Garcia argues that T.H. admitted to using alcohol and substances almost every day at the time of the alleged misconduct, she changed her version of events at least once, "[t]his raises questions about her ability to recall events and dates accurately," and the State did not prove that he "was fully aware of T.H.'s age." Appellant's Brief at 31.

[30] Ind. Code § 35-42-4-9(a) provides that "[a] person at least eighteen (18) years of age who knowingly or intentionally performs or submits to sexual intercourse . . . with a child less than sixteen (16) years of age, commits sexual misconduct with a minor, a Level 5 felony" and "the offense is . . . a Level 4 felony if it is committed by a person at least twenty-one (21) years of age."

[31] T.H. testified that she was fourteen years old when she met Garcia, she would visit his residence on a regular basis to smoke marijuana, and Garcia gave her the marijuana. She indicated she was a regular user of marijuana at that time. When asked "[d]id [Garcia] know how old you were at the time," she replied affirmatively, and when asked "[h]ow would he know that," she answered "[i]t was mentioned that I was the baby, and I was the youngest, and then there was mention that I was turning 15 in a few weeks." Transcript Volume II at 207.

When asked "had you ever told him you were 14 and you were having a 15th birthday soon," she answered "[y]eah." *Id*. When asked "[h]ow would you describe your relationship with him around the time of your 15th birthday," she testified "[w]e weren't dating, but we were having sexual activities with each other." *Id*. When asked "[d]o you remember the first time this happened," she answered: "Yes. I[t] was a week before my 15th birthday." *Id*. She testified that, on that occasion, she snuck out of K.K.'s house and that she and Garcia had sexual intercourse in his vehicle while parked in a wooded area. T.H. testified that she had a birthday party for her fifteenth birthday and that Garcia attended the party. When asked "[s]ometimes when we have birthday parties, especially, when we're younger you put the number of years, as you get older it's rude, so did you're [sic] birthday party have reflects of some . . . [t]hing, saying you're 15 that day," she answered "[y]es." *Id*. at 208-209. T.H. testified she had sex with Garcia after she turned fifteen years old at his apartment. She indicated they had sex in the kitchen and K.K. walked in on them. She indicated she had sex with Garcia on subsequent days at his residence, again in the kitchen and in his bedroom. When asked how long the relationship lasted, she said "it was just maybe two/three months." *Id*. at 214. When asked "what was life like for you at the time that you described this relationship or times that you had sex with Xavier Garcia," T.H. testified: "I was drinking every night. I was going to parties. I was sleeping around. I just didn't care about my life." *Id*. at 216.

[32] On cross-examination, defense counsel asked "why did you have a skills coach," T.H. testified: "Because I went through a lot of trauma as a child and I did not know how to deal with it at such a young age, so I had to go into therapy and skills coach." *Id*. at 228. When asked "during the time, a lot of the time periods we're discussing here today, I think you've indicated today, and I think you've indicated in the past, [] you were drinking heavily," she answered affirmatively, and when asked "[s]moking marijuana almost every day," and she said "[y]es." *Id*. K.K. testified that T.H.'s fifteenth birthday party was at her house and Garcia was present at one point. She indicated that she occasionally went to Garcia's residence and that, on one occasion, she observed T.H. and Garcia having sex.

[33] The jury heard T.H.'s testimony regarding Garcia's actions, her alcohol and marijuana use, and her age at the time. T.H. and K.K. were thoroughly cross-examined regarding their recollections. We will not judge the credibility of the witnesses or reweigh their testimony. We conclude the State presented evidence of probative value from which the jury could find that Garcia committed the crimes of sexual misconduct with a minor as level 4 felonies as charged.

B. *Counts 5 through 8*

[34] Garcia argues C.B. "expressed uncertainty about the exact date that she and [he] first had sexual relations" and admitted their first sexual encounter may have occurred after her fourteenth birthday. Appellant's Brief at 31. Ind. Code

§ 35-42-4-3(a) provides that "[a] person who, with a child under fourteen (14) years of age, knowingly or intentionally performs or submits to sexual intercourse . . . commits child molesting, a Level 3 felony" and "the offense is a Level 1 felony if . . . it is committed by a person at least twenty-one (21) years of age."

[35] C.B. testified that she and Garcia had sexual intercourse at a hotel when she was thirteen years old. She testified Garcia knew how old she was because she told him. She indicated she was in a relationship with Garcia and they had sex in his vehicle while parked in the woods and at a house in Decatur. When asked how many times she had sex with Garcia at the house in Decatur, she replied: "A lot." Transcript Volume III at 84. When asked "[w]ould you see [Garcia] every day or was it every weekend, how would you best describe it," she testified "[i]t was mainly like every weekend." *Id*. When asked if she was thirteen years old when she had sex with Garcia at the house in Decatur, she replied affirmatively. When asked "[o]n most of those weekends did you have sex," she answered affirmatively, and when asked "[y]ou've told us about the motel, the woods, did you have sex with him . . . at least twice at the house in Decatur," she again responded affirmatively. *Id*. at 85. She indicated that she had considered Garcia her boyfriend, and when asked how long the relationship lasted, she answered "I think almost a year." *Id*. at 84. When asked, "[t]he sex that you've told us about, that you had with [Garcia], did that all happen before you're [sic] 14th birthday in September of 2021," C.B. answered: "Yes." *Id*. at 87.

[36] On cross-examination, defense counsel asked C.B. if she turned fourteen years old on September 7, 2021, she replied affirmatively, he asked "you believe that the incident at the hotel happened on either a Friday or a Saturday during the school year," and she again replied affirmatively. *Id*. at 96. When asked "[s]o, isn't it true then that the date that Mr. Garcia actually picked you up and took you to the hotel was September 10, 2021," C.B. stated "I'm not sure." *Id*. When asked "[b]ut it could be, right," she stated "[y]eah." *Id*. at 97. On redirect examination, the prosecutor asked "[w]hen you had sex with [Garcia] in the hotel, how old were you," C.B. answered "13." *Id*. When asked "[w]ere you sure," she said "[y]eah," when asked "[h]ow about the woods," she said "13," and when asked "[a]nd in his house," she said "13." *Id*.

[37] C.B. was thoroughly examined and cross-examined regarding her age when she had sexual intercourse with Garcia. The State presented evidence of probative value from which the jury could find that Garcia committed the crimes of child molesting as level 1 felonies as charged.

C. *Count 9*

[38] Garcia argues "Indiana Code § 35-42-4-6 subsection (b) outlines the elements for soliciting a child under fourteen, while subsection (c) outlines the elements for soliciting a child between fourteen and sixteen," he "was charged under subsection (b)," "C.Z. admitted she was not sure if the incident with [him] happened when she was fourteen or fifteen," and "[i]f she was fifteen, [he] was not guilty as charged." Appellant's Brief at 32.

[39] The charging information filed on March 7, 2022, included an allegation under Count 17 that Garcia committed child solicitation under Ind. Code § 35-42-4-6(b). The State's April 18, 2023 motion to amend information provided "Minor Victim 3 cannot recall the exact date of the offense" and "[t]he amended information retains the same charge of child solicitation as a level 5 felony, but now alleges a different subsection due to the victim's uncertainty whether she was 13 or 14 years old at the time." Appellant's Appendix Volume II at 199. The amended information included an allegation under Count 9 that Garcia committed child solicitation under Ind. Code § 35-42-4-6(c), which provides:

> A person at least twenty-one (21) years of age who knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5), or any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person, commits child solicitation, a Level 5 felony. . . .

[40] C.Z. testified that she was either fourteen or fifteen years old when Garcia took her to the woods. In particular, when asked "[h]ow old were you when that happened," she answered "I was between the age of 14 and 15." Transcript Volume III at 141. She testified "[i]t was around the time that, my birthday's in May and it was around that time frame it had happened." *Id.* The prosecutor asked "was it in the month of May that this happened in the woods," she replied affirmatively, the prosecutor asked "[y]ou can't say, if it was after the 14th," she replied "[y]es," the prosecutor asked "[b]ut was this, so, you would

have turned 15, right," and she answered "[y]ep." *Id*. at 141-142. The State presented evidence of probative value from which the jury could find that Garcia committed the offense of child solicitation as a level 5 felony.

VI.

[41] Garcia argues that his sentence is inappropriate. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[42] Ind. Code § 35-50-2-4 provides that a person who commits a level 1 felony shall be imprisoned for a fixed term of between twenty and forty years with the advisory sentence being thirty years. Ind. Code § 35-50-2-5.5 provides that a person who commits a level 4 felony shall be imprisoned for a fixed term of between two and twelve years with the advisory sentence being six years. Ind. Code § 35-50-2-6 provides that a person who commits a level 5 felony shall be imprisoned for a fixed term of between one and six years with the advisory sentence being three years.

[43] Our review of the nature of the offenses reveals that Garcia had sexual intercourse with C.B. on at least four occasions when she was thirteen years old including at a hotel, in his vehicle in a wooded area, and at a residence in

Decatur. C.B. testified that she would see Garcia "like every weekend," on "most of those weekends" she had sex with him, she considered him to be her boyfriend, their relationship lasted almost a year, he gave her a ring which "had diamonds on it" as a gift, and she and Garcia discussed that their relationship would "be a permanent relationship." Transcript Volume III at 84-85, 89. Garcia had sexual intercourse with T.H. on at least four occasions when she was fourteen and fifteen years old, and he provided her and her friend K.K. with marijuana. T.H. testified that she "went to a very dark and lonely place" and her "whole life turned upside down." *Id*. at 247. Garcia picked up C.Z. when she was fourteen or fifteen years old, she believed he was driving to his residence but he turned onto a gravel road and parked in a wooded area, he unbuckled his pants and asked her "to give him 'head,'" he "kept on asking," and she refused. *Id*. at 140. C.Z. testified that she was confused and scared.

[44] Our review of Garcia's character reveals that Garcia filed a sentencing memorandum which stated that he has spent most of his formative years and adult life in incarceration, that this set of circumstances can lead to an individual becoming institutionalized and contribute to a lack of normal social and emotional development, and that the length of his incarceration has contributed to his criminal conduct. The memorandum further stated: "Mr. Garcia detailed an extensive history of mental and physical abuse, mental health issues, and substance abuse issues." Appellant's Appendix Volume III at 106. At his sentencing hearing, Garcia testified that, as a child, he was subject to abuse, at one point he was placed with his grandmother in Arizona, at that

time he was subjected to deprivation of food and physical and mental abuse, and the abuse occurred when he was nine and ten years old and occurred over a couple of years. He indicated that he was placed in a maximum security facility when he was seventeen years old, he was incarcerated for eleven years and six months, and he was released from the Department of Corrections when he was twenty-eight years old.

[45] The presentence investigation report ("PSI") indicates that Garcia was born in July of 1989 and had juvenile adjudications for criminal damage in Arizona in 2002 and for criminal damage and possession of a deadly weapon on school grounds in Arizona in 2004. The PSI states that he was waived into adult court when he was seventeen years old and convicted of five counts of burglary, six counts of theft, attempted theft, and receiving stolen property in 2006. The PSI provides that, in April 2008, Garcia entered a plea of guilty to attempted burglary as a class B felony, theft as a class D felony, and attempted theft as a class D felony. It indicates he entered pleas of guilty to battery resulting in bodily injury as a class A misdemeanor in August 2021 and to strangulation as a level 6 felony and obstruction of justice as a level 5 felony in February 2022.

[46] The PSI further provides Garcia "reported being diagnosed with Bipolar Disorder, Antisocial Personality Disorder, Attention Deficit Disorder, and Attention Deficient Hyperactive Disorder." *Id*. at 89. He reported attempting suicide as a juvenile. He also reported that "he first began experimenting with marijuana at the age of seven," "[h]e also was drinking alcohol at that age," "[a]t the age of twelve, his alcohol use increased to daily," while incarcerated

he used "alcohol, marijuana, and suboxone often," in 2019 he "began using pain pills (Percocet[]s, Vicodin, and Norco[]s)," "he was using pain pills daily until his arrest in January of 2022," and he "was using Suboxone daily until his arrest." *Id*. at 89-90. The PSI indicates that Garcia's overall risk assessment score using the Indiana risk assessment tool places him in the high risk to reoffend category.

[47] We note that Garcia's crimes were not isolated occurrences made by a person who otherwise led a law-abiding life. Rather, Garcia has a significant history of criminal activity, there were multiple victims and repeated occurrences of sexual activity, and Garcia cultivated his relationships with at least two of the victims over an extended period beginning a short time after he was released from his previous incarceration. After due consideration, we conclude that Garcia has not sustained his burden of establishing that his aggregate sentence is inappropriate in light of the nature of the offenses and his character. *See Stetler v. State*, 972 N.E.2d 404, 409 (Ind. Ct. App. 2012) (affirming the defendant's aggregate sentence of ninety years where there were two victims of child molesting and the defendant had a significant criminal history), *trans. denied*; *Upton v. State*, 904 N.E.2d 700, 704 (Ind. Ct. App. 2009) (affirming the

defendant's aggregate sentence of ninety years where there were multiple victims and occurrences of child molesting), *trans. denied*.[2]

[48] For the foregoing reasons, we affirm Garcia's convictions and sentence.

[49] Affirmed.

Foley, J., concurs.

Riley, J., concurs in part and dissents in part, with separate opinion.

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[2] To the extent Garcia argues the trial court abused its discretion in sentencing him because it did not find his prior trauma and present mental illness to be mitigating circumstances, we need not address this issue because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider defendant's guilty plea as a mitigating factor is harmless if sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting 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"), *trans. denied*), *trans. denied*. Even if we were to address Garcia's abuse of discretion argument, we would not find it persuasive in light of the record.

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Riley, Judge, concur in part, dissent in part.

[50] I respectfully part ways with the majority's decision as it affirms the trial court's sentence of Garcia. The principal role of review under Appellate Rule 7(B) is to attempt to leaven the outliers. Merida v. State, 987 N.E.2d 1091, 1092 (Ind. 2013). As such, we have recognized that "appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). Here, the trial court imposed an aggravated, total sentence of ninety-five years. I find the imposition of this enhanced aggregate sentence inappropriate in light of the nature of the offenses and the character of the offender. See Rule 7(B). In light of Garcia's criminal history, which consists of offenses unrelated to the instant convictions, his significant history of trauma and abuse, and his mental health, I would reverse the trial court's sentence, and remand for the imposition of the same aggravated sentence for each separate conviction, with all sentences running concurrently, for an aggregate sentence of thirty-five years. In all other respects, I concur with the majority's opinion.