MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua Morgan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 20, 2021

Court of Appeals Case No. 20A-CR-960

Appeal from the LaPorte Circuit Court

The Honorable Thomas Alevizos, Judge

Trial Court Cause No. 46C01-1609-F1-799

May, Judge.

[1] Joshua Morgan appeals his thirty-six-year aggregate sentence following convictions of three counts of Level 1 felony child molestation,[1] two counts of Level 4 felony child molestation,[2] and one count of Level 4 felony child solicitation.[3] He raises two issues on appeal, which we revise and restate as: (1) whether the trial court abused its discretion at sentencing; and (2) whether his sentence is inappropriate in light of the nature of his offense and his character. We affirm.

Facts and Procedural History

[2] B.R. was born in November of 2005, and in 2016, she lived in LaPorte, Indiana, with her mother V.R. ("Mother"), her father R.R. ("Father"), her younger brother, her grandmother, and occasionally, her stepbrother. Morgan was friends with both Mother and Father. He would routinely visit them, and they would smoke marijuana together. Morgan and Mother also had a sexual relationship. Father would watch Morgan and Mother perform coitus, and Father would sometimes join them in the activity.

[3] Morgan spent time with B.R. and her younger brother when he visited Mother and Father. Morgan would take them to a nearby gas station to get treats, and he would give them rides on his moped. Morgan would also exchange text

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[1] Ind. Code § 35-42-4-3(a).

[2] Ind. Code § 35-42-4-3(b).

[3] Ind. Code § 35-42-4-6.

messages and messages through Facebook Messenger with B.R. on an almost daily basis. B.R. was ten years old at the time, and she testified that the messages started as "the normal, 'hello,' 'hi,' at the beginning" but that progressed to Morgan calling her "certain names with—like what you do with couple names. . . Like, 'Hey there, beautiful[.]'" (Tr. Vol. III at 121.) Morgan and B.R. also sent each other pictures. On April 2, 2016, Morgan messaged B.R., "How old are you now?" (State's Ex. 39.) B.R. stated, "10," and Morgan asked, "R u going through puberty yet?" (*Id.*) B.R. answered, "No puberty yet." (*Id.*)

[4] Morgan also asked B.R. to send him pictures of her vagina, and B.R. complied with Morgan's requests. Morgan sent B.R. a picture of his penis. In one June 2016 text conversation, Morgan sent B.R. messages stating, "Would u like me to Fuck that tiny little pussy;" "I can boom on your beach lol;" and "Would you like me to rape you. Lol[.]" (State's Ex. 23) (errors in original).

[5] During one of Morgan's visits when B.R. was ten years old, Morgan entered B.R.'s bedroom while she was lying on the floor, sleeping. Morgan moved B.R.'s blanket off her body and put it over her face. He then removed her pajama bottoms and used his hand to poke and rub B.R.'s vagina. He also performed oral sex on B.R. and inserted his penis into her vagina. B.R.'s younger brother was sleeping in a nearby bed when this occurred.

[6] Another time, Morgan visited the house while B.R. was home alone. B.R. was lying on her stomach near the edge of her parents' bed playing a video game

when Morgan entered the bedroom. Morgan then began rubbing his crotch against B.R.'s behind. Both Morgan and B.R. were fully clothed, and B.R. tried to ignore Morgan and concentrate on the video game during the encounter.

[7] A third encounter occurred when Morgan woke B.R. while she was sleeping on the floor. They talked and either Morgan or B.R. removed B.R.'s clothes. Morgan unzipped his pants and directed B.R. to masturbate him. Morgan also used his hand to rub B.R.'s vagina and inserted his penis into B.R.'s vagina while B.R. was lying on her back on the floor. Morgan ejaculated on B.R.'s stomach.

[8] A fourth event occurred when Morgan accompanied B.R. and her family on a visit to a hair salon. Morgan and B.R. waited alone in the family's sport utility vehicle for the other members of B.R.'s family to finish receiving haircuts. B.R. and Morgan were sitting on a row of seats behind the driver and front-passenger seats, and Morgan unzipped his pants. Pursuant to Morgan's instructions, B.R. masturbated Morgan and put her lips around the head of his penis.

[9] There was also an incident in which B.R. witnessed Morgan and Mother having sex from the hallway after Father temporarily opened the bedroom door. Afterwards, Morgan approached B.R. while she was sitting on an outdoor porch swing. Morgan sat down next to B.R. and started to talk to her about what she had just witnessed. Morgan then unzipped his pants, and he directed B.R. to rub his penis. On separate occasions, Morgan also asked B.R.

to masturbate him while they were sitting together in a shed in her family's backyard and Morgan sucked on one of B.R.'s breasts while they were sitting together on a couch in the family's living room.

[10] On July 18, 2016, Mother noticed a message from Morgan appear on B.R.'s phone during a family cookout. Mother realized the message was inappropriate, and she contacted the police. An officer with the LaPorte City Police interviewed Mother, collected B.R.'s phone, and referred the matter to the department's detective bureau. As part of the detective bureau's investigation, B.R. underwent a sexual assault examination at a local hospital, and an Indiana Department of Child Services coordinator conducted a forensic interview. Officers initially contacted Morgan via phone, and they later conducted an in-person interrogation. Morgan denied abusing B.R., and when officers asked Morgan about the text messages between him and B.R., Morgan stated that he thought he was texting Mother.

[11] The State charged Morgan with four counts of Level 1 felony child molestation, two counts of Level 4 felony child molestation, and one count of Level 4 felony child solicitation. Morgan agreed to accept a plea agreement, and on August 2, 2017, the LaPorte County Probation Department filed a pre-sentence investigation report ("PSI") that included a psychosexual report. In a statement Morgan submitted in connection with the psychological assessment, he wrote, "On what [B.R.] say happen to her was not 'all' me. there were others. She just putting it all on one person." (App. Vol. II at 94) (errors in original). The

report indicated that Morgan presented a medium to high risk to re-offend. The report noted that Morgan demonstrated:

- Poor understanding of sexual offending risk factors and risk management strategies.
- Serious problems associated with alcohol and drug abuse.
- Fails to identify obvious life problems and has difficulty recognizing negative consequences of his decisions.
- Precontemplation stage: Does not recognize his problems and has no intention to change.
- No fixed address.
- Associates with primarily negative social influences.

(*Id*. at 96.) However, at the sentencing hearing on August 11, 2017, the trial court rejected the plea agreement.[4] Morgan's case then proceeded to trial.

[12] The court held a jury trial from February 10 to February 13, 2020. Following presentation of the evidence, the State dismissed one of the Level 1 felony counts, and the jury returned guilty verdicts on all remaining counts. The trial court ordered the preparation of an updated PSI, but the court expressly chose not to order a psychosexual evaluation because "[t]hat would entail that Mr.

[4] It is not clear from the record why the trial court rejected the plea agreement.

Morgan would have to admit his guilt, so I don't think he wants to do that at this point." (Tr. Vol. IV at 241.)

[13] The court held a sentencing hearing on March 30, 2020. At the sentencing hearing, Morgan acknowledged that he had read the updated PSI. He explained the PSI incorrectly indicated that his alcoholism began earlier than it did and the PSI erroneously stated he first tried marijuana at age nine when he actually first tried it at thirteen. The parties also clarified the number of days of jail time credit Morgan earned, but Morgan did not point to any other inaccuracies in the PSI. The State asked the court to impose a forty-year sentence with no more than five years suspended. Morgan argued for the court to impose the mandatory minimum sentence of twenty years. Morgan declined to make an allocution statement, but his counsel proposed as mitigating factors: (1) that the crimes were the result of circumstances unlikely to recur, and (2) that Morgan's character and attitudes indicate he is unlikely to commit another crime. In response, the court stated:

> THE COURT: What attitude? The attitude where he blames basically the victim throughout most of his statement that he gave to probation? That attitude?
>
> [Defense Counsel]: No. The—
>
> THE COURT: Okay. I'm now just wondering where you're pulling this out of other than just reading down the list. But how are you applying it to this situation? I see no evidence that that effects either [sic]. Also, you said that this is likely to not occur again, and, yet, the psychosexual evaluation said he's very highly

> likely to reoccur [sic] again. Then you said it was a situation that might not [happen] again. Pure conjecture once again. So I don't find any of those mitigators. Do you have any others?
>
> [Defense Counsel:] No, I do not, Your Honor.

(Tr. Vol. V at 4.)

[14] The court found Morgan's criminal history to be an aggravating factor. The court also found as an aggravating factor that while Morgan was incarcerated awaiting trial in the case at bar, the State charged him with battery against a public safety officer.[5] The court sentenced Morgan to a term of thirty-six years in the Indiana Department of Correction on the first count of Level 1 felony child molestation, thirty-year terms of imprisonment for each of the remaining counts of Level 1 felony child molestation, six-year terms of imprisonment for each of the two counts of Level 4 felony child molestation, and six-years imprisonment for the one count of Level 4 felony child solicitation. The trial court ordered the sentences to run concurrently for an aggregate sentence of thirty-six years.

Discussion and Decision

[5] Ind. Code § 35-42-2-1(e)(2) (2016).

I. Abuse of Discretion

[15] We trust sentencing decisions to the sound discretion of the trial court, and we review such decisions for an abuse of discretion. *Crouse v. State*, 158 N.E.3d 388, 393 (Ind. Ct. App. 2020). An abuse of discretion occurs if the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom." *Hudson v. State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). A trial court may abuse its discretion at sentencing by:

> (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law.

Id. The trial court is not required to accept a defendant's arguments regarding what constitutes a mitigating factor, nor is the trial court required to give proposed mitigating factors the same level of importance as the defendant does. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied*.

[16] Morgan argues the trial court impermissibly considered the psychosexual report completed in connection with the initial PSI to disregard two of his proposed mitigating factors, the crime was the result of circumstances unlikely to recur and he was unlikely to commit another crime. Initially, we address the State's argument that Morgan's challenge is waived. "A party's failure to object to an alleged error at trial results in waiver, also known as 'procedural default' or

'forfeiture.'" *Durden v. State*, 99 N.E.3d 645, 651 (Ind. 2018) (quoting *Bunch v. State*, 778 N.E.2d 1285, 1287 (Ind. 2002)). Further, a defendant's "failure to object or make any factual challenge to the presentence investigation report is tantamount to an admission to the accuracy of the facts contained therein." *Chupp v. State*, 830 N.E.2d 119, 126 n.12 (Ind. Ct. App. 2005). At his sentencing hearing, Morgan corrected information in the PSI regarding his history of substance abuse, but he did not object to inclusion of the psychosexual report prepared as part of his initial PSI in his updated PSI. When the trial court referenced the psychological assessment at Morgan's sentencing hearing to discount Morgan's proposed mitigating factors, Morgan did not attempt to rebut the trial court's observations or argue that the trial court could not consider such statements. Therefore, Morgan's argument that the trial court erred in considering Morgan's statements from the psychological assessment is waived. *See Flowers v. State*, 154 N.E.3d 854, 868 (Ind. Ct. App. 2020) (holding defendant's argument was waived due to his failure to raise it before trial court).

[17] Waiver notwithstanding, Morgan argues the statements he gave in connection with the psychosexual report prepared as part of his initial PSI amount to communications made during plea negotiations, and the trial court should not have considered them at sentencing. Indiana Rule of Evidence 401 provides in relevant part that: "In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea or admission of the charge that was later

withdrawn[.]" "In order to be privileged and therefore inadmissible, the communication must have as its ultimate purpose the reduction of punishment or other favorable treatment from the State to the defendant." *Crandell v. State*, 490 N.E.2d 377, 380 (Ind. Ct. App. 1986), *reh'g denied*, *trans. denied*. For instance, a defendant's statements made during a pre-sentence report interview, but prior to the court's acceptance of a plea agreement, may not be used against the defendant at his criminal trial if the court ultimately rejects the plea agreement. *Stephens v. State*, 588 N.E.2d 564, 566 (Ind. Ct. App. 1992), *trans. denied*. Similarly, if plea negotiations are unsuccessful or the defendant later withdraws a guilty plea, the trial court may not use the defendant's admissions during plea negotiations to impose a harsher sentence. *See Hensley v. State*, 573 N.E.2d 913, 917 (Ind. Ct. App. 1991) (holding it was improper for the court to find defendant's uncharged criminal activity to be an aggravating factor when defendant admitted to the uncharged criminal activity during plea negotiations), *trans. denied*. Therefore, the trial court should not have considered the statements Morgan gave in connection with the psychosexual report prepared as part of his initial PSI as evidence against him at sentencing. *See Gonzalez v. State*, 929 N.E.2d 699, 702 (Ind. 2010) (holding defendant's letter to automobile accident victim was inadmissible because it was written in effort to convince court to accept plea agreement).

[18] Nonetheless, even if the trial court abuses its discretion at sentencing, we will still affirm the trial court if we conclude that either: (1) the trial court would have imposed the same sentence absent the abuse of discretion, *Alvies v. State*,

905 N.E.2d 57, 64 (Ind. Ct. App. 2009), or (2) the defendant's sentence was not inappropriate. *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007), *reh'g denied*. Other than bare assertions by counsel, Morgan did not present any evidence demonstrating that he felt remorse or that he learned from his crimes. The updated PSI noted that Morgan considered B.R. a "bullshit liar." (App. Vol. III at 4.) This statement in and of itself discredits Morgan's assertion that his character and attitude make reoffending unlikely, and thus, even without consideration of the psychosexual report, the trial court still likely would have rejected Morgan's proposed mitigators. *See Banks v. State*, 841 N.E.2d 654, 658-59 (Ind. Ct. App. 2006) (holding trial court's failure to recognize proposed mitigator was harmless error as court likely would have imposed same sentence), *trans. denied*.

[19] Morgan also argues the trial court abused its discretion by considering that the State charged him with battery of a public safety official while he was awaiting trial to be an aggravating factor. Morgan contends "the new allegation was not of a similar nature to his convictions in the present case and was pending, with a presumption of innocence, at the time of his sentencing hearing." (Appellant's Br. at 25.) However, a court may consider a defendant's behavior while incarcerated awaiting trial to be an aggravating factor. *See Powell v. State*, 644 N.E.2d 82, 83 (Ind. 1994) ("The court noted that Powell had continued to exhibit violent, destructive behavior while incarcerated in the jail awaiting trial and displayed no remorse toward his victim."). Further, the trial court did not abuse its discretion in considering Morgan's criminal history to be an

aggravating factor. *See Atwood v. State*, 905 N.E.2d 479, 488 (Ind. Ct. App. 2009) ("Even a limited criminal history can be considered an aggravating factor."), *trans. denied*. While Morgan may believe the trial court overemphasized his criminal history and past probation violations in fashioning his sentence, the weight a trial court assigns to aggravating factors is not subject to appellate review. *See Ramon v. State*, 888 N.E.2d 244, 255 (Ind. Ct. App. 2008) ("Therefore, the weight the trial court gives to any aggravating circumstances is not subject to appellate review.").

II. Appropriateness of Sentence

[20] Morgan argues his aggregate thirty-six-year sentence is inappropriate given the nature of his offenses and his character. We may revise a sentence if it "is inappropriate in light of the nature of the offense and the character of the offender." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider the aggravators and mitigators found by the trial court and any other factors appearing in the record. *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016), *trans. denied*. Our determination of appropriateness "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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The appellant must demonstrate his sentence is inappropriate in order for us to revise his sentence downward. *Baumholser*, 62 N.E.3d at 418.

[21] When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007). A Level 1 felony is punishable by a term of imprisonment between twenty and forty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4. However, the maximum sentence is fifty years for a credit restricted felon convicted of Level 1 child molest, like Morgan.[6] *See id*. A Level 4 felony is punishable by a term of imprisonment between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. Morgan argues that "nothing about this case makes it more egregious than other Level 1 or Level 4 child molesting case[s]." (Appellant's Br. at 26.) He contends, "No evidence was submitted that the victim, B.R., suffered any physical injury or that she encountered any significant emotional disruption." (*Id*.) However, Morgan took advantage of the trust Mother and Father placed in him to prey on B.R. *See Hart v. State*, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) (holding defendant's abuse of position of trust was a valid aggravating circumstance to consider at sentencing). While Morgan is correct that he did not use a weapon in the commission of his crimes, he did tell B.R. that they would both get in trouble if others found out about their activities, and his offenses were not isolated incidents but part of a pattern of abuse. Therefore, an above-advisory sentence

[6] Morgan is a credit restricted felon because he committed child molesting involving sexual intercourse or other sexual conduct when he was over twenty-one years of age and his victim was less than twelve years of age. *See* Ind. Code § 35-31.5-2-72(1).

is not inappropriate given the nature of Morgan's offense. *See Quiroz v. State*, 963 N.E.2d 37, 45 (Ind. Ct. App. 2012) (holding nature of defendant's offenses supported trial court's decision to impose a sentence greater than the advisory), *trans. denied*.

[22] One factor we consider when assessing a defendant's character is his criminal history. *Webb v. State*, 149 N.E.3d 1234, 1241 (Ind. Ct. App. 2020). An offender's continued criminal behavior after judicial intervention reveals a disregard for the law that reflects poorly on his character. *Kayser v. State*, 131 N.E.3d 717, 724 (Ind. Ct. App. 2019). Similarly, an offender demonstrates poor character by engaging in criminal behavior while awaiting trial. *See Valle v. State*, 989 N.E.2d 1268, 1274 (Ind. Ct. App. 2013) (holding defendant's commission of crime while incarcerated awaiting trial reflected negatively on defendant's character). Here, Morgan's criminal history included one felony conviction for Class D felony neglect of a dependent[7] and several misdemeanor convictions. The State also charged Morgan with assaulting a jail officer while awaiting trial in the instant case. Therefore, we cannot say Morgan's character merits a lesser sentence. We hold Morgan's thirty-six-year aggregate sentence is not inappropriate given the nature of his offense and his character.[8] *See Mise v.*

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[7] Ind. Code § 35-46-1-4 (2007).

[8] When a defendant challenges the appropriateness of his sentence on appeal, we possess the authority to either reduce or increase the sentence if we determine it to be inappropriate. *McCullough v. State*, 900 N.E.2d 745, 750 (Ind. 2009). Here, the State characterizes Morgan's sentence as "overly lenient" and opines "an executed sentence closer to the maximum sentence, or consecutive sentences, would have been more appropriate." (Appellee's Br. at 22, 27.) Nonetheless, as the State does not ask us to increase Morgan's

State, 142 N.E.3d 1079, 1089 (Ind. Ct. App. 2020) (holding aggregate thirty-four-year sentence for two counts of child molesting was not inappropriate given nature of offenses and character of offender).

Conclusion

[23] Morgan waived any claim of error to the trial court's consideration of the psychosexual report prepared in connection with his initial PSI because he did not object to its inclusion in the updated PSI. Nevertheless, the trial court's consideration of the psychosexual report was harmless. The trial court did not abuse its discretion in considering Morgan's criminal history and his behavior while incarcerated awaiting trial to be aggravating factors. Morgan's sentence is not inappropriate given the egregious nature of his offenses and his continued criminal behavior after judicial interventions. Therefore, we affirm the trial court.

[24] Affirmed.

Bailey, J., and Robb, J., concur.

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sentence, we will not do so. *See Akard v. State*, 937 N.E.2d 811, 814 (Ind. 2010) (reversing this court's sua sponte increase of defendant's sentence).