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**IN THE
COURT OF APPEALS OF INDIANA**

DANNY STEWART,)
)
Appellant-Defendant,)
)
vs.) No. 90A02-0909-CR-855
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0601-FC-3

February 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Danny Stewart challenges his three-year sentence for class D felony battery, claiming that it is inappropriate in light of the nature of the offense and his character. We affirm.¹

On August 16, 2005, thirty-seven-year-old Stewart saw thirteen-year-old acquaintance J.E. and her friend at the park in his apartment complex. Stewart asked J.E. to come to his apartment to help dress his five-year-old son. J.E. initially responded that the boy was old enough to dress himself, but Stewart persisted, asking her to help the boy select what clothes to wear. J.E. agreed and went to the apartment. She helped choose the boy's outfit and then ran the boy's bath water. Thereafter, she attempted to leave, and Stewart asked her for a hug, which she gave him. He then asked her for a kiss, and when she refused, he shoved her into his bedroom, removed her belt, forced his hand down her pants, and inserted his finger into her vagina. Eventually, she pushed his hand away and fled the apartment. J.E. and her friend told J.E.'s mother, who reported the incident to the police.

On September 8, 2005, the State charged Stewart with class A felony child molesting and class D felony sexual battery. The charges were dismissed on October 11, 2005, and re-filed under this cause number on January 12, 2006, charging Stewart with class C felony child molesting and class D felony sexual battery. On June 12, 2008, the State amended its charging information, adding the charge of class D felony battery.

On October 2, 2008, Stewart pled guilty via an open plea agreement to class D felony battery in exchange for the State's dismissal of the remaining charges. Following an August

¹ Our recitation of the facts is based on the police report, which was incorporated into the probable cause affidavit and attached to the presentence investigation report. At sentencing, Stewart did not dispute the contents of the report. Sent. Tr. at 3.

27, 2009 sentencing hearing, the trial court sentenced Stewart to the maximum three-year term, citing as aggravating circumstances his lengthy criminal record and the fact that he was on parole when he committed the instant offense. This appeal ensued.

Stewart now challenges the appropriateness of his three-year sentence. On appeal, we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). We do not look to see whether the defendant’s sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is “inappropriate.” *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

First, we address the nature of the offense. Stewart was convicted of class D felony battery. *See* Ind. Code § 35-42-2-1 (prohibiting a person over the age of eighteen from knowingly or intentionally touching a person under the age of fourteen in a rude, insolent, or angry manner). In addressing the nature of a defendant’s offense, “the advisory sentence is the starting point the Legislature has selected as an appropriate sentence.” *Anglemyer*, 868 N.E.2d at 494. Here, Stewart received the maximum three-year sentence for his crime. *See* Ind. Code § 35-50-2-7 (providing a sentencing range of six months to three years for a class D felony conviction, with a one-and-a-half-year advisory term). The facts underlying

Stewart's offense support the three-year term. He lured a thirteen-year-old girl to his apartment ostensibly to help dress his young son. After she had helped the boy and was attempting to leave, Stewart asked her for a hug and kiss. When she refused to kiss him, he forced her into his bedroom and inserted his finger into her vagina. These facts far transcend the material elements of the crime.

Stewart's acts against J.E. also reflect his poor character. The record indicates that he was acquainted with J.E. and that she and her mother had watched a movie with him on one occasion. He exploited that acquaintance and took advantage of her kindness by forcibly fondling her.

Likewise, Stewart's extensive criminal history reflects poorly on his character. His criminal record extends from his days as a juvenile, when he had referrals for battery and disorderly conduct, to his adult record, which includes such offenses as resisting law enforcement, disorderly conduct, numerous alcohol offenses, two battery convictions, class D felony habitual traffic offender resulting in permanent license suspension, and class D felony criminal recklessness resulting in serious bodily injury.

Finally, Stewart's probation and parole failures indicate that he has not responded favorably to less stringent sentences. He had two probation violations and was on parole when he committed the instant offense. Thus, the fact that he has led a law-abiding life during the pendency of this case is more indicative of pragmatism than progress. To the extent he cites undue hardship on his dependents due to his incarceration, we note that hardship occurs whenever a parent is incarcerated and that he is under no legal obligation to

support his girlfriend or his girlfriend's child.²

In sum, we conclude that Stewart has failed to meet his burden of establishing the inappropriateness of his three-year sentence. As such, we affirm.

Affirmed.

RILEY, J., and VAIDIK, J., concur.

² We also note his concession that, based on the dismissal of charges he received in exchange for his guilty plea, the trial court properly rejected it as a mitigator.