



## **Case Summary**

Zuryzaday Flores appeals his thirty-year-sentence for Class A felony criminal deviate conduct and Class B felony burglary. We affirm.

### **Issues**

Flores raises two issues, which we restate as:

- I. whether the trial court abused its discretion when it sentenced him; and
- II. whether his sentence is inappropriate.

### **Facts**

On July 11, 2009, twenty-four-year-old Flores entered fourteen-year-old O.M.'s bedroom through a window. O.M. was the younger sister of Flores's live-in girlfriend. O.M. was asleep in bed with her two younger sisters, and her younger brother was asleep on the floor. Flores laid down on the bed next to O.M. He kissed her, touched her breasts, and put his fingers inside her vagina. During the incident, Flores held a knife to O.M.'s neck. At some point, O.M. was able to run to the bathroom, and Flores left through the window.

On July 14, 2009, the State charged Flores with Class A felony criminal deviate conduct, Class A felony sexual misconduct with a minor, Class B felony criminal confinement, Class B felony burglary, and Class C felony sexual battery. Flores was convicted as charged following a bench trial. At the sentencing hearing, the trial court merged the sexual misconduct, criminal confinement, and sexual battery charges into the criminal deviate conduct charge. In sentencing Flores, the trial court stated:

the Defendant's criminal history is a mitigator and the hardship on his dependant is a mitigator. . . . I also agree with [defense counsel] that this is one course of conduct and the counts should be served, the sentences rather should be served concurrently. But beyond that, this defendant knew the age of the victim, he was in a somewhat position of trust. He was extended family. And although he did not have direct supervision over the child victim, there was a familial obligation that was violated and that is due some mitigating, or rather some aggravating weight. Although Mr. Flores has expressed his remorse post-conviction, I do not find that there is any mitigating weight due that fact, and under the circumstances, I find the aggravators balance the mitigators.

Tr. pp. 131-32. The trial court sentenced Flores to thirty years on the criminal deviate conduct charge and ten years on the burglary charge and ordered the sentences to be served concurrently for a total sentence of thirty years. Flores now appeals.

## **Analysis**

### ***I. Abuse of Discretion***

Flores argues the trial court abused its discretion when it sentenced him. We evaluate a sentence under the current "advisory" sentencing scheme pursuant to Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g by Anglemyer v. State, 875 N.E.2d 218 (Ind. 2007). The trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer, 868 N.E.2d at 491. The reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. "The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Id.

Flores claims the trial court improperly failed to recognize his remorse as a mitigator after he apologized at the sentencing hearing. The trial court, however, did not overlook Flores's expression of remorse. Instead, the trial court acknowledged Flores's expression of remorse but declined to give it mitigating weight. Because the weight given to this proposed mitigator is not subject to appellate review, this claim fails. See id.

Flores also argues that the trial court improperly considered his position of trust with O.M. as an aggravator because it was not supported by the record. See id. at 490 (explaining that an abuse of discretion occurs when “entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons . . .”). Although the trial court mentioned that Flores was “somewhat in a position of trust” with O.M., it went on to explain that he was extended family and there was a “familial obligation that was violated” even though he did not have direct supervision over her. The pre-existing relationship between O.M. and Flores was supported by the record. At trial, O.M. testified that Flores was in a relationship and living with her sister and referred to him as her brother-in-law. This is consistent with Flores's trial testimony in which he described O.M. as his “ex-sister-in-law.” Tr. p. 93. Flores has not established that the trial court abused its discretion by considering Flores's familial relationship with O.M. as an aggravating circumstance.

## ***II. Inappropriateness***

Flores also argues that his sentence is inappropriate in light of the nature of the offenses and the character of the offender. Indiana Appellate Rule 7(B) permits us to 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 offenses and the character of the offender. When considering whether a sentence is inappropriate, we need not be "extremely" deferential to a trial court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Under this rule, 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).

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "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." Id.

Pointing to his character, Flores argues he only has one prior misdemeanor conviction for a driving-related offense, he showed remorse, and he had the support of his family at the sentencing hearing. Flores also points out that he took a substance abuse class while awaiting trial and has not previously received the benefit of supervised probation.

Flores's claims of good character, however, are undercut by his pending additional misdemeanor driving-related charges, his status as an illegal alien, his use of marijuana, and his underage consumption of alcohol. Moreover, when considering Flores's character, we cannot overlook the fact that at the time of the offense Flores was in a relationship and living with O.M.'s sister. Further, at trial, Flores testified that he went to O.M.'s room because they had previously kissed, she called him to initiate the meeting, and she pulled him onto the bed after he arrived. This testimony provides little credence to his subsequent expression of remorse.

Regarding the nature of the offenses, Flores argues that he did not physically harm O.M. Although he did not physically harm O.M., he did commit the offense while armed with a knife. When O.M. began to cry, Flores told her to be quiet. When she threatened to scream, he took out a knife and said he was capable of killing. Further, Flores committed the offense while O.M.'s two younger sisters slept in the same bed and O.M.'s younger brother was asleep on the floor. Neither Flores's character nor the nature of the offenses warrants a reduction in the thirty-year-sentence.

### **Conclusion**

The trial court did not abuse its discretion when it sentenced Flores. His thirty-year-sentence is not inappropriate. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.