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ATTORNEY FOR APPELLANT:

DAVID W. STONE, IV
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LAWRENCE AULER,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 48A05-0904-CR-203
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0807-FA-400

August 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Lawrence Auler appeals his sentence of ninety-nine years for convictions on two counts of Class A felony child molesting. On appeal, Auler raises two issues, which we restate as 1) whether the trial court abused its discretion when it sentenced Auler and 2) whether Auler's sentence is inappropriate in light of the nature of the offense and his character. Concluding that the trial court abused its discretion in finding an aggravating circumstance and that Auler's sentence is inappropriate, we reverse.

Facts and Procedural History

On several occasions in June 2008, forty-four-year-old Auler babysat six-year-old C.M. and C.M.'s brother, ten-year-old M.F. On each of these occasions, Auler engaged in inappropriate conduct with C.M., including licking and touching C.M.'s vagina, having C.M. touch his penis with her hands and her mouth, and "French kissing" C.M. Appellant's Appendix at 6. M.F. observed some of Auler's inappropriate conduct and informed his parents; Auler subsequently confessed during a recorded police interview.

On July 9, 2008, the State charged Auler with five counts of child molesting, Counts I and II as Class A felonies and Counts III to V as Class C felonies.[1] On November 4, 2008, the parties entered into a plea agreement under which Auler agreed to plead guilty to Counts I and II, and the State agreed to dismiss the remaining charges. The trial court accepted Auler's guilty plea on the same day.

[1] Count I alleged Auler performed deviate sexual conduct on C.M. by placing his mouth on her sex organ, and Count II alleged Auler submitted to deviate sexual conduct by having C.M. place her mouth on his sex organ. See id. at 5. The remaining counts alleged various forms of touching with intent to arouse Auler's sexual desires. See id. at 6-7.

On December 16, 2008, the trial court conducted a sentencing hearing, at which it admitted a letter from C.M.'s mother into evidence, heard a statement from Auler, and considered the parties' arguments. Based on this evidence and argument, the trial court found the following aggravating circumstances: 1) the harm to C.M. was significant and greater than the elements necessary to prove the commission of the offense; 2) Auler committed the offenses knowing that M.F. was present; 3) Auler was in a position of care, custody, and control of C.M.; 4) Auler claimed that C.M. facilitated the offenses; 5) Auler abused the goodwill of C.M.'s parents in that they let him reside in their home; and 6) Auler's offenses against C.M. occurred repeatedly over a one-month period. The trial court also found that Auler's proffered mitigators were insignificant. Based on these findings, the trial court sentenced Auler to fifty years on Count I and forty-nine years on Count II. The trial court also ordered these sentences to run consecutively, resulting in an aggregate sentence of ninety-nine years with the Indiana Department of Correction. Auler now appeals.

Discussion and Decision

I. Abuse of Discretion

Auler argues the trial court abused its discretion when it found that his position of care, abuse of goodwill, and commission of repeat offenses were aggravating circumstances. A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind.

2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if the 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." Hollin v. State, 877 N.E.2d 462, 464 (Ind.2007) (citation omitted).

Turning first to the position-of-care aggravator, Auler claims "[t]here was no evidence that the defendant was babysitting for the children." Appellant's Brief at 9. The record, however, is to the contrary. The probable cause affidavit, which was attached to the pre-sentence investigation report (the "PSI"), states, "Lawrence stated that he . . . did all these things [(i.e., acts of molestation)] each and every time that he babysat for the kids." Appellant's App. at 36. At the outset of the sentencing hearing, Auler stated that he had reviewed the PSI and that its contents, with one exception not relevant here, were accurate. See Transcript at 16-18. This concession by Auler forecloses any argument that the evidence to support the position-of-care aggravator was lacking. See Idle v. State, 587 N.E.2d 712, 714 (Ind. Ct. App. 1992) (concluding trial court did not abuse its discretion in relying on a PSI that the defendant conceded was accurate), trans. denied; cf. Robeson v. State, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005) ("The

information in the PSI is presumed to be accurate unless the defendant registers an objection to the information contained therein, and the failure to so object waives appellate review of this issue."), trans. denied.

Auler challenges the abuse-of-goodwill aggravator on the same ground, and we agree the record does not support a finding that C.M.'s parents let him reside in their home. The State cites the letter from C.M.'s mother that was admitted into evidence stating she felt Auler betrayed her, but even considering this evidence in a light most favorable to the trial court's finding, it does not permit a reasonable inference that Auler was a guest at the family's home. Accordingly, we conclude the trial court abused its discretion when it found that Auler's abuse of goodwill was an aggravating circumstance.

Auler's final challenge concerns the repeat offenses aggravator; he argues the trial court was precluded from finding this aggravator because the repeat offenses were dismissed pursuant to a guilty plea. To support this argument, Auler cites Farmer v. State, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002), where a panel of this court concluded it is improper to enhance a sentence on the basis of charges dismissed pursuant to a plea agreement because such an enhancement deprives the defendant of the full benefit of the agreement. In response, the State relies on Harris v. State, 897 N.E.2d 927, 930 (Ind. 2008), where our supreme court concluded an enhanced sentence for two counts of Class A felony child molesting was warranted in part because in addition to the charged offenses, there was evidence the defendant molested the victim on many other occasions, though those occasions did not result in formal charges. Farmer and Harris thus stand for

the proposition that although a repeat offenses aggravator may not be based on charges that were dismissed pursuant to a guilty plea, it may be based on uncharged conduct.

The record indicates that on the one hand, Auler's three Class C felony child molesting charges were dismissed pursuant to the parties' plea agreement, while on the other hand Auler admitted he molested C.M. on at least seven other occasions, though those occasions did not result in formal charges. See Appellant's App. at 36 (probable cause affidavit stating that Auler "stated he had [C.M.] suck his penis 3 times. He stated he licked [C.M.'s] genital area 3 times. He believes that he touched [C.M.] on her genital area 3 times. Auler believes [C.M.] touched his penis 3 times" and recommending that "Auler be charged with a total of 12 counts of Child Molesting (6 A Felonies and 6 C Felonies) based on his own admission of the separate offenses he has committed under the Child Molesting statute"). Although the trial court did not specify which offenses it was relying on to support the repeat offenses aggravator, we will assume for purposes of this opinion that, consistent with Farmer and Harris, it relied on the uncharged conduct only. See State v. Van Cleave, 674 N.E.2d 1293, 1306 (Ind. 1996) ("[W]e are to presume that the trial judge will act according to law. This carries with it the presumption that the trial court will conduct a fair sentencing hearing and properly apply the mitigating and aggravating factors the law prescribes.") (citation omitted), reh'g granted in part, 682 N.E.2d 181 (1997), cert. denied, 522 U.S. 1119 (1998); Moran v. State, 622 N.E.2d 157, 159 (Ind. 1993) ("[T]here is a strong presumption on appeal that a trial court has acted correctly and has properly followed the applicable law."). Given this assumption, it

follows that the trial court did not abuse its discretion when it found that Auler's repeat offenses were an aggravating circumstance.

Having concluded the trial court abused its discretion with regard to one aggravating circumstance, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). We also may review Auler's sentence under Indiana Appellate Rule 7(B). See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). Because Auler also challenges his sentence under Rule 7(B), we will address his sentence in that context.

II. Appropriateness of Sentence

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the 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 may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offenses and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record.

Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. In conducting this review, however, the burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offenses, Auler argues "[t]here was nothing in this case which made it more serious than any other case involving repeated acts of deviate conduct with the same girl." Appellant's Br. at 10. To the extent this argument pertains to the harm to the victim, we agree. C.M.'s mother stated that C.M. "is having nightmares and behavioral problems. She also wets herself if you bring up [Auler's] name. She don't [sic] want to discuss it and if you mention his name she starts screaming. She is in counseling . . . ." Appellant's App. at 21. Although we acknowledge the hardships C.M. has endured and will endure are substantial – indeed, all child molestations by their nature are heinous and likely inflict extensive, permanent harm on the victims, cf. Walker v. State, 747 N.E.2d 536, 538 (Ind. 2001) ("Crimes against children are particularly contemptible.") – such harm is apparently accounted for in the advisory sentence, as this court has consistently observed that harm similar to that suffered by C.M. does not render a child molesting offense more egregious than is typical. See Taylor v. State, 891 N.E.2d 155, 162 (Ind. Ct. App. 2008) (concluding evidence that child molestation victim suffered from nightmares and was receiving counseling were effects that were "not inconsequential" but nevertheless "typical of what victims of molestation experience"), trans. denied, cert. denied, 129 S.Ct. 1008 (2009); Simmons v. State, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001) (concluding evidence that child molestation victim would need counseling for "many, many years," met with a

counselor regularly, and had nightmares about defendant is not "distinct from the impact felt by similarly situated victims"), trans. denied; cf. Thompson v. State, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003) (concluding trial court improperly found that emotional and psychological harm to victim was an aggravating circumstance because the trial court's sentencing statement "did not indicate that the psychological effects on [the victim] were greater than those on any other child who had been molested").

But to the extent Auler argues the remaining evidence in the record does not render the nature of the offenses more egregious than is typical, we disagree. First, we note, as the trial court did, that aside from the instant offenses and those that were dismissed pursuant to the plea agreement, Auler admitted molesting C.M. on seven other occasions during a one-month period. These uncharged molestations make the instant offenses more egregious because they are evidence of serial conduct, but also because they indicate Auler had time to reflect on the wrongfulness of his actions, but nevertheless chose to continue harming C.M. See Kien v. State, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003), trans. denied. Second, Auler committed at least one of the offenses with knowledge that C.M.'s brother was present, which indicates the trauma he endured was greater than if he had learned about Auler's conduct through other means. See id. ("While every family member of a victim of child abuse is likely to be harmed by the act, it is not beyond the reaches of common sense for one to expect a family member, who is a young child himself, to be more severely affected when he has been a witness to his young sister's molestation."). We therefore conclude that the nature of the offenses are more egregious than typical child molestations.

Regarding Auler's character, we note initially that he does not argue his guilty plea should be considered favorably. This concession is well taken because a guilty plea does not warrant significant mitigation if the defendant received a substantial benefit in exchange for the plea, see Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied, and Auler received such a benefit when the State agreed to dismiss the three Class C felony child molesting charges against him. The absence of a criminal record does, however, comment very favorably on Auler's character, as our supreme court has stated it "deserves substantial mitigating weight." Edgecomb v. State, 673 N.E.2d 1185, 1199 (Ind. 1996) (quoting Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994)). But against the mitigating weight of Auler's favorable criminal record is evidence that he babysat C.M. and therefore repeatedly chose to violate a position of trust, that he blamed C.M. for facilitating the offenses, see appellant's app. at 21 (PSI stating defendant's version of the offenses: "I kissed [C.M.] age six three times. She took off her clothes and pulled my pants down. She did oral sex on me twice. I told her no, but she wanted to do this to me. I thought she was just playing a kissing game. She told me she wanted to play house."), and that Auler threatened C.M. and her brother with violence if they told anyone about the offenses, id. at 35 (probable cause affidavit stating that "Both [C.M.] and [her brother] stated that Lawrence told them that if they told anyone about this, he would 'whip' them"). Taken together, we conclude these points more than offset Auler's favorable criminal history.

Considering Auler's sentence in light of the foregoing determinations that the trial court abused its discretion in finding Auler's abuse of C.M.'s family's goodwill as an

aggravator, that the nature of the offenses are more egregious than is typical, and that Auler's character is somewhat unfavorable, we nevertheless conclude Auler has carried his burden and demonstrated his sentence is inappropriate. In reaching this conclusion, we are mindful of the fact that Auler's ninety-nine year sentence is just one year shy of the statutory maximum for two Class A felonies. See Ind. Code § 35-50-2-4 ("A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years."). Had there been more evidence commenting negatively on Auler's character (and thereby outweighing his favorable criminal record), we might be inclined to affirm a sentence so close to the statutory maximum, as we could say with confidence that such a sentence was imposed on a defendant who was one of the worst offenders and had committed some of the worst child molesting offenses. Cf. Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003) ("[M]aximum sentences should be reserved for the worst offenses and offenders."). The absence of a criminal history, however, convinces us that although Auler's character is somewhat negative, he does not fall within the worst offender category.

Although we conclude Auler's sentence is inappropriate, we are not convinced we should exercise our revise authority to impose, as Auler requests, concurrent terms of thirty years for each offense. See Appellant's Br. at 10, 13. Concurrent, advisory terms would overlook that the nature of Auler's offenses is more egregious than is typical. Regarding whether concurrent or consecutive terms are appropriate, Auler urges the former by analogizing the facts in this case to those in Harris. See 897 N.E.2d at 929-30.

In that case our supreme court concluded the defendant's statutory maximum sentence of one hundred years for two counts of Class A felony child molesting was inappropriate and therefore revised the sentence to concurrent terms of fifty years. We acknowledge there are similarities between this case and Harris – both involve multiple offenses against a single victim, abuse of a position of trust, and defendants with favorable criminal histories (the defendant in Harris had a criminal history, but it was "not significant"). Id. at 930. However, in this case, both the nature of the offenses and Auler's character are worse because C.M.'s brother witnessed at least one molestation, Auler blamed C.M. for initiating or facilitating the offenses, and Auler threatened C.M. and her brother with violence if they reported his offenses. We therefore reject Auler's invitation to impose concurrent sentences.

Based on our review, we conclude the nature of Auler's offenses and his character justify reducing his sentence to consecutive advisory terms of thirty years for an aggregate sentence of sixty years.

Conclusion

The trial court abused its discretion when it found an aggravating circumstance, and Auler's sentence is inappropriate. Accordingly, we reverse with instructions that the trial court impose consecutive sentences of thirty years on each count.

Reversed and remanded.

DARDEN, J., and BAILEY, J., concur.