



Appellant-defendant Augustus Comello appeals his conviction and sentence for Sexual Misconduct with a Minor,<sup>1</sup> a class B felony. Specifically, Comello argues that (1) the trial court erred in finding that he failed to prove his defense of reasonable belief, (2) the trial court erred in permitting the State to admit evidence of his prior unrelated convictions, and (3) his twenty-year sentence is inappropriate in light of the nature of the offense and his character. Concluding that the trial court erroneously admitted evidence of Comello's prior convictions but that such error was harmless and finding no other error, we affirm the judgment of the trial court.

### FACTS

On July 25, 2000, Comello pleaded guilty to class B felony child molesting in cause number 69C01-9912-CF-50 (CF-50), and the trial court sentenced him to ten years imprisonment with four years suspended to probation. After serving the executed portion of his sentence, Comello was released from prison on October 21, 2003.

Comello was twenty-four years old when he met fourteen-year-old M.G. at his brother's home in Ripley County in late 2003. One week later, Comello and M.G. saw each other at a CVS Pharmacy and exchanged phone numbers. M.G. telephoned Comello later that night and asked him if he wanted to get together. Comello picked up M.G. and some of her friends and took them to a local pool hall. Later that evening, the group returned to M.G.'s home and drank beer that Comello had brought with him. M.G. "got drunk and passed out." Tr. p. 297.

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<sup>1</sup> Indiana Code § 35-42-4-9(a)(1).

Comello and M.G. soon began seeing each other more frequently and began a sexual relationship in January 2004. M.G. told Comello that she was “fifteen (15) going on sixteen (16).” Id. at 299. Comello asked Brenda Emery, M.G.’s mother with whom she lived, to tell people that M.G. was nineteen years old. Emery responded that her daughter was “thirteen (13) going to be fourteen (14).”<sup>2</sup> Id. at 331.

M.G. became pregnant at the end of January 2004. She gave birth to a child on October 28, 2004, and a genetic test linked the child’s paternity to Comello. The child was later placed for adoption.

On February 17, 2004, Indiana State Police Officer Larry Nash was assigned to investigate a report that Comello was having sexual contact with M.G. Officer Nash visited M.G.’s home and spoke with Comello, Emery, and Emery’s boyfriend, Homer Calhoun. Comello admitted to having sexual contact with M.G. but stated that he believed that she was sixteen years old.

On February 18, 2004, the State charged Comello with class B felony sexual misconduct with a minor. That same day, the State filed a probation violation petition in CF-50. Following a bench trial on March 22, 2005, Comello was found guilty as charged, and the trial court found that the conviction violated Comello’s probation in CF-50. After a joint sentencing hearing on April 18, 2005, the trial court sentenced Comello to twenty years of imprisonment for the sexual misconduct with a minor conviction and ordered that, as a result of the probation violation, Comello serve the four-year suspended portion of his CF-50

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<sup>2</sup> At trial, Emery admitted that she had miscalculated her daughter’s age and that M.G. was, in fact, fourteen years old at that time. Tr. p. 331-32.

sentence. The trial court ordered that the sentences be served consecutively.

Comello appealed, and on December 29, 2005, we reversed his conviction and remanded his case to the trial court for a new trial, holding that Comello had not knowingly waived his right to a jury trial. Comello v. State, No. 69A01-050-CR-194, slip op. p. 2 (Ind. Ct. App. Dec. 29, 2005). On May 10, 2006, a jury found Comello guilty of class B felony sexual misconduct with a minor. After a sentencing hearing on June 2, 2006, the trial court sentenced Comello to twenty years of imprisonment. He now appeals.<sup>3</sup>

## DISCUSSION AND DECISION

### I. Defense of Reasonable Belief

Comello argues that he proved that he had a reasonable belief that M.G. was at least sixteen years old when he had intercourse with her. Specifically, Comello directs us to witness testimony that M.G. frequently lied about her age.

Indiana Code section 35-42-4-9(c) provides that “[i]t is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the [sexual] conduct.” A defendant has the burden to prove this defense by a preponderance of the evidence. Moon v. State, 823 N.E.2d 710, 716 (Ind. Ct. App. 2005), trans. denied. A defendant’s belief that the victim was at least sixteen years old must be reasonable. Id. at 715.

When a party who had the burden of proof at trial appeals, that party appeals a

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<sup>3</sup> On June 16, 2006, Comello filed a verified motion to transmit and incorporate the transcript and the appendix from his previous appeal into the record for his current appeal. We granted this motion on July 5, 2006, and those materials are also before us.

negative judgment. State v. Eichholtz, 752 N.E.2d 163, 164 (Ind. Ct. App. 2001). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court. Id. We neither reweigh the evidence nor judge the credibility of witnesses; rather, we consider the evidence most favorable to the judgment. State v. Phillips, 828 N.E.2d 441, 442 (Ind. Ct. App. 2005).

M.G. was fourteen years old when she and Comello began their sexual relationship in January 2004. M.G. “[n]ever told [Comello] that [she] was sixteen (16) years of age or older.” Tr. p. 300. While M.G. admitted that she lied about her age, she told Comello that she was born November 29, 1988, instead of her actual birthday, which was November 29, 1989. However, even if Comello had believed this falsehood, M.G. would still have been only fifteen years old—one year below the requisite age of consent for sexual activity. Furthermore, when Comello asked M.G.’s mother to tell people that M.G. was nineteen years old, Emery told Comello that M.G. was thirteen years old and about to turn fourteen. Id. at 339-40.

While Comello directs us to witness testimony that M.G. frequently lied about her age, his argument is an invitation for us to reweigh the evidence and assess the credibility of witnesses—an invitation that we decline. Consequently, we cannot conclude that the trial court erred when it found that Comello had failed to sufficiently establish his defense of reasonable belief.

## II. Evidence of Prior Convictions

Comello argues that the trial court erred when it permitted the State to present evidence of his prior convictions over his objection. Specifically, Comello argues that this

evidence violated Indiana Evidence Rules 403 and 404(b).

In resolving this issue, we initially observe that a trial court's evidentiary rulings are afforded great deference on appeal and are overturned only upon a showing of an abuse of discretion. Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Put another way, a trial court's decision to admit evidence will not be reversed absent a showing of a manifest abuse of discretion resulting in the denial of a fair trial. Id.

Indiana Evidence Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the “forbidden inference” that the defendant had a criminal propensity and therefore engaged in the charged conduct. Goldsberry v. State, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005).

In assessing the admissibility of 404(b) evidence, a trial court should undertake a two-step analysis. First, it must determine that 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. Id. Second, the trial court must balance the probative value of the evidence against its prejudicial effect, and we grant the trial court wide latitude when determining this balance. Id. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Ind. Evidence Rule 403.

At trial, evidence of Comello’s prior convictions for class D felony child solicitation and class B felony child molesting were admitted over his objection. The State argues that the trial court properly admitted this evidence because Comello’s reasonable belief defense put his intent to commit the crime at issue, and Rule 404(b) contains an exception for prior convictions used to show intent. We first note that the State’s argument contains a logical disconnect. Comello’s reasonable belief defense put his knowledge of M.G.’s young age at issue, not his intent to have sexual relations with her. And Comello’s prior convictions—which did not involve sexual activity with M.G.—do nothing to prove that Comello knew that M.G. was less than sixteen years of age. And even if Comello’s previous convictions address his intent, our Supreme Court has emphasized the narrowness of the intent exception:

Wickizer[v. State, 626 N.E.2d 795 (Ind. 1993),] held that the intent exception was available only when a defendant went beyond merely denying the charged culpability and affirmatively presented a claim of particular contrary intent. Id. at 799. In this respect, intent is unlike the other listed exceptions in 404(b). Intent is often an element of the crime and is likely to be found relevant. A prior intent to commit a bad act, however, although of some relevance, “introduces the substantial risk of conviction based predominantly on bad character.” Id. at 797. That is, a defendant’s prior intent to harm the victim or some other person may be relevant to show that the defendant had the requisite intent in the charged crime. But this prior intent, whatever its relevance, is likely to create the forbidden inference that because the defendant meant to cause harm before, he must have meant to cause harm in this case. Because of this danger and the relevance of intent generally, Wickizer narrowly construed the intent exception.

Hicks v. State, 690 N.E.2d 215, 222 n.12 (Ind. 1997) (emphases added).

We agree with Comello that admitting evidence of his prior convictions was likely to create the forbidden inference that because he had previously targeted children he must have committed the charged offense, and this inference is precisely what Rule 404(b) is intended

to prevent. Therefore, we conclude that the trial court erred by admitting the evidence of Comello's prior convictions.

Nonetheless, the improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction. Ware v. State, 816 N.E.2d 1167, 1175 (Ind. Ct. App. 2004). As previously discussed, Comello never denied having sexual relations with M.G. and, instead, argued that he believed that she was at least sixteen years old. However, the State presented substantial evidence that Comello knew that M.G. was underage. M.G. told Comello that she was fifteen and "[n]ever told [him] that [she] was sixteen (16) years of age or older." Tr. p. 300. Furthermore, in response to Comello's request that M.G.'s mother tell people that she was nineteen, Emery replied that M.G. was only thirteen years old. Because the State presented substantial independent evidence of Comello's guilt, we find that the erroneous admission of his previous convictions was harmless error and did not contribute to the conviction.

### III. Appropriateness

Comello argues that his twenty-year sentence is inappropriate in light of the nature of his offense and his character. Specifically, Comello argues that there was nothing particularly egregious in the way this crime was committed and that M.G.'s mother allowed the relationship to progress.

The amended sentencing statute<sup>4</sup> provides that for a class B felony, a person “shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Ind. Code § 35-50-2-5. Our court has the constitutional authority to revise a sentence 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.” Ind. Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court’s decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offense, Comello emphasizes that the sexual relationship

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<sup>4</sup> Indiana’s sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Comello committed his criminal offense before this statute took effect but was sentenced after the effective date. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

While our Supreme Court has not explicitly ruled which sentencing scheme applies in these situations, a recent decision seems to indicate the date of sentencing to be critical. Prickett v. State, 856 N.E.2d 1203 (Ind. 2006). The defendant in Prickett committed the crimes and was sentenced before the amendment date. In a footnote, our Supreme Court stated that “[w]e apply the version of the statute in effect at the time of Prickett’s sentence and thus refer to his ‘presumptive’ sentence, rather than an ‘advisory’ sentence.” Id. at \*3 n.3 (emphasis added). Therefore, since Comello was sentenced on June 2, 2006—more than one year after the effective date—we will apply the amended statute and refer to Comello’s “advisory” sentence.

was consensual and argues that “[t]he only thing egregious about this crime is that it happened at all.” Appellant’s Br. p. 18. However, Comello—who was twenty-four years old—had sex with a fourteen-year-old girl and impregnated her. His actions resulted in the birth of a child who was eventually placed for adoption. In light of these circumstances, we do not find that the nature of Comello’s offense aids his argument.

Turning to his character, Comello first argues that “M.G.’s mother encouraged the relationship by inviting Mr. Comello to move in and share M.G.’s bed.” *Id.* However, Comello’s rationalization demonstrates his failure to take responsibility for his actions, and he cannot prevail by placing blame on Emery’s questionable parenting tactics. Furthermore, Comello’s prior criminal record includes convictions for child molesting, public intoxication, minor consumption, child solicitation, battery, criminal mischief, contributing to the delinquency of a minor, and false reporting. Not only does this laundry list of convictions show Comello’s disregard for the law and the welfare of others, three of his convictions—child molesting, child solicitation, and contributing to the delinquency of a minor—were criminal offenses involving children. Therefore, we cannot find that Comello’s sentence is inappropriate in light of his character. Instead, it is readily apparent that the twenty-year sentence imposed by the trial court is not inappropriate in light of the nature of the offenses and Comello’s character.

#### IV. Probation Revocation

Comello argues that the trial court erred by “revoking the entire four year suspended sentence in [CF-50.]” Appellant’s Br. p. 19. Specifically, Comello argues that he has already been severely punished for that crime.

We initially note that the ability to serve a sentence on probation has been described as a “matter of grace” and a “conditional liberty that is a favor, not a right.” Marsh v. State, 818 N.E.2d 143, 146 (Ind. Ct. App. 2004) (quoting Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999)). We review a trial court’s sentencing decision in a probation revocation proceeding for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. Rosa v. State, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). If the trial court finds that the person violated a condition of probation, it may order the execution of any part of the sentence that was suspended at the time of initial sentencing. Stephens v. State, 818 N.E.2d 936, 942 (Ind. 2004).

The trial court revoked the suspended portion of Comello’s CF-50 sentence on April 18, 2005. Our court subsequently reversed and remanded the conviction upon which the revocation was based, Comello, slip op. at 2, and a new jury trial was held on May 10, 2006. After a guilty verdict, the trial court sentenced Comello to “twenty (20) years with the Indiana Department of Correction.” Tr. p. 509; Appellant’s App. p. 8, 110. Although the trial court’s May 2006 sentencing order does not address CF-50, Comello appeals the trial court’s April 18, 2005, order and asks that we review the decision to revoke his probation.

We find that the May 2006 conviction supports the CF-50 probation revocation. We reiterate that probation is a matter of grace, and Comello’s class B felony sexual misconduct with a minor conviction violated a condition of his probation. While Comello argues that the trial court’s imposition of the entire previously suspended sentence was excessive, the sanction to be imposed is ultimately within the trial court’s discretion. Abernathy v. State,

852 N.E.2d 1016, 1022 (Ind. Ct. App. 2006). As we held in Abernathy:

If the trial court were to exercise other sanction options more liberally, the “grace of probation” would be rendered meaningless. Probation violators would be less apt to modify their behavior and abide by the terms of probation in the absence of a need to avoid the imposition of a suspended sentence.

Id. Therefore, we conclude that the trial court did not abuse its discretion when it ordered Comello to serve the entire portion of his four-year suspended sentence in CF-50.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.