

Justin Trevor Stetler pleaded guilty to attempted child molesting¹ as a Class B felony and was given a fourteen year sentence with ten years executed and four years suspended and served on probation. He appeals raising the following restated issues:

- I. Whether the trial court erred when it imposed a lifetime requirement to stay 1,000 feet from any child care facility or school in its sentencing order;
- II. Whether the trial court abused its discretion in its finding of aggravating and mitigating circumstances; and
- III. Whether Stetler's sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On December 24, 2008, Stetler, who was eighteen years old at the time, was at the home of twelve-year-old D.S., a friend who lived in the same apartment complex. Stetler was playing video games with D.S. and another friend, A.J. After A.J. left to go home, D.S. went into his mother's bedroom and called Stetler in to view pictures of the mother's boyfriend's genitals on a digital camera. Stetler and D.S. began wrestling, and Stetler became aroused. D.S.'s sweatpants came down, partly from the wrestling and partly from the action of Stetler. Stetler then exposed his penis and pinned D.S. against the bed with his forearm. D.S. was on his stomach with his pants pulled down, and Stetler intended to put his penis inside D.S.'s anus. At that time, they heard D.S.'s brother and another friend enter the apartment.

¹ See Ind. Code §§ 35-42-4-3, 35-41-5-1.

After D.S.'s brother found Stetler in the bathroom and D.S. under the blankets in the bedroom, he told Stetler to leave. D.S. told his brother what had happened, and the police were called. Later that night, Stetler was interviewed by the police, and denied any inappropriate behavior. The next morning, he returned to the police department and told the police what had actually happened because he "couldn't stand the guilt anymore." *Tr.* at 35.

On December 29, 2008, the State charged Stetler with attempted child molesting as a Class B felony, attempted child molesting as a Class C felony, and criminal confinement as a Class C felony. On January 22, 2010, Stetler pleaded guilty to Class B felony attempted child molesting with the remaining counts to be dismissed and sentencing left to the discretion of the trial court. At the sentencing hearing, Stetler admitted that D.S. "looked up" to him and that he had betrayed the trust of D.S. *Id.* at 33. D.S.'s father gave a statement and recommended some form of aggravated sentence for Stetler. The trial court found Stetler's age, acceptance of responsibility for his actions, and family support as mitigating circumstances. It found Stetler's juvenile history, his abuse of trust, and the request of D.S.'s father to be aggravating circumstances. Finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Stetler to fourteen years with ten years executed and four years suspended and served on probation. In its sentencing order, the trial court included language stating, "[p]ursuant to IC 35-38-1-7.5, the defendant is a sexually violent predator by operation of law which requires a lifetime registration requirement and a lifetime requirement to stay 1,000 feet from any child care facility or school." *Appellant's App.* at 72. Stetler now appeals.

DISCUSSION AND DECISION

I. Illegal Sentence

A trial court is required to sentence convicted criminals within statutorily prescribed limits, and any sentence which is contrary to, or violative of, the penalty mandated by the applicable statute is an illegal sentence. *Ben-Yisrayl v. State*, 908 N.E.2d 1223, 1228 (Ind. Ct. App. 2009), *trans. denied*. A sentence that is contrary to, or violative of, a penalty mandated by statute is illegal in the sense that it is without statutory authorization. *Id.* A sentence that exceeds statutory authority constitutes fundamental error and is subject to correction at any time. *Id.*

As the determination of whether a particular penalty is authorized by statute is a question of law, our review is de novo. *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), *trans. denied*. Penal statutes should be construed strictly against the State and ambiguities should be resolved in favor of the accused. *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005). However, statutes should not be narrowed so much as to exclude cases they would fairly cover. *Id.* When interpreting a criminal statute, “[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense.” Ind. Code § 1-1-4-1(1).

Stetler argues that the trial court erred when it included in his sentencing order the following language: “Pursuant to IC 35-38-1-7.5, the defendant is a sexually violent predator by operation of law which requires . . . a lifetime requirement to stay 1,000 feet from any child care facility or school.” *Appellant’s App.* at 72. He contends that this requirement that he stay 1,000 feet from any child care facility or school is in violation of the statute. Stetler argues that the statute does not prohibit him from merely *being* within

1,000 feet of a school or child care facility; it only forbids him from residing within 1,000 feet of such places. We agree.

Under Indiana Code section 35-38-1-7.5(b)(1), Stetler is a sexually violent predator based on his conviction for attempted child molesting as a Class B felony pursuant to Indiana Code section 35-42-4-3. Ind. Code § 35-38-1-7.5(b)(1)(C), (J). When a person is a sexually violent predator, he is required to register as a sex offender with the local law enforcement agency. I.C. § 35-38-1-7.5(f). However, no statute prohibits a defendant deemed to be a sexually violent predator from merely *being* within 1,000 feet of a child care facility or a school. As a mandatory condition of his probation, Stetler is prohibited “from *residing* within 1,000 feet of school property . . . for the period of probation.” I.C. § 35-38-2-2.2(2) (emphasis added). This statute specifically limits the restriction to the defendant’s *place of residence* during the term of his probation and not where he can generally be. We, therefore, conclude that this restriction in the sentencing order exceeded statutory authority, and the trial court erred in including such language. We remand to the trial court to delete such language and impose conditions as stated in the statute.

II. Aggravating and Mitigating Circumstances

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. *Id.* 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.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* An abuse of discretion occurs 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.” *Id.*

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Other examples include 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, or the sentencing statement 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. Because the trial court no longer has any obligation to “weigh” aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. Once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.” Ind. Code § 35-38-1-7.1(d).

Stetler argues that the trial court abused its discretion when it sentenced him because it relied on two improper aggravating circumstances and omitted significant mitigating circumstances. He specifically contends that the trial court improperly found

the following aggravating circumstances: (1) the victim's representatives requested an aggravated sentence; and (2) the defendant was in a position of trust. He further claims that the trial court failed to find his mental health issues and low intelligence and his cooperation with the police to be mitigating factors.

We turn first to Stetler's contention that the trial court abused its discretion by finding the recommendation of the victim's representatives as an aggravating circumstance. Initially, we note that pursuant to Indiana Code section 35-38-1-7.1(c), a trial court is not limited by the specific factors enumerated in the other subsections of that statute with regard to the finding of aggravating circumstances. Unlike the previous versions of Indiana Code section 35-38-1-7.1, which required a trial court to merely "consider" "any oral or written statement made by a victim of the crime," in deciding what sentence to impose, the current version of the statute contains no such reference or limitation. Thus, we conclude that it was not an abuse of discretion for the trial court to consider the recommendations of the victim's representatives as to the sentence as an aggravating factor.

Stetler next contends that the trial court improperly found that he was in a position of trust with the victim to be an aggravating factor. "The position of trust aggravator is frequently cited by sentencing courts where an adult has committed an offense against a minor and there is at least an inference of the adult's authority over the minor." *Edrington v. State*, 909 N.E.2d 1093, 1099 (Ind. Ct. App. 2009) (quoting *Rodriguez v. State*, 868 N.E.2d 551, 555 (Ind. Ct. App. 2007)), *trans. denied*. At the sentencing hearing, Stetler admitted that D.S., who was twelve years old at the time of the offense,

looked up to him, his eighteen-year-old friend, and that Stetler had betrayed that trust. *Tr.* at 33. We conclude that the evidence supported finding this as an aggravating factor, and the trial court did not abuse its discretion.

Stetler finally argues that the trial court failed to find significant mitigating circumstances, including his low intelligence and mental health issues and the fact that he promptly cooperated with the police. It is well settled that a trial court is not required to find mitigating circumstances, nor is it obligated to accept as mitigating each of the circumstances proffered by the defendant. *Ousley v. State*, 807 N.E.2d 758, 761 (Ind. Ct. App. 2004). Accordingly, the finding of a mitigating circumstance is within the trial court's discretion. *Id.* A court does not err in failing to find mitigation when the presence of a mitigating circumstance is highly disputable in nature, weight, or significance. *Id.* at 761-62. However, when the trial court fails to find a significant mitigator that is clearly supported by the record, there is a reasonable belief that the mitigator was overlooked. *Id.* at 762.

Here, Stetler argued at his sentencing hearing that his mental health issues and his low intelligence should be considered to be mitigating factors. Although the trial court did not list them as mitigating circumstances in the written sentencing statement, it did discuss them in its oral sentencing statement. On appeal, we will review both the written and oral sentencing statements to discern the findings of the trial court. *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002). Therefore, the trial court did not fail to consider Stetler's mental health issues and low intelligence as mitigators; it just did not find them to be significant. "The relative weight or value assignable to reasons properly found or

those which should have been found is not subject to review for abuse.” *Anglemyer*, 868 N.E.2d at 491. The trial court did not abuse its discretion.

Stetler also argued that his cooperation with the police, namely going to the police station on his own to confess, should have been a mitigator. Cooperation with the authorities can be a mitigating factor, but it is not a substantial factor when it is the result of a pragmatic decision. *See Glass v. State*, 801 N.E.2d 204, 209 (Ind. Ct. App. 2004) (finding no abuse of discretion because defendant’s decision to plead guilty and cooperate with authorities were merely pragmatic decisions). Here, Stetler cooperated with authorities by admitting his actions only because he “couldn’t stand the guilt anymore.” *Tr.* at 35. His confession was not motivated by remorse for his actions, but merely his own self-interest of easing his conscience. Additionally, the trial court did find Stetler’s acceptance of responsibility for his actions by pleading guilty to be a mitigating factor. One of the ways that he accepted responsibility was by cooperating with the police. The trial court did not abuse its discretion in its finding of aggravating and mitigating circumstances.

III. Inappropriate 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.’” *Spitler v. State*, 908 N.E.2d 694, 696 (Ind. Ct. App. 2009) (quoting Ind. Appellate Rule 7(B)), *trans. denied*. “Although Indiana Appellate Rule 7(B) does not require us to be ‘extremely’ deferential to a trial court’s sentencing decision, we still must give due consideration to that decision.”

Patterson v. State, 909 N.E.2d 1058, 1062-63 (Ind. Ct. App. 2009) (quoting *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007)). We understand and recognize the unique perspective a trial court brings to its sentencing decisions. *Id.* at 1063. The defendant bears the burden of persuading this court that his sentence is inappropriate. *Id.*

Stetler argues that his fourteen-year aggregate sentence, with ten years executed and four suspended and served on probation, was inappropriate in light of the nature of the offense and character of the offender. He contends that the nature of the offense was not exceptional and was, at most, only minimally aggravating. He also claims that the evidence of his mental health issues and his acceptance of responsibility demonstrate that his sentence was inappropriate as to his character.

Although we agree that the nature of Stetler's offense was not extraordinary, we find that his character as shown by his juvenile criminal history supported the sentence given. The evidence showed that Stetler had a juvenile history consisting of several contacts with the criminal justice system beginning when Stetler was fourteen years old. While this history was fairly minimal, it justified his slightly enhanced sentence. Stetler was given ten years executed, which was the advisory sentence under Indiana Code section 35-50-2-5, with an enhancement of four years to be served on probation. We conclude that this sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and BAILEY, J., concur.