

STATEMENT OF THE CASE

Nathan D. Simpson appeals the sentence imposed following his conviction for child molesting, as a Class C felony, pursuant to a plea agreement. We consider the following issues on appeal:

1. Whether the trial court abused its discretion when it identified aggravating and mitigating circumstances.
2. Whether the trial court's sentencing statement is adequate.
3. Whether Simpson's sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 3, 2009, the State charged Simpson with one count of child molesting, as a Class A felony. The State alleged that Simpson, when at least twenty-one years of age, had performed sexual intercourse and/or sexual deviate conduct with eleven-year-old H.W. H.W. had accused Simpson while she was in the hospital recovering from a suicide attempt. On March 15, 2010, Simpson entered into a plea agreement, under which he agreed to plead guilty to the lesser charge of child molesting, as a Class C felony, in an open plea that left sentencing to the trial court's discretion. On March 29, Simpson appeared in court for a change of plea, which the parties read into the record. The court accepted Simpson's plea.

The sentencing hearing was held on April 26, after which the court issued the following written sentencing order:

The Court having entered Judgment of Conviction against the defendant following the guilty plea in Count[] I, Child Molest[ing], [as a]

Class C felony, considers the pre-sentence investigation report, the arguments and evidence of counsel, and now finds the following aggravating circumstances to exist: Defendant's prior criminal history; defendant was on probation at the time this crime was committed; Therefore, the Court finds sufficient aggravating circumstances to enhance the sentences herein. The Court now sentences the defendant as follows: On Count I, to the custody of the Indiana Department of Correction for a period of 8 years, all of which shall be executed.

Appellant's App. at 14. Simpson now appeals.

DISCUSSION AND DECISION

Issue One: Aggravators and Mitigators

Simpson contends that the trial court abused its discretion when it sentenced him.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. As we have previously observed, “[i]n order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course such facts must have support in the record.” Page v. State, 424 N.E.2d 1021, 1023 (Ind. 1981). 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.” K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006) (quoting In re L.J.M., 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)).

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. 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. Under

those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. In reviewing sentences in non-capital cases we examine both the written and the oral sentencing statements to discern the findings of the trial court. McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007).

Here, Simpson contends that the trial court abused its discretion when it identified aggravators and mitigators. In particular, Simpson first argues that the trial court improperly identified as an aggravator that he had pleaded guilty to a Class C felony but had originally been charged with a Class A felony. He argues that “this is analogous to the trial court using facts that give rise to dropped charges as aggravating circumstances.” Appellant’s Brief at 7. Such, he continues, is an inappropriate basis for enhancing a sentence. Simpson mischaracterizes the trial court’s use of that aggravator.

At the sentencing hearing, the trial court identified as an aggravator “the fact that [the offense] was dropped from a [C]lass A felony to a [C]lass C felony” as a result of Simpson’s plea agreement. Appellant’s App. at 31. This court addressed a similarly worded sentencing statement in Lamar v. State, 915 N.E.2d 193 (Ind. Ct. App. 2009).

There, we reasoned:

Lamar argues that the trial court abused its discretion when it found[] that the benefit he received from his plea bargain was an aggravator to his sentence. While the trial court states that the aggravator is the reduced charges, it appears that the trial court viewed the substantial benefit received as a result of the plea agreement as the aggravator. The trial court characterized this as an aggravator, but the benefits Lamar received from the plea agreement more properly relate to the determination of whether the plea agreement is a significant mitigator. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). The real meaning of the trial court’s

unfortunate choice of words is also borne out by its consideration of Lamar's plea agreement as an aggravator and his guilty plea as a mitigator.

In this case, Lamar had been charged with three Class A felonies with a habitual offender count and habitual substance offender count but pleaded guilty to one Class C felony and the habitual substance offender count. Although Lamar received the maximum sentence of sixteen years, he also avoided a potential sentence of eighty years had he been convicted of all three Class A felonies and been found to be a habitual offender. Lamar received a large benefit from the plea agreement, which reduced its value as a mitigator for sentencing. To the extent that Lamar claims that the trial court abused its discretion by failing to give his guilty plea more weight, the claim is not available for appellate review. Id. at 493-94.

Lamar, 915 N.E.2d at 195-96.

Just as in Lamar, the trial court here stated at the sentencing hearing that one aggravating factor was that the charge was “dropped from a [C]lass A felony to a [C]lass C felony” as a result of the plea agreement. Appellant's App. at 31. Although the trial court did not list that aggravator in the written sentencing order, again, we examine both the written and the oral findings when reviewing a sentencing statement. See McElroy, 865 N.E.2d at 589. Here, the trial court's finding that the level of the offense had been reduced from a Class A felony to a Class C felony by virtue of the plea agreement speaks to the benefit Simpson received by entering into the plea agreement. In other words, the statement complained of states the court's reason for assigning “de minimus” weight to Simpson's guilty plea as a mitigator. Simpson has not shown that the trial court abused its discretion when it identified the benefit Simpson gained through the plea agreement as one of the reasons for the sentence imposed. And to the extent Simpson argues that the trial court improperly weighed his guilty plea, again, we may not review the weight

assigned by the trial court to an aggravating or mitigating circumstances. Anglemyer, 868 N.E.2d at 490-91; Lamar, 915 N.E.2d at 196.

Next, Simpson contends that the trial court abused its discretion when it identified his criminal history as an aggravator.¹ Specifically, he argues that he has led a “law[abiding life” since the date of the offense, that he was not charged until three years after the date of the offense, and that he has no adult felony convictions. Appellant’s Brief at 9. Simpson sets out the standard that the significance of a criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. But he does not then describe his criminal history or apply this standard with the exception of stating that he had no adult felony criminal convictions. Without more, Simpson has not shown that the identification of his criminal history as an aggravating circumstance was an abuse of discretion.

Issue Two: Sentencing Statement

Simpson next contends that the trial court’s sentencing statement was inadequate. Specifically, he argues that the sentencing statement does not set out facts beyond the elements of the offense. Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. Anglemyer, 868 N.E.2d at 490. Again, 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

¹ Simpson’s argument regarding the use of his criminal history in sentencing is unclear. Specifically, he mixes his arguments under the abuse of discretion standard and Appellate Rule 7(B). Despite the lack of clarity, we exercise our discretion to address each of these arguments. However, we remind counsel that arguments may be waived if it is not clear to this court what those arguments actually are. See Ind. Appellate Rule 46(A)(8)(a).

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.

Here, when orally pronouncing sentence,² the trial court stated in relevant part that

this is a pretty egregious case when a twenty-two[-]year[-]old is having [a] sexual relationship with an eleven[-]year[-]old. Just probably two (2) years or less younger she [sic] would’ve been in single digits and that’s just almost inconceivable and so it’s just inconceivable that he would be doing this to an eleven[-]year[-]old. What was he thinking? . . .

Appellant’s App. at 31-32. Simpson argues that this part of the sentencing statement is “not sufficient to demonstrate that [the trial court] was referring to facts that were in addition to, but not necessary to just establish[,] the elements of the offense.”

Appellant’s Brief at 8. We cannot agree.

Again, the sentencing statement need only refer to “facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions.” Anglemyer, 868 N.E.2d at 490. Here, Simpson pleaded guilty to child molesting, as a Class C felony, under Indiana Code Section 35-42-4-3(b), which provides:

A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony[.]

² The written sentencing statement does not include a similar reference.

Simpson contends that the trial court's description of the ages of the victim and Simpson in this case as part of the sentencing statement merely restate the facts that satisfy the elements of the offense. Again, we cannot agree. The trial court's statement shows the court's serious concern with the tender age of the victim, well under fourteen years old and barely out of "single digit" age. The extent to which the victim was less than fourteen years old is not an element of the offense. As such, Simpson has not shown that the sentencing statement is inadequate.

Issue Three: Appellate Rule 7(B)

Simpson also contends that his sentence is inappropriate under Appellate Rule 7(B). Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offense and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration original).

Simpson contends that his sentence is inappropriate in light of his character. In support he argues, again, that he has led a “law[-]abiding life” since the date of the offense, that he was not charged until three years after the date of the offense, and that he has no adult felony convictions. Appellant’s Brief at 9. He also notes that he worked for more than two years at two different times at the Arcadia Development Center (“ADC”). During his employment there, he became a Certified Nursing Assistant and obtained a certified activity director license. ADC’s administrator testified that he was reliable and very appropriate with the children and adults at the facility. Simpson also points to his “strong family support system, as well as[] strong church support from his pastor.” Id.

But Simpson has not made any argument regarding the nature of the offense, which, as suggested above, is heinous. Revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his offense and his character. Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008); see Ind. Appellate Rule 7(B). Because Simpson presents no cogent argument regarding the inappropriateness of his sentence in light of the nature of his offense, he has waived our review of this claim. Id.; see App. R. 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999) (holding that the defendant’s “argument with respect to the review and revise provision of the constitution is waived for failure to state a cogent argument”).

Affirmed.

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