

Ronald Thomas, Jr., appeals his sentence for Class B felony rape.¹ He argues the trial court abused its discretion and his sentence is inappropriate in light of his character and offense. We affirm.

FACTS AND PROCEDURAL HISTORY

In June of 2007, Thomas and A.H. were in the process of obtaining a divorce and lived separately. On June 30, A.H. took their three children to Thomas' house to visit him. Upon arrival, A.H. and the eight-month-old went into the house, while the two older children remained in the car. Thomas and A.H. began to argue. Thomas then threw A.H. on the couch, removed her pants, stuck his finger in her anus, and announced he wanted sex. A.H. threatened to call the police, but Thomas broke the phone. A.H. fled toward the bathroom, but Thomas caught up and threw her to the ground, which caused rug burns on her shoulder. Thomas then threw A.H. onto the bed and forced his penis into her mouth. Their eight-month-old child crawled into the bedroom. Despite the child's presence, Thomas raped A.H. While they were in the bedroom, A.H. said "no" to Thomas at least five times.

After being raped, A.H. grabbed the baby and ran out the front door without any pants or underwear. A.H. got into her car and drove to a friend's house, where she arrived naked from the waist down and with the baby sitting on her lap. A.H. told her friend she had been beaten and raped. The friend gave a towel to A.H. so that she could wipe herself off. A.H. then went to the hospital, where a sexual assault kit was completed. A.H. had rug burns on her shoulder and a small tear on her vagina. The sperm sample collected from A.H.'s vagina

¹ Ind. Code § 35-42-4-1(a)(1).

matched Thomas' sperm.

The State charged Thomas with Class B felony rape and Class B felony criminal deviate conduct.² Thomas agreed to plead guilty to rape if the State dismissed the other charge and his executed sentence was capped at twelve years. The court pronounced a twenty-year sentence, with twelve years executed, eight years suspended, and three years of probation.³

DISCUSSION AND DECISION

“Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008).

1. Discretionary Matters⁴

Thomas alleges the court abused its discretion when it failed to find his remorse and the hardship his imprisonment would cause his children as mitigating circumstances. When

² Ind. Code § 35-42-4-2(a)(1).

³ The maximum sentence for a Class B felony is twenty years, with ten years being advisory. Ind. Code § 35-50-2-5.

⁴ Thomas also claims the trial court abused its discretion by considering a written victim impact statement. We reject this claim for multiple reasons. First, we will not find error in a trial court’s consideration of a document based on the appellant’s inability to find that document in the Clerk’s Record; Appellate Rule 32 provides a mechanism for correcting the Clerk’s Record, if a party feels correction is necessary. Second, the written victim impact statement was admitted for consideration in sentencing Thomas during the same hearing for an unrelated theft conviction under a separate cause number. The first part was the impact statement from the victim of that theft, and thus presumably was admissible. *See* Ind. Evid. R. 402 (“relevant evidence is admissible”). The second part, which was described as an impact statement from “another cause of action in another county,” (Tr. at 8), in fact, was a statement A.H. wrote when Thomas was being sentenced for crimes against her in Hancock County. (*See id.* at 36-7.) As A.H. took the stand during sentencing and discussed the events from Hancock County and her desire for consecutive sentences, we find no error in the admission of what appears to have been cumulative evidence. *See Hammon v. State*, 829 N.E.2d 444, 458 (Ind. 2005) (“Error in the admission of evidence may be harmless when the evidence is merely cumulative of other properly admitted evidence.”).

sentencing a defendant, the court “must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.” *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g on other grounds* 875 N.E.2d 218 (Ind. 2007). The court is not required, however, to explain why it did not find certain factors were mitigators. *Id.* at 493. We review the court’s findings for an abuse of discretion. *Id.* at 491. To demonstrate the court abused its discretion by failing to identify a mitigator, a defendant must “establish that the mitigating evidence is both significant and clearly supported by the record.” *Id.* at 493.

The trial court rejected Thomas’ imprisonment being a hardship to his children because it was “not convinced this mitigator is present in any degree other than that which is normally present in any criminal case.” (Tr. at 38.) Thomas has not pointed to any evidence demonstrating the hardship on his children would be greater than normal.⁵ Thus, Thomas has not established that this mitigator was “significant and clearly supported by the record.” *See Anglemyer*, 868 N.E.2d at 493.

As for Thomas’ alleged remorse, we agree with him that his counsel asked the court to consider that factor a mitigator, (Tr. at 28-9), that the record contains multiple statements

⁵ Instead, Thomas takes issue with two more specific findings by the trial court: that Thomas was not supporting his children when the rape occurred and that the crime “impacted” all of the children. (Tr. at 38.) While there may not have been any counseling records admitted to support an impact on the children, we cannot find error when the record shows the youngest child was in the room while Thomas raped A.H. and the other two children were waiting in the hot car, only to have their mother, who was naked from the waist down, run out to the car and leave in such a hurry that she drove with the baby on her lap. And, regardless whether Thomas was supporting the children at the time he raped A.H., he would be unable to provide support for those children for at least the next decade due to his twenty-five year executed sentence in Hendricks County for additional crimes against A.H.

regarding his level of remorse, and that the court did not mention remorse when discussing which proposed mitigators it was rejecting. Nevertheless, we need not reverse for a trial court's failure to find a mitigator if we are confident the court would have imposed the same sentence if it had considered that mitigator. *See, e.g., Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007) (An appellate court need not reverse a sentence based on the trial court finding an improper aggravator if the appellate court is confident trial court would have imposed the same sentence without that aggravator.). The trial court's sentencing statement makes crystal clear that an additional mitigator would not have made any difference:

[T]he aggravating factors in this case by far outweigh the mitigators. Both in the aggregate, go to all the aggravating factors against the aggregate of the mitigators, but the one factor alone that outweighs everything else is the fact that this crime was committed in the presence of a child. The Defendant's own child, and in the close proximity to the Defendant's other two children. The plea is accepted. Judgment of conviction is entered to rape as a Class B felony. The Defendant is sentenced to twenty years at the Indiana Department of Corrections [sic]. The Court notes that the Defendant's conduct in this case, and the aggravators and the mitigators, the Court would have no problem whatsoever if I weren't constrained by the plea agreement, in requiring that each and every minute of that sentence be executed at the Indiana Department of Corrections [sic] for the protection of the victims of this offense. I am constrained by the plea agreement. I have considered the fact that a plea agreement was entered as a mitigating factor in this case, and I will accept the plea agreement and the limitations have been placed upon the Court by the agreement of the State and the Defendant, but I want it clear on the record that I do so somewhat reluctantly.

(Tr. at 42-3.) Therefore, we need not reverse for resentencing.

2. Appellate Rule 7(B) Review

We may review a sentence on appeal for appropriateness under Indiana Appellate Rule 7(B). *Anglemyer*, 868 N.E.2d at 491. That rule provides we may revise a sentence

“authorized by statute 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.” App. R. 7(B). The appellant has the burden to demonstrate his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). In reviewing the sentence, we look to any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 217 (Ind. 2007).

We need not reiterate the events that transpired on June 30, 2007. Thomas’ crimes against A.H. were heinous and deplorable. That he raped her in front of one child, while their other two children waited outside in the car, is unfathomable. The nature of his offense does not suggest his sentence is inappropriate.

Three months after Thomas raped A.H., he committed four additional crimes against her in Hancock County: Class B felony burglary, Class B felony armed robbery, Class A felony burglary resulting in bodily injury, and Class C felony criminal confinement. He was convicted of those crimes prior to entering the guilty plea herein. A.H. indicated Thomas had also committed other uncharged crimes against her, including threatening to kill her. If Thomas did have untreated mental health problems at the time he committed these crimes, the fact remains that he knew he needed medication to control that problem, and he failed to take the steps required to obtain that medication. Nothing about Thomas’ character suggests his sentence is inappropriate.

Thomas has not demonstrated the trial court abused its discretion, and his sentence is not inappropriate in light of his character and offense. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.