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**IN THE
COURT OF APPEALS OF INDIANA**

RYAN BAKER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 18A04-0609-CR-524

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0411-FB-23

May 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Ryan Baker pleaded guilty to Sexual Misconduct with a Minor,¹ as a class D felony, and was sentenced to the maximum sentence of three years in prison. He presents the following restated issue for review: Did the trial court abuse its discretion when sentencing Baker?

We affirm.

In early August 2004, twenty-year-old Baker was babysitting several of his adopted siblings² while his parents were out of town with another sibling, who was being hospitalized. One of the children under Baker's care was his thirteen-year-old sister, N.B. After the other children had gone to sleep, Baker and N.B. engaged in sexual intercourse in his bedroom.

N.B. later told a friend, a fellow eighth grader, about the sexual relationship with her adopted brother, whom N.B. apparently thought of as a boyfriend. The friend eventually reported the relationship to a school counselor in October. Upon being questioned by counselors, N.B. admitted having had sexual intercourse with Baker on at least the one occasion set forth above.

On November 5, 2004, the State charged Baker with child molesting, as a class B felony. Following several continuances and a settlement conference, on August 5, 2005, the State sought dismissal of the original charge and filed a second count against Baker, alleging sexual misconduct with a minor as a class D felony. Thereafter, pursuant to a

¹ Ind. Code Ann. § 35-42-4-9(b) (West 2004).

² Baker's parents adopted the children in November 2002. About a year prior to the adoption, the children had been placed in foster care with the Bakers after being removed from an abusive home in which, among other things, N.B. had been molested by either her biological father or stepfather.

plea agreement, Baker pleaded guilty to the lesser charge of sexual misconduct with a minor, as a class D felony. The plea agreement left sentencing to the trial court's discretion and specifically provided for the trial court's (rather than a jury's) determination of aggravating circumstances based upon the presentence investigation report (PSI) and the evidence and arguments presented at the sentencing hearing.

Two sentencing hearings were held in this case. At the first hearing on February 13, 2006, Baker and his father, Michael, testified. Michael explained that his son was a hard worker and had otherwise been a good kid. Baker expressed remorse, stated that he knew better, and admitted that he had not only violated his sister's person, but her trust. Baker then opined that a fair sentence for his crime would be "a fair amount of community service, home arrest, probation, anything like that where I can help improve, where I can get back involved in the community and start improving myself again." *Transcript* at 24. At the conclusion of the testimony, the trial court made a lengthy statement in which it ultimately expressed deep concern as to whether the court should accept the plea agreement in light of the seriousness of Baker's offense. The trial court took the plea agreement under advisement and, on March 27, 2006, ordered Baker to undergo a psychological evaluation in an attempt to determine whether he is a sexually violent predator and likely to reoffend.

The subsequent sentencing hearing was held on August 28, 2006, at which results from two psychological evaluations were admitted. In both instances, the evaluator opined that Baker was not a sexually violent predator. At this sentencing hearing, Baker and his father once again testified. Michael explained that Baker has a good, supportive

family. Michael testified that Baker is remorseful and would not make such a serious mistake again. He described his son as very dependable and trustworthy, and noted that Baker had been employed since high school. In addition to expressing remorse, Baker testified regarding his steady employment and lack of criminal history. Baker asked the court to impose a suspended sentence, with a significant number of community service hours. When questioned by the State, Baker acknowledged he had been given a “huge break” in this case because “the State could have very easily proven a Class B felony child molesting” and then he would be facing six to twenty years in prison. *Id.* at 50.

At the conclusion of the evidence, Baker asked the court to consider the mitigating factors set forth in the PSI, specifically that he had no prior criminal history and that he was likely to respond affirmatively to probation or short-term incarceration. In addition, Baker proffered as mitigating his employment history and his remorse. Baker’s counsel argued in conclusion:

I think under the facts and circumstances of this case and the relationships of the people involved in it, Judge, are supportive of a suspended term. Judge, I think this is where we can get creative. I would want to see Ryan on the street corner with a broom. I want to see Ryan have to pay money in restitution, or some fine. I want to see Ryan be able to have dinner with his family and have his sister there. I want that counseling to happen. I want that healing to happen. Sending this young man to the DOC, Judge, is not conducive to those ends, and that’s what everybody wants here. I think that’s what society wants. I think that’s what the family wants, and it sounds to me, what the victim wants....

Id. at 53-54. The State responded, in part, by emphasizing the nature and circumstances of the crime, which were that Baker had sexual intercourse with his young sister whom he had been entrusted with babysitting. The State further indicated that it had already

given Baker a “tremendous break” and that the plea offer took into consideration Baker’s supportive family and N.B.’s wishes.³ *Transcript* at 55.

In a lengthy statement, the trial court addressed the seriousness of the offense and explained why the incident could not simply be swept under the rug and dealt with through probation and community service as urged by the defense. The court concluded its statement at the sentencing hearing as follows:

We all have to pay for our crimes. And there’s nothing that I can do to take it away. And there’s nothing that I can do to lessen the impact of it. And there’s nothing that I can do that’s going to make this any less offensive than what it is. Do you want me to say to the community, “Oh, yeah, if you’ll do that, I’ll give you a suspended sentence.” I can’t do that. I took an oath to uphold the laws of the State of Indiana. This is the law. You can’t have sexual intercourse with a thirteen year old child when you’re twenty. But it happened. And I’m sorry for the family. And I’m sorry for him. But the aggravating circumstances of this, his own sister, according to the adoption and you people, you’ve all lived together as a family. When he’s in a position of trust and confidence, he is supposed to be taking care of her and he violates her. That’s a horrendous crime. And I can’t just wave it away. I understand the mitigators, but the mitigators don’t come close to excusing this crime. And I don’t know what the counseling was of the little girl, and I hope she gets over it. I hope it doesn’t bother her. But it can’t happen in this community. It will be the judgment of this Court the defendant be sentenced to the Indiana Department of Correction for a period of three years.

³ In this regard, the State noted N.B. likely still felt she was somehow at fault and “would have probably punished herself if he’d gone to jail for six to twenty years”. *Id.* at 55. In fact, N.B. wrote the following letter regarding Baker’s sentencing:

I do not want Ryan to go to prison! He’s my brother and I love him very much as that. We made a mistake and we have paid for that through different ways but I don’t think it would be fair to him, me, or my family for him to pay for it this way! I’m dealing with my mistakes very well right now Ryan is not a rapist and a criminal and he does not deserve to be treated that way! Please listen to what I have to say and take it into your heart as you make a decision as to what Ryan’s punishment is to be!

Appendix at 96.

Id. at 60-61. In its written sentencing order, the trial court further indicated that the aggravating circumstances outweighed the mitigating circumstances. Baker now appeals his three-year executed sentence.

Baker argues that the trial court abused its discretion by entering an inadequate sentencing statement. He claims the court failed to identify and meaningfully evaluate the mitigating and aggravating circumstances. Further, he baldly asserts that the trial court disregarded two significant mitigators—his lack of criminal history and “the testimony of Mike Baker as to [Baker’s] character”. *Appellant’s Brief* at 9. Finally, Baker seems to argue that the trial court improperly considered elements of the offense as aggravators.

Sentencing determinations generally rest within the trial court’s discretion. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). Thus, it is within the trial court’s discretion to determine whether a presumptive sentence⁴ will be enhanced in light of aggravating factors. *Soliz v. State*, 832 N.E.2d 1022 (Ind. Ct. App. 2005), *trans. denied*.

If the trial court relies on aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court’s evaluation and balancing of the circumstances.

Cotto v. State, 829 N.E.2d at 523-24. If we find an irregularity in a trial court’s sentencing decision, “we have the option to remand to the trial court for a clarification or

⁴ We recognize that pursuant to Public Law 71-2005, our sentencing statutes now provide for “advisory” rather than “presumptive” sentences. Baker, however, was sentenced under our former sentencing statutes.

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.” *Id.* at 525.

Contrary to Baker’s assertion on appeal, the trial court adequately articulated the aggravating circumstances. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) (“[i]n reviewing a sentencing decision in a non-capital case, we are not limited to the written sentencing statement but may consider the trial court’s comments in the transcript of the sentencing proceedings”). Specifically, the court found in aggravation that the victim was Baker’s own sister and that at the time of the offense he was in a position of trust, as he was caring for N.B. and other siblings while their parents were out of town. Baker, himself, effectively acknowledged these aggravators at the sentencing hearing.

Further, we cannot agree with Baker that the trial court relied upon elements of the offense as aggravators. To be sure, the trial court addressed the particularly egregious nature of the crime in that twenty-year-old Baker had sexual intercourse with his thirteen-year-old sister while he was suppose to be taking care of her. While Baker only pleaded guilty to fondling or touching N.B., a child allegedly under the age of sixteen but at least fourteen years of age, with the intent to arouse or satisfy his own sexual desires, the extent of his touching of N.B. (i.e., sexual intercourse) and N.B.’s age were never actually in dispute. It is clear that the specific circumstances of this case are much more serious than the typical offense of sexual misconduct with a minor, as a class D felony. For this reasons, as well as the aggravators set out above, the trial court rejected Baker’s

request for a suspended sentence and community service and imposed the maximum executed sentence of three years.

Finally, we address Baker's rather undeveloped claim regarding mitigating circumstances. In this regard, he claims that the trial court failed to identify two significant aggravating circumstances—his lack of criminal history and his character.

Although a trial court must consider all evidence of mitigating circumstances presented by a defendant, the finding of mitigating circumstances rests within the sound discretion of the court. *Newsome v. State*, 797 N.E.2d 293 (Ind. Ct. App. 2003), *trans. denied*. Only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the court has abused its discretion by overlooking a mitigating circumstance. *Pennington v. State*, 821 N.E.2d 899 (Ind. Ct. App. 2005). “The trial court need not consider, and we will not remand for reconsideration of, alleged mitigating factors that are highly disputable in nature, weight, or significance.” *Id.* at 301. Moreover, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Newsome v. State*, 797 N.E.2d 293. “An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant *and* clearly supported by the record.” *Pennington v. State*, 821 N.E.2d at 905 (emphasis in original).

We initially observe Baker has not even attempted to establish that the alleged mitigating circumstances were both significant and clearly supported by the record. It is not sufficient to simply allege that the trial court failed to explain why it did not find certain proffered mitigating factors to be significantly mitigating. *See Pennington v.*

State, 821 N.E.2d 899. Moreover, our review of the sentencing transcript reveals the trial court fully considered the mitigating circumstances proffered by the defense, including those listed in the PSI, and determined they were outweighed by the aggravating circumstances. To the extent the trial court erred in failing to specifically identify mitigating circumstances in its sentencing statement, we find the error harmless. *See Boyd v. State*, 564 N.E.2d 519, 525 (Ind. 1991) (“[e]ven if the trial judge had correctly recognized this mitigating factor and accorded it some mitigating weight, we are satisfied that the outcome of the balancing process would not have been different”).

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.