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IN THE
COURT OF APPEALS OF INDIANA

RAFAEL HERNANDEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0806-CR-546
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0309-FA-33

June 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Rafael Hernandez pled guilty to one count of child molestation, a Class A felony,[1] and was sentenced to forty years in the Department of Correction. He raises three issues on appeal, which we restate as:

1. Whether the trial court should have issued a more detailed sentencing statement;

2. Whether the trial court abused its discretion in declining to find certain mitigating circumstances; and

3. Whether the forty-year sentence was inappropriate in light of Hernandez's character and crime.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 24, 2003, C.T. took her eleven-year-old daughter, Z.P., to Dr. Steven Lipp's office in Lafayette. A nurse in Dr. Lipp's office told police Z.P. was at least three months pregnant. Later that evening, C.T. received a telephone call from Hernandez, informing her that he was leaving the next day to go back to his home country of Mexico because of the investigation. At the time, Hernandez was twenty-five years old and had been married to C.T. for three years.

On September 25, 2003, police met with Z.P. She alleged Hernandez had sexual intercourse with her at their home in Lafayette between February and May of 2003. She

[1] Ind. Code § 35-42-4-3.

denied having sexual intercourse with anyone else. The State charged Hernandez with Class A felony child molesting.

On October 13, 2003, Hernandez surrendered to the Lafayette Police Department. He admitted having sexual intercourse with Z.P. three or four times between January and June of 2003. Hernandez stated he had sex with Z.P. in her room and sometimes she would resist by asking him to stop and to not touch her. Hernandez said he usually tried to withdraw before ejaculation, but the last time he had sex with Z.P. he was unable to do so. Hernandez stated he had fondled Z.P. and inserted his penis into Z.P.'s vagina during those three or four sexual encounters.

On October 21, 2003, the State charged Hernandez with three additional counts of Class A felony child molesting and one count of Class C felony child molesting.[2] On January 16, 2004, the State and Hernandez agreed Hernandez would plead guilty to one count of Class A felony child molesting and the State would dismiss the remaining charges. The trial court accepted the plea.

On March 2, 2004, the court held a sentencing hearing. It found as mitigating that Hernandez returned from Mexico and turned himself in knowing there was a warrant for his arrest; Hernandez signed over his retirement account for the benefit of Z.P.; he pled guilty; and he appeared remorseful. It found as aggravating factors that Hernandez violated a position of trust and an eleven-year-old child had a baby as a result of his

[2] Ind. Code § 35-42-4-3(b).

crime. After finding the aggravating factors outweighed the mitigating factors, the trial court sentenced Hernandez to forty years.[3]

DISCUSSION AND DECISION

1. Sentencing Statement

Hernandez contends the trial court did not issue a detailed enough sentencing statement. It did.

A sentencing statement must:

> (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors.

Padgett v. State, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 221 (Ind. 2007). The statement must include "reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (hereinafter "*Anglemyer I*"), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007) (hereinafter "*Anglemyer II*"). Failure to provide such a statement is an abuse of discretion. *Id*. However, we will affirm a sentence enhancement even if a trial court does not specifically articulate its reasons if the record indicates the court engaged in the evaluative process. *Buzzard v. State*, 712 N.E.2d 547, 554 (Ind. Ct. App. 1999), *trans. denied* 726 N.E.2d 301 (Ind. 1999). When we review a sentencing statement, we may consider all the trial court's comments during the proceedings. *See Corbett v. State*, 764

[3] Prior to the April 25, 2005, revisions, Ind. Code § 35-50-2-4 provided "[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances . . . ."

N.E.2d 622, 631 (Ind. 2002) ("[W]e are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings.").

Hernandez and his counsel presented reasons why the court should be lenient and the court evaluated those arguments:

> BY THE COURT: As I understand it, [Hernandez] has a fourth grade education . . . .
>
> * * * * *
>
> BY THE COURT: Now how much money is in the defendant's 401K?
>
> BY MS. ZEMAN: We show a balance, as of his last statement, which was November 30th of 2003, five zero five seven point four nine ($5,057.49).
>
> BY THE COURT: My inclination is that this 401K should be set over for the benefit of the victim in this case . . . .
>
> BY MR. DEKKER: Your Honor, I did discuss this with [Hernandez]. We did discuss the amount of money, the amount remaining and he would like to voluntarily release the full amount of the 401K for those fees.
>
> BY THE COURT: To [Z.P.'s] mother for the benefit of the baby[?]
>
> BY MR. DEKKER: Correct.
>
> * * * * *
>
> BY THE COURT: …[T]he defendant has no history of criminal activities. The defendant has been cooperative with law enforcement. As a matter of fact, he was in Mexico and he came back voluntarily to this country. On the other hand, the victim of the crime was less than twelve (12) years of age. However, is that, is that an element of the crime? That can't be used as an aggravator. It seems to me the circumstances surrounding the crime would be the aggravator, the circumstances that the child was apparently ten (10) years of age at the time she became pregnant, and with a baby. And she's had a baby as a result of this illegal activity.
>
> * * * * *

BY THE COURT: Now the recommendation here by the Probation Department is thirty (30) years, all executed . . . .

* * * * *

BY THE COURT: So I'm listening, I want to listen to what people have to say or any evidence that's submitted to see where we are on this, in terms of the balancing of the aggravators and the mitigators . . . .

* * * * *

BY THE COURT: But the idea of you having sexual intercourse with a ten (10) year old girl and getting her pregnant and the impact that having this baby at age eleven (11) on her life is phenomenal . . . . But [Hernandez], I want to hear, tell me something, tell me whatever you want to tell me so I can understand . . . . But the circumstance around here makes it an aggravated case when I try to weigh the mitigators and the aggravators. You did come back to the United States voluntarily to [sic], and you have entered a plea of guilty. And . . . you've wanted to take responsibility for what happened. And how terrible, the terrible effect this has on a young person's life.

* * * * *

BY THE DEFENDANT: I didn't hit her. I was, as well, sexually abused at the age of seven (7) years old. I haven't had nobody to help me through this. I love the baby and I love her mother as well. I want them to forgive me for everything that I have done. I'm here only to pay for what I have done . . . .

* * * * *

DIRECT EXAMINATION
QUESTIONS BY BRIAN DEKKER, ESQ.,

Q: You indicated you were molested as a child from the age of seven (7).

A: Yes.

Q: How many years were you molested?

A: Just once.

Q: And who was that . . . by?

* * * * *

A: A son of one of my uncles.

* * * * *

Q: Do you think what you did was wrong?

A: Yes.

Q: Is that why you came back from Mexico and turned yourself in?

A: Yes.

* * * * *

BY THE COURT: . . . I understand he's sorry and he came back from Mexico. And he could have stayed there. I understand that. But still that doesn't erase the circumstances surrounding what he did, having sexual intercourse with a ten (10) year old, getting the girl pregnant. She's got a baby. It's got to have a terrible impact on her life. And being sorry, that's not enough, is it?

* * * * *

BY MR. DEKKER: . . . Your Honor, we're asking for the minimum twenty (20) [year sentence] . . . He's voluntarily (Inaudible) for the bills, the pre-natal bills, the counseling . . . .

BY THE COURT: Well, that's a mitigating factor the Court does consider . . . .

BY MR. DEKKER: . . . He did violate a petition [sic] of trust. He understands that you're gonna consider those factors in determining the sentence that you give.

BY THE COURT: It was a position of trust –

BY MR. DEKKER: Yes.

BY THE COURT: . . . that the Court, it's hard to get past it.

> BY MR. DEKKER: But Your Honor, hopefully you will also balance these other factors that he has led a law-abiding life; that he did work for his family; that he did voluntarily come back and turn himself in, which is a rarity. . . . We're asking for the minimum of twenty (20), Your Honor, so eventually he can get out and work and eventually support this child.
>
> BY THE COURT: Thank you. What's the State's position on this?
>
> BY MS. ZEMAN: The State's position is this is a, as you said, phenomenal case. . . We could not fathom a ten (10) year old being pregnant. . . The impact this has had, not only on [Z.P.], is also on [her mother]. . . . I also acknowledge that it's very rare that somebody would come back and, and take responsibility as he has. And I don't know that any amount of time is going to, to repair the damage that he has done. And I'll leave that to your judgment.
>
> * * * * *
>
> BY THE COURT: The aggravators outweigh the mitigators and I'm gonna [sic] sentence you to the DOC for forty (40) years. Thank you.

(Sentencing Tr. at 24 – 40.)

The trial court's comments reflect that it engaged in a sufficient evaluative process. The judge noted both the aggravating and mitigating circumstances after being presented with argument by the parties regarding the proper factors to take into account in sentencing Hernandez. It evaluated the surrounding circumstances of the case and found sufficient reasons why each proffered factor was mitigating or aggravating. It considered as possible mitigating factors Hernandez's return from Mexico, his voluntary relinquishment of the 401(k) money, and his plea and remorse. It found aggravators in Hernandez's violation of a position of trust and that he caused a ten-year old girl to become pregnant. Finally, it balanced the mitigating and aggravating circumstances. We

cannot say the trial court abused its discretion when it assigned more weight to the aggravating circumstances than to the mitigating circumstances.

2. Mitigating Factors

Hernandez contends the trial court abused its discretion because it did not find as mitigating that he "has no criminal history, was abused as a child, has limited education, and pled guilty to the offense"[4] when these were clearly supported by the record. (Appellant's Brief at 11.) We find no abuse of discretion.

"[I]t is for the trial court to determine which mitigating circumstances to consider, and the trial court is solely responsible for determining the weight to accord such factors." *Hines v. State*, 856 N.E.2d 1275, 1282 (Ind. Ct. App. 2006), *trans. denied* 869 N.E.2d 459 (Ind. 2007). A trial court may abuse its discretion by entering a sentencing statement that omits mitigating circumstances clearly supported by the record and advanced for consideration. *Anglemyer I*, 868 N.E.2d at 490-91. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish the mitigating evidence is supported by the record and is significant. *Anglemyer II*, 875 N.E.2d at 220-21. The trial court is not obliged to explain why it did not find a factor to be significantly mitigating. *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006). Nor is it obliged to "weigh or credit mitigating factors the way a defendant suggests." *Hines*, 856 N.E.2d at 1282.

[4] The trial court explicitly noted in its sentencing order Hernandez's guilty plea was a mitigating factor. (*See* Appellant's App. at 18.)

Hernandez first contends the trial court should have found as mitigating the fact he was abused as a child. We disagree. Evidence of a difficult childhood warrants little, if any, mitigating weight. *Id.* at 1283. The trial court did engage in a brief colloquy regarding Hernandez's claim he was molested as a child, (Sentencing Tr. at 33-34), and we thus conclude the trial court considered this factor and did not abuse its discretion in declining to find it mitigating or to assign it mitigating weight.

Hernandez next contends the trial court should have found as mitigating the fact he has a limited education. Hernandez does not explain why this factor was significant; this argument therefore is waived. *See* Ind. Appellate Rule 46(A)(8)(a); *Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) (failure to develop cogent argument waives the issue for appellate review), *trans. denied* 841 N.E.2d 191 (Ind. 2005). Lack of education may be a mitigating factor, *Long v. State*, 743 N.E.2d 253, 262 (Ind. 2001), but despite his lack of education, Hernandez admitted he knew what he had done was wrong. (Sentencing Tr. at 25-26, 34.)

Finally, Hernandez contends the trial court should have found as mitigating the fact he had no criminal history. A trial court may properly conclude a defendant's lack of a criminal record is not entitled to mitigating weight. *Sipple v. State*, 788 N.E.2d 473, 483 (Ind. Ct. App. 2003), *trans. denied* 804 N.E.2d 747 (Ind. 2003). In *Jones v. State*, 467 N.E.2d 681, 684 (Ind. 1984), our Supreme Court addressed a statement by the sentencing judge that "[W]e're not talking about a first offender here who's convicted of a crime of theft or burglary or even robbery. We're talking about a crime of violence. . . ." The Court interpreted the statement to mean Jones' crime was "of such violence that

the trial judge could not consider lack of a prior record to be mitigating. This is a judgment he had the responsibility and authority to make . . . . We therefore see no shortcoming in the conclusion he makes in this regard." Similarly, the sentencing judge in the case before us had the authority to decide Hernandez's lack of criminal history was not entitled to consideration as a mitigator in light of the nature of Hernandez's offense.

The trial court did not abuse its discretion in declining to find Hernandez's proffered mitigating circumstances.

3. Appropriateness of Sentence

The presumptive sentence for a Class A felony was thirty years. Ind. Code § 35-50-2-4 (2004). The trial court sentenced Hernandez to forty. Hernandez contends a forty-year sentence is "inappropriate for an individual with no criminal history, a limited education, who was victimized as a child, is remorseful for his actions, voluntarily returned to this Country to face the charge, and plead [sic] guilty." (Appellant's Br. at 8.) His sentence was appropriate.

Even when a trial court acts within its discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision. *Taylor v. State*, 891 N.E.2d 155, 162 (Ind. Ct. App. 2008), *trans. denied* 898 N.E.2d 1227 (Ind. 2008), *cert. denied* 129 S.Ct. 1008 (2009), *reh'g denied* 129 S.Ct. 665 (2009). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Hernandez bears the burden of showing his sentence is inappropriate in light of both the nature of his offense and his character. *See Williams v. State*, 891 N.E.2d 621, 633 (Ind.

Ct. App. 2008). We give deference to the trial court's decision, recognizing its special expertise in making sentencing decisions. *Taylor*, 891 N.E.2d at 162.

Hernandez impregnated Z.P. when she was ten and she gave birth at the age of eleven. In *McCoy v. State*, we held a sentence fifteen years above the presumptive was appropriate where McCoy molested his thirteen-year-old stepdaughter who became pregnant and miscarried. 856 N.E.2d 1259, 1264 (Ind. Ct. App. 2006). We have characterized as "vile" a father's impregnation of his daughter, *Newsome v. State*, 797 N.E.2d 293, 302 (Ind. Ct. App. 2003), and cannot say such an act by Hernandez is less vile. In this case, Z.P. not only had to endure the physical and psychological pain of being molested on multiple occasions, but she gave birth to Hernandez's child at only eleven years old. Given the vile nature of this offense, we cannot find Hernandez's sentence inappropriate.

The mitigating factors found by the trial court reflect well on Hernandez, but we need not ignore that Hernandez committed this offense against a victim with whom he was in a position of trust. Hernandez's abuse of this position of trust reflects poorly on his character. *See Booker v. State*, 790 N.E.2d 491, 496 (Ind. Ct. App. 2003) (violation of position of trust reflected poorly on character), *trans. denied* 804 N.E.2d 746 (Ind. 2003).

In light of Hernandez's character and offense, the trial court did not abuse its discretion by imposing a forty-year sentence.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.