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**IN THE
COURT OF APPEALS OF INDIANA**

TERESA M. MASON,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 22A01-1003-CR-131

APPEAL FROM THE FLOYD SUPERIOR COURT No. 3
The Honorable Maria D. Granger, Judge
Cause No. 22D03-0906-MR-1340

July 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Teresa Mason was convicted, pursuant to a guilty plea, of Class C felony Reckless Homicide¹ for which she received a maximum eight-year sentence in the Department of Correction. Upon appeal, Mason challenges her sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

On October 30, 2001, Mason recklessly killed her husband Walter Mason in Floyd County. On June 3, 2009, a grand jury indicted Mason for murder. On October 23, 2009, the State amended the indictment to Class C felony reckless homicide. That day, Mason pled guilty to reckless homicide. The trial court entered judgment of conviction at the November 23, 2009 sentencing hearing.

Mason is five feet, four inches tall, weighs approximately 115 pounds, and suffers from emphysema and various other ailments, including bipolar disorder. At the sentencing hearing, Mason and her sister and daughter testified that Walter had subjected her to frequent physical and emotional abuse, including threatening her with his guns. At one point, Walter's physical abuse allegedly caused Mason to suffer a broken leg. Both Mason and Walter abused alcohol, and Mason actively argued with Walter. Walter's son testified that he had seen Mason acting violently. Mason's criminal history includes several alcohol-related convictions.

Mason does not remember much of the night in question. Photographs show the presence of several beer cans in the kitchen at the time, and Mason testified that she and Walter drank the beer from those cans. Walter's body was found in the bathroom

¹ Ind. Code § 35-42-1-5 (2001).

slumped against the toilet and the bathroom wall with a revolver next to his left leg. Mason did not remember calling 911 after the shooting but did not dispute that she had. Photographs of Mason do not indicate that she had suffered physical injury that night.

Upon sentencing Mason, the trial court found as aggravating factors Mason's criminal history and the fact that she used excessive force during the incident resulting in Walter's death. The trial court also noted Mason's history of criminal arrests, which suggested to the trial court that police intervention did not serve to deter her criminal conduct. The court did not consider this factor to be an aggravator, however.

With respect to mitigating factors, the trial court acknowledged Mason's claimed bipolar condition but concluded that any mitigation from this factor or the fact of her guilty plea was already reflected by her reduced Class C felony charge. In addition, with respect to the events surrounding Walter's death, the trial court specifically found no evidence of the following: (1) that Mason and Walter were involved in a domestic dispute; (2) that Walter placed Mason in any danger of immediate harm; (3) that Walter prevented Mason from leaving the home; (4) that Mason and Walter engaged in any struggle; (5) that Walter battered or threatened Mason; (6) that Walter used any force whatsoever against Mason; (7) that Walter was armed; or (8) that Walter fired a weapon. The trial court ultimately concluded that the aggravating factors outweighed the mitigating factors, and it imposed a maximum eight-year sentence in the Department of Correction. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Mason challenges the trial court's consideration of aggravating and mitigating factors. She also claims that her maximum eight-year sentence is inappropriate. We first address Mason's challenge to the sentencing factors.

I. Aggravating and Mitigating Factors

Upon evaluating Mason's challenge to the trial court's use of aggravating and mitigating factors, we first observe that Mason committed her crime in 2001. We therefore apply the presumptive sentencing scheme in effect prior to the 2005 sentencing amendments creating advisory sentences. See *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (“[T]he sentencing statute in effect at the time a crime is committed governs the sentence for that crime.”). We specifically note that the rule articulated in *Anglemyer v. State (Anglemyer I)*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), that the relative weight of aggravators and mitigators is not reviewable for abuse of discretion, does not apply here.

Sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). Based upon the law applicable to Mason at the time of her sentence, if a trial court relied on aggravating or mitigating circumstances to modify the presumptive sentence, it was required to do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. *Id.*

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. The trial court is not required to give the same weight as the defendant does to mitigating evidence. *See Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance is sufficient to justify an enhanced sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Matshazi v. State*, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), *trans. denied*. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, but rather only those that it considered significant. *Id.*

A. Aggravating Factors

1. Excessive Force

Mason first challenges the trial court's consideration of her use of excessive force as an aggravating factor. Mason argues that "excessive force" is necessarily an element of the crime of reckless homicide and therefore cannot also be used as an aggravator. *See Johnson v. State*, 687 N.E.2d 345, 347 (Ind. 1997) ("A factor constituting a material element of a crime cannot be considered an aggravating circumstance in determining sentence."). It appears that the trial court, in finding this factor to be an aggravator, was focused more upon the specific nature and circumstances of the crime than the mere fact

that Mason killed Walter. Following defense counsel's objection to the court's use of this aggravator, the prosecutor specifically pointed to the facts that Walter was shot in the head while he was unarmed and using the restroom, which was allegedly more egregious than the more typical scenario involving the mere pointing of a gun in a reckless manner. The trial court was within its discretion to consider the particular circumstances surrounding Mason's actions, including their "excessive" nature, to be aggravating. *See McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001) (endorsing use of "nature and circumstances" of crime as proper aggravator). We find no abuse of discretion.

2. Criminal History

Mason also challenges the trial court's consideration of her criminal history as a weighty aggravating factor. Mason claims that her prior convictions are all misdemeanors and do not serve to justify her receiving a maximum sentence. It is true that the significance of a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999). While Mason's criminal history does not include particularly grave offenses, the nature and number of Mason's offenses justify the trial court's considering her criminal history to be significantly aggravating. Mason has a lengthy history of alcohol-related crimes dating back to 1988, and she has accumulated a full ten misdemeanor convictions since that time. Many of those convictions, like the instant case, involved alcohol. In light of the clear influence of alcohol in Mason's repeated offenses, including in the instant case, we cannot say that

the trial court abused its discretion in considering Mason's lengthy criminal history to be a significant aggravating factor.

B. Mitigating Factors

1. Guilty Plea

The trial court attributed little weight to Mason's guilty plea, reasoning that any mitigating weight had already been factored into the State's agreement to reduce her charge from murder to reckless homicide. In challenging the trial court's consideration of this factor, Mason claims that the State had twice previously dismissed its murder charge against her, demonstrating that it too benefited from the reduced charge and guilty plea.

The Indiana Supreme Court has held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Anglemyer v. State (Anglemyer II)*, 875 N.E.2d 218, 220 (Ind. 2007). The significance of a guilty plea as a mitigating factor varies from case to case. *Id.* at 221. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea. *Id.* Here, Mason received a significant benefit from the plea, namely the State's dropping its murder charge against her. While the State may also have benefited from the plea, this does not nullify Mason's clear advantage in facing a Class C felony rather than murder. Given this advantage, Mason's decision to plead guilty was just as easily a pragmatic decision as an effort at taking responsibility. We find no abuse of discretion

in the trial court's failure to consider Mason's guilty plea to be a significant mitigating factor.

2. Abuse

Mason contends that the trial court abused its discretion in failing to place significant mitigating weight on the fact that she was a long-time victim of Walter's abuse. Indiana Code section 35-38-1-7.1(c)(11) (2001) provides for the following mitigating factor:

The person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted.

The trial court specifically found that Mason had failed to demonstrate that she had suffered from the effects of repeated instances of battery at the hands of Walter. Indeed, the photographic exhibits following the incident in question do not appear to show that Mason had suffered any physical injury. Of course, not all "effects of battery" must be physical, but the trial court was within its discretion to disbelieve Mason's and her witnesses' testimony regarding Walter's alleged abuse and its effect. To the extent there was abuse involved, there was ample testimony that Mason and Walter were both alcoholics and mutually responsible for the destructive nature of their relationship. We defer to the trial court's assessment of the facts and conclude that it did not abuse its discretion in this regard.

II. Appropriateness

Mason also challenges the appropriateness of her maximum sentence.² Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the “Court 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.” We exercise deference to a trial court’s sentencing decision, both because Rule 7(B) requires that we give “due consideration” to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant’s burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Mason’s maximum eight-year sentence is not inappropriate. The nature of the instant offense involved permitting her drunken, volatile lifestyle to escalate to the point of shooting her own husband in the head while he was in the bathroom, presumably in a

² Mason committed her crime in 2001, when the Indiana Appellate Rule 7(B) standard required a sentence to be “manifestly unreasonable” to warrant revision. Effective January 1, 2003, Rule 7(B) no longer contains the phrase “manifestly unreasonable” and now provides that a sentence need only be “inappropriate in light of the nature of the offense and the character of the offender” to warrant revision. App. R. 7(B). Because the rule is directed to the reviewing court, the amendment is applicable to review after January 1, 2003, even though the crime occurred prior to that date. *See Polk v. State*, 783 N.E.2d 1253, 1260-61 (Ind. Ct. App. 2003) (applying “inappropriateness” standard to Rule 7(B) review of sentence imposed prior to Rule 7(B) amendment because appellate court was asked to review sentence after date of that amendment), *trans. denied*.

vulnerable state. Mason's character has little to recommend it: she has a twenty-year history of repeatedly breaking the law, often while abusing alcohol, and placing others at risk in the process. This case underscores the dire consequences of that behavior. Indeed, Mason conceded at the sentencing hearing that alcohol was a major contributing factor in the instant crime. The fact that Mason may also suffer from bipolar disorder and other ailments does not alter or excuse the fact of her willfully drunken and destructive actions, nor does it suggest that her eight-year sentence is excessive.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.