Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

KELLY N. BRYAN
Public Defender
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

HENRY A. FLORES, Jr.
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GEOFFREY L. LEHMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0901-CR-2
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0703-FB-3

August 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Geoffrey Lehman appeals following his convictions for Count I, Sexual Misconduct with a Minor,[1] a Class B felony, and Count II, Sexual Misconduct with a Minor,[2] a Class C felony. Upon appeal, Lehman contends that the trial court abused its discretion in considering certain aggravating factors for the purposes of sentencing him. In addition to the abuse of discretion challenge, Lehman contends that his sentence is inappropriate in light of the nature of his offense and his character. Lehman was sentenced to twelve years of incarceration with two years suspended to probation for Count I and six years of incarceration for Count II. We affirm.

FACTS AND PROCEDURAL HISTORY

In November of 2003, Lehman met B.E. in Delaware County. (Tr. 10). Lehman was approximately twenty-four years old and knew that B.E. was fourteen years old. (Tr. 9-10). Between November of 2003 and December of 2004, Lehman and B.E. engaged in sexual intercourse, and on another occasion, Lehman engaged B.E. to perform oral sex. (Tr. 9-10, State's exhibit 1). On March 16, 2007, the State charged Lehman with three counts of Class B felony, sexual misconduct with a minor. (Appellant's App. 17-19).

On June 2, 2008, Lehman pled guilty, pursuant to a plea agreement, to Count I as charged, and Count II, as a Class C felony. (Appellant's App. 86-87). The State agreed to dismiss Count III pursuant to the plea agreement. On December 1, 2008, Lehman asserted that he wanted to withdraw his guilty plea. (Tr. 62). The trial court denied Lehman's motion and sentenced him to twelve years of incarceration, with two years suspended to probation,

[1] Ind. Code § 35-42-4-9 (a)(1) (2003).

for Count I and six years of incarceration for Count II. (Appellant's App. 168-169). The trial court ordered that his sentences be served concurrently. (Tr. 87). This appeal follows.

DISCUSSION AND DECISION

I. Abuse of Discretion

Lehman challenges his sentence on the ground that the trial court abused its discretion when it sentenced him above the presumptive term. As a preliminary matter, we note that Lehman committed the instant offense at a time when the governing sentencing law was based on the presumptive sentencing scheme. As a result, we apply the sentencing laws applicable to that presumptive sentencing scheme. We specifically observe that the rule in *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), stating that the relative weight of aggravating and mitigating factors is not reviewable for abuse of discretion, does not apply here.

It is well-settled that 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 Lehman at the time of his sentence, the trial court was required to do the following: (1) identify all significant aggravating and mitigating factors; (2) explain why each factor is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. *Id.* The trial court found the nature of Lehman's offense and his past criminal history to be aggravating factors. In addition to those factors, the court articulated that Lehman's assumption of responsibility and the hardship to

---

[2] Ind. Code § 35-42-4-9 (a) (2003).

his children were minimal mitigating factors.

The fixed presumptive term for Lehman's Class B felony sexual misconduct conviction was ten years, with a maximum sentence of twenty years. Ind. Code § 35-50-2-5 (2003). The fixed presumptive term for Lehman's Class C felony sexual misconduct conviction was four years, with a maximum sentence of eight years. *Id.* Lehman's sentences were ordered to run concurrently to one another. Therefore, Lehman was sentenced to an aggregate twelve years of incarceration, two years above the presumptive term.

Lehman contends that the trial court abused its discretion when it used the age element of the offense as an aggravating factor, namely, that Lehman knew that B.E. was too young for legal sexual intercourse[3]. It is true that a material element of a crime may not be used as an aggravating factor to support an enhanced sentence. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). However, when evaluating the nature of the offenses, "'the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors.'" *Id.* at 590-91 (quoting *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001)). The trial court must then "'detail why the defendant deserves an enhanced sentence under the particular circumstances.'" *Id.* at 590 (quoting *Vasquez v. State*, 762 N.E.2d 92, 98 (Ind. 2001)). Generally, this aggravator is "'thought to be associated with particularly heinous facts or situations.'" *Id.* at 590 (quoting *Smith v. State*, 675 N.E.2d 693, 698 (Ind.

[3] To the extent that Lehman challenges that the trial court abused its discretion when it considered that he had sexual intercourse with B.E. around sixty (60) times, Lehman did not object to the admission of State's exhibit 3, B.E.'s interview with the Muncie Police Department, for the purpose of the factual basis of Lehman's guilty plea. We therefore conclude that the trial court properly considered this evidence as it relates to the nature of Lehman's offenses.

1996)).

In the instant case, the trial court did more than merely recite the age element of the instant offenses to enhance Lehman's sentence. The trial court examined the unique characteristics of Lehman's offense and deemed his offense "particularly heinous" because he believed the victim to be much younger than her true age of fourteen. Tr. p. 85. The trial court additionally considered the particularized circumstance that Lehman ended the relationship with B.E. when he found out that the she was not as young as he believed. We cannot say that the trial court abused its discretion in recognizing this aggravating factor. *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007).

Lehman also claims that the trial court should not have considered his criminal record to be a significant aggravating factor. In making such argument, Lehman relies on *Hines v. State*, 856 N.E.2d 1275, 1281 (Ind. Ct. App. 2006), *trans. denied*, which recognized that a criminal record is relevant for sentencing purposes but not significant when the criminal history is neither excessive nor directly related to the offense. *Id.* at 1281. While Lehman contends that the trial court failed to distinguish the commonality or excessive nature of his crimes as detailed in *Hines*, we note that *Hines* is distinguishable from the circumstances here.

The trial court in *Hines* considered the defendant's two misdemeanor convictions and his previous probation violation to be aggravating, and we agreed with Hines that his criminal history was neither excessive nor directly related to his conviction. *Id.* Here, however, Lehman's past criminal history is more extensive. Over a span of four years,

Lehman had been convicted of two counts of disorderly conduct as a Class B misdemeanor, theft as a Class A misdemeanor, resisting law enforcement as a Class A misdemeanor, and battery as a Class A misdemeanor. Moreover, the misdemeanors considered in *Hines* were committed in a span of eleven years, whereas Lehman's criminal four-year span is relevant and reveal an individual with a habitual disregard for the law.

The trial court properly considered Lehman's criminal history. *Newsome v. State*, 797 N.E.2d 293, 300 (Ind. Ct. App. 2003). A person's criminal history is a valid aggravating circumstance. *Smith v. State*, 908 N.E.2d 1251, 1253 2009 (Ind. App. 2009). The weight to be afforded this factor must be considered along with other aggravators cited by the court. *Id.* In addition to Lehman's criminal record, the trial court found the nature of the crime to be an aggravating factor, and we have stated that one aggravating factor can be sufficient to enhance a sentence. *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). We are unconvinced that the trial court's consideration of Lehman's criminal history as a partial justification for a two year enhancement on his sentence is an abuse of discretion.

In addition to challenging the aggravating factors, Lehman contends that although the trial court recognized mitigating factors, it gave minimal weight to his remorse, his guilty plea, and the undue hardship on his dependent children. 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*. Furthermore, the trial court's assessment of the proper weight of mitigating and aggravating

circumstances and the appropriateness of the sentence as a whole is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. *Id.*

As to Lehman's remorse, the trial court recognized that he was sincere in his expression of remorse, but found it minimal in light of how long Lehman continued the relationship with B.E. In addition to the length of the relationship, approximately five years had passed between the time that Lehman committed the offenses and his being charged with the crimes, in which time, Lehman had made no attempt to come forward with the truth. Based on these facts, it is unclear whether Lehman's remorse results from the mistakes that he made with B.E., or the fact that he was finally caught. While Lehman hoped that more consideration would be given to his apology, the trial court need not agree with him as to the weight or value to be given to his mitigating factors. *Id.* As such, we do not find an abuse of discretion on this point.

With respect to Lehman's challenge that his guilty plea should have received a greater weight, we observe that a guilty plea is a mitigating factor, but not necessarily a significant mitigating factor. See *Scott v. State*, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006). Here, Lehman's guilty plea did spare B.E. from the embarrassment of testifying in court. However, as the trial court found, Lehman also received a significant benefit from the plea. Pursuant to the plea agreement, the State agreed to reduce a second Class B felony count to a Class C felony and dismiss a third Class B felony. Due to Lehman's admissions to these offenses, Lehman garnered a real benefit from the plea agreement. Therefore, we find no abuse of

discretion on this point.

With respect to Lehman's challenge that his sentence would be an undue hardship to his dependent children, the hardship to a defendant's dependents is not always a significant mitigating factor. *McElroy*, 865 N.E.2d at 592. Moreover, the Supreme Court has affirmed a trial court's conclusion that the nature and circumstances of an offense may by themselves outweigh multiple mitigating circumstances. See *Thacker v. State*, 709 N.E.2d 3, 9 (Ind. 1999). Such is the case here, we are unconvinced that the trial court abused its discretion.

II. Appropriateness

Lehman also challenges his sentence on the grounds that his twelve-year sentence is inappropriate in light of the nature of his offense and his character. Indiana Appellate Rule 7(B) 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." Indiana Appellate Rule 7(B).

With respect to the nature of the offense, Lehman does not specify why he believes that his sentence was inappropriate. This argument is hard to make given the facts of this case. The nature of Lehman's offenses, as the trial court found, is "particularly heinous." Between November of 2003 and December of 2004, Lehman preyed on the youth of fourteen-year old B.E. and traumatized B.E. by continuing a sexual relationship with her that spanned the course of one year. B.E., now a young woman, still suffers from the effects of these actions, and may continue to be haunted by her victimization. In addition to B.E.'s mental injury, we

cannot overlook the fact that Lehman actually believed that he was victimizing an even younger child, and only stopped his sexual misconduct with B.E. when he learned she was not as young as he believed. In addition, Lehman, who is a father of two small daughters, is privy to the vulnerability of young girls and the pain the victimization of a child could cause a parent.

With respect to Lehman's character, Lehman's motion to withdraw his guilty plea during his sentencing hearing, despite his admissions to the offenses on two separate occasions, demonstrates an overall failure to accept responsibility for his actions. Not only did Lehman's motion to withdraw his plea show a lack of remorse, but his criminal record reveals that he continuously graduated to higher degree of offenses. Lehman urges this court to consider the hardship his children will suffer as a result of his sentence. Yet Lehman, a father at the time he committed his offenses, did not find his children a significant enough factor to deter him from committing these crimes. We are therefore unconvinced that Lehman's character or the nature of his offenses somehow merits a lesser sentence.

From these facts, and having concluded that the trial court did not abuse its discretion with respect to the weighing of aggravating and mitigating factors, we affirm the trial court's imposition of an aggregate twelve-year sentence.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.