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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA BALSER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0903-CR-272
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald Daniel, Judge
Cause No. 79C01-0710-FD-46

August 19, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Joshua Balser ("Balser") pleaded guilty in Tippecanoe Circuit Court to two counts of Class D felony dissemination of matter harmful to minors, one count of Class D felony invasion of privacy with a prior conviction, and admitted to being an habitual offender. The trial court sentenced Balser to an aggregate term of ten years, eight years executed and two years on probation. Balser appeals and argues that the trial court improperly recognized aggravating factors when sentencing him and that his sentence was inappropriate. Finding no abuse of discretion in sentencing and concluding that Balser's sentence was not inappropriate, we affirm.

Facts and Procedural History

On August 31, 2007, Balser entered his room in his mother's house and observed his eleven-year-old nephew, J.D, viewing one of Balser's pornographic videos. Balser did not prevent J.D. from viewing the material and, in fact, proceeded to provide J.D. with two other pornographic videos. On another occasion, Balser found J.D. viewing Balser's pornographic magazines and did not prevent J.D. from viewing Balser's pornographic magazines. Balser then provided him with additional pornographic magazines. Balser recognized that he should not allow J.D. to view such material but permitted him to continue to do so.

On October 9, 2007, the State charged Balser with six counts of Class D felony dissemination of matter harmful to minors and one count of being a habitual offender. While out on bond, Balser contacted his ex-wife in violation of a protective order. The State charged Balser with Class D felony invasion of privacy with a prior conviction

which was consolidated with the case involving the six counts of Class D felony dissemination of matter harmful to minors.

On October 17, 2008, Balser pleaded guilty to two counts of Class D felony dissemination of matter harmful to minors, one count of Class D felony invasion of privacy, and admitted to being a habitual offender. The remaining charges were dismissed. On November 14, 2008, the trial court sentenced Balser to an aggregate ten year term. The trial court's oral pronouncement at the November 14 sentencing hearing was as follows: "The Court will accept the pleas of guilty and a – and convictions will be entered against Joshua D Balser on Count one and Count six Dissemination of [material] harmful to minors as D felonies." Tr. p. 42. However, the trial court also issued a written sentencing order later on the same day which stated that Balser "is guilty of Count I, Dissemination of Matter Harmful to Minor, a Class D felony; Count IV, Dissemination of Matter Harmful to Minor, a Class D felony; Count VIII, Invasion of Privacy with a Prior, a Class D felony; and Count VII, Habitual Offender, and the remaining counts were dismissed." Appellant's App. p. 71 (emphasis added). The same order proceeded to sentence Balser as follows:

> [Balser is sentenced to] the Indiana Department of Correction for a period of three (3) years on Count I, a Class D felony; three (3) years on Count VI, a Class D felony; three (3) years on Count VIII, a Class D felony; and four (4) years on Count VII. Count VI shall be concurrent to Count I. Count VIII shall be consecutive to Count I for a total of ten (10) years. [1]

Tr. p. 72 (emphasis added).

[1] We note the discrepancy between the guilty finding and sentencing portions of the trial court's order and the absence of Count IV in the sentencing portion of the order. The parties have proceeded as if the proper count at issue is Count VI, as do we. However, it is for this reason that we remand this case for correction of the clerical error in Balser's sentencing order.

Balser was ordered to execute eight years with two years suspended to probation. Four days later the trial court signed an Abstract of Judgment that reflected Balser's conviction on count six as pronounced at the sentencing hearing. Appellant's App. p. 76.

Balser now appeals.

Discussion and Decision

I. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Id. at 491 (citations omitted). A trial court can abuse its sentencing discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that explains reasons for imposing a sentence where the record does not support the reasons; (3) entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for consideration; and (4) entering a sentencing statement in which the reasons given are improper as a matter of law. Id. at 490-91. If the trial court abuses its discretion in one of these or any other way, remand for resentencing may be the appropriate remedy "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491.

Balser does not argue that his criminal history is not a proper aggravator but does challenge the three other aggravators used by the trial court: the recommendation of one of the victims, Balser's young age[2], and his LSI-R score[3].

Balser argues that the trial court should not consider the recommendation of a victim as an aggravator. The trial court noted that Balser's ex-wife asked for a maximum sentence. However, "although recommendations by a victim's family may be used by the court to assist it in making a sentencing decision, the recommendations 'are not mitigating or aggravating circumstances as those terms are used in the sentencing statute.'" Hawkins v. State, 748 N.E.2d 362, 363 (Ind. 2001) (quoting Edgecomb v. State, 673 N.E.2d 1185, 1199 (Ind. 1996)). Reliance on such a recommendation as an aggravating circumstance is improper. Id.

Balser also argues that the trial court should not have considered his LSI-R score[4] as an aggravator. We have previously determined that the use of the LSI-R score as an aggravating factor is improper as a matter of law. Rhodes v. State, 896 N.E.2d 1193 (Ind. Ct. App. 2008).

In a situation such as the one before us, we will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence had

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[2] Balser and the State argue whether the victim's young age is a proper aggravator; however, the trial court actually uses Balser's young age as an aggravator, not that of his victim. Appellant's App. p. 72. Even if the trial court did improperly use Balser's age as an aggravating factor, he has waived this issue by failing to raise it on appeal. See Ind. Appellate Rule 46(A)(8).

[3] Although the Level of Service Inventory Revised (LSI-R) score is in terms of the offender's recidivism, the actuarial instrument is the most commonly used classification tool to determine the rehabilitation needs of offenders. Colorado Division of Criminal Justice, Office of Research and Statistics, Evidence Based Correctional Practices, http://www.dcj.state.co.us/ors/pdf/docs/CCJJ_EBP_rpt_v3.pdf.

[4] See note 3, supra.

it properly considered the sentencing factors. Anglemyer, 868 N.E.2d at 491. The trial court here properly found the following aggravators: Balser's extensive criminal history, including four felonies and seven misdemeanors, with two probations revoked and four probation revocations pending at the time of sentencing, as well as the fact that the sentences were non-suspendible. The trial court also properly found the following mitigators: that Balser took responsibility for his actions by pleading guilty, that Balser has one minor child but he is not supporting that child, and that Balser has cerebral palsy. Upon review of these aggravators and mitigators, we can say with confidence that the trial court would have imposed the same sentence had it properly considered the sentencing factors.

II. Inappropriate Sentence

Second, Balser argues that his sentence was inappropriate. A defendant may challenge his sentence is under Indiana Appellate Rule 7(B) which provides: "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." The Anglemyer Court explained:

> It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

Id. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Id. at 494.

Balser's sentence is appropriate in light of the nature of the offenses. Balser exposed his eleven-year-old nephew to pornography owned by Balser on a number of occasions despite being in a self-described "parental role" with regard to the nephew. Tr. p. 19. Also, while out on bond on those charges, Balser contacted his ex-wife in violation of a protective order which led to the Class D felony invasion of privacy charge in the instant case. This latest violation is one of the many protective order violations by Balser against his ex-wife.

Balser's character also supports the appropriateness of the trial court's sentence. Since late 2001, Balser has amassed an extensive criminal history, described earlier in this opinion. A particularly telling aspect is that all of Balser's invasion of privacy convictions, both as felonies and as misdemeanors involved the same victim, his ex-wife, who was the victim once again in the case before us.

Conclusion

The trial court did not abuse its discretion in sentencing Balser because the trial court properly found aggravators that were sufficient to support the sentence imposed. Under the facts and circumstances of this case, we cannot say that Balser's ten year aggregate sentence was inappropriate in light of the nature of the offense and the character of the offender. This case is remanded for correction of the clerical errors explained in Footnote 1.

Affirmed.

RILEY, J., and KIRSCH, J., concur.