



Deborah J. Schwartz appeals her two-year sentence for theft as a Class D felony. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On December 16, 2008, Schwartz stole \$120 worth of merchandise from a Von Maur Department Store in Allen County. At that time, Schwartz was on probation from separate 2007 and 2008 proceedings in which she was convicted, respectively, of Class D felony theft and Class C misdemeanor check deception. The State charged Schwartz with Class D felony theft. Schwartz pled guilty, and the court ordered a two-year sentence.

### **DISCUSSION AND DECISION**

Schwartz asserts she is challenging whether her “sentence was inappropriate in light of the nature of the offense and the character of the Defendant,” (Br. of Defendant-Appellant at 2), and sets out a single-sentence standard of review therefor. (*See id.* at 5.) However, the bulk of her argument focuses on whether the trial court improperly overlooked her mental health issues as a significant mitigator. Arguing for that additional mitigator is the only manner in which Schwartz discusses her “character,” and at no point does she offer argument about “the nature of the offense.” *See* Ind. Appellate R. 7(B).

Whether the trial court overlooked a significant mitigator and whether a defendant received an inappropriate sentence are two distinct arguments with different standards of review. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g* 875 N.E.2d 218 (Ind. 2007). We remind counsel that an argument presented in terms of “inappropriateness” of a sentence is subject to waiver when the focus of the argument is

on the trial court's consideration of aggravating and mitigating circumstances. *See Ford v. State*, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999) (Ford's argument with respect to the former "review and revise" provision of the Indiana constitution waived for failure to state a cogent argument when Ford recited that standard but then focused only on the propriety of the trial court's use of his criminal history and his need for correctional or rehabilitative treatment as aggravating circumstances). Waiver notwithstanding, we quickly reject both possible claims.

When sentencing a defendant, the court "must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer*, 868 N.E.2d at 490. The court is not required, however, to explain why it did not find certain factors were mitigators. *Id.* at 493. We review the court's findings for an abuse of discretion. *Id.* at 491. To demonstrate the court abused its discretion by failing to identify a mitigator, a defendant must "establish that the mitigating evidence is both significant and clearly supported by the record." *Id.* at 493.

Schwartz proposed the court find a mitigator in her history of mental health treatment for depression and post traumatic stress disorder, both of which resulted from her father abusing her when she was a child. The court noted: "According to you, between your mental disorders and your medications you snapped and committed this Theft." (Tr. at 10.) That comment demonstrates the court considered, but rejected, her proposed mitigator. Schwartz did not explain to the trial court, or to us, the relevance of

her mental health issues to this theft or to her continued commission of crimes. We are not convinced her mental health issues were so significant to make their rejection an abuse of discretion.

We may revise a sentence if we find it “inappropriate in light of the nature of the offense and the character of the offender.” App. R. 7(B). To revise a sentence, we need not first find the trial court abused its discretion in determining the sentence. *Smith v. State*, 889 N.E.2d 261, 263 (Ind. 2008). The “defendant must persuade [us] that his or her sentence has met this inappropriateness standard of review.” *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The sentencing range for a Class D felony is six months to three years, with the advisory sentence being eighteen months. Ind. Code § 35-50-2-7. Schwartz had five convictions preceding this one, and four of them were of a similar nature.<sup>1</sup> Schwartz received suspended sentences for all her prior convictions, and nevertheless she continued to break the law. When she committed this crime, she was already on probation from separate proceedings leading to convictions of theft and criminal conversion. In light of her failure to modify her behavior based on prior less-restrictive sentences, Schwartz’s mental health issues are insufficient to cause us to find a two-year sentence inappropriate.<sup>2</sup>

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<sup>1</sup> Her convictions include criminal conversion in 1981, Class C felony forgery in 1982, Class C misdemeanor driving while suspended in 2006, Class D felony theft in 2007, and Class C misdemeanor check deception in 2008.

<sup>2</sup> The record contains no additional facts regarding the nature of her offense. Neither has Schwartz explained whether or how her sentence is inappropriate in light of the nature of her offense. Thus we

Affirmed.

CRONE, J., and BROWN, J., concur.

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presume no extenuating circumstances differentiated Schwartz's theft from other garden-variety thefts from department stores.