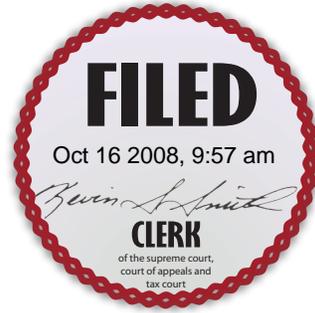


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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PEDRO DELEON, )

Appellant-Defendant, )

vs. )

No. 45A03-0804-CR-194

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Salvador Vasquez, Judge  
Cause No. 45G01-0605-FC-61

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**October 16, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Pedro DeLeon appeals his sentence for sexual battery as a class D felony.<sup>1</sup> DeLeon raises one issue, which we revise and restate as whether the trial court abused its discretion in sentencing DeLeon. We affirm.

The relevant facts follow. Between April 22, 2003, and December 31, 2005, R.C., who was born on April 22, 1992, would go to her cousin's house to do house cleaning work and her cousin's father, DeLeon, would often be present and pay her for her work. DeLeon would often come up behind R.C. while she was doing dishes, grab her waist, and tell her how pretty she was. On one occasion, R.C. asked DeLeon to come into the bedroom and see if it was cleaned sufficiently so she could get paid. DeLeon sat down on the bed next to her, put his hand on her shoulder, pushed her down, got on top of her, and began touching her stomach and buttocks while telling her how pretty she was and that he loved her. After R.C. managed to get out from underneath DeLeon, DeLeon got up and said "'look at me' in reference to a wet spot in his crotch area." Appellant's Appendix at 23. On another occasion, DeLeon came up behind R.C. while she was doing dishes, rubbed up against her, and whispered in her ear that he was going to "jack off" in the bathroom. Id. On another occasion, R.C. was lying on the ground watching television when DeLeon got on top of her and started moving up and down against her body. DeLeon pulled his penis out of his pants and continued to rub up and down against

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<sup>1</sup> Ind. Code § 35-42-4-8 (2004).

R.C.'s body. R.C. attempted to get away, but DeLeon grabbed her shoulders and held her there until DeLeon was finished at which point R.C. noticed that DeLeon had ejaculated on her leg. After this incident, DeLeon approached R.C. while she was crying and offered R.C. money to be quiet and not to tell anyone because he explained that he would go to jail.

On May 19, 2006, the State charged DeLeon with child molesting as a class C felony. On February 18, 2008, DeLeon pleaded guilty to sexual battery as a class D felony, and the State dismissed the charge of child molesting as a class C felony. The trial court found DeLeon's lack of criminal history as a mitigator. The trial court also found DeLeon's guilty plea and admission of responsibility as a mitigator, which it assigned "minimal weight." Appellant's Appendix at 25. The trial court found the following aggravators: (1) "the defendant exposed his penis and ejaculated on the victim's leg;" (2) "[t]he adverse psychological impact is significant and can not be overstated;" (3) DeLeon "engaged in sexually explicit language with the victim;" and (4) DeLeon "held the victim, preventing her from leaving, during an encounter." *Id.* at 25-26. The trial court found that each aggravating factor outweighed any mitigating factor and sentenced DeLeon to two and one-half years in the Indiana Department of Correction.

The sole issue is whether the trial court abused its discretion in sentencing DeLeon. The Indiana Supreme Court has held that we apply the sentencing scheme in

effect at the time of the defendant's offense. See Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007) ("Although Robertson was sentenced after the amendments to Indiana's sentencing scheme, his offense occurred before the amendments were effective so the pre-Blakely sentencing scheme applies to Robertson's sentence."); Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). The exact dates on which DeLeon committed his offense are unclear and the charging information cites the time between April 22, 2003 and December 31, 2005. DeLeon and the State both apply the pre-April 25, 2005 presumptive sentencing scheme. However, the probable cause affidavit states that some of the incidents occurred after April 25, 2005. Thus, we will review DeLeon's arguments under each standard. Under either the pre-April 25, 2005 sentencing statutes or the amended statutes, we conclude that DeLeon's arguments fail.

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to support those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind.

2003). A single aggravator may be the basis for an enhanced sentence. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied.

Under the new sentencing statutes, we review the sentence for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (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.” Id. A trial court abuses its discretion if it: (1) fails “to enter a sentencing statement at all;” (2) enters “a sentencing statement that explains reasons for imposing a sentence--including a finding of aggravating and mitigating factors if any - but the record does not support the reasons;” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing “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. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

DeLeon argues that the trial court improperly considered the psychological impact upon R.C. The State concedes that the trial court improperly considered this as an aggravator. See Mitchem v. State, 685 N.E.2d 671, 679 (Ind. 1997) (holding that we

presume that the legislature considers victim impact when establishing a presumptive sentence and there was nothing in the record to indicate the impact of the families and victims was different than the impact that usually occurs in such crimes).

DeLeon argues that the trial court improperly relied on the three remaining aggravators because they constituted material elements of sexual battery. Specifically, DeLeon argues that the trial court improperly relied on the aggravator that he had ejaculated on R.C. because this action was used to establish the element of the offense that he intended to satisfy his sexual desire. DeLeon argues that the fact that he used sexually explicit language with the victim established the element of DeLeon's intent to satisfy his sexual desires. DeLeon also argues that the fact that he held R.C. and prevented her from leaving constituted a material element of the crime of sexual battery.

A trial court may not use a material element of the offense as an aggravating circumstance. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, the trial court may find the nature and circumstances of the offense to be an aggravating circumstance. Id. The offense of sexual battery is governed by Ind. Code § 35-42-4-8, which provides that “[a] person who, with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person, touches another person when that person is . . . compelled to submit to the touching by force or the imminent threat of force . . . commits sexual battery, a Class D felony.”

The State argues that “[t]he act of exposing one’s self may be used to satisfy an element of sexual battery, such as intent, but the act of ejaculating on the victim during the sexual battery goes beyond the basic element and should be considered an aggravator.” Appellee’s Brief at 5. The State also argues that “[s]peaking sexually explicit language should also be considered an aggravator as it is beyond the basic elements of sexual battery.” Id. Finally, the State argues that “[o]n two separate occasions, DeLeon laid on top of R.C. for a period long enough to ejaculate,” and “[b]oth of these offenses go beyond the basic element of touching by force.” Id. We agree with the State.

Based on the record, we conclude that the trial court considered the fact that DeLeon ejaculated on R.C., his language, and the extent to which DeLeon held R.C. down not as material elements of the crime but as the nature and circumstances of the offense. Consequently, the trial court did not abuse its discretion by considering the nature and circumstances as an aggravating factor. See Sallee v. State, 777 N.E.2d 1204, 1215 (Ind. Ct. App. 2002) (holding that the length of time over which the offenses occurred and the continuing violation of the victim could be summarized as describing the nature and circumstances of the crime), trans. denied; Kile v. State, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000) (holding that the trial court did not abuse its discretion by using the particularized factual circumstances of the case, namely the victim’s young age, as an aggravating factor even though the neglect of a dependent statute required the victim to

be under eighteen years of age or have a mental or physical disability); Harrison v. State, 644 N.E.2d 888, 892 (Ind. Ct. App. 1994) (holding that the nature and circumstances of the offense were proper aggravating factors), trans. denied.

For the foregoing reasons, we affirm DeLeon's sentence for sexual battery as a class D felony.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur