

STATEMENT OF THE CASE

Leslie Ann McCormick appeals the sentence imposed following her conviction for battery, as a Class D felony, pursuant to an open plea agreement. McCormick presents the following issues on appeal:

1. Whether the trial court erred when it identified certain aggravating circumstances.
2. Whether her sentence is appropriate in light of the nature of the offense and her character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2009, McCormick was a foster parent to three-year-old O.O. On March 31, the State charged McCormick with neglect of a dependent, as a Class C felony; criminal confinement, as a Class C felony; battery, as a Class D felony; and neglect of a dependent as a Class D felony. On May 14, the State amended the information by adding a charge of criminal deviate conduct, as a Class B felony.

On May 18, McCormick pleaded guilty to battery, as a Class D felony, pursuant to a written plea agreement. Under the agreement, sentencing was left to the trial court's discretion, and the State agreed to drop the remaining charges at sentencing. The parties also agreed to the following stipulated factual basis:

1. That LESLIE MCCORMICK . . . is the defendant in Cause 45G03-0903-FC-00037.
2. That [O.O.], the defendant's former foster child, is the victim in Cause 45G03-0903-FC-00037.

3. That between June 12, 2008[,] and December 2, 2208, LESLIE MCCORMICK was in a residence located at 1215 N. Cline Avenue in Griffith, Lake County, Indiana.
4. That [O.O.], who was 3 years old at said time, was also at said location.
5. That LESLIE MCCORMICK knowingly or intentionally touched [O.O.] in a rude, insolent, or angry manner, and it resulted in bodily injury to [O.O.].

These actions by LESLIE MCCORMICK were contrary to I.C. [§] 35-42-2-1, and against the peace and dignity of the State of Indiana.

6. That all of these events occurred in Lake County, Indiana.

Appellant's App. at 50. On June 23, 2010, the court accepted McCormick's guilty plea.

The sentencing order provides, in part:

Having considered the written pre-sentence investigation report, as well as I.C. [§] 35-38-1-7.1, the Court now enters the following findings and sentence:

Mitigation:

The defendant has no history of delinquency or criminal activity. The defendant further admitted her guilt and has accepted responsibility for her actions.

Aggravation:

The nature and circumstances of the crime and the age of the child. Also, that the defendant was in a position of care and custody of the child at the time of his injuries and the severity of his injuries.

Id. at 51. The trial court sentenced McCormick to two years in the Indiana Department of Correction. McCormick now appeals her sentence.

DISCUSSION AND DECISION

Issue One: Finding Aggravators

McCormick first contends that the trial court abused its discretion when it identified certain aggravators in determining her sentence. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only 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).

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. As we have previously observed, “[i]n order to carry out our function of reviewing the trial court’s exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course such facts must have support in the record.” Page v. State, 424 N.E.2d 1021, 1023 (Ind. 1981). 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.” K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006) (quoting In re L.J.M., 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)).

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering 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, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, 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 490-91. In reviewing sentences in non-capital cases we examine both the written and the oral sentencing statements to discern the findings of the trial court. McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007).

McCormick contends that the trial court improperly identified the child's age as an aggravator. Specifically, she argues that the child's age is an element of the offense and, therefore, cannot be used to determine her sentence. We cannot agree.

McCormick was convicted of battery under Indiana Code Section 35-42-2-1, which provides in relevant part that battery is a Class D felony if it "results in bodily injury to a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age[.]" At sentencing the trial court found that the child's age, three years old, was an aggravator. The trial court's statement shows the court's serious concern with the tender age of the victim, who was well under fourteen years old. The trial court may consider the age of an extremely young victim to be an aggravator even if, as here, the offense includes an age range under which the level of the offense is elevated. See Reyes v. State, 909 N.E.2d 1124, 1128 (Ind. Ct. App. 2009) (where victim's age is an element, as in child molesting, "trial court may consider age as an aggravator only if the youth of the victim is extreme"). We conclude that the trial court did not err when it identified O.O.'s age as an aggravator.

McCormick also challenges the trial court's finding that the severity of the child's injuries is an aggravator. She argues that the trial court should have relied only on the stipulated facts as a basis for determining her sentence. And the stipulated facts do not state the nature of extent of O.O.'s injuries. The State concedes that "there was no

evidence presented regarding the extent of O.O.'s injuries and that the trial court "could not consider the extent of O.O.'s injuries as an aggravating circumstance." Appellee's Brief at 5. Thus, we conclude that the trial court erred when it identified the extent of the child's injuries as an aggravator.

However, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate." Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007), trans. denied; see also Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding that in the absence of a proper sentencing order, we may either remand for resentencing or exercise our authority to review the sentence pursuant to Indiana Appellate Rule 7(B)). Thus, we consider whether McCormick's sentence is inappropriate under Appellate Rule 7(B).

Issue Two: Appellate Rule 7(B)

McCormick next contends that her sentence is inappropriate in light of the nature of the offense and her character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize [] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App.

2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration original).

The Indiana Supreme Court more recently stated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. The principal role of appellate review is to attempt to "leaven the outliers." Id. at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." Id. at 1224.

We initially observe that McCormick refers to her two-year sentence as enhanced. She is incorrect. Under the advisory sentencing scheme, courts "may now impose any sentence within the statutory range for the crime; a sentence at the high end of the range under the present scheme is not an 'enhanced sentence' for [purposes of Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 46 U.S. 976 (2005)]." Marbley-El v. State, 929 N.E.2d 194 (Ind. 2010). McCormick's two-year sentence lies within the statutory range for a Class D felony and, therefore, is not enhanced.

Here, McCormick challenges the length of her sentence and also contends that probation would have been more appropriate due to her lack of criminal history. But a defendant is not entitled to serve a sentence in a probation program; rather, such placement is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005), trans. denied. Further, there is thus “no right answer as to the proper sentence in any given case.” Cardwell, 895 N.E.2d at 1224. Again, the principal role of appellate review is to attempt to “leaven the outliers.” Id. Thus, we consider whether the sentence imposed is inappropriate in light of the nature of the offense and her character. See App. R. 7(B).

We first consider the nature of McCormick’s offense. McCormick does not challenge the trial court’s finding that she was in the position of care and custody of O.O. at the time of his injuries. Indeed, the stipulated facts show that McCormick was the child’s foster mother. While in that position of trust, McCormick battered three-year-old O.O. Due to his tender age, O.O. was incapable of protecting himself or seeking help from others. In light of these facts, we cannot say that McCormick’s sentence, merely six months over the advisory sentence but one year under the maximum sentence, is inappropriate.

McCormick also contends that her sentence is inappropriate in light of her character. In support, she refers to her lack of criminal history; her “long history of illnesses, both physical and mental[] and [that] she is taking mediation[;]” her history as a victim of sexual abuse by a cousin and stepbrother when she was a child; her expression of remorse; and that she had to forego surgery on her foot due to the instant case.

Appellant's Brief at 8. The trial court recognized McCormick's admission of guilt and her acceptance of responsibility as mitigators. And her physical and mental history and condition are unfortunate. But, again, our role on appeal is to attempt to "leaven the outliers." Cardwell, 895 N.E.2d at 1225. Whether we regard a sentence as inappropriate at the end of the day turns on "our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case." Id. at 1224. Considering both the nature of the offenses and McCormick's character, we do not consider her two-year sentence to be an outlier or "inherently unfair" as McCormick contends. Appellant's Brief at 9. McCormick has not shown that her sentence is inappropriate.

Conclusion

The trial court did not err when it identified the extremely young age of McCormick's victim as an aggravator, but it erred when it identified the severity of O.O.'s injuries as an aggravator in sentencing McCormick. Nevertheless, considering together the nature of the offenses, including the victim's extremely young age and McCormick's position of trust, and McCormick's character, we cannot say that her two-year sentence in the Department of Correction for battery, as a Class D felony, is inappropriate.

Affirmed.

ROBB, C.J., and CRONE, J., concur.