



## **STATEMENT OF THE CASE**

Kelly L. Stacy appeals her conviction and sentence for Neglect of a Dependent, as a Class D felony, after remand. She presents two issues for our review, which we restate and reorder as follows:

1. Whether Stacy's Class D felony conviction violates her right to be free from double jeopardy.
2. Whether the trial court's sentencing statement supports the imposition of sentence greater than the presumptive.
3. Whether Stacy's sentence is inappropriate in light of the nature of her offenses and her character.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

The facts underlying Stacy's crime come from her first direct appeal:

Stacy and Andrew Stacy are the parents of four children. On October 3, 2003, Stacy took their youngest daughter, two-month old K.S., to see Dr. Sylvia Vicente because K.S. had been sick. Dr. Vicente diagnosed K.S. with an ear infection and bronchitis. Although she also noted crackling sounds in her chest, an x-ray was negative for pneumonia. Nonetheless, Dr. Vicente performed a nebulizer treatment on K.S. during the office visit. Amoxicillin was prescribed for the ear infection and Stacy was given a nebulizer to continue the treatments at home. Stacy was instructed to bring K.S. back for a follow-up on October 6. However, Stacy failed to do so.

After Stacy did not appear for the October 6 appointment, Dr. Vicente called Stacy's contact number and reached K.S.'s paternal grandfather. The grandfather said that he had seen K.S. that day and she was fine. Dr. Vicente told him that even if K.S. was better, she needed to come back into the office because she did not get her vaccinations on October 3 due to her illness. K.S. was scheduled for two more appointments with Dr. Vicente, October 24, and November 2, but missed these appointments as well. On December 16, Stacy and Andrew took K.S. to the hospital where K.S. was "dead on arrival," already showing signs of rigor mortis. Dr. John Cavanaugh, who performed an autopsy on K.S., testified that the cause of

death was pneumonia, which was composed of tracheal bronchitis, interstitial pneumonia and bronchopneumonia.

Stacy v. State, Cause No. 45A03-0510-CR-500, slip op. at 2-3 (Ind. Ct. App. August 25, 2006) (“Stacy I”). Because of K.S.’s death, the police investigated Stacy’s home and found that her three other children should be removed due to the filth in the home and the children’s physical condition. Id. The State charged Stacy with three counts of neglect of a dependent for her conduct related to K.S.’s death, the first as a Class B felony, the second as a Class C felony, and the third as a Class D felony. Id. The State also charged Stacy with three counts of neglect of a dependent for her conduct related to her three other children, all as Class D felonies. Id.

The jury convicted Stacy of all six counts, and the trial court merged the three counts related to K.S.’s death and sentenced Stacy only on the Class B felony. Id. at 4. The court ordered Stacy to serve eight years on the Class B felony and one year on each Class D felony, and it ordered Stacy to serve all of her sentences consecutively for an aggregate eleven-year sentence. Id. Stacy appealed and challenged the sufficiency of the evidence underlying her convictions for neglect of a dependent, both as a Class B and Class C felony, related to K.S.’s death. Id. at 4. We reversed those convictions, noting that she did not challenge the evidence underlying any of her Class D felony convictions. Id. at 9. We remanded the case to the trial court to “reinstate the Class D felony and re-sentence Stacy accordingly.” Id. at 9, n. 4. We also affirmed the court’s imposition of consecutive sentences. Id. at 12.

Stacy’s husband, Andrew, was also charged, tried, and convicted on the same six charges, and he received the same sentence as Stacy. He also won reversal of the Class B

and Class C felony convictions on direct appeal, and on November 11, 2006, the court resentenced Stacy and Andrew at the same hearing. Neither Stacy, Andrew, nor the State presented new evidence. The court stated:

I do believe that the two of you continue to be remorseful regarding this entire turn of events. Nevertheless, the sentence must be adjusted, that has to be addressed. I agree with the [State's] portion of its argument regarding Count III being distinguishable from the other counts in that that was the count that involved [K.S.]. The first three counts originally involved [K.S.] and, of course, she died. Pursuant to the order of the Court of Appeals, the Court will now sentence each defendant to two years on Count III to run consecutive to the other counts.

On March 19, 2007, Stacy requested permission to file a belated notice of appeal, which the court granted. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Double Jeopardy**

Stacy contends that her conviction for neglect of a dependent, as a Class D felony, violates her right to be free from double jeopardy because the court originally entered judgment on three convictions for the same conduct after her trial. She is no longer, however, appealing that judgment. Here, she stands convicted for only one offense based on her conduct against K.S., neglect of a dependent, as a Class D felony. Because this court found the evidence insufficient to support Stacy's other two convictions related to K.S.'s death, we ordered the trial court to vacate Stacy's convictions for neglect of a dependent as a Class B felony and neglect of a dependent as a Class C felony and resentence Stacy only for the Class D felony.

Stacy did not complain during her first appeal that her three convictions violated her right to be free from double jeopardy. And it is not clear that the trial court

committed any error. See Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) (“Where the court merges the lesser-included offense without imposing judgment, there is no need to remand on appeal to ‘vacate.’”). Stacy correctly points out that in her case the court had, in fact, entered judgment of conviction on all three offenses.

Regardless, the time for Stacy’s double jeopardy complaint has passed. This court’s order to vacate two of Stacy’s three convictions removed any potential double jeopardy violation. Thus, Stacy has only one conviction for this conduct. The trial court did not err when it followed our instructions and sentenced Stacy for neglect of a dependent, as a Class D felony.

**Issue Two: Whether the Court’s Sentencing Statement  
Supports Stacy’s Two Year Sentence**

Stacy argues that the court’s sentencing statement inadequately supports her two year sentence. Because she committed her crime in 2003, before the legislature amended the sentencing statutes in April 2005, she should have been sentenced under the old presumptive sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006). Under that sentencing scheme, when a trial court deviates from the statutorily prescribed presumptive sentence, it must: 1) identify all of the significant mitigators and aggravators; 2) explain why each circumstance is mitigating or aggravating; and 3) articulate the evaluation and balancing of these circumstances to determine whether an enhanced or reduced sentence is appropriate. Kinkead v. State, 791 N.E.2d 243, 247 (Ind. Ct. App. 2003), trans. denied.

The presumptive term for a Class D felony at the time Stacy committed her crime was eighteen months with a maximum sentence of three years and a minimum sentence

of six months. Ind. Code § 35-50-2-7 (2003). The court stated that it believed that Stacy continued to be remorseful but it found Count III “distinguishable from [the three Class D felony convictions related to Stacy’s conduct against her three other children] in that that was the count that involved [K.S.] . . . and, of course, she died.” Transcript at 19. The court then imposed a two year sentence and ordered Stacy to serve it consecutively to her sentences for an aggregate sentence of five years.<sup>1</sup>

The court did not identify either factor it considered as a mitigator or aggravator, and it did not articulate its weighing of the factors before it imposed sentence. The court also did not issue a written sentencing statement. Where the appellate court finds an irregularity in a sentencing decision, it has three options: 1) remand to the trial court for a clarification or new sentencing determination; 2) affirm the sentence if the error is harmless; or 3) reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Merlington v. State, 814 N.E.2d 269, 273 (Ind. 2004).

Based on the record and the sentence imposed, we infer that the court considered Stacy’s remorse as a mitigator and K.S.’s death as an aggravator. The court’s imposition of a sentence six months greater than the presumptive reasonably leads to the conclusion that it found the aggravator outweighed the mitigator. Thus, because we can meaningfully review Stacy’s sentence even though the sentencing statement is technically inadequate, such inadequacy is harmless error. See Gleaves v. State, 859 N.E.2d 766

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<sup>1</sup> Stacy does not challenge the imposition of consecutive sentences, which we approved during her first appeal.

(Ind. Ct. App. 2007) (affirming the imposition of consecutive sentences by applying “an exercise in simple logic to conclude that the aggravating circumstances preponderate.”).

Stacy contends that K.S.’s death is an invalid aggravator because this court held that the State’s evidence at trial was insufficient to support her convictions for Class B and Class C felony neglect of a dependent. We cannot agree. This court did not determine that Stacy’s conduct did not cause K.S.’s death. Indeed, we determined that the evidence supported “Stacy’s subjective knowledge of K.S.’s illness” and that she was “clearly negligent” for failing to take K.S. back to the doctor. Stacy I, slip op. at 8. We also held that the “evidence support[ed] the causal connection between K.S.’s condition on October 3 and her death.” Id. We reversed Stacy’s convictions for Class B and Class C neglect only because “the State failed to meet its burden to prove that Stacy was aware of a high probability that her actions placed K.S. in actual and appreciable danger.” Id.

Here, the court identified K.S.’s death as an aggravator, and K.S.’s death was not an element of Stacy’s neglect conviction as a Class D felony. Generally, the nature and circumstances of a crime are proper aggravators so long as the trial court takes into consideration facts not needed to prove the elements of the offense. McCoy v. State, 856 N.E.2d 1259, 1263 (Ind. Ct. App. 2006) (citing McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001)). Indiana Code Section 35-38-1-7.1 provides that a trial court may assign aggravating weight to the harm, injury, loss, or damage suffered by the victim of an offense if such harm was significant and greater than the elements necessary to prove the commission of the offense. See I.C. § 35-38-1-7.1(a)(1). Thus, the court’s consideration of K.S.’s death as an aggravating factor was proper.

Further, the court considered Stacy's remorse as a mitigator, but it found that mitigator outweighed by the aggravator. The court did not impose the maximum three year sentence authorized for a Class D felony, but it increased the presumptive by six months to impose a two year sentence. Sentencing determinations are within the trial court's discretion and will be reversed only for an abuse of that discretion. Field v. State, 843 N.E.2d 1008, 1010 (Ind. Ct. App. 2006), trans. denied. "An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." Id. We cannot say that the court abused its discretion for sentencing her to two years for her neglect of K.S. that resulted in K.S.'s death.

### **Issue Three: Whether Stacy's Sentence is Inappropriate**

Stacy also contends that her two year sentence is inappropriate. Indiana Appellate Rule 7(B) provides that we "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." To prevail on this claim, Stacy "must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In this review, we recognize the special expertise of the trial court in making sentencing decisions and do not merely substitute our opinion for that of the trial court. Davis v. State, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), trans. denied. But appellate courts may exercise their authority to revise a sentence deemed "inappropriate in light of the nature of the offense and the character of the offender." Childress, 848 N.E.2d at



1080. Having reviewed the facts of her offense and her sentence, we cannot say that Stacy's two year sentence for neglecting her infant daughter K.S. is inappropriate in light of the nature of her offense and what it reveals about her character.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.