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IN THE COURT OF APPEALS OF INDIANA

TODD L. ANDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0703-CR-91
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D01-0510-FB-153

September 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Todd L. Anderson appeals his convictions for Attempted Criminal Deviate Conduct,[1] a class B felony, Attempted Rape,[2] a class B felony, and Sexual Battery,[3] a class D felony, as well as his adjudication as a Habitual Offender.[4] Anderson further appeals his aggregate sentence of sixty years in prison. Anderson presents the following restated issues for review:

1. Were out-of-court statements the victim made to her guardian, her aunt, and the sexual assault examiner improperly admitted into evidence?

2. Did the trial court abuse its discretion in excluding evidence that the victim had previously given birth to a child?

3. Did the trial court abuse its discretion in sentencing Anderson?

We affirm.

T.G. was born April 10, 1980. She has cerebral palsy and is moderately mentally disabled, with an I.Q. of 52. T.G. has considerable speech deficits and significant difficulty with basic reasoning skills. She functions at about a first-grade level, or that of a child about six years old. As a result, she cannot manage her own finances, is unable to drive, cannot work without constant assistance, receives disability payments from the federal government, cannot cook or keep house, and is not able to live alone. Further, T.G. is unable to understand abstract concepts – including the obligations of an oath –

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[1] Ind. Code Ann. § 35-42-4-2(a)(3) (West 2004); Ind. Code Ann. § 35-41-5-1 (West 2004).

[2] I.C. § 35-42-4-1(a)(3) (West 2004); I.C. § 35-41-5-1.

[3] I.C. § 35-42-4-8(a)(2) (West 2004).

[4] Ind. Code Ann. § 35-50-2-8 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007).

and she does not have the mental capacity to consent to sexual activity. Annette Williams has been T.G.'s guardian and caretaker for the last several years.

Anderson dated T.G.'s aunt, Dorothy Simpson, off and on for many years. During that time he came to know T.G. well. In fact, Anderson acknowledged that he knew T.G. was mentally handicapped and received disability benefits from the federal government because of her handicap. Further, an expert testified at trial that after only a short conversation with T.G., a person of average or even below-average intelligence should be able to realize T.G.'s significant impairment and inability to make her own decisions. The expert explained, "She's very clearly disabled." *Trial Transcript* at 306.

On August 28, 2005, Annette Williams dropped T.G. off at the home of T.G.'s grandmother. Anderson, Simpson, Shkela Ford (T.G.'s younger cousin), and others also lived at that residence, which T.G. visited on an almost daily basis. At some point that evening, T.G. was left alone with Anderson on the front porch. Ford was the only other person home at the time, and she was inside. T.G. and Anderson proceeded to pick up trash around the outside of the house. While doing so, Anderson began discussing possible sexual activity with T.G.

According to Anderson's own admissions to Detective Lorna Russell, the following events then occurred. On the side of the house, Anderson asked T.G. to perform oral sex on him, but she declined when he took his penis out of his pants. He then inquired about the possibility of having sexual intercourse with her, and T.G. agreed. They moved to the backyard. At some point, Anderson "sucked her nipples". *Id*. at 340. T.G. was then bent over a chair in the backyard with her head near the seat and her pants

pulled down. He exposed his penis and had brought it within an inch of T.G.'s vagina with the intention of having sexual intercourse. At that point, however, a light came on in the backyard and Ford looked outside. Anderson immediately "took off running" to the front of the house and lit a cigarette. *Id*. at 342.

According to Ford, she saw T.G. bent over the chair with her pants down and Anderson near the gate. Anderson proceeded to the front of the house. Ford asked T.G. what was going on, but T.G. just kept saying that she had to go. T.G. then went to the front of the house, where Williams had been waiting in her car for T.G. Once T.G. left with Williams, Ford questioned Anderson and he attempted to bribe her. Believing something was amiss, Ford called and informed her mother and her aunt (Simpson) what she had observed.

Early the following morning, Simpson went to Williams's home to speak with T.G. She went up to T.G.'s bedroom and asked what had happened the previous night with Anderson. T.G. exclaimed that Anderson had raped her and "wanted her to suck his penis and she said no." *Id*. at 227. T.G. was crying, shaking, and hysterical while discussing the incident. Williams, who was also present during the discussion, called the police. Before the police arrived, Williams asked T.G. to calm down and tell her exactly what happened. According to Williams,

> [T.G.] said that [Anderson] told her to come outside, around to the back, and when she got around there, he asked her to suck his dick and she said, no. That he pushed her over the chair and every…pushed her over the chair, made her pull her pants down, and he did it to her.

Id. at 170.

Soon after the police arrived, T.G. was taken to the Fort Wayne Sexual Assault Treatment Center. T.G. reported the encounter with Anderson to the nurse examiner, Leslie Cook, who then collected swabs from the parts of T.G.'s body that were allegedly affected.[5] The swab taken from T.G.'s right nipple tested positive for the presence of Anderson's DNA.

On October 21, 2005, the State charged Anderson with attempted criminal deviate conduct, a class B felony, attempted rape, a class B felony, and sexual battery, a class D felony. The State also alleged Anderson was a habitual offender. On January 31, 2006, the defense deposed T.G., asking her a series of questions regarding the incident. Some of the answers given by T.G. were responsive and others were not. After roughly nine pages of testimony, defense counsel concluded the deposition.

On February 24, 2006, the State notified Anderson of its intent to use T.G.'s out-of-court statements to Williams (her guardian), Simpson (her aunt), and the sexual assault nurse examiner. The statements were to be admitted in lieu of T.G. testifying at trial because she was allegedly unavailable as a witness due to her inability to understand the nature and obligation of an oath. T.G. appeared at the protected person hearing, on June

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[5] At trial, Cook recounted the following patient history provided by T.G.:

> Patient gives history of penile/anal penetration. She states and in [sic] "Todd made me pull down my pants. He showed me his thing, his dick. I said, I don't want to suck his thing. He made me bend over the chair, had my head on the chair. He put his thing in my butt. She state . . . she states, it felt not good at all. She states, he told me don't say nothing. She also states he touched her boobs on top of her bra and that he lifted her shirt and bra and he licked my boob on my skin. She states, he made me feel on his dick with my bare hand. She states, he touched my butt on top of her clothes. She states, he asked me can he do it? I said, yeah. To clarify for penile/anal penetration. She states, he told me can he get some. She also states, [Ford] saw it happen."

Id. at 243.

9, 2006, and was questioned by defense counsel. At the conclusion of the hearing, Anderson objected to T.G. being found unavailable for trial, arguing that she sufficiently understood the nature and obligation of an oath and that he should be given the opportunity to effectively cross-examine her at trial.[6] The trial court, however, concluded that T.G.'s statements were admissible under the protected person statute and that T.G. was unavailable as a witness because she was incapable of understanding the nature and obligation of an oath.

Anderson's two-day jury trial commenced on September 19, 2006. During Williams's testimony, Anderson attempted to present evidence that T.G. had previously given birth to a child. The court, however, ruled that such evidence was irrelevant and barred by Indiana Evidence Rule 412. Anderson testified on his own behalf at trial and effectively admitted the facts of the sexual encounter with T.G. that supported each of the charges against him. His sole defense was that he did not know T.G. was "so mentally disabled or deficient that she could not consent" to said sexual activity. *Trial Transcript* at 431. Despite the proposed defense, the jury found Anderson guilty as charged. The jury also subsequently found him to be a habitual offender.

On October 16, 2006, the trial court sentenced Anderson to an aggregate term of sixty years in prison. He was specifically sentenced to twenty years for attempted criminal deviate conduct (Count 1), ten years for attempted rape (Count 2), and three years for sexual battery (Count 3). The sentence for Count 1 was enhanced by thirty

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[6] In other words, Anderson did not object to T.G. being found to be a protected person (as defined by Ind. Code Ann. § 35-37-4-6 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007)) or to the statements being admitted as long as T.G. testified at trial.

years due to the habitual offender finding, resulting in a sentence of fifty years for that crime. The court ordered Anderson to serve Counts 1 and 2 consecutively, with Count 3 concurrent to Count 1. Anderson now appeals his convictions and sentence.

Before reaching the issues presented by Anderson, we feel compelled to address at least some of the glaring deficiencies in his appellate materials. Of particular note, we find Anderson's statement of facts wholly inadequate. Indiana Appellate Rule 46(A)(6) requires the statement of facts section to describe in narrative form "the facts relevant to the issues presented for review" supported by citations to the record. In addition to providing no citations to the record, Anderson makes no attempt to provide us with the facts relevant to the three (poorly phrased) issues he presents for review.[7] Rather, he merely offers a recitation of the charges filed against him. This constitutes a flagrant violation of the appellate rules and is unacceptable appellate practice. *See Ramsey v. Review Bd. of Indiana Dep't of Workforce Dev.*, 789 N.E.2d 486 (Ind. Ct. App. 2003) (appellant's brief must be prepared so that the court, considering the brief alone and independently from the record, can intelligently consider each question presented).

Further, Anderson's summary of the argument section, though titled as such, cannot be considered a summary of his appellate arguments. In this regard, the appellate rules expressly provide: "The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere

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[7] Anderson's statement of the case is also of little assistance to us in this appeal, as he does not even mention the protected person hearing or the trial court's evidentiary rulings that are challenged in the first two issues presented for appeal. *See* App. R. 46(A)(5) (statement of case "shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues").

repetition of the argument headings." App. R. 46(A)(7). Contrary to the rule, Anderson has simply cut and pasted into this section his previous statement of the issues, which also constitute the argument headings throughout his brief.

The paltry table of contents provided for Anderson's 197-page appendix has further hampered our review. Pursuant to App. R. 50(C), "[t]he table of contents shall specifically identify each item contained in the Appendix, including the item's date." This is yet another appellate rule Anderson has entirely disregarded.

Finally, we observe that Anderson's appellate arguments are generally vague and conclusory. Much of these failings appear to result from his failure to address in his argument (or, for that matter, anywhere in his brief) the procedural and substantive facts necessary for consideration of the issues. *See* App. R. 46(A)(8)(b). Were it not for the State's thorough brief and our own review of the record, we would not even be able to begin to consider much of Anderson's appellate arguments.

This is a prime example of an appeal that should be waived in light of the substantial and flagrant violations of our appellate rules, which have clearly impeded our consideration of the appeal. *See Ramsey v. Review Bd. of Indiana Dep't of Workforce Dev.*, 789 N.E.2d at 490 ("because Ramsey's noncompliance with the appellate rules substantially impedes us from reaching the merits of this appeal, we are compelled to find the issues raised are waived"). We, however, will exercise our discretion and address the issues presented to the extent possible.

1.

Though the first issue presented by Anderson is difficult to decipher, it appears that he is challenging the admission of T.G.'s out-of-court statements to her guardian, her aunt, and the sexual assault examiner. He challenges the admission of the statements on two grounds. First, he claims they were improperly admitted at trial because he did not have the opportunity to effectively cross-examine T.G. at the protected person hearing. Second, he asserts that each of the statements was testimonial and therefore barred by *Crawford v. Washington*, 541 U.S. 36 (2004), because T.G. was unavailable for trial and Anderson lacked a prior opportunity for adequate cross-examination of her.

As indicated by the State, Anderson failed to object at trial when the various witnesses testified regarding T.G.'s out-of-court statements. Therefore, Anderson has waived appellate review of the admission of said statements. *See Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) ("the failure to object at trial results in a waiver of the issue on appeal"). Moreover, with respect to Anderson's *Crawford* claim, we observe that this ground was never raised below, either at the protected person hearing or at trial, providing yet another basis for waiver of appellate review of this issue. *See Taylor v. State*, 841 N.E.2d 631 (Ind. Ct. App. 2006) (noting the well-settled rule that a defendant may not argue one ground for objection below and then raise a new ground on appeal), *trans. denied*.

Waiver notwithstanding, Anderson's arguments are unavailing. With respect to his argument based on the protected person statute, we observe the statute requires that if the protected person is unavailable to testify at trial, the statement may be admitted only

if the protected person was available for cross-examination at the protected person hearing (or when the statement was made). I.C. § 35-37-4-6(f); *see also Anderson v. State*, 833 N.E.2d 119 (Ind. Ct. App. 2005). While Anderson appears to acknowledge he attempted to question T.G. at the hearing, he argues he had no meaningful opportunity for effective cross-examination. We have recently addressed the same argument in *Anderson* and explained:

> Our supreme court has found that the statutory requirement is satisfied when a child, judged incompetent to testify at trial, is available to be cross-examined at a hearing under the Protected Persons Statute, even if the child's testimony at the hearing is not coherent. *Pierce v. State*, 677 N.E.2d 39, 46 (Ind. 1997). And we recently held in *Purvis* that the statutory requirement was satisfied where a developmentally disabled child gave "incoherent, distorted, and nonsensical" testimony at the Protected Persons hearing. [*Purvis v. State*,] 829 N.E.2d [572,] 584 [(Ind. Ct. App. 2005), *trans. denied*]. Moreover, the statute is plainly written to require cross-examination in situations where the witness to be cross-examined is incompetent to testify at trial. Compare I.C. § 35-37-4-6(e)(2)(B)(iii) (stating "the protected person is incapable of understanding the nature and obligation of an oath") with I.C. § 35-37-4-6(f) (stating "the protected person [must be] available for cross-examination").

Anderson v. State, 833 N.E.2d at 125. Thus, Anderson's opportunity to cross-examine T.G. at the protected persons hearing clearly satisfied the statutory cross-examination requirement, and the trial court properly admitted the out-of-court statements into evidence at trial under that statute.

With respect to Anderson's newly raised *Crawford* argument, we observe that he has not even adequately presented the issue on appeal. After briefly setting forth some general principles from *Crawford* and subsequent cases, Anderson baldly asserts that the statements were testimonial because "they were elicited by her aunt, guardian, and

experts for the State of Indiana for trial purposes." *Appellant's Brief* at 10. He favors us with no further identification or analysis of the out-of-court statements. This does not constitute cogent reasoning as required by App. R. 46(A)(8)(a).

Moreover, even if Anderson had properly established that each of the statements was admitted in violation of *Crawford*, we would have found the error harmless. A denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a jury could not have found otherwise. *D.G.B. v. State*, 833 N.E.2d 519 (Ind. Ct. App. 2005). Here, the challenged statements were introduced to establish Anderson's sexual contact with T.G. on the night in question, not to establish her ability to consent. In his pretrial admissions and his testimony at trial, Anderson admitted these same relevant facts (i.e., he sucked T.G.'s nipples, he asked her for oral sex and exposed his penis, and he then asked T.G. about having sexual intercourse with him, bent her over a chair in the backyard, and placed his exposed penis within an inch of her vagina before being interrupted by Ford). Thus, the challenged statements were merely cumulative of Anderson's own admissions, and the sole issue Anderson presented to the jury was whether he knew of T.G.'s mental incapacity to consent to sexual activity. T.G.'s out-of-court statements were not relevant to that issue, which was established by other evidence at trial.

2.

Anderson argues the trial court abused its discretion in excluding evidence that T.G. had previously had a child with another man. In this regard, Anderson claims he was denied his "6th amendment rights of cross examination regarding the issue of

consent." *Appellant's Brief* at 10. Though Anderson's argument is difficult to follow, he appears to argue that he should have been allowed to elicit this information from T.G. at trial due to the risk of partial corroboration.

We initially observe, as set forth above, that T.G. did not testify at trial. Thus, Anderson never sought to cross-examine her at trial, whether on the issue of consent or any other issue. In fact, it was during Williams's testimony that Anderson sought to admit evidence T.G. had previously given birth to another man's child.[8]

Moreover, we fail to see how such evidence is relevant to the issue of T.G.'s mental capacity to consent to sexual activity, and such evidence clearly violates Ind. Evidence Rule 412(a). This rule provides:

> (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:
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> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
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> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
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> (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
>
> (4) evidence of conviction for a crime to impeach under Rule 609.

As found by the trial court, none of the statutory exceptions apply in the instant case.

Anderson directs us to *Redding v. State*, 844 N.E.2d 1069 (Ind. Ct. App. 2006), but then entirely fails to apply the case to the facts at hand. In *Redding*, the theory of defense was that the defendant had never had any sexual contact with the alleged six-year-old victim and that any physical evidence demonstrating that the child had been

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[8] The record establishes that at the end of 2004, T.G. had a child with Williams's son, who was also mentally handicapped and has since passed away. Williams cares for T.G. and the child.

sexually abused was the result of a previous molestation by another individual. Under the circumstances, we reversed and held that Redding should have been allowed to introduce evidence regarding the prior molestation. Our decision was based on the risk of partial corroboration, which has been defined as follows:

> In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically "bolstered." This bolstering evidence invites the inference that because the victim was accurate in stating that sexual contact occurred, the victim must be accurate in stating that the defendant was the perpetrator. Therefore, in such cases, the defendant must be allowed to rebut this inference by adducing evidence that another person was the perpetrator.
>
> In other words, the risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue.

Id. at 1070-71. *Redding* is inapposite to the instant case, as Anderson has admitted sexual contact with T.G. on the night in question and has never suggested that another individual was the perpetrator of the alleged crimes. Therefore, there was no risk of partial corroboration here.

3.

Finally, Anderson challenges his sentence. He claims the trial court abused its discretion in failing to consider Anderson's mental health and his troubled childhood. He further asserts that the trial court abused its discretion by imposing the maximum habitual offender enhancement.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances, or the reasonable probable, and actual deductions to be drawn therefrom. *Id*.

If a trial court's sentencing statement includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating or aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. Our Supreme Court has clarified that a trial court may abuse its discretion in the following ways: (1) Failing to enter a sentencing statement; (2) entering a sentencing statement that includes reasons not supported by the record; (3) entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id*. Further, a claim that the trial court improperly weighed the aggravating and mitigating circumstances when imposing a sentence is no longer subject to review for abuse of discretion.[9] *Id*.

Here, the trial court found a number of aggravators and no mitigators. When pronouncing Anderson's sentence, the court stated in relevant part:

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[9] A defendant, of course, may still challenge the appropriateness of the sentence via Ind. Appellate Rule 7(B), which provides that the "[c]ourt may review 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." Anderson, however, does not present us with such a challenge.

> The Court does find as an aggravating circumstance your criminal record covering a period of time from 1992 to 2005. You are a multi-state, multi-county offender, having accumulated in that time one Misdemeanor conviction, six prior Felony convictions, two of those as sex offenses. Efforts at rehabilitation have failed. [Court recounts Anderson's criminal history in detail.] It's astonishing to me Mr. Anderson, that in all of that that I've just recited, you were given so much probation and you continued to commit criminal activity. It didn't seem that probation curbed your conduct. St. Joe County Jail as a condition of probation didn't help. You're back in LaGrange County in January of 1997, where a probation violation was filed against you. In Allen County, five months later, you were convicted of Criminal Trespass, given a suspended jail sentence, assessed a fine and costs. In June of 1997, your probation out of LaGrange County was finally revoked. You were committed to the Department of Correction, released to parole in October of 1997, discharged from parole in July of 1998. 2003, you were convicted of Child Molesting, a Class C Felony, given a totally executed sentence in the Department of Correction. In June of '05, you were released to parole and less than two months later, you commit these offenses. You've been on probation, it's been revoked. You were on parole when you committed these particular offenses and apparently have a current violation pending. I don't know Mr. Anderson, what it is that Indiana Or [sic] Michigan, in any of these counties is suppose to do for you. Todd Anderson does what Todd Anderson wants to do period. I find there are no mitigating circumstances.

Sentencing Transcript at 13-16.

On appeal, Anderson does not challenge any of the aggravating circumstances found by the trial court. Although, with respect to the habitual offender enhancement, he appears to argue the trial court abused its discretion by giving too much weight to his criminal history because "there are only two prior sex related convictions in the Defendant's criminal history one from fourteen years prior and one from three (3) years prior to the current conviction". *Appellant's Brief* at 14 (record citations omitted). As set forth above, a claim of improper weighing is no longer subject to review for abuse of discretion. *See Anglemeyer v. State*, 868 N.E.2d 482.

We now turn to Anderson's claim that the trial court failed to consider two significant mitigating circumstances: his mental illness and his troubled childhood. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Id*. at 493.

With respect to his troubled childhood, we observe that Anderson did not argue the existence of this alleged mitigator at the sentencing hearing. Therefore, we are precluded from reviewing it on appeal. *See Anglemeyer v. State*, 868 N.E.2d 482; *see also Simms v. State*, 791 N.E.2d 225, 233 (Ind. Ct. App. 2003) ("[i]f the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the circumstance is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal").

While Anderson's alleged mental illness was discussed at the sentencing hearing in a different context, it was not expressly raised as a mitigating circumstance. In fact, Anderson proffered no mitigating circumstances to the trial court. Moreover, there was no evidence admitted to support a claim of mental illness, aside from Anderson's own self-serving claims set out in the presentence investigation report. Further, Anderson has not even attempted to establish a nexus between his alleged mental illness and the crimes he committed. *See Evans v. State*, 855 N.E.2d 378, 387-88 (Ind. Ct. App. 2006) ("a defendant's mental illness is afforded mitigating weight in circumstances that establish a nexus between the mental illness and the offense"), *trans. denied*; *Corralez v. State*, 815 N.E.2d 1023, 1026 (Ind. Ct. App. 2004) ("in order for a mental history to provide a basis

for establishing a mitigating factor, there must be a nexus between the defendant's mental health and the crime in question"). We reiterate that the defendant must establish the mitigating evidence is significant and clearly supported by the record. *Anglemeyer v. State*, 868 N.E.2d 482. Anderson has not met his burden here.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.