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IN THE
COURT OF APPEALS OF INDIANA

TAMMY JACKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0612-CR-1115
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0305-MR-79353

October 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tammy Jackson appeals the sentence imposed by the trial court after she pleaded guilty to one count of battery as a class A felony.

We affirm.

ISSUE

Whether the sentence imposed by the trial court was inappropriate.

FACTS[1]

On the morning of February 21, 2003, Kevin Baugh took his wife Ellen to work and then took their eight-month-old daughter Hayliy to the home of her babysitter, Jackson. Hayliy was fine when he left her in Jackson's care, between approximately 8:15 and 8:30 a.m. Jackson had been babysitting for Hayliy for several weeks. At approximately 10:24 a.m., paramedics and police were dispatched to Jackson's home. They found Hayliy in cardiac arrest.

Pathologist Stephen Radentz conducted an autopsy, at which he found a "depressed semi-lunar, complex skull fracture" of Hayliy's head and other head injuries. (App. 39). Dr. Radentz reported that the injuries "resulted from the baby having been

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[1] Jackson's Appendix does not contain the information. According to the CCS and the plea agreement, Jackson was charged with both murder and battery as a class A felony. Further, according to a statement by the trial court at sentencing, trial on those charges was well under way before Jackson agreed to the plea agreement.

The PSI reports that for the battery offense, the State alleged that Jackson "did knowingly touch Hayliy Baugh, a person who was less than fourteen (14) years of age, that is: eight (8) months old, in a rude, insolent, or angry manner by forcefully striking the head of Hayliy Baugh against a hard surface, thereby fracturing the skull of Hayliy Baugh, resulting in the death of Hayliy Baugh." (PSI at 5).

In the record submitted by Jackson, the only source of information regarding the events giving rise to Jackson's guilty plea is the probable cause affidavit, which provides the following facts about the incident.

flung with tremendous force against a hard surface with some sort of an 'edge' to it," such as "lifting the baby and flinging it forcefully in such a way that its head struck the edge of" a rounded countertop like the one in Jackson's home near where Hayliy had been placed. *Id.* Further, according to Dr. Radentz, "the severe impact to Hayliy's head in that particular area" would have resulted in her ceasing to breathe "within 20-30 minutes of suffering the fatal head injury." (App. 40). Dr. Radentz described the force of the blow as similar to "a child who had been struck by an automobile." *Id.*

On May 16, 2003, the State charged Jackson with murder and battery as a class A felony. On December 20, 2004, Jackson and the State tendered to the trial court a written plea agreement, wherein Jackson agreed to "plead guilty as charged to Count II, Battery, a class A felony," and the State agreed to dismiss the murder charge. (App. 145). The agreement also provided that Jackson's "original executed sentence shall not exceed thirty (30) years at the Department of Correction[]." (App. 146). According to the CCS, a factual basis for the plea was established, the plea accepted, and judgment of conviction entered on that day.

On January 21, 2005, Jackson appeared for sentencing. Ellen Baugh testified that she had chosen Jackson "to watch" and "take[] care of" Hayliy, but that as a result of Jackson's action, she would "never be able to see [her] daughter again." (Tr. 5). The State requested that the trial court consider as an aggravating circumstance Jackson's position of trust – having been entrusted with the care of the Baughs' precious child – and impose a thirty-year executed sentence. Jackson argued that her lack of any criminal

history and her guilty plea should be found mitigating circumstances, and asked that she be ordered to serve the minimum executed time.

The trial court recognized that Jackson's "lack of a prior criminal history" was "a significant" mitigating factor, but found that factor to "balance out" against the impact of Hayliy's death on Hayliy's family. (Tr. 15). With respect to Jackson's guilty plea, the trial court stated that it had been "entered . . . well after the trial had begun and after the Baughs had had to testify, so while her entering a guilty plea is a mitigating factor, it is not much of one." *Id.* It found Jackson's "position of trust" a "large" aggravating factor, and found "the extreme amount of force used in this case to be the most aggravating factor." *Id.* The trial court concluded that "the aggravating factors outweigh the mitigating factors." (Tr. 16). It imposed a forty-year sentence, with ten years suspended, for a "sentence consistent with the plea agreement." *Id.*

DECISION

The Indiana Constitution authorizes "independent appellate review and revision" of the sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court 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." *Id.* It is the burden of the defendant appealing his sentence to "persuade the appellate court" that his sentence "has met th[e] inappropriateness standard of review." *Id.* at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Jackson first argues that her sentence is inappropriate because the aggravating factors the trial court relied upon – her position of trust, and the extreme amount of force used – are invalid because they violate *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), in that they were neither admitted by her nor found by a jury. As the State responds, in the plea agreement, Jackson expressly waived her right under the U.S. and Indiana Constitutions "to have a jury determine, by proof beyond a reasonable doubt, the existence of any fact or aggravating circumstance that would allow the Court to impose a sentence in excess of the statutory presumptive sentence." (App. 148).

We also note that at the plea hearing, Jackson affirmed that she understood that by pleading guilty, she was "giving up" her right to have a jury determine not only "whether you're guilty or not" but also "whether or not certain aggravating factors might exist." (App. 165). She affirmed that she understood that "one of the aggravating factors that could be found in this case would be that you, as a babysitter, were in a position of responsibility to the baby and that the baby had a right to impose certain trust in you." *Id.* She "admit[ed] that there could be an aggravating factor found and [was] giving up the right to have a jury find that factor." (Tr. 166).

Jackson's reply argues that pursuant to *Combs v. State*, 851 N.E.2d 1053, 1061 (Ind. Ct. App. 2006), the appellate court "should not rely upon factors that violate *Blakely* when considering whether or not a defendant's sentence is inappropriate under Appellate

Rule 7(B).[2] In *Combs*, there had been no *Blakely* waiver by the defendant. Thus, we find it inapposite.

Jackson waived her right to have a jury find whether aggravating factors warranted imposition of a sentence greater than the advisory. Therefore, this argument fails.

Jackson argues that her "maximum sentence is inappropriate in terms of the nature of the offense and the character of the offender." Jackson's Br. at 9. However, Jackson did not receive the maximum sentence for a class A felony. *See* Ind. Code § 35-50-2-4 (range "between twenty (20) and fifty (50) years," with thirty years the advisory sentence). The trial court imposed a sentence of forty years, but it suspended ten years and ordered that Jackson serve a thirty-year executed sentence.

In addressing an appellate claim that the sentence imposed is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence or the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class A felony is thirty years. *See* Ind. Code § 35-50-2-4.

As to the nature of the offense, Jackson inflicted a fatal head injury that resulted in the death of an eight-month-old infant entrusted to her care. The pathologist reported that the force of the blow to Hayliy's head was similar to her having been struck by an automobile. We agree with the State that such facts warrant the imposition of a sentence greater than the advisory sentence.

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[2] Jackson's reply emphasizes that she "raises the invalid aggravators under the auspices of an inappropriateness claim" under Indiana Appellate Rule 7(B). Reply at 1. Hence, we do not consider application of the analysis provided in *Anglemyer*, 868 N.E.2d at 490-91, as to whether the sentence ordered was an abuse of the trial court's discretion.

With respect to the character of the offender, it is true that Jackson had no prior criminal history. However, the trial court recognized her lack of criminal history as a mitigating factor. Nevertheless, reflective of Jackson's character also is the fact that she had agreed to care for the child, putting herself in the position of caregiver and then violated that trust by striking Hayliy's head with violent force, resulting in the child's death.

We do not find that the sentence imposed is inappropriate in light of the nature of Jackson's offense and her character.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.