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**IN THE  
COURT OF APPEALS OF INDIANA**

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GARY W. GREGORY,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A02-0504-CR-349

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Ted Robinette, Judge Pro Tem  
Cause No. 49G03-0210-FA-240782

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**October 19, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Following a guilty plea, Gary Gregory appeals his sentences for two counts of child molesting, both Class C felonies. Gregory raises two issues, one of which is dispositive: whether the trial court abused its discretion in sentencing Gregory. Concluding that the trial court abused its discretion by finding an improper aggravating circumstance, we reverse Gregory's sentence and remand to the trial court with instructions to issue a new sentencing statement.<sup>1</sup>

## Facts and Procedural History

On September 24, 2002, the State filed an eight-count information charging Gregory with one count of child molesting, a Class A felony, and seven counts of child molesting, all Class B felonies. Gregory pled not guilty and a jury trial commenced on October 12, 2004. The jury returned a not-guilty verdict on one of the Class B felonies and was unable to reach a verdict on the seven remaining counts.

On January 27, 2005, Gregory pled guilty to two counts of child molesting, both Class C felonies. In pleading guilty, Gregory admitted: 1) at some point between January 1, 1996, and December 31, 1996, he fondled or touched his biological daughter, A.H., who was between nine and ten years old at the time; and 2) between January 1, 1995, and December 31, 1996, Gregory also fondled or touched his former step-daughter, R.H., who was between twelve and thirteen years old at the time. In exchange for Gregory's guilty plea, the State dropped the remaining counts. This plea agreement left sentencing to the trial court's

discretion, but provided that Gregory would serve the sentences concurrently. The State also agreed to make no argument or recommendation at the sentencing hearing.

At the sentencing hearing, the trial court made the following statement regarding aggravating and mitigating circumstances: “I’m finding aggravating circumstances pursuant to statute, that the victim of the crime was less than 12 years at the time that the crime was committed. I find that this aggravating circumstance outweighs any mitigating circumstances.” Transcript at 50. The trial court sentenced Gregory to eight years, with three years suspended, for molesting A.H. and four years for molesting R.H., for an aggregate sentence of eight years with three years suspended. After recessing, the trial court then recalled Gregory to advise him of his right to appeal. On request from counsel, the trial court then stated that the mitigating circumstances it considered were the lack of criminal record and the hardship on Gregory’s dependants. The trial court again stated that the aggravating circumstance outweighed the mitigating circumstances. Gregory now appeals.

### Discussion and Decision

#### I. Standard of Review

Under the presumptive sentencing scheme, which applies to Gregory,<sup>2</sup> if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). Sentencing

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<sup>1</sup> Gregory also argues that his sentence is inappropriate in light of his character and the nature of his offenses. We need not address this issue, as we are remanding for resentencing.

determinations are within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). We will find the trial court abused its discretion only when its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. If we find an error in the trial court’s sentencing decision, “we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level.” Cotto v. State, 829 N.E.2d 520, 523-24 (Ind. 2005).

## II. Age of the Victim

Gregory argues that the trial court improperly found the age of the victim to be an aggravating circumstance because this factor is also an element of child molesting. We agree.

“When the age of a victim constitutes a material element of the crime, then the victim’s age may not also constitute an aggravating circumstance to support an enhanced sentence.” McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). In order to properly use this aggravating circumstance, the trial court must identify “particularized circumstance[s] that would justify relying on the victim’s age[] as [an] aggravating circumstance[.]” Id. An element of child molesting as a Class C felony is that the victim be under the age of fourteen. Ind. Code § 35-42-4-3. Therefore, we have previously held that a trial court improperly found the aggravating circumstance of a victim being under the age of twelve when

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<sup>2</sup> Gregory committed the offenses prior to April 25, 2005, the date when the new “advisory”

sentencing a defendant for child molesting when the trial court failed to explain why it found the victim's age to be an aggravating circumstance. Johnson v. State, 845 N.E.2d 147, 151 (Ind. Ct. App. 2006), trans. denied; Bear v. State, 772 N.E.2d 413, 427 (Ind. Ct. App. 2002), trans. denied, overruled on other grounds, Ludy v. State, 784 N.E.2d 459 (Ind. 2003) (trial court improperly found victim's age to be an aggravating circumstance where it "listed no other considerations pertaining to age"). However, when the trial court explains why the victim's age is particularly aggravating, the trial court acts within its discretion in finding this aggravating circumstance in sentencing a defendant for child molestation. See Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (trial court recognized that victim's age was element of child molesting, but fact that victim was eight years old made the crime "more heinous"); Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), trans. denied (trial court properly considered victim's age where trial court "specifically noted that a four or five-year-old child is extremely vulnerable to sexual predation because of her 'tender years.'").

Here, the trial court identified no particularized circumstances rendering the victim's age an aggravating circumstance. Therefore, we conclude the trial court abused its discretion in sentencing Gregory. We cannot say that the error is harmless, as the victim's age was the only aggravating circumstance found by the trial court. Therefore, we elect to remand to the trial court with instructions to issue a revised sentencing statement.<sup>3</sup> Although not necessary to our decision, we will briefly address Gregory's argument regarding mitigating

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sentencing scheme came into effect. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

circumstances, as the issue could recur.

### III. Gregory's Guilty Plea

Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied.

Gregory argues that the trial court abused its discretion in failing to find his guilty plea to be a mitigating circumstance. Our supreme court has held that trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004). However, a guilty plea is not inherently considered a significant mitigating circumstance. Id. at 238 n.3; Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Where a defendant has already received a benefit in exchange for the guilty plea, the weight of a defendant's guilty plea is reduced. See id. at 1165. Here, Gregory already received a substantial benefit in exchange for his plea as the State dropped multiple felony counts as part of the plea agreement. Also, the plea came after Gregory had already been tried on these and other counts. Although, as Gregory points out, his plea spared his victims from having to go through a second trial, the victims were not spared testifying and appearing at his first trial. Cf. Francis, 817 N.E.2d at 238 n.3 (recognizing that a guilty plea's weight may be reduced where it did not extend a benefit to the victims by avoiding a trial). Also, the State had already expended significant resources on Gregory's

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<sup>3</sup> The trial court need not hold a new sentencing hearing.

case prior to his guilty plea. See Gillem v. State, 829 N.E.2d 598, 605 (Ind. Ct. App. 2005), trans. denied. Although the trial court may choose to find Gregory's guilty plea to be a mitigating factor on remand, it acted within its discretion in declining to do so.

#### Conclusion

We conclude the trial court abused its discretion in finding the victim's age to be an aggravating circumstance. We therefore reverse Gregory's sentence and remand with instructions that the trial court issue a new sentencing statement.

Reversed and remanded.

KIRSCH, J., and BARNES, J., concur.