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**IN THE  
COURT OF APPEALS OF INDIANA**

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EDGAR LEWIS BAKER, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 54A02-0707-CR-577

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APPEAL FROM THE MONTGOMERY CIRCUIT COURT  
The Honorable Thomas K. Milligan, Judge  
Cause No. 54C01-0211-FA-130

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**November 5, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Edgar Lewis Baker appeals the thirty-year executed sentence that was imposed following his convictions for Child Molesting,<sup>1</sup> a class C felony, and Child Molesting,<sup>2</sup> a class A felony. Specifically, Baker argues that his sentence must be set aside because “the trial court used improper aggravating factors, and failed to consider evidence of mitigating factors.” Appellant’s Br. p. 1. Finding no error, we affirm the judgment of the trial court.

### FACTS

On November 14, 2002, the State charged fifty-six-year-old Baker with eleven counts of class A felony child molesting and one count of class C felony child molesting, alleging that between August 2000 and November 8, 2000, he fondled twelve-year-old A.B., had sexual intercourse with her on six occasions, and engaged in sexual deviate conduct with her on five occasions.

On March 10, 2003, Baker entered into an agreement with the State, which provided that he would plead guilty to one count of class A felony child molesting, and to one count of child molesting as a class C felony. In exchange, the State agreed to dismiss the remaining charges and to recommend to the trial court that the executed portion of Baker’s sentence not exceed forty-eight years.

The presentence investigation report revealed that A.B. is the daughter of Baker’s niece. In 1994, Baker became the legal guardian of A.B. and her sister. Both girls lived with

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<sup>1</sup> Ind. Code § 35-42-4-3(b).

<sup>2</sup> I.C. § 35-42-4-3(a)(1).

Baker and his wife until he was arrested for the above offenses.

A.B. reported in her victim impact statement that Baker would smack and whip her when he became angry. Thus, she was afraid to report the sexual abuse. A Montgomery County Police Department report attached to the presentence report noted that A.B. told investigators that Baker had been sexually abusing her since she was in the first grade. The report also indicated that Baker would take A.B. to the bathroom in their home and expose his genitals to her. Baker admitted to investigators that on three or four occasions when A.B. was in the second grade, he directed A.B. to bend over a bed so he could masturbate on her back. Following Baker's arrest, his daughter-in-law reported that Baker had sexually abused her from the time that she was in second grade until she was sixteen years old.

At the combined guilty plea and sentencing hearings that were conducted on April 21, 2003, Baker admitted that A.B. had been placed in his care because A.B.'s mother trusted him. Baker argued that the trial court should consider his lack of criminal history, show of remorse, and the fact that a physical illness might have clouded his judgment, as mitigating circumstances. Before pronouncing the sentence, the trial court noted that even though Baker had been the subject of physical and sexual abuse as a child, he had been able to "get along and make his way." Tr. p. 24. The trial court then identified Baker's lack of criminal record and show of remorse as mitigating circumstances. The trial court also found the following aggravating circumstances: 1) Baker had subjected A.B. to a variety of sexual activities over a lengthy period of time and there were reports that he had engaged in similar abuse with his daughter-in-law for nearly ten years; 2) A.B.'s youthfulness and the vast difference in age

between her and Baker; 3) Baker abused his position of trust with A.B; and 4) the particularly insidious nature of the offenses would have lasting effects on A.B.

Finally, the trial court determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced Baker to eight years for class C felony child molesting and to forty years for class A felony child molesting, to be served concurrently, with ten years suspended. Baker now appeals.<sup>3</sup>

## DISCUSSION AND DECISION

### I. Mitigating Circumstances

Baker first claims that his sentence must be set aside because the trial court overlooked several mitigating factors that were apparent from the record. Specifically, Baker asserts that the trial court abused its discretion in: 1) refusing to identify his cooperation with law enforcement officers and his decision to plead guilty; 2) failing to consider the testimony of Baker's family member at sentencing; 3) refusing to assign any weight to a psychiatrist's conclusion that Baker would probably not re-offend; and 3) failing to consider the fact that he had been physically and sexually abused as a child.

Before addressing the merits of Baker's arguments, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. The statutes were amended to incorporate advisory sentences rather than

presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code § 35-38-1-7.1, § 35-50-2-1.3.

Here, Baker committed the charged offenses before the amended statutes took effect. In Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007), our Supreme Court observed that “the sentencing statute in effect at the time a crime is committed governs the sentence for that crime.” Because Baker committed the offenses prior to the effective date of the sentencing amendments, we apply the former version of the statute.<sup>4</sup>

This court has observed that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). It is within the trial court’s discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation

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<sup>3</sup> The trial court granted Baker’s motion for permission to file a belated appeal on March 16, 2006, and again on May 10, 2007. Appellant’s App. p. 6-7.

<sup>4</sup> When Baker committed the offenses, the relevant sentencing statute provided that

[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000).

I.C. § 35-50-2-4. Additionally,

[a] person who commits a class C felony shall be imprisoned for a fixed term of four (4) years with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000).

I.C. § 35-50-2-6.

that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

Proceeding to Baker's arguments, we initially observe that he has waived his claims because he did not raise them at the sentencing hearing. See Georgopoulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000) (holding that a trial court does not abuse its discretion in not considering a mitigating factor that the defendant does not raise at sentencing).<sup>5</sup> However, even if Baker had not waived these issues, we note that a plea bargain does not constitute a mitigating circumstance when the defendant has already received a significant benefit from the plea agreement. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Here, Baker's decision to plead guilty was not a significant mitigator because he received the benefit of the State's dismissal of ten counts of class A felony child molesting, which could have resulted in a substantial term of imprisonment.

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<sup>5</sup> As noted above, Baker argued at the sentencing hearing that his lack of criminal record, his remorse, and the possibility that his physical ailments may have contributed to the offenses may have contributed to the commission of the offenses were mitigating factors. Tr. p. 22-23.

Additionally, Baker's contention that he was unlikely to reoffend is not clearly supported by the record. Although Baker points to the character testimony of his daughter at the sentencing hearing and a psychiatrist's report for the proposition that he did not have a propensity for being sexually attracted to young children, Baker's daughter testified that she had not had much contact with Baker during her life. Tr. p. 15-16. Moreover, the evidence established that Baker had also molested his wife's oldest daughter for nearly nine years. Appellant's App. p. 18. Thus, Baker's claim fails with regard to this proffered mitigator.

Finally, the record shows that the trial court did consider Baker's alleged history of physical and sexual abuse and chose not to credit it. Tr. p. 24. Indeed, the trial court is not obligated to weigh or credit the mitigating factors the way a defendant suggests that they should be weighed or credited. Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002). As a result, Baker's contentions fail, and we conclude that the trial court did not abuse its discretion when it did not consider Baker's proffered mitigating circumstances.

## II. Aggravating Factors

Baker next claims that he must be resentenced because the trial court improperly identified a number of aggravating factors. Specifically, Baker challenges the trial court's identification of the difference between Baker and A.B.'s ages, the psychological effects on A.B., Baker's abuse of his position of trust with A.B., and the existence of uncharged criminal conduct, as aggravating factors.

With respect to A.B.'s age, we note that the child molesting statute under which Baker was charged requires that the victim be under fourteen years of age and provides that a

defendant over the age of twenty-one who engages in sexual intercourse with a victim of that age commits a class A felony. I. C. §§ 35-42-4-3(a), (b). Although Baker correctly observes that a trial court may not identify a material element of the crime as an aggravating factor, it may consider the particularized nature and circumstances of the offense. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). Specifically, in Garland v. State, 855 N.E.2d 703 (Ind. Ct. App. 2007), trans. denied, this court determined that the trial court could properly identify the victim's "tender age" as an aggravating circumstance when the evidence showed that the victim was seven years old at the time the defendant molested her. Id. at 710.

In this case, A.B. was twelve years old and Baker was fifty-six when Baker committed the offenses alleged in counts I and II. Appellant's App. p. 23-28. At the sentencing hearing, the trial court commented about the "youthfulness" of A.B. and the "age of Mr. Baker" in explaining why the age difference was an aggravating circumstance. Tr. p. 25. In our view, it is apparent that the trial court found the forty-four year age difference between Baker and A.B. to be a particularized circumstance that merited aggravating weight. We cannot say that the trial court abused its discretion in determining that such a vast age difference between A.B. and Baker constituted an aggravating circumstance.

Baker also claims that the trial court erred because it found only "general concepts about the psychological effects of the offenses" as an aggravating factor. Appellant's Br. p. 6. We note that there is a presumption that the legislature considered the emotional and psychological effects of a crime when it set the presumptive sentence for the particular offense. Thompson v. State, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003). However, the



psychological effects may still be a valid aggravating circumstance if the impact, harm, or trauma of the crime is greater than that normally associated with it. Id.

In this case, the trial court found that the impact of the offenses will likely be long-lasting for A.B. as she becomes a woman. Tr. p. 25-26. The trial court noted that A.B. is extremely frightened of Baker, and A.B. expressed a desire to avoid contact with Baker under any circumstance because she is scared of him. Appellant's App. p. 17. Presumably, A.B.'s desire to avoid Baker may have even precluded her from testifying against Baker if this case had proceeded to trial. In our view, the evidence establishing such a profound impact of the offenses on A.B. is greater than that contemplated by the statute. Thus, we cannot say that the trial court erred in finding that the psychological damage and trauma that A.B. would suffer was an aggravating circumstance.<sup>6</sup>

With regard to Baker's contention that the trial court improperly identified uncharged criminal conduct as an aggravating factor, we note that the defendant's character may be considered when determining what sentence to impose. Jones v. State, 614 N.E.2d 936, 938 (Ind. 1993). Moreover, a trial court may consider a defendant's prior criminal history, including arrests and other prior criminal acts not reduced to a conviction, as a valid aggravating factor in assessing the defendant's character and whether the defendant is likely to reoffend. Taylor v. State, 695 N.E.2d 117, 121 (Ind. 1998).

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<sup>6</sup> We note, however, that even assuming for argument's sake that this aggravating factor was improperly identified, we have held that a defendant's sentence may be upheld if a legitimate aggravator otherwise supports it. Powell v. State, 751 N.E.2d 311, 317 (Ind. Ct. App. 2001). As discussed more fully below, the remaining aggravating factors that the trial court found were both proper and adequate to justify an enhanced sentence. See Garrett v. State, 714 N.E.2d 618, 623 (Ind. 1999) (holding that the trial court did not abuse its

In this case, the evidence established—and the trial court found—that Baker had been molesting A.B. since she was six years old. It was also determined that Baker engaged in a variety of improper sexual activity with A.B. over the years and that Baker had molested his daughter-in-law for nearly ten years. Tr. p. 25. In essence, it is apparent that the trial court found that the lengthy period of abuse and the nature of the various sexual acts involved merited aggravating weight. Id. That determination was supported by evidence of the acts of fondling and sexual intercourse to which Baker pleaded guilty as well as evidence of the offenses that were not charged. Appellant’s App. p. 37-38. As a result, we conclude that the trial court did not err with regard to this aggravating factor.

Finally, Baker contends that the trial court improperly relied on the fact that he violated a position of trust with A.B. when he committed the offenses because the legislature had contemplated that factor when the child molesting statute was enacted. Appellant’s App. p. 6. However, this court has determined that violating a position of trust may be a valid aggravating factor. Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). Even more compelling, the child molesting statute does not require that a defendant be in a position of trust with the victim. I.C. § 35-42-4-3.

At the sentencing hearing, the trial court specifically commented that Baker “was in a position of trust. That he violated the trust that [his wife] placed in him, other members of the family placed in him and that the children placed in him.” Tr. p. 25. Moreover, as noted above, Baker admitted at the sentencing hearing that A.B. was placed in his care because

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discretion because, even though trial court erred in finding one improper aggravating circumstance, other

A.B.'s mother trusted him. As a result, we conclude that the trial court properly identified Baker's violation of his position of trust as a valid aggravating factor.

In sum, Baker does not prevail on his contentions that the trial court overlooked certain mitigating circumstances or that it erred in identifying various aggravating factors. Thus, Baker's contention that he must be resentenced fails.<sup>7</sup>

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.

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valid aggravating circumstances remained).

<sup>7</sup> We note that Baker does not make any additional argument that the sentence was inappropriate pursuant to Indiana Appellate Rule 7(B). Even so, when considering the seriousness of these offenses, Baker's molestation of the other victim, and the other aggravating circumstances that the trial court identified, we can only conclude that the sentence for this offense was not inappropriate when considering the nature of the offense and Baker's character in accordance with Indiana Appellate Rule 7(B). See Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003) (holding that sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision and we refrain from merely substituting our judgment for that of the trial court).