ATTORNEY FOR APPELLANT:

STEVEN KNECHT
Vonderheide & Knecht
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CARMEN DUENAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A04-0702-CR-83
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0503-FA-37

November 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Carmen Duenas appeals her sentence for neglect of a dependent resulting in serious bodily injury as a class B felony.[1] Duenas raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Duenas; and

II. Whether Duenas's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. Duenas is the mother of two children, E.D., an eighteen-month-old, and R.D., a three-and-a-half-year-old. Duenas is deaf and usually locked the children in their bedroom because she could not hear them, even though Duenas knew that the lock on the door did not work all the time and the children could push the door open. Duenas was aware of devices that would alert her to the children's whereabouts, but she did not get the devices before E.D.'s death because she could not afford them because her boyfriend spent the money on beer and cigarettes. At 7:20 a.m., on January 30, 2004, Duenas took her children downstairs for breakfast and then took them upstairs to their bedroom. Later, Duenas brought the children down for lunch and fed them hot dogs. After lunch and a short play period, Duenas took the children back upstairs and put them in their bedroom for a nap.

[1] Ind. Code § 35-46-1-4 (Supp. 2003) (subsequently amended by Pub. L. No. 46-2004, § 1 (eff. July 1, 2004); Pub. L. No. 26-2006, § 2 (eff. July 1, 2006)).

Mother claimed that she later found E.D. face down in the bathtub. E.D. died as a result of asphyxiation, but the manner of death was not determined. E.D. also suffered second degree burns extending 9.5 inches up his legs, which was the depth of the water at the drain end of the tub.

The State charged Duenas with neglect of a dependent as a class A felony.[2] The trial court later amended the charge to neglect of a dependent as a class B felony. Duenas pleaded guilty to neglect of a dependent as a class B felony, and the State agreed to recommend that Duenas receive an executed sentence not to exceed ten years.

At the sentencing hearing, Dr. Dean Hawley, the pathologist, indicated that E.D.'s burns were consistent with submersion by another individual. The water coming out of the hot water heater was approximately 126 degrees Fahrenheit, and Dr. Hawley indicated that E.D. would had to have been placed in water of 125 degrees for approximately two minutes to create the burns that he suffered. Dr. Hawley found several large pieces of hot dog in E.D.'s stomach. Dr. Hawley indicated that E.D. died not very long after he was burned.

Duenas stated that, after she placed the children down for a nap, R.D. and E.D. came out of the bedroom at around 3:00 p.m. Duenas put the children back into their bedroom, and she returned to playing games. Duenas stated that she did not see the children again until close to six p.m. Duenas went to get the children for dinner and

---

[2] Id.

discovered R.D. standing outside the bathroom. Duenas discovered E.D. in the bathtub with his head down in cold water. Duenas performed CPR on E.D., and E.D. vomited. Duenas went to the neighbor's home for help. Duenas stated that she did not know that E.D. could get into the bathtub by himself.

The trial court found Duenas's lack of criminal history and her guilty plea as mitigators. The trial court found the nature and circumstances of the offense as an aggravator. Specifically, the trial court stated:

> Um, you could argue that the physical limitation, her physical limitations, um, her deafness, um contributed in part to the circumstances, that can be both a mitigator and an aggravator. Um, in fact, I, I, I have considered the nature and circumstances of the offense and find, uh, the fact that [Duenas]'s physical limitations did contribute to, um, to the circumstances in a negative way. Um, neglect as the, a factual basis was established, was based on a parent's, um, placing a dependent in a situation, a child in a situation that endangers that child's life or health by, by failing to obtain proper medical treatment. Um, I think the nature and circumstances of, of this tragic situation also establishes that Carmen Duenas did knowingly place [E.D.] in a situation that endangered his life by leaving him and his older brother, both pre-school children, alone upstairs for some period of time that obviously allowed this, this tragic circumstance to happen. Um, the nature and circumstances of the offense indicate that [E.D.] suffered severe burns covering both of his legs from the mid-thigh area to the, to both of his feet. As the reports indicate his legs were completely blistered and the skin was falling off in sheets. The reports indicate that the burns were consistent with having been dipped in scalding water. And that couldn't have occurred without someone else doing the dipping, in the court's opinion. [E.D.] was 18 months old at the time, his older brother [R.D.] was three and a half years old at the time. Again, whatever happened upstairs, if it happened upstairs, uh, as far as this case is concerned, will remain a mystery. [Duenas]'s version based on the factual basis, based on her interviews, um, with the police are inconsistent with, with the condition that [E.D.] was found, and whether she is hiding something or just doesn't know what happened, uh, again will remain a mystery to the Court and to, to, uh, those involved in the investigation of

> this case. Nevertheless, [E.D.] did die as a result of, of the lack of, of, um, appropriate supervision and there has to be consequences as a result of, of that. The Court believes that the, the mitigating factors are certainly present; however, the nature and circumstances of this offense, uh, support the presumptive sentence of ten years.

Transcript at 56-57. The trial court sentenced Duenas to ten years in the Indiana Department of Correction.

I.

The first issue is whether the trial court abused its discretion in sentencing Duenas. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). Duenas's offense was committed prior to the April 25, 2005, sentencing statute amendments. Thus, we apply the pre-April 25, 2005, sentencing statutes. Under those statutes, in order for a trial court to impose an enhanced sentence, it was required to: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). Duenas argues that the trial court used improper aggravating circumstances and failed to find a mitigating circumstance.

A. Mitigator

Duenas argues that the trial court abused its discretion by failing to find her deafness as a mitigator. The State argues that the trial court found that Duenas's deafness "was cancelled out by the fact that [Duenas] allowed her deafness to contribute to the neglect of her children." Appellee's Brief at 7.

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. 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. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

At sentencing, Duenas's attorney argued that "if the Court takes and weighs her testimony . . . then one would also have to find, that to a certain extent, Judge, her own physical limitations, the inability to hear, contributed in part to what happened to [E.D.] on that day." Transcript at 53. The trial court stated:

> Um, you could argue that the physical limitation, her physical limitations, um, her deafness, um contributed in part to the circumstances, that can be both a mitigator and an aggravator. Um, in fact, I, I, I have considered the nature and circumstances of the offense and find, uh, the fact that the Defendant's physical limitations did contribute to, um, to the circumstances in a negative way.

Id. at 56.

The trial court stated that Duenas's version of events was "inconsistent with, with the condition that [E.D.] was found . . . ." Id. at 57. Because the trial court found that Duenas's version of the events was inconsistent with E.D.'s condition, the trial court did not find Duenas's testimony credible and did not have to find that her deafness contributed in part to what happened as Duenas's attorney suggested. The record also reveals that Duenas was aware of devices that would alert her, but she did not get the devices before E.D.'s death because she could not afford them because her boyfriend spent the money on beer and cigarettes. We cannot say Duenas has shown that the mitigating evidence is both significant and clearly supported by the record. Accordingly, we cannot say that the trial court abused its discretion by not finding Duenas's deafness to be a mitigating circumstance. See, e.g., Carter, 711 N.E.2d at 838-839 (Ind. 1999) (holding that the trial court did not abuse its discretion by failing to find mitigators).

B. Aggravators

Duenas argues that the trial court abused its discretion by using her deafness as an aggravating circumstance. We cannot say that the trial court used the fact that Duenas was deaf as an aggravator. Rather the trial court stated that in considering the nature and

circumstances of the offense, Duenas's disability contributed "to the circumstances in a negative way." Transcript at 56. As previously discussed, the trial court found that Duenas's version of the events was inconsistent with E.D.'s condition. See supra Part A. Further, the record reveals that Duenas failed to take steps to assist her with her disability. See id. We cannot say that the trial court abused its discretion in considering Duenas's deafness as part of the nature and circumstances of the offense.

Duenas appears to argue that the trial court erroneously considered the fact that the children were left alone as an aggravator because it was a material element of the offense. A trial court may not use a material element of the offense as an aggravating circumstance. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, the trial court may find the nature and circumstances of the offense to be an aggravating circumstance. Id. Based on the trial court's statements, we cannot say that the trial court considered only the fact that the children were left alone when it considered the nature and circumstances of the offense. The trial court found that Duenas left E.D. alone upstairs, that eighteen-month-old E.D. suffered severe burns consistent with being dipped in scalding water, and that E.D. could not have dipped himself into the scalding water. We conclude that the trial court considered the nature of E.D.'s burns and death not as a material element of the crime but as the nature and circumstances of the offense.[3]

[3] Duenas argues that the description of the burns on E.D.'s legs might be permissible as "nature and circumstances," but because the trial court was "not sure that [Duenas] caused the injuries in a more active manner than by lack of supervision, it is improper to find as an aggravating circumstance that

Consequently, the trial court did not abuse its discretion by considering the nature and circumstances as an aggravating factor. See, e.g., Kile v. State, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000) (holding that the trial court did not abuse its discretion by using the particularized factual circumstances of the case, namely the victim's young age, as an aggravating factor even though the neglect of a dependent statute required the victim to be under eighteen years of age or have a mental or physical disability); Harrison v. State, 644 N.E.2d 888, 892 (Ind. Ct. App. 1994) (holding that the nature and circumstances of the offense were proper aggravating factors), trans. denied.

II.

The next issue is whether Duenas's ten-year presumptive sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the

---

'someone else' did it." Appellant's Brief at 14. Duenas argues that "[s]he is essentially being punished for committing an act the court admits it does not know she committed." Id. The Indiana Supreme Court has held that ". . . aggravating circumstances turn on the consequences to the victim as well as the culpability of the defendant," and "[t]his understanding of aggravating circumstances comports with the Black's Law Dictionary definition of aggravation: '[a]ny circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences. . . .'" McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001) (quoting BLACK'S LAW DICTIONARY 60 (5th ed. 1979)). Because the nature and circumstances of E.D.'s burns and death increase the enormity of Duenas's neglect and adds to the injurious consequences of the offense, we find the nature and circumstances of the offense is a proper aggravator.

burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Duenas locked E.D. an eighteen-month-old, and R.D., a three-and-a-half-year-old, in their bedroom for several hours during the day. Duenas knew that the lock on the door did not work all the time and that the children could push the door open. While under Duenas's care, E.D. suffered second degree burns extending 9.5 inches up his legs, which were consistent with submersion by another individual. E.D. died as a result of asphyxiation.

Our review of the character of the offender reveals that Duenas has no criminal history and pleaded guilty. At sentencing, Duenas stated that she accepted responsibility and was sorry for the things that happened. Duenas indicated that she did not get devices to help her with her handicap before E.D.'s death because her boyfriend spent money on beer and cigarettes.

After due consideration of the trial court's decision, we cannot say that the ten-year presumptive sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Hulfachor v. State, 813 N.E.2d 1204, 1209 (Ind. Ct. App. 2004) (holding that defendant's sentence for neglect of a dependent was not inappropriate).

For the foregoing reasons, we affirm Duenas's sentence for neglect of a dependent resulting in serious bodily injury as a class B felony.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur