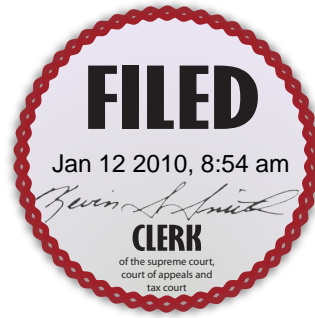


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUAN I. OLVERA,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0906-CR-529

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0311-FA-00034

January 12, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Juan I. Olvera (“Olvera”) pleaded guilty in Tippecanoe Superior Court to Class A felony child molestation. The trial court sentenced Olvera to a term of forty-five years.

Olvera appeals and argues the following issues:

- 1) Whether the trial court abused its discretion in its determination of aggravators and mitigators;
- 2) Whether the trial court made a sufficient statement of its reasons for selecting the sentence imposed; and
- 3) Whether his sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

On November 12, 2003, Olvera, a then-thirty-five year-old Mexican national, drove J.O., his twelve-year-old niece, from Illinois to Indiana without permission from her parents. An Illinois Amber Alert was issued regarding J.O. Olvera had sexual intercourse with his niece in a Lafayette motel, and was subsequently apprehended by Lafayette police.

Police officers interviewed Olvera and J.O. J.O. initially denied having sexual intercourse with Olvera, but then told officers that she had. After the interview, officers obtained a search warrant to search the motel room and found bed sheets soiled with semen and blood. A medical exam of J.O. revealed a torn and bruised hymen which is consistent with first-time sexual intercourse. During Olvera’s interview, he admitted to having sexual intercourse with J.O., but claimed that he thought she was thirteen at the time, not twelve.

On November 14, 2003, the State charged Olvera with Class A felony child molestation and Class B felony incest. On April 30, 2004, Olvera pleaded guilty to Class A felony child molestation and the Class B felony incest charge was dismissed. On May 28, 2004, the trial court sentenced Olvera to forty-five years in the Department of Correction.

On September 25, 2007, Olvera filed a petition for post-conviction relief which claimed that the trial court failed to advise him of his right to appeal his sentence and that the trial court had improperly enhanced his sentence. On March 28, 2008, the trial court denied the petition stating that the post-conviction petition was not the proper venue for challenging a sentence. Olvera filed a motion to correct error and requested appointment of a public defender to appeal.

On July 14, 2008, Olvera filed a notice of appeal. On January 20, 2009, we affirmed the trial court as to all issues except for its dismissal of Olvera's improper sentence enhancement claim and remanded the issue to the trial court.¹ We noted that Olvera has the right to petition for permission to file a belated notice of appeal. On February 19, 2009, Olvera filed a verified petition for permission to file a belated appeal. The trial court held a hearing on May 15, 2009, granted Olvera permission to file the belated appeal and appointed appellate counsel. Olvera now appeals.

I. Aggravators and Mitigators

Olvera argues that the trial court abused its discretion by giving improper consideration to aggravating and mitigating circumstances. Specifically, Olvera contends that the trial court failed to find Olvera's guilty plea as a mitigator and that the trial court

¹ Olvera v. State, 899 N.E.2d 708 (Ind. Ct. App. 2009).

improperly considered as aggravators the age disparity between Olvera and J.O. and Olvera's lack of remorse.

The trial court is responsible for determining the appropriate weight of aggravating and mitigating factors in sentencing. Wingett v. State, 640 N.E.2d 372, 373 (Ind. 1994). A sentence may be enhanced by a single aggravating circumstance. Haddock v. State, 800 N.E.2d 242, 245 (Ind. Ct. App. 2003). Trial courts have discretion to determine both the existence and the weight of a significant mitigating circumstance. Jones v. State, 705 N.E.2d 452, 454 (Ind. 1999). "A trial court must include mitigators in its sentencing statement only if they are used to offset aggravators or to reduce the presumptive sentence, and only those mitigators found to be 'significant' must be enumerated." Allen v. State, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000) (citing Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997)). Furthermore, a trial court is "not required to find the presence of mitigating factors" or to give those factors the same weight as does the defendant. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). Moreover, the trial court "is not obligated to explain why it has found that the factor does not exist." Id.

A. Mitigators

Olvera argues that the trial court should have given some mitigating weight to his guilty plea. Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995). A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995); see also

Williams v. State, 430 N.E.2d 759, 764 (Ind.1982) (“[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return.”). However, a guilty plea is not entitled significance if the decision to plead is a pragmatic one. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (citing Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)).

When Olvera sought to have his guilty plea considered a mitigator, the trial court stated, “Well, I think he’s pled guilty but I don’t think, but the Pre-Sentence says he’s not remorseful. I find that to be an aggravator. I, I can find the mitigator he pled guilty for whatever reason, but....” Tr. p. 25. The trial court’s statement shows that it did consider the guilty plea to be a mitigator but did not give it significant weight given Olvera’s lack of remorse.

Also, Olvera’s decision to plead guilty was clearly a pragmatic decision. In addition to the evidence found in the motel room, Olvera waived his right to remain silent during the initial police interview and admitted to having sexual intercourse with J.O. when he was confronted with overwhelming evidence of his guilt.

The trial court recognized Olvera’s guilty plea as a mitigator and did not abuse its discretion when it assigned little weight to the guilty plea given his confession and lack of remorse. The trial court also properly considered Olvera’s lack of criminal history as an additional mitigator.

B. Aggravators

Olvera first argues that the trial court’s finding of a lack of remorse as an aggravator was an abuse of discretion. A defendant’s lack of remorse can constitute an

aggravating circumstance. See Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). A defendant demonstrates lack of remorse by displaying “disdain or recalcitrance, the equivalent of ‘I don’t care.’” Cox v. State, 780 N.E.2d 1150, 1158 (Ind. Ct. App. 2002). On the other hand, the fact that a defendant maintains his innocence by making statements akin to “I didn’t do it” is not properly considered an aggravating circumstance. Id. Although lack of remorse is a proper aggravator, it is not a weighty aggravator, and instead is considered an aggravator of only modest significance. See Georgopoulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000) (“[T]he lack of remorse is regarded only as a modest aggravator.”) In Smith v. State, 655 N.E.2d 532, 540 n.11 (Ind. Ct. App. 1995), trans. denied, we recognized the modest nature of the lack of remorse, and noted that “lack of remorse alone under these circumstances arguably would not justify a ten-year enhancement [for conspiracy to commit murder].”

In this case, Olvera admitted to the crime when questioned by police and stated that J.O. came into his bed and then they fell asleep. He then stated that “[w]hen I woke up I was with her and whatever happened happened. She wanted to and several times denied it to the police.” Appellant’s App. p. 165. Based on this statement, the probation officer recommended that the court consider Olvera’s lack of remorse at sentencing. Id. at 167.

Olvera’s statement seeks to shift the blame from himself to J.O. Despite his guilty plea, he did not acknowledge that what he had done with J.O. was wrong and illegal. As we have noted before, the above aggravator alone is not sufficient to justify the enhanced sentence yet this is not the only aggravator found by the trial court. In addition to this

aggravator the trial court properly found, as an aggravator, Olvera's violation of his position of trust with his niece, J.O.

Second, Olvera argues that the trial court improperly considered the age disparity between Olvera and the victim as an aggravator used to enhance his sentence. Olvera is correct that, generally, where a victim's age is an element of the offense, it may not be considered as an aggravator to support an enhanced sentence. McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). However, the trial court may consider the particularized circumstances regarding the factual elements of an offense as aggravating. Id. Here, the trial court failed to explicitly state the particularized circumstances that led to its finding that the age disparity between Olvera and J.O. was an aggravator.

The trial court properly found that Olvera's lack of remorse and the violation of Olvera's position of trust were aggravators. However, the use of the age disparity as an aggravator was an abuse of discretion.

C. Reweighing Aggravators and Mitigators²

Where we find an irregularity in a 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. See Bivins v. State, 642

² Olvera committed Class A felony child molestation before the 2005 amendments to Indiana's criminal sentencing statutes, which provided, in part, that we may no longer reweigh aggravators and mitigators. See Krempetz v. State, 872 N.E.2d 605, 613 (Ind. 2007). Since Olvera's criminal act was committed in 2003 and he was sentenced prior to these amendments, we retain the option of reweighing the proper aggravators and mitigators. See Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994), cert. denied, 510 U.S. 893, 114 S.Ct. 255, 126 L.Ed.2d 208 (1993).

N.E.2d 928, 957 (Ind. 1994), cert. denied, 516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734 (1996). We elect appellate reweighing here.

The only mitigator that we find to be significant is Olvera's lack of a criminal history prior to this crime. We find that this is a mitigator in the medium range. See Baird v. State, 604 N.E.2d 1170, 1182 (Ind. 1992) (weighing lack of criminal history as a mitigating circumstance in the medium range), cert. denied, 510 U.S. 893, 114 S.Ct. 255, 126 L.Ed.2d 208 (1993). As noted above, we do not find that Olvera's guilty plea is a significant mitigator, given its pragmatic nature and his lack of remorse. We also find that Olvera's lack of remorse is an aggravator. Finally, the most significant aggravator is Olvera's violation of his position of trust in the commission of this crime.

Weighing the aggravating and mitigating circumstances, we find that the aggravators outweigh the mitigators and conclude that an enhanced sentence of forty-five years is appropriate.

II. Sentencing Statement

Next, Olvera asserts that the trial court abused its discretion when it failed to provide a sentencing statement. Because the trial court used aggravators to enhance the presumptive sentence, the trial court must identify all significant circumstances, state the specific reasons why the circumstance is aggravating or mitigating, and articulate the court's evaluation and balancing of the circumstances. Ind. Code § 35-38-1-3(3) (1998); Bonds v. State, 729 N.E.2d 1002, 1005 (Ind. 2000). Olvera was sentenced to a term in excess of the presumptive sentence at the time; the trial court is required to make a statement regarding the reasons for selecting the sentence it imposed.

Nevertheless, if the trial court states proper reasons for enhancing a sentence but merely fails to do so with sufficient particularity, such an error does not necessarily mandate remand. Singer v. State, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996). As long as the record indicates that the trial court engaged in the evaluative processes and the sentence was not inappropriate, the purposes of the sentencing statement have been satisfied. Id. When reviewing a sentencing statement, this court is not limited to the written sentencing order but may examine the record as a whole to determine that the trial court made a sufficient statement of its reasons for selecting the sentence imposed. Id.

In this case, the trial court recognized the aggravators and mitigators suggested in the pre-sentence investigation report: Olvera's lack of a criminal history, Olvera's position of trust, Olvera's lack of remorse, and the age disparity between Olvera and his niece. Tr. p. 22. The trial court then asked Olvera and the State for argument about which aggravators and mitigators the trial court should consider in sentencing. Id. The State argued for adoption of the probation department's recommendation, specifically noting J.O.'s age, Olvera's admission, and the circumstances surrounding the crime. Tr. p. 23. Olvera argued for additional mitigators, including Olvera's character, his guilty plea, cooperation with authorities and the remorse shown by his guilty plea. Tr. pp. 24-26. The State then argued that Olvera was not remorseful because his statements in the pre-sentence investigation report showed that he tried to shift the blame to J.O. for what happened in the motel in Lafayette. Tr. p. 26. The trial court determined that the aggravators outweighed the mitigators. Appellant's App. p. 38. The trial court then

adopted the probation department's recommendations and sentenced him in accordance with the sentencing recommendation. Tr. p. 27; Appellant's App. p. 38.

The trial court's sentencing statement was sufficient to ensure that the trial court adequately evaluated the aggravators and mitigators and to ensure that the sentence was not inappropriate.

III. Inappropriate Sentence

Olvera finally argues that his sentence is inappropriate.³ Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007). Additionally, "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Id. at 490.

The nature of the offense is particularly egregious. Olvera, a thirty-five-year-old man, had sexual intercourse with his twelve-year-old niece, J.O., without any apparent concern for the ramifications of this act.

Although Olvera does not have a criminal history, his actions before and after he had intercourse with J.O. speaks volumes about his character. He took J.O. from Illinois to Indiana without her parents' permission. He then had sexual intercourse with his

³ In 2005, our General Assembly amended the sentencing statutes to provide for advisory rather than presumptive sentences. Because Olvera committed these offenses prior to the enactment of those new statutes, we apply the prior version. See Anglemyer, 868 N.E.2d at 491, n.9; Ind. Code § 35-50-2-6 (2004 & Supp. 2006).

twelve-year-old niece and when asked about the incident stated that “When I woke up I was with her and whatever happened happened. She wanted to[.]” Appellant’s App. p. 165. Olvera does not recognize the severe criminality of his actions and has tried to shift the responsibility for what happened to his twelve-year-old niece.

Olvera’s forty-five year sentence, five years less than the maximum sentence of fifty years, was not inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

Although the trial court abused its discretion in considering the age disparity between Olvera and his victim as an aggravator, the other aggravators and mitigators were properly found. After appellate reweighing, we find that the aggravators outweighed the mitigators and that Olvera’s forty-five year sentence was appropriate. The trial court’s sentencing statement was adequate. Olvera’s forty-five year sentence was not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BARNES, J., and BROWN, J., concur.