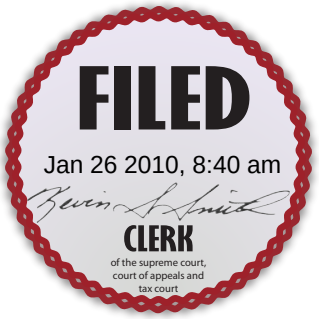

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IN THE
COURT OF APPEALS OF INDIANA

DUSTIN RODGERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0907-CR-392
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0901-FB-2

January 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Dustin Rodgers appeals the aggregate sixteen-year sentence imposed by the trial court after Rodgers pleaded guilty to Neglect of a Dependent,[1] a class B felony, and Theft,[2] a class D felony. Rodgers argues that the trial court erred by finding improper aggravators and by neglecting to find a mitigator that was supported by the record. Additionally, Rodgers contends that the sentence is inappropriate in light of the nature of the offenses and his character. Finding no reversible error and finding the sentence appropriate, we affirm. We also remand with instructions to amend the written sentencing order such that it complies with Rodgers's plea agreement and the trial court's oral statements at the sentencing hearing.

FACTS

Rodgers's son, E.R., was born two months prematurely on September 30, 2008. On November 26, 2008, E.R.'s mother, Aerial Rodgers, returned to work following the end of her maternity leave. On the morning of November 30, 2008, Aerial left E.R. in Rodgers's care when she went to work. During that day, E.R. began crying, so Rodgers decided to "discipline" him and it "got out of control." Tr. p. 36.

When Aerial returned home, she noted that E.R. was pale and asleep at an abnormal time. Later that evening, Aerial noticed that E.R. had a peeling blister on his finger. Throughout the course of the evening and into the early morning hours, E.R. was unusually sleepy. Around midnight, E.R. regurgitated his formula in an unusual manner

[1] Ind. Code § 35-46-1-4.

[2] Ind. Code § 35-43-4-2(a).

and then began experiencing seizures. Aerial took E.R. to the hospital, where it was eventually discovered that he had a significant amount of blood around his brain. He was diagnosed with a subdural hematoma, a brain injury, and retinal hemorrhages.

On January 8, 2009, the State charged Rodgers with class B felony neglect of a dependent resulting in serious bodily injury. On May 12, 2009, Rodgers pleaded guilty to this charge and to a class D felony theft charge that had been filed against him in a separate proceeding when he had stolen from Wal-Mart, his employer at that time. In exchange, the State dismissed a conversion charge that also stemmed from the Wal-Mart incident. Rodgers's plea agreement provided that the sentences for neglect and theft would be served concurrently but otherwise left sentencing to the trial court's discretion.

Following the June 10, 2009, sentencing hearing, the trial court found the following aggravators: Rodgers's criminal history; areas of concern highlighted by Rodgers's Level of Service Inventory-Revised (LSI-R) score;[3] his drug and alcohol use; E.R.'s age; the fact that Rodgers was in a position of trust with E.R.; and the fact that Rodgers was on bond at the time of the instant offense. It also found Rodgers's guilty plea, the fact that he had a young son, that he was a member of the National Guard, his history of emotional and mental health issues, and the support shown for Rodgers via letters and people present at the sentencing hearing as mitigators. Finding that the

[3] This court has explained that "'[t]he LSI-R is a standardized actuarial instrument that contains 54 items and produces a summary risk score that can be categorized into five risk levels . . . . Higher risk levels reflect an increase in the propensity to commit future criminal acts.'" Rhodes v. State, 896 N.E.2d 1193, 1194 (Ind. Ct. App. 2008) (quoting Christopher T. Lowenkamp & Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System, 71 Fed. Probation 25, 25-26 (Dec. 2007)).

aggravators outweighed the mitigators, the trial court imposed a sixteen-year sentence for neglect and a two-year sentence for theft, to be served concurrently, directing that two years of the sentence be served on Community Corrections and two years be suspended to probation. Rodgers now appeals.

DISCUSSION AND DECISION

I. Sentencing Statement

Rodgers first argues that the trial court considered a number of improper aggravating factors and overlooked a mitigator supported by the record. In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007), our Supreme Court held that trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. We review sentencing decisions for an abuse of discretion. Id., 868 N.E.2d at 490. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

A. Aggravators

1. Criminal History

Rodgers argues that the trial court erred by finding his criminal history to be an aggravating factor. When Rodgers committed the instant offense, he was twenty years old. By that time, he had been convicted of class B misdemeanor reckless possession of paraphernalia and two counts of class A misdemeanor possession of marijuana. In

addition to the pending charges of class D felony theft and class A misdemeanor conversion stemming from Rodgers's theft from his employer, there was also a charge of class D felony possession of marijuana pending at the time Rodgers pleaded guilty herein. Although Rodgers's criminal history is not the worst of the worst, it is evident that his frequent contacts with the judicial system have not dissuaded him from disobeying the rule of law. Furthermore, Rodgers's offenses have increased in severity and frequency in just over two years. Under these circumstances, the trial court did not err by finding his criminal history to be an aggravator.

2. LSI-R Score

The trial court found Rodgers's LSI-R Score to be an aggravator, commenting as follows: "[Your LSI-R score] shows that you have areas of concern including employment and education, financial issues, family, accommodations, leisure and recreation, companions and emotional and personal issues. The Court shares those concerns." Tr. p. 56.

This court, however, has explicitly disapproved of the use of a defendant's LSI-R score as an aggravator:

> The use of a standardized scoring model, such as the LSI-R, undercuts the trial court's responsibility to craft an appropriate, individualized sentence. Relying upon a sum of numbers purportedly derived from objective data cannot serve as a substitute for an independent and thoughtful evaluation of the evidence presented for consideration. As our Supreme Court recently noted in discussing the appellate review of sentences, "[a]ny effort to force a sentence to result from some algorithm based on the number and definition of crimes and various consequences removes the ability of the trial judge

> to ameliorate the inevitable unfairness a mindless formula sometimes produces." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). Therefore, it is an abuse of discretion to rely on scoring models to determine a sentence.
>
> Here, the trial court used the LSI-R score as an aggravator in addition to performing an independent evaluation of the evidence. This is also problematic, because areas analyzed in this psychological inventory appear duplicative of factors already considered by the trial court in sentencing (criminal history, education, employment) and other areas appear of questionable value (leisure and recreation). We therefore conclude that use of an LSI-R score as an aggravating factor is improper as a matter of law.

Rhodes, 896 N.E.2d at 1195. We share the Rhodes court's concern about the use of the LSI-R score as an aggravator and adopt its conclusion that this aggravating factor is improper as a matter of law.

3. Drug and Alcohol Use

Rodgers argues that the trial court erred by finding his drug and alcohol use to be an aggravating factor. While he acknowledges that the use of drugs and alcohol can sometimes be used appropriately as an aggravator, Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), he argues that it is improper in this case because he was only twenty years old. Thus, unlike in Iddings, Rodgers did not have a decades-long history of drug and alcohol abuse.

We do not find Rodgers's analysis to be compelling. At the age of twenty, he has been engaging in underage alcohol consumption for at least two years. He has abused marijuana on a regular basis since the age of seventeen, and he has used cocaine and methamphetamine. His alcohol and drug abuse has continued notwithstanding the court-

ordered substance abuse classes he took in 2007. Under these circumstances, we do not find the court's consideration of Rodgers's drug and alcohol use as an aggravator to be an abuse of discretion.

4. E.R.'s Age

The trial court also found E.R.'s age to be an aggravator. Rodgers acknowledges that the age of a victim may be considered as an aggravator for a conviction of neglect of a dependent, Robinson v. State, 894 N.E.2d 1038 (Ind. Ct. App. 2008), but argues that it was inappropriate herein because E.R. was not a newborn, unlike the victim in Robinson. We cannot agree. E.R. was two months old at the time of Rodgers's abuse. Moreover, E.R. had been born two months prematurely; thus, he was only a matter of weeks past his actual due date and had been home from the hospital for only one month when he was so severely injured. Under these circumstances, we do not find that the trial court erred by finding E.R.'s age to be an aggravator.

5. Position of Trust

The trial court also found the fact that Rodgers was in a position of trust with E.R. as an aggravating factor. A trial court may not use a material element of the underlying crime as an aggravator. Waldron v. State, 829 N.E.2d 168, 184 (Ind. Ct. App. 2005). Here, Rodgers was convicted of class B felony neglect of a dependent. A person commits that offense when he has the care of a dependent and knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health, resulting in serious bodily injury. I.C. § 35-46-1-4.

Thus, being in a position of trust—a position of care—of a dependent is an element of the underlying crime. In Robinson, this court found the consideration of such an aggravator proper, interpreting the trial court's comments to mean that it was considering the particularized individual circumstance of a vulnerable newborn victim, which is a permissible aggravator. 894 N.E.2d at 1043. Here, however, the trial court separately considered E.R.'s age as an aggravator. Thus, in this case, the fact that Rodgers was in a position of trust with E.R. was an improper aggravating factor.

6. On Bond at Time of Instant Offense

Finally, Rodgers argues that the trial court erred by finding as an aggravator that he was out on bond on another offense at the time he committed the instant crime. He contends that because the trial court failed to elaborate about the other case, this aggravator is improper. It is uncontested, however, that on September 11, 2008, Rodgers was charged with class D felony theft and class A misdemeanor conversion. The neglect offense occurred on November 30, 2008, at which time the other offenses had not yet been resolved. Thus, it is evident that Rodgers was on some form of pretrial release at the time he committed the offense herein. We do not find this aggravator to be improper.

B. Mitigating Circumstances

Rodgers argues that the trial court erred by neglecting to consider his age as a mitigating circumstance. At the sentencing hearing, however, his counsel merely stated that Rodgers was a young man, making no attempt to explain why Rodgers's age should be considered significant for sentencing. And on appeal, Rodgers again simply states that

his age was significant without explaining why. Under these circumstances, he has failed to establish that the mitigating evidence is significant and clearly supported by the record.

Briefly, we note that even at the relatively young age of twenty, it cannot be said that Rodgers was a naïve person with no worldly experience. Indeed, by the time he was sentenced herein, he already had a criminal record, a felony drug charge, and years of drug and alcohol abuse, prompting the trial court to note that "[a]t age twenty that's—you're off to a really bad start with your criminal history." Tr. p. 55-56. We do not find that the trial court abused its discretion by declining to find Rodgers's age to be a mitigating circumstance.

In sum, the remaining proper aggravators are Rodgers's criminal history, his drug and alcohol use, E.R.'s age, and the fact that he was on pretrial release at the time he committed the instant offense. The mitigating factors are Rodgers's guilty plea, the fact that he had a young son, that he was a member of the National Guard, his history of emotional and mental health issues, and the support shown for Rodgers via letters and people present at the sentencing hearing as mitigators. Given the severity of the remaining aggravators—most significantly, E.R.'s age—and the leanness of the mitigators, as more fully explored below, we are persuaded that the trial court would have imposed the same sentence even in the absence of the improper aggravators. Therefore, we decline to reverse on this basis.

II. Appropriateness

Rodgers next argues that the sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory sentence for a class B felony is ten years, with a minimum of six and a maximum of twenty. Here, the trial court imposed a sixteen-year sentence for Rodgers's offense.

As for the nature of the offense, Rodgers agreed to care for his two-month-old son while Aerial went to work. He was the sole person responsible for E.R.'s well-being on the day in question. E.R. had been born two months prematurely, was barely past his due date, and had been home from the hospital for only one month. The infant, whom Rodgers believed "hates him," appellant's app. p. 8, and who was entirely helpless and dependent upon Rodgers for his well-being, began crying. Rodgers was unable to quiet E.R., so he decided to "discipline" the baby and it "got out of control." Tr. p. 36. Whatever occurred during the "discipline," it resulted in E.R. being hospitalized with a peeling blister, a subdural hematoma, a brain injury, and retinal hemorrhages. By the time of sentencing, a no-contact order had been entered prohibiting Rodgers from having any contact with E.R.; thus, we give little credence to the fact that Rodgers had a young son, who also happened to be the victim of Rodgers's crime herein.

As for Rodgers's character, his criminal history includes a drug paraphernalia possession conviction and two marijuana possession convictions. He received fully suspended sentences and completed alcohol and drug programs for those offenses. Nevertheless, he proceeded to steal from his employer and commit the instant offense. Additionally, he was facing a pending charge of class D felony marijuana possession at the time he was sentenced herein. Furthermore, he has admittedly been a regular user of alcohol and marijuana and has also admitted to using cocaine and methamphetamine.

Rodgers should be—and was—given credit for his guilty plea. As the trial court noted, however, the fact that the proceedings were so far advanced at the time he entered into the plea agreement diminishes the significance of the plea. Furthermore, although Rodgers was a member of the National Guard, his short period of service was marred by the fact that he had already received a rank reduction for being absent without leave.

The trial court found Rodgers's emotional and mental health to be a mitigator, though it did not elaborate. We glean from the presentence investigation report that Rodgers was diagnosed with Attention Deficit Hyperactivity Disorder when he was eight years old and participated in family counseling when he was twelve years old. As an adult, however, he seems to have had no difficulties until after he committed the instant crime. Having seriously injured E.R., Rodgers states that he attempted suicide and was eventually admitted to a psychological ward for five days. Although this is undeniably a serious situation, we cannot conclude that it is out of the ordinary to experience significant emotional or mental hardship as a consequence of severely injuring one's own

newborn. There is no evidence of significant underlying mental or emotional problems; thus, we give this fact little weight in our analysis. The trial court also found the expressions of support for Rodgers as a mitigating factor. Aerial, however, testified that Rodgers "can always find a way to get out of trouble," tr. p. 55, and we cannot conclude that his ability to find a few people to write letters or attend the sentencing hearing in his support lends significant weight to a conclusion of good character. Given the egregious nature of the offense and considerable evidence of Rodgers's refusal to abide by the rule of law, we cannot conclude that the sixteen-year sentence imposed by the trial court is inappropriate.

Finally, we note that Rodgers's plea agreement provided that the theft and neglect sentences were to be served concurrently. Appellant's App. p. 33. At the sentencing hearing, the trial court orally stated that it was imposing a sixteen-year sentence for neglect and a two-year sentence for theft, to be served concurrently, with the last two years to be served on Community Corrections and a further two years on supervised probation. The written sentencing order, however, states that the two sentences were to be served consecutively, with the last two years served in Community Corrections and two years on supervised probation.

As noted above, Rodgers's plea agreement required that the two sentences were to be served concurrently. Thus, the maximum aggregate sentence that he faces herein is sixteen years. The trial court believed that he should serve two years of that sentence on Community Corrections and two years on probation. Tr. p. 56. Therefore, we remand

with instructions to correct the written sentencing order, providing that Rodgers shall serve twelve years with the Department of Correction, two years on Community Corrections, and two years on supervised probation.

The judgment of the trial court is affirmed and remanded with instructions to amend the written sentencing order.

BAILEY, J., and ROBB, J., concur.