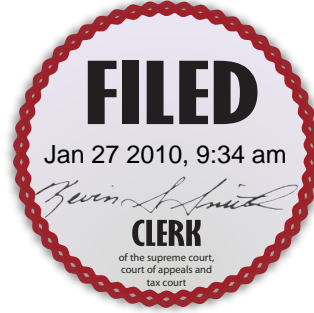


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
 COURT OF APPEALS OF INDIANA**

MELISSA CHANDLER,
)
)
 Appellant-Defendant,
)
)
 vs.
)
)
 STATE OF INDIANA,
)
)
 Appellee-Plaintiff.)

No. 27A02-0905-CR-415

APPEAL FROM THE GRANT SUPERIOR COURT
 The Honorable Jeffrey D. Todd, Judge
 Cause No. 27D01-0902-FB-33

January 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Melissa Chandler appeals her sentence following a plea of guilty to two counts of class C felony neglect of a dependent.¹

We affirm.

ISSUE

Whether the trial court erred in sentencing Chandler.

FACTS

In February of 2008, Chandler and her then-four-year-old daughter, M.D., moved in with Chandler's sister, Jennifer Leonard; Leonard's then-four-year-old son, J.L.; and a married couple, Madelyn and Donnie Hawk. On or about May 5, 2008, Chandler met with a mental health professional to get a prescription refilled. During her appointment, Chandler informed the counselor that the Hawks were trying to take M.D. away from her. The counselor reported this information to the Kokomo Police Department, which dispatched police officers to Chandler's residence.

During their investigation, police officers observed “[l]arge visible bruises and open wounds” on both M.D. and J.L. (App. 15). The Howard County Department of Child Services immediately removed both children from the home.

Chandler subsequently admitted that the children had been “confined with plastic ‘flex cuffs’ and secured to objects in the residence.” (App. 15). Chandler also reported witnessing Madelyn Hawk strike the children all over their bodies with wooden spoons.

¹ Ind. Code § 35-46-1-4(b).

Chandler admitted to hitting M.D. with a metal spoon. The adults often locked the children in closets; withheld food; and forced the children to stay awake as punishment.

Medical examinations revealed that both children suffered from open wounds and sores that were infected with antibiotic-resistant bacteria; M.D. subsequently required surgery to remove an abscess from her buttock. M.D. also suffered “multiple fractures to her hands and arm, in different stages of healing.” (App. 18). In addition, M.D.’s lower lip had been severely damaged, causing it to hang “so low” that she cannot eat or speak properly. (Tr. 17). According to M.D.’s court-appointed special advocate, M.D. will need “at least four (4) surgeries” to remove scar tissue from her lip and gums. (Tr. 17).

On May 7, 2008, the State charged Chandler with two counts of class B felony neglect of a dependent; four counts of class C felony neglect of a dependent; and two counts of class B felony battery. On February 26, 2009, the State and Chandler entered into a plea agreement, whereby Chandler agreed to plead guilty to two counts of class C felony neglect of a dependent for knowingly or intentionally depriving J.L. and M.D. of necessary support, i.e., medical care. In return, the State agreed to dismiss all remaining charges. The plea agreement provided that sentencing would be within the trial court’s discretion but that the sentences shall run concurrently.

The trial court ordered a pre-sentence investigation report (“PSI”) and held a sentencing hearing on April 13, 2009.² After hearing evidence of mitigating and aggravating circumstances, the trial court found as follows:

I find that there are numerous aggravating circumstances as well as numerous mitigating circumstances in this case. I’ll start first with the aggravating circumstances. The victims in both counts were less than twelve (12) years of age. In fact, . . . both children were only four (4) years old at the time the criminal acts occurred. . . . [B]ecause they were four (4) years old they were essentially at the Defendant’s mercy. They were not of an age where they were capable of protecting themselves in any way. Second aggravating circumstance is that the Defendant was in a position of trust. She was the mother of one (1) victim and the aunt of the other victim. She lived with both of the children and was in a position where she had . . . the care of both of the victims. Third aggravating circumstance is that the harm and injury to both victims was significant and greater than the elements necessary to prove the commission of the offenses. . . . At least one (1) child is going to have some lasting physical injuries. The children are traumatized and they may be traumatized for years to come. In short, what I find is that these children were tortured. I also agree with the State that a fourth aggravating circumstance is that the events were not isolated. It appears to have occurred over a period of time and [was] not just one (1) incident. And as a final aggravating circumstance, I find that any sentence less than an enhanced sentence would depreciate the seriousness of the crimes. I’m differentiating that from one of the usual aggravating circumstances that [a] sentence less than the advisory sentence would depreciate the seriousness of the crimes. I find, instead, that anything less than [an] enhanced sentence would depreciat[e] the seriousness of the crime. As far as mitigating circumstances, I do find that the Defendant has no criminal history and the law requires the Court give this mitigating circumstance substantial weight, and I will do that. I find that the Defendant was remorseful. However, I don’t assign any significant weight to that particular mitigating circumstance for a couple of reasons. First being that the Defendant stood by and watched these children be tortured. . . . In addition, I’m not sure how genuine her remorse is. . . . Third

² We remind Chandler’s counsel that presentence investigation reports shall be “tendered on light green paper or have a light green coversheet attached to the document, marked “Not for Public Access” or “Confidential.” Ind. Trial Rule 5(G)(1).

mitigating circumstance would be that she cooperated with law enforcement. However, I don't give much weight to that mitigating circumstance, because I heard her today diminish her culpability and indicate that the police had made certain false statements in their reports regarding these crimes. A fourth mitigating circumstance would be that the [D]efendant pled guilty. Again, I give this mitigating circumstance very little weight, as I think the plea agreement which required her to plead guilty to only two (2) of eight (8) counts including the dismissal of all class B felonies takes this mitigating circumstance into consideration. Fifth, I do find that her mental retardation or her impairment is a mitigating circumstance and a valid mitigating circumstance. However, I do not give it considerable weight. I heard nothing that led me to believe that the Defendant didn't know right from wrong. . . . In balancing the aggravating and mitigating circumstances, I find that the aggravating circumstances greatly outweigh the mitigating circumstances and in fact call for the maximum sentence of eight years.

(Tr. 59-61). Accordingly, the trial court sentenced Chandler to eight years on each count, to be served concurrently.

DECISION

Chandler asserts that the trial court erred in sentencing her. Specifically, she argues that the trial court failed to give sufficient weight to mitigating circumstances; considered improper aggravating circumstances; and that her sentence is inappropriate.

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may abuse its discretion if the sentencing statement

explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly

supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91.

1. Mitigating Circumstances

Chandler argues that the trial court failed to give adequate weight to the mitigating circumstances. The relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.* at 491. We therefore will not review the weight assigned to the mitigating circumstances.

Chandler also argues that the trial court abused its discretion in omitting from consideration in its sentencing statement that she is “likely to respond affirmatively to probation or short term imprisonment.” Chandler’s Br. at 20.

The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

Chandler has failed to show that responding affirmatively to probation or short-term imprisonment is both a significant mitigating circumstance and clearly supported by the record. Accordingly, we find no abuse of discretion in failing to consider it as a mitigating circumstance.

2. Aggravating Circumstances

Chandler also asserts that the trial court abused its discretion in finding that she was in a position of trust and that the imposition of the advisory sentence would depreciate the seriousness of the crime to be aggravating circumstances.

a. *Position of trust*

Chandler argues that her position of trust to the victim(s) is an improper aggravating circumstance because it is “an inherit [sic] element of the offense” of neglect of a dependent. Chandler’s Br. at 19. We disagree.

It is proper for trial courts to consider the particularized individual circumstances of the crime as an aggravating factor. *Robinson v. State*, 894 N.E.2d 1038, 1043 (Ind. Ct. App. 2008). In this case, a review of the trial court’s sentencing statement clearly reveals that it did not just merely consider the fact that M.D. and J.L. were Chandler’s dependents to be an aggravating circumstance. Rather, it considered and commented on the record that Chandler is the mother to one victim and aunt to the other; that she lived with the victims; and that she had the care of both. We therefore find no abuse of discretion in finding Chandler’s position of trust in this case to be an aggravating circumstance.

b. *Enhanced sentence*

Chandler argues that the trial court improperly found that any sentence below the enhanced sentence would depreciate the seriousness of the crime. Generally, finding that a reduced sentence would depreciate the seriousness of the crime “serves only to

support a refusal to impose less than the presumptive [now advisory] sentence and does not serve as a valid aggravating factor supporting an enhanced sentence.” *Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005); *Davidson v. State*, 849 N.E.2d 591, 595 (Ind. 2006) (“This circumstance is properly considered only when the trial court is considering imposing a sentence below the presumptive term.”); *but cf. Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006) (“[I]t is not error to enhance a sentence based upon the aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the crime committed.”). Consideration of this circumstance is improper where there is nothing in the record to indicate that the trial court was considering less than the advisory sentence. *See Cotto*, 829 N.E.2d at 524.

Here, the record does not indicate that the trial court was considering imposing less than the advisory sentence. Thus, it improperly considered depreciation of the seriousness of the crime as an aggravating circumstance.

Where the trial court considers an improper aggravating circumstance, this court has at least three courses of actions:

- 1) “remand to the trial court for a clarification or new sentencing determination”, 2) “affirm the sentence if the error is harmless”, or 3) “reweigh the proper aggravating and mitigating circumstances independently at the appellate level.”

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto*, 829 N.E.2d at 525), *trans. denied*.

The record clearly supports the finding of the nature and circumstances of Chandler's crime as an aggravating circumstance, where she was in a position of trust; lived with the victims; the victims were of a very young age and therefore incapable of seeking medical assistance; and the victims suffered multiple injuries, including broken bones and protracted infected wounds, requiring medical care. A single circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). We find that such is the case here, and the error, if any, was harmless.

3. Inappropriate Sentence

Chandler further asserts that her sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class C felony is four years. I.C. § 35-50-2-6. The potential maximum sentence is eight years. *Id.* Here, the trial court sentenced Chandler to the maximum sentence of eight years on both counts.

We first note that Chandler failed to develop any argument regarding whether her sentence is appropriate. She therefore has waived this issue. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) (“A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.”), *trans. denied*.

Waiver notwithstanding, we find that Chandler’s sentence is appropriate given the nature of her offense. The record shows that from approximately February of 2008 to May 5, 2008, Chandler’s four-year-old daughter and four-year-old nephew suffered extreme abuse, resulting in broken bones, numerous bruises, and protracted infected sores, resulting in severe psychological damages to both. The abuse also left Chandler’s daughter with a deformed lip, preventing her from eating and speaking properly. She will have to endure at least four surgeries to correct the deformity. Despite the obvious abuse and injuries, Chandler failed to seek medical attention on behalf of the children. Given these facts, we find Chandler’s sentence to be appropriate.

Affirmed.

MAY, J., and KIRSCH, J., concur.