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**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN D. HAWKINS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A05-0912-CR-701

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0812-FC-101

March 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Nathan D. Hawkins appeals the sixteen-year aggregate sentence imposed following his guilty plea to two counts of class C felony child molesting,¹ arguing that it is inappropriate in light of the nature of the offenses and his character. We vacate his sentence and remand with instructions to impose an aggregate sentence of ten years executed.

Between February 2006 and December 2008, Hawkins lived with his girlfriend, J.E. During this time, he fondled and touched her son in a sexual manner with the intent to arouse his own or the boy's sexual desires. Tr. at 12. J.E. became suspicious of Hawkins after finding pornographic pictures of children on his cell phone and computer. She questioned her son as to whether anyone had touched him inappropriately, and he told her that Hawkins had. In December 2008, J.E. called the police. At that time, her son was seven years old.

On December 18, 2008, the State charged Hawkins with five counts of class C felony child molesting. On January 9, 2009, the initial hearing was held, at which Hawkins was appointed counsel, a hearing on trial readiness was set for April 17, 2009, and trial was set for May 5, 2009. On April 15, 2009, Hawkins entered into a plea agreement with the State, wherein he pled guilty to two counts of class C felony child molestation and left sentencing to the trial court's discretion. On June 26, 2009, the trial court accepted Hawkins's guilty plea and dismissed the remaining three counts of child molesting. In imposing Hawkins's sentence, the trial court found that the victim's youthful age, Hawkins's position of trust, the repetitive nature of the offenses, and J.E.'s recommendation of the maximum sentence

¹ Indiana Code Section 35-42-4-3(b) provides, "A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony."

constituted aggravating factors. The trial court also found mitigating factors consisting of Hawkins's guilty plea, non-existent criminal history, and solid work history. However, the trial court found that the aggravating factors outweighed the mitigating factors and sentenced Hawkins to eight years on each count, to be served consecutively, with one year suspended.

Hawkins appeals his sentence, contending that it is inappropriate. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Indiana Appellate Rule 7(B) states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. The defendant bears the burden of persuading us that the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The advisory sentence for a class C felony is four years, with a fixed term of between two and eight years. Ind. Code § 35-50-2-6. Hawkins received maximum, consecutive sentences.

[T]he maximum possible sentences are generally most appropriate for the worst offenders. This is not, however, an invitation to determine whether a

worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002) (citations and quotation marks omitted).

Thus, “with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, ... we should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.” *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*.

Turning first to the nature of Hawkins’s offenses, we observe that “the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed.” *Anglemyer*, 868 N.E.2d at 494. Here, the victim was seven years old in December 2008 when the charges were filed, and the fondling and touching had been occurring since February 2006. Thus, at the time the molestation began, the victim was only four years old, and the molestation continued over a long period. Although we recognize that a material element of a crime may not be used to support an enhanced sentence, *see Stewart v. State*, 531 N.E.2d 1146, 1150 (Ind. 1988), a trial court may properly consider the particularized circumstances of the material elements of the crime. *See Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003) (concluding that trial court’s specific observation that four- or five-year-old victim is extremely vulnerable to sexual predation because of her

tender years was appropriate sentencing consideration), *trans. denied*. Further, as the live-in boyfriend of the victim's mother, Hawkins effectively adopted the role of a father to the boy. His sexual offenses against the boy were therefore a violation of a position of trust. *See Laster v. State*, 918 N.E.2d 428, 434-35 (Ind. Ct. App. 2009) (concluding that mother's boyfriend who had lived with mother and victim for three years was father figure to victim); *Edrington v. State*, 909 N.E.2d 1093, 1099-1100 (Ind. Ct. App. 2009) (concluding that long-time friend of victim's father who was watching victim for father was acting as a parent to victim), *trans. denied*. Finally, the effect of his actions on the young child has been profound: the child has become withdrawn but at the same time unwilling to be alone, and his mother has sought counseling for him. Tr. at 17. Thus, the nature of these offenses justifies enhanced, consecutive sentences.

As to Hawkins's character, there are several facts that reflect favorably on his character. At the time of sentencing he was twenty-nine years old but had no juvenile record and had never been charged or convicted with any felonies or misdemeanors. He has a high

school degree and a consistent work history. He pled guilty² and read a statement at sentencing accepting responsibility for his actions and apologizing to the victim and the victim's family as well as to his own family and the law enforcement system. *See Lopez v. State*, 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007) (observing that defendant's guilty plea reflects positively on character), *trans. denied*. Based on Hawkins's character, we conclude that the maximum sentence is inappropriate. However, the nature of his offenses does warrant enhanced and consecutive sentences. We therefore vacate Hawkins's sentence and remand with instructions to reduce each sentence to five years executed, to be served consecutively. The trial court need not hold a new sentencing hearing on remand.

Vacated and remanded.

RILEY, J., and VAIDIK, J., concur.

² We observe that in exchange for pleading guilty to two counts of child molesting, the State dismissed the remaining three counts. Hawkins argues, however, that he did not actually receive a benefit for pleading guilty because any additional convictions on the dismissed counts would have violated the prohibition against double jeopardy because the charging informations did not charge a separate occurrence. Appellant's App. at 7-8. The State does not respond to this argument. "An appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief." *Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002). Thus, Hawkins need only establish prima facie error. *See id.* We conclude that he has done so.

The State argues that Hawkins's guilty plea is not entitled to significant mitigating weight. Appellant's Br. at 5n.1. To the extent that this argument is related to our discussion that Hawkins's guilty plea reflects favorably on his character, we will address the State's contention briefly. The State asserts that Hawkins's guilty plea is not entitled to significant mitigating weight because it was reached on the eve of trial. However, the trial date was set at the initial hearing before Hawkins was represented by counsel, and the chronological case summary shows that no action had been taken in the case other than the State's filing of its discovery disclosures. The record does not indicate that a jury had been called for service for the May 5, 2009 trial setting. Further, there is nothing in the record to suggest that the trial court considered Hawkins dilatory in any way. Therefore, we conclude that the timing of Hawkins's guilty plea does not affect our conclusion that his guilty plea reflects favorably on his character.