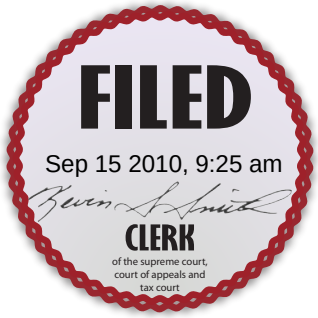

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL HAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1002-CR-90
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
Cause No. 49F18-0912-FD-99437

September 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Michael Hay appeals the three-year sentence imposed by the trial court after Hay pleaded guilty to Theft,[1] a class D felony. Hay argues that the trial court erred by refusing to adopt several proffered mitigating circumstances and that the sentence is inappropriate in light of the nature of the offense and his character. Finding no error, we affirm.

FACTS

On December 7, 2009, Hay stole a watch and an MP3 player from a department store. The State charged Hay with class D felony theft, and on January 19, 2010, Hay pleaded guilty as charged in an open plea. That same day, the trial court held a sentencing hearing.

At the sentencing hearing, it was revealed that Hay has eleven prior convictions, nine of which were felony theft convictions. He was on work release for another conviction at the time he committed the instant offense. Hay and his attorney told the trial court that he stole the merchandise from Sears so that he could return them and use the cash to purchase a coat, inasmuch as it was 30 degrees outside and he had no coat. The trial court indicated that it was skeptical about that explanation, stating that "[t]he obvious question is why didn't you steal a coat?" Tr. p. 26. The trial court went on to comment that "most of the time merchandise such as that is stolen for . . . alcohol or drugs." Id. at 27. After listening to Hay's statement, the trial court acknowledged Hay's guilty plea as a mitigator but emphasized that Hay's criminal history is a "huge

[1] Ind. Code § 35-43-4-2.

aggravating factor" that "just looms over the whole issue of your being sorry or even the fact that there are some mitigating factors that I see other than the plea agreement." Id. at 29. The trial court then imposed the maximum three-year sentence, and Hay now appeals.

DISCUSSION AND DECISION

Hay first argues that the trial court erred by refusing to accept several of his proffered mitigators.[2] 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. Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007).

Hay points to an alleged learning disability and argues that the trial court should have found that to be a mitigating circumstance. On appeal, however, Hay offers no elaboration or explanation of his learning disability, how it affects his ability to live his life, or whether there was a nexus between the alleged disability and his actions herein. Therefore, we decline to find error on this basis.

Hay also argues that the trial court should have found the fact that Hay did not cause or threaten serious harm to persons or property as a mitigating circumstance. Violence, however, is not an element of theft. I.C. § 35-43-4-2. Therefore, the fact that Hay's offense is non-violent need not have been a mitigating circumstance.

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[2] Hay also argues that the trial court erred by giving insufficient mitigating weight to his guilty plea, but we do not review the weight assigned to aggravators and mitigators. Anglemyer, 868 N.E.2d at 490.

Finally, Hay contends that the trial court should have considered the potential hardship on his two minor children as a mitigator. Because many offenders have minor children, it is well established that "absent special circumstances, trial courts are not required to find that imprisonment will result in undue hardship [to a defendant's minor children]." Comer v. State, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005). Here, Hay makes no attempt to argue that there are special circumstances in this case rendering any hardship to his children undue. Thus, we do not find that the trial court erred by declining to find this a mitigating circumstance.

Hay also argues that the three-year 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). Here, Hay has made no specific argument regarding the nature of the offense or his character, he merely refers in passing to the Rule 7(B) standard. Thus, he has waived this argument.

Waiver notwithstanding, we note that Hay stole merchandise from a department store. Although he claims that he did so to return the items for cash with which he intended to buy a coat, it is evident from the transcript that the trial court did not find Hay's explanation to be credible. Furthermore, we note—as did the trial court and the prosecutor—that even if Hay did, in fact, need a coat, he had many options aside from

theft, such as shelters and organizations that provide food and clothing to people with scant financial resources.

As for Hay's character, he has been amassing theft convictions for the better part of two decades. The instant conviction was his twelfth overall and his tenth conviction for felony theft. He was on work release for another conviction at the time he committed the instant offense. Given Hay's significant criminal history and the fact that his many contacts with the criminal justice system have clearly not deterred him from ignoring the rule of law, we cannot say that the maximum three-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and Hay's character.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.