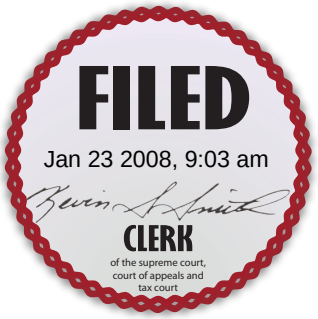

ATTORNEYS FOR APPELLANT:

BENJAMEN W. MURPHY
ANDREW M. YODER
Murphy Yoder Law Firm, P.C.
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DAVID JEFFREY LEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0705-CR-250
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0306-FD-113

January 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his guilty plea to thirty-six counts of voyeurism as a Class D felony for secretly videotaping his photography business clients while they changed clothing, David Jeffrey Lee appeals his aggregate six-year sentence, with three years served in the Department of Correction and three years served in community corrections. We find that any error committed by the trial court in recognizing Lee's position of trust with his victims as an aggravating circumstance was harmless and that the trial court did not abuse its discretion in failing to find in mitigation that Lee would respond affirmatively to probation or a shorter term of imprisonment and in weighing the aggravators and mitigators. We also find that Lee's sentence is appropriate. Therefore, we affirm.

Facts and Procedural History

Between May 1998 and May 2003, Lee ran a photography business in the basement of his home, which he shared with his then-fiancé, Melissa Koczur, in Highland, Indiana. Lee's mother owned the home. During this time, Lee installed five hidden video cameras in the room where his clients changed clothing. Without their knowledge or consent, Lee videotaped thirty-six of his female clients while they disrobed in his changing room. He later viewed the tapes.

On May 10, 2003, Koczur found some of the tapes and the recording devices while searching for fertilizer in the home's basement. After viewing several tapes and suspecting that Lee secretly created them, Koczur packaged sixteen tapes and went to the Highland Police Department, where she reported what she had discovered. Officers viewed several randomly selected tapes and conducted a check of Lee's driver's license.

This check revealed an outstanding arrest warrant in another county. The officers then went to Lee's home and arrested him on the outstanding warrant. Koczur consented to a warrantless search of the residence, which the officers began. They halted their search after learning that Lee's mother owned the house and commenced again once they obtained her consent to search it. Thereafter, officers seized five cameras, five recorders, and 369 videocassettes.

The State charged Lee with thirty-six counts of voyeurism as a Class D felony. Lee filed a motion to suppress the tapes given to the officers by Koczur and those seized pursuant to the warrantless search, which the trial court denied. On interlocutory appeal, this Court affirmed as to the videos Koczur gave to the police but reversed as to the tapes found in the home. *Lee v. State*, 826 N.E.2d 131, 136 (Ind. Ct. App. 2005), *trans. granted*. Our Supreme Court granted transfer, affirmed the trial court, and remanded this case for resolution on the merits. *Lee v. State*, 849 N.E.2d 602 (Ind. 2006), *reh'g denied*, *cert. denied*, 127 S. Ct. 1331 (U.S. Ind. Feb. 20, 2007) (No. 06-904).

Lee then pled guilty to all thirty-six counts. In exchange, the plea agreement provided that Lee would receive concurrent terms on Counts 1 through 12, concurrent terms on Counts 13 through 24, and concurrent terms on Counts 25 through 36. Appellant's App. p. 69. The agreement left the parties free to argue the individual sentences and whether the groupings' sentences would run concurrently or consecutively to each other. *Id.* At the conclusion of a sentencing hearing, the trial court found two mitigating circumstances: (1) that Lee pled guilty and admitted responsibility and (2) that Lee had no history of delinquency or criminal convictions before these offenses. *Id.* at

76. The trial court also found three aggravating circumstances: (1) that Lee violated a position of trust, (2) Lee's conviction for voyeurism while on bond in this case, and (3) the number of victims. *Id.* The court concluded that any of the factors, standing alone, outweighed all of the mitigating circumstances. *Id.* The trial court then sentenced Lee to a total of six years (two years for each individual conviction, subject to the limitations of the plea agreement), with three years to be served in the Department of Correction and three years to be served in community corrections. *Id.* at 75. Lee now appeals.

Discussion and Decision

Lee raises four challenges to his sentence on appeal. First, he argues that the trial court abused its discretion in recognizing his position of trust with his victims as an aggravating circumstance. Second, he contends that the trial court erred in failing to find in mitigation that he would respond affirmatively to probation or a shorter term of imprisonment. Third, he argues that the trial court erred in weighing the aggravating and mitigating circumstances. Finally, he claims that his sentence is inappropriate.

In general, sentencing decisions lie within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, including whether to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances, *id.*, or to run the sentences consecutively due to aggravating circumstances, *Deane v. State*, 759 N.E.2d 201, 205 (Ind. 2001). When a court identifies aggravating or mitigating circumstances, it must provide a statement of its reasons for selecting the sentence imposed. *Jackson v.*

State, 728 N.E.2d 147, 154 (Ind. 2000). This statement of reasons must include the following:

> (1) identification of all significant mitigating and aggravating circumstances; (2) the specific facts and reasons that lead the court to find the existence of each such circumstances; and (3) reflection of an evaluation and balancing of the mitigating and aggravating circumstances in fixing the sentence.

Id. Additionally, even where a trial court has followed the proper procedure in imposing sentence, we "may revise a sentence . . . if, after due consideration of the trial court's decision, [we] find[] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). *See Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006).

The sentencing statute in effect at the time of Lee's crimes provided, as follows: "A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 ½) years, with not more than one and one-half (1 ½) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances." Ind. Code § 35-50-2-7 (1998); Ind. Code § 35-50-2-7 (1993).[1] Under the terms of Lee's plea agreement, the trial court could impose any lawful sentence upon each count, but the counts were grouped, and sentences for counts within a grouping would be served concurrently. Appellant's App. p. 69. Thus, once the trial court entered a judgment of conviction for each of the thirty-six Class D felonies, the court had the

[1] Between the dates of Lee's offenses, May 1998 and May 2003, and the date of sentencing, May 11, 2007, the Indiana General Assembly replaced the former presumptive sentencing scheme with the current advisory sentencing scheme. *See* P.L. 71-2005 (eff. Apr. 25, 2005). Nonetheless, because "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime," *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007), we address Lee's sentence under the former presumptive sentencing scheme.

discretion to impose any aggregate sentence between six months and nine years.[2] *See* Tr. p. 65. The trial court sentenced Lee to two years on each count, one-half year above the presumptive sentence for a Class D felony, and ordered the groupings of sentences to be served consecutively, for a total sentence of six years. *Id.*

I. Position of Trust

We first address Lee's contention that the trial court improperly recognized "a position of trust inherent between a photographer and his client" as an aggravating circumstance. *See* Appellant's App. p. 76. Lee's argument on this point is two-pronged. First, he argues that the trial court's finding of this aggravating factor violates the rule set forth in *Blakely v. Washington*, 542 U.S. 296, 301 (2004), that

> a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi* rights and consented to judicial factfinding.

Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007). Next, he argues that the relationship between a photographer and a client does not create a position of trust.

As an initial matter, we agree with Lee that *Blakely* applies to his case. However, we disagree that the trial court could not, pursuant to *Blakely*, legitimately identify Lee's position of trust as an aggravating factor simply because Lee did not admit to the court that he was in a position of trust with his victims. Our Supreme Court has allowed this aggravator where, although a defendant does not admit to being in a "position of trust,"

[2] Where a person has committed a Class D felony and certain requirements are met, Indiana Code § 35-50-2-7(b) allows a trial court to enter an alternative judgment of conviction for a Class A misdemeanor. However, in this case, Lee pled guilty to thirty-six Class D felonies, and the trial court entered a judgment of conviction accordingly.

the defendant admits to the fact of the relationship. *See Trusley v. State*, 829 N.E.2d 923, 926-27 (Ind. 2005). In *Trusley*, the Court found no *Blakely* violation where the defendant admitted that she was the daycare provider for the child victim. The Court reasoned, "[The trial court] supported the position of trust aggravator by reference to the admitted fact that Trusley was [the victim's] day care provider. This was an appropriate legal observation about properly established facts and constituted a legitimate aggravating circumstance." *Id.* at 927. Likewise, in this case the trial court's observation was based upon properly established facts. Namely, Lee stipulated to the following facts as a part of the factual basis for his guilty plea:

> That between May of 1998 through May of 2003, . . . Lee ran a photography business from the basement of [his home]. . . . That during that time, the defendant set up video cameras in the dressing room that was part of the photography studio, and when his clients came to have their pictures taken, they were filmed by the video cameras as they changed clothes in the dressing room.

Appellant's App. p. 71. Thus, he admitted to the trial court that his relationship with the victims was one of photographer and clients. There is no *Blakely* violation.

Nevertheless, we need not reach the issue of whether, under these facts, this relationship constituted a position of trust. This is because it is clear from the record that if the trial court abused its discretion, as Lee argues, in identifying his relationship with his clients as a position of trust, any such error is harmless in light of the other aggravating circumstances found by the trial court. That is, because the trial court identified two other aggravators that are unchallenged by Lee and whose weights we evaluate below and approve, we are confident that the trial court would have imposed the same sentence had it not identified Lee's position of trust as an aggravating circumstance.

See Drakulich v. State, 877 N.E.2d 525, 535 (Ind. Ct. App. 2007) ("'[W]e can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators.' We conclude that any error . . . was harmless.") (quoting *Robertson*, 871 N.E.2d at 287).

II. Affirmative Response to Probation or Shorter Term of Imprisonment

We next address Lee's contention that the trial court erred in failing to find in mitigation that Lee would respond affirmatively to probation or a shorter term of imprisonment. Although the trial court had the discretion to increase or decrease Lee's sentence from the presumptive term based upon aggravating and mitigating circumstances, "the use of mitigating circumstances is not mandatory." *Taylor v. State*, 840 N.E.2d 324, 340 (Ind. 2006). The trial court need not accept a defendant's argument as to what constitutes a mitigating circumstance. *Gross v. State*, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." *Id.* Only those mitigating circumstances that are "significant" and "clearly supported by the record" must be identified. *Taylor*, 840 N.E.2d at 340 (quoting *Jones v. State*, 467 N.E.2d 681, 683 (Ind. 1984)). Here, we cannot say that the trial court abused its discretion in failing to find that Lee would respond affirmatively to probation or a shorter term of imprisonment. Lee presented testimony during his sentencing hearing that he complied with his probation stemming from another case and that one expert predicted that he had a low risk to reoffend. Tr. p. 43-44, 49. However, it is clear that the trial court considered and rejected this prediction, noting:

> [W]hile on bond in this case for 36 counts of voyeurism, you go to Porter County and you commit the exact same offense. I find that to be absolutely

> incredible – shocking, to tell you the truth – that you would have the gall to do this again while under the authority of this Court. With all these counts that you're facing, you do the same thing.
> *Now, what this really tells me is that you do not have control. . . . I understand these factors that could be placed on you – these conditions that can be placed on you to help you gain control that – that you need. . . . The fact of the matter is that one day you will not be under probation. And I don't think you have control and that's scary. One day you may very well go to a different location outside of Lake County . . . and do the same thing again because at that point no one is going to know who Mr. Lee is.*

Id. at 94-95 (emphasis added). With this in mind, we cannot say that the trial court overlooked a significant mitigator that was clearly supported by the record.

III. Weighing of Aggravators and Mitigators

Next, Lee argues that the trial court erred in weighing the aggravating and mitigating circumstances. Specifically, Lee contends that the trial court afforded too much weight to the number of victims and the fact that he committed a similar offense while he was on bond in this case and gave his guilty plea and his lack of criminal history insufficient weight. We disagree.

The trial court's sentencing statement reveals that it engaged in the process of weighing the aggravators against the mitigators. After identifying the aggravating and mitigating circumstances, it concluded that any of the aggravating factors, standing alone, outweighed all of the mitigating circumstances. Appellant's App. p. 76. We now address Lee's arguments regarding the weight given to the number of victims in this case and the fact that Lee committed another voyeurism offense while on bond for this case.

Lee argues that the number of victims in this case is not significantly aggravating because "his offenses were not violent in nature" and "it was never his intention to harm anyone." Appellant's Br. p. 24. However, it is well established that the fact of multiple

victims is a valid aggravating circumstance, regardless of whether any violence is involved. *See Campbell v. State*, 551 N.E.2d 1164, 1168 (Ind. Ct. App. 1990) (finding no error where trial court recognized aggravating nature of multiple victims when sentencing defendant for theft and forgery). Lee's convictions relate to crimes against *thirty-six* separate victims. The trial court did not err in assigning significant weight to this aggravating factor.

Lee also argues that his criminal history, consisting of one other felony voyeurism conviction, is not significantly aggravating because the underlying offense for that conviction did not occur until *after* Lee committed these crimes. However, this argument misconstrues the trial court's findings regarding Lee's criminal history. The trial court's written and oral sentencing statements make clear that it recognized that Lee had no criminal history prior to the commission of these thirty-six offenses. Indeed, the court assigned an appreciable mitigating weight to that fact, explaining, "I do not believe that the maximum sentence is appropriate – not in this case, not with this kind of history, not with you really leading relatively a law-abiding life to this time. I think that it would be absolute error on my part to give the maximum sentence." Tr. p. 96. What it found aggravating was that Lee chose to *again* commit voyeurism while on bond in this case, which is a valid aggravator. *See Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004), *trans. denied*. Indeed, thirty-six counts of voyeurism pending against him did not deter Lee from committing voyeurism in another county, and we cannot say that the trial court abused its discretion in its weighing of this aggravating circumstance.

Similarly, we find no abuse of discretion in the trial court's assignment of weight to the mitigating circumstances. As just explained, the trial court assigned mitigating weight to Lee's lack of a prior criminal history such that it chose not to impose the maximum sentence. Tr. p. 96-97. Lee also argues that the trial court should have afforded his guilty plea more mitigating weight. Lee is correct that "[w]here the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned." *Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999). However, "when a defendant has already received a benefit in exchange for the guilty plea, the weight of a defendant's guilty plea is reduced." *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007) (citing *Sensback*, 720 N.E.2d at 1165), *trans. denied*; *see also McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007). Here, it is clear that the trial court did not afford Lee's guilty plea significant mitigating weight because of the substantial benefit he received in return. At the sentencing hearing, the trial court explained:

> I will give you some [mitigating] weight for pleading guilty. . . I also note that . . . you have been given the benefit of a very good plea agreement, having most of these counts run concurrent to one another. So, although a mitigating factor is noted, the weight to that mitigating factor perhaps may not be as strong as a different case where that benefit isn't so great.

Id. at 92. We find no error in the trial court's weighing of this mitigating factor.

One valid aggravating circumstance is sufficient to support an enhanced sentence. *Altes v. State*, 822 N.E.2d 1116, 1125 (Ind. Ct. App. 2005), *trans. denied*. In this case, the trial court identified three aggravating factors, at least two of which are valid and deserving of significant aggravating weight. It also found two mitigating factors and did

not abuse its discretion in weighing them. We perceive no abuse of discretion in the trial court's weighing and balancing of aggravating and mitigating circumstances.

IV. Appropriateness of Sentence

Finally, Lee argues that his sentence is inappropriate. When challenging the appropriateness of a sentence pursuant to Indiana Appellate Rule 7(B), the defendant bears the burden of persuading us that the sentence is inappropriate "in light of the nature of the offense and the character of the offender." *Childress*, 848 N.E.2d at 1080 (citation omitted). After due consideration of the trial court's decision, we cannot say that Lee's sentence is inappropriate. Regarding the nature of the offense, it is highly troubling that Lee victimized thirty-six women over the course of five years. He did so by inviting them into his home photography studio and secretly videotaping them while they disrobed in his changing room. In regard to Lee's character, it is true, and commendable, that before sentencing in this case Lee complied with an unrelated probation, attended counseling, and received a favorable report from his probation officer. However, it is also true that, while facing charges for these thirty-six counts, Lee went to another county and yet again committed felony voyeurism. This belies Lee's acceptance of responsibility and indicates an unwillingness to conform his behavior to the constraints of the law. Under these facts, Lee's six-year sentence, with three years served in the Department of Correction and three years served in community corrections, is not inappropriate.

Affirmed.

SHARPNACK, J., and BARNES, J., concur.