



## **Case Summary**

Appellant-Defendant Jonathan S. Nixon appeals his sentences for Burglary, as a Class B felony,<sup>1</sup> and Sexual Battery, as a Class D felony,<sup>2</sup> alleging that the trial court abused its discretion in imposing the sentences. We affirm.

## **Facts and Procedural History**

On June 26, 2004, T.M. was at her apartment in Elkhart. T.M. fell asleep on her couch located on the lower level of her apartment. She later awoke to find Nixon, whom T.M. did not know, standing over her and declaring that they were going to have sex. Nixon was naked and refused the demands of T.M. that he leave. While T.M. struggled to resist, Nixon removed T.M.'s clothes and touched her legs, breasts and vaginal area. T.M. was eventually able to escape her apartment and ask a neighbor to call the police.

The State charged Nixon with Burglary, as a Class B felony, and Sexual Battery, as a Class D felony. After a jury trial, Nixon was found guilty as charged. The trial court sentenced Nixon to fourteen years for the Burglary count and two years for Sexual Battery, to be served concurrently.

Nixon now appeals.

## **Discussion and Decision**

Nixon asserts that the trial court abused its discretion in sentencing him because it failed to recite the incidents comprising his criminal history when finding it as an aggravating factor. At the outset, we note that Nixon committed these offenses and was sentenced prior

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<sup>1</sup> Ind. Code § 35-43-2-1(1).

<sup>2</sup> Ind. Code § 35-42-4-8.

to the legislature enacting the advisory sentencing scheme, and therefore was sentenced under the presumptive or fixed sentencing scheme. The change from presumptive to advisory sentencing is not applied retroactively, so we review Nixon's sentence according to the earlier presumptive sentencing scheme. Hightower v. State, 866 N.E.2d 356, 370 (Ind. Ct. App. 2007), trans. denied.

Generally, sentencing determinations are within the trial court's discretion. Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002). Sentencing decisions are reviewed only for abuse of discretion, "including a trial court's decisions to increase or decrease the presumptive sentence" due to aggravating or mitigating circumstances. Id. If a trial court relies on aggravating circumstances to enhance the presumptive sentence, "it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances." Id.

Here, the trial court imposed a sentence enhanced four years above the presumptive for the Class B felony of Burglary and a sentence six months above the presumptive for the Class D felony conviction for Sexual Battery. See Ind. Code §§ 35-50-2-5 (The presumptive sentence for a Class B felony is ten years, with a maximum sentence of twenty years and a minimum sentence of six years.) and – 7 (The presumptive sentence for a Class D felony is one and one-half years, with a maximum sentence of three years and a minimum sentence of six months.) (West 2004). The trial court based these enhancements on two aggravators,

Nixon's criminal history and his alcoholism,<sup>3</sup> and found no mitigating circumstances.

“When a defendant’s criminal history is used as an aggravating factor to support an enhanced sentence, the court must recite the incidents comprising the criminal history.” Battles v. State, 688 N.E.2d 1230, 1235 (Ind. 1997). The State concedes that the trial court failed to articulate the details of Nixon’s criminal record. Therefore, the statement of reasons for enhancing Nixon’s sentences is “deficient because the reference to his prior criminal history is not sufficiently individualized.” Mayes v. State, 744 N.E.2d 390, 396 (Ind. 2001). However, the specific facts supporting this aggravating factor are readily discernible from the record. In his argument at sentencing, the prosecutor noted Nixon’s two prior felonies of assault with a deadly weapon and attempted theft. Furthermore, the pre-sentence report, which the trial court noted it had reviewed, lists Nixon’s other convictions, including resisting law enforcement, assault, criminal conversion and public intoxication. We are satisfied that the trial court engaged in the necessary evaluative process and that the deficiency in the sentencing statement does not necessitate a remand to articulate the facts underlying the aggravating circumstance of Nixon’s criminal history. Id.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

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<sup>3</sup> The trial court noted that Nixon’s problem with alcohol contributed to these offenses as he was “almost catatonic in the amount of alcohol he consumed” when he committed these crimes. Sentencing transcript at 8.