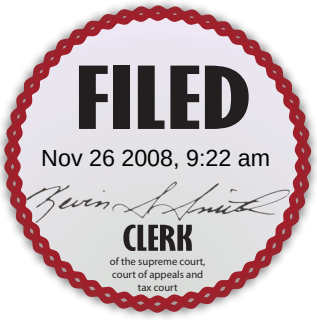

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IN THE
COURT OF APPEALS OF INDIANA

JOHN A. TATE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0803-CR-177
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0709-FB-27

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant John A. Tate appeals his fifteen-year sentence for Battery to a Child with Serious Bodily Injury, as a Class B felony.[1] We affirm.

Facts and Procedural History

In 2007, Tate lived in Tippecanoe County with his girlfriend, their baby, his girlfriend's daughter [A.M.], and Tate's daughter. At some time in either August or September of that year, Tate held A.M.'s arm over an open flame, resulting in a large, severe burn on her forearm that required medical attention. At the time of the incident, Tate was upset and ostensibly did this to discipline six-year-old A.M.

The State charged Tate with two counts of Battery to a Child, one as a Class B felony and one as a Class D felony. The Class D charge was for a separate incident involving A.M. that occurred in the same timeframe. Pursuant to a plea agreement, Tate pled guilty to the Class B charge in exchange for the State dismissing the other charge. The agreement left Tate's sentence to the discretion of the trial court. The trial court accepted the guilty plea and sentenced Tate to an enhanced sentence of fifteen years with the last year to be served at the Tippecanoe Community Correction facility.

Tate now appeals.

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[1] Ind. Code § 35-42-2-1(a)(4).

Discussion and Decision

Tate contends that the trial court abused its discretion in finding two improper aggravators and that his sentence is inappropriate. As directed by our Supreme Court, we address these two challenges separately. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

I. Abuse of Discretion

Sentencing decisions rest within the discretion of the trial court. Id. at 490. As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. One way in which a trial court may abuse its discretion is by finding aggravating and mitigating factors that are not supported by the record, are improper as a matter of law, or the court fails to include factors that are clearly supported by the record and advanced for consideration. Id. at 490-91.

Tate challenges two aggravators found by the trial court: his Level of Service Inventory-Revised score (LSI-R) and the circumstances and nature of the crime that included the injuries related to the dismissed charge of Battery. First, Tate contends that the record does not support that his LSI-R score is an aggravating factor because his score falls into the Low/Moderate Risk/Needs category. We agree that this aggravator is improper but with the reasoning that it is an improper aggravator as a matter of law.

"The LSI-R is a standardized actuarial instrument that contains 54 items and produces a summary risk score that can be categorized into five risk levels. . . . Higher risk levels reflect an increase in the propensity to commit future criminal acts." Christopher T.

Lowenkamp & Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System, 71 Fed. Probation 25, 25-26 (Dec. 2007). While this actuarial instrument may be a helpful consideration for a probation department in determining rehabilitative services for an offender, its use by a trial court to assess a defendant's character is contrary to the essential function of the trial court in sentencing.

A probation officer is required to conduct a presentence investigation to gather information regarding the circumstances of the offense, the defendant's history of criminality, social and employment history, family situation, economic status, education and personal habits as well as the impact of the offense on the victim and whether the victim desires restitution. Ind. Code §§ 35-38-1-8.5 and -9. The trial court is then required to consider the content of the presentence investigation report before pronouncing a sentence. Ind. Code § 35-38-1-8. The purpose of the presentence report is to assist the judge in having the relevant information to create an appropriate, individualized sentence. Timberlake v. State, 690 N.E.2d 243, 266 (Ind. 1997). Armed with this information, the trial court performs its own evaluation of the circumstances to determine the existence of aggravating and mitigating factors. Id.

The use of a standardized scoring model, such as the LSI-R, undercuts the trial court's responsibility to craft an appropriate, individualized sentence. Relying upon a sum of numbers purportedly derived from objective data cannot serve as a substitute for an independent and thoughtful evaluation of the evidence presented for consideration. As our

Supreme Court recently noted in discussing the appellate review of sentences, "[a]ny effort to force a sentence to result from some algorithm based on the number and definition of crimes and various consequences removes the ability of the trial judge to ameliorate the inevitable unfairness a mindless formula sometimes produces." Cardwell v. State, ____ N.E.2d ____, ___ 2008 WL 4868299 (Ind. Nov. 12, 2008). Therefore, it is an abuse of discretion to rely on scoring models to determine a sentence.

Here, the trial court used the LSI-R score as an aggravator in addition to performing an independent evaluation of the evidence. This is also problematic, because areas analyzed in this psychological inventory appear duplicative of factors already considered by the trial court in sentencing (criminal history, education, employment) and other areas appear of questionable value (leisure and recreation). We therefore conclude that use of an LSI-R score as an aggravating factor is improper as a matter of law.

Tate also challenges the trial court's reliance on the combined injuries sustained by A.M. in the two separate incidents as an aggravator. He argues that reliance on the injuries that were the basis of the dismissed charge to support his enhanced sentence effectively circumvents his plea agreement. Although pictures of all of A.M.'s injuries were submitted into evidence at the sentencing hearing without objection, we agree that reliance on facts related to the dismissed charge was an abuse of discretion. "If a trial court accepts a plea agreement under which the State agrees to drop or not file charges, and then uses facts that give rise to those charges to enhance a sentence, it in effect circumvents the plea agreement." Roney v. State, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), trans. denied.

II. Inappropriate Sentence

Although we have concluded that the trial court abused its discretion in finding two of the aggravators, we will uphold a sentence if it is appropriate in accordance with Indiana Appellate Rule 7(B). Felder v. State, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007). Our Supreme Court recently reviewed the standard by which appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a 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. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted). Tate was convicted of a Class B felony, which has a sentence range of between six and twenty years with the advisory of ten years. See Ind. Code § 35-50-2-5. The trial court sentenced Tate to an enhanced sentence of fifteen years.

As to the nature of the offense, Tate held six-year-old A.M.'s arm over an open flame as punishment. This resulted in a severe burn the size of a baseball on A.M.'s forearm. Tate acknowledged that the burn would leave a serious and permanent scar. However, when questioned, Tate could not recall the reason why he had punished A.M. As Tate was living with A.M.'s mother, Tate was in a position of trust with A.M.

As to the character of the offender, Tate did plead guilty in return for the dismissal of

the second charge of Battery to a Child, as a Class D felony. Tate has a limited criminal history that includes Carrying a Firearm, Driving Under the Influence, and Operating a Vehicle While Never Receiving a License. However, Tate admitted to past usage of illegal drugs, being a member of a gang, and selling drugs. His most recent usage and dealing of illegal drugs were in 2007 and 2005, respectively. Also a consistent heavy drinker, Tate acknowledged an increase in his drinking after the passing of his father in June of 2007. Tate has five children from five different relationships. Due to the lack of steady employment, Tate is behind in his child support payments. Post-arrest evaluation revealed that Tate struggles with emotional and mental health issues.

In light of the nature of the offense and the character of the offender, Tate has not convinced this Court that his enhanced sentence of fifteen years is inappropriate.

Affirmed.

RILEY, J., and BRADFORD, J., concur.