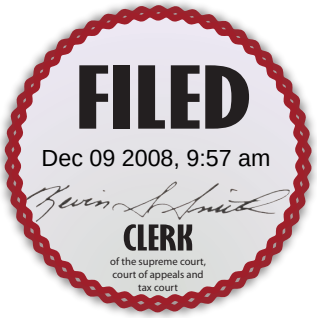

ATTORNEY FOR APPELLANT:

WILLIAM W. GOODEN
Mount Vernon, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ALEX O. JAMES
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

MELINDA LINDAUER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A05-0803-CR-143
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0711-FC-113

December 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Melinda Lindauer pleaded guilty to Reckless Homicide,[1] a class C felony. The trial court sentenced her to six years in prison. On appeal, Lindauer claims the trial court abused its discretion in sentencing her by finding improper aggravating circumstances and failing to find several mitigating circumstances.[2]

We affirm.

On Thanksgiving Day, November 22, 2007, Lindauer recklessly killed Nicole Stroud with a .357 magnum. The circumstances of the shooting follow. Lindauer resided with her husband and fourteen-year-old daughter in a residential area in Wadesville, Indiana. The back of their property abutted the back of Stroud's grandmother's (Judy Lizotte's) property, and a six-foot privacy fence separated the two backyards. Lindauer erected the fence because of a poor relationship with the Lizotte family. In fact, Lindauer had poor relations with other neighbors, too, and was known for her hot temper.

On several prior occasions, Lizotte's small dog had entered the Lindauers' backyard and dug up the grave of Lindauer's cat. Lindauer had apparently fired a gun on one of those occasions in October to scare the dog away. Thereafter, on Thanksgiving Day, a child[3] alerted Lindauer to the fact that the dog was digging around the cat's grave again. Lindauer immediately went into her bedroom, opened the bedroom window, yelled at the dog, and then

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[1] Ind. Code Ann. § 35-42-1-5 (West 2004).

[2] To the extent Lindauer argues her sentence is inappropriate, we find the issue waived for failing to provide a separate analysis as to the nature of the offense and the character of the offender. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) ("[a] party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record"), *trans. denied*; Ind. Appellate Rule 46(A)(8)(a).

[3] There were three minors at Lindauer's home at the time, as well as her husband and one of her friends.

retrieved her .357 caliber handgun from under the bed, unzipping the loaded gun from its case. Despite the fact that the fence completely obscured the view of her neighbor's backyard and residence, Lindauer fired two shots in that direction toward the small dog.

On that afternoon, Lizotte had her family, including her five young grandchildren, over to celebrate Thanksgiving. The children had been playing in the backyard earlier in the day, but just prior to the shots only Lizotte, Stroud, Stroud's sister, and Stroud's mother were outside, as they were looking for the dog. Stroud saw him under the fence, so she bent down at the fence in an attempt to coax her grandmother's dog back. At the same moment, Lindauer took the tragic shots. One of the bullets struck the ground just inside the fence and deflected up into Stroud's chest. Stroud screamed, rose to her feet while clutching her chest, and then collapsed in front of her mother, sister, and grandmother. She was pronounced dead shortly thereafter at the hospital.

Several 911 calls were made after the shooting. One of these calls came from Lindauer, who reported that she had shot at the neighbor's dog because it was digging up her cat's grave. Lindauer stated that she may have hit the neighbor and that she wanted an officer so that she could make a complaint about the dog.

On November 26, 2007, the State charged Lindauer with class C felony involuntary manslaughter, class C felony reckless homicide, and class D felony criminal recklessness. On February 8, 2008, Lindauer pleaded guilty to reckless homicide without the benefit of a plea agreement. The trial court accepted the plea and dismissed the remaining counts on double jeopardy grounds. The sentencing hearing was held on that same date. At the conclusion of the hearing, the court made the following sentencing statement:

[COURT]: Counsel, as I understand Indiana Law to impose a maximum sentence the Court has to determine that the particular offender is the worst possible offender that could have ever committed this crime. Is that your understanding of the law, [prosecutor]?

[PROSECUTOR]: It is, your Honor.

[COURT]: It doesn't, of course, lessen the loss to Mrs. Stoud's family, or to Mrs. Stroud, or her child, or her husband. But Mrs. Lindauer has no previous record, juvenile or adult, she has pled guilty, and not put Mrs. Stroud's family through a trial, she did call the police, now whether she called to complain about a dog in her yard, or not, she did call, and she did claim that she was sorry for any harm she may have caused. She also did not run from the scene. I don't see how a maximum sentence could stand up to the scrutiny of Indiana law, for someone with that background. On the other hand, there are aggravators here. I think that it's proven beyond a reasonable doubt that when Mrs. Lindauer fired those shots, she knew that within sight and hearing of her crime, were at least two (2) individuals less than eighteen (18) years of age. That is one of the specific statutory aggravators. According to Mrs. Lemieux, everybody in Mrs. Stroud's family heard the shots, and I think it is reasonable to assume, if you fire, even a 38-caliber weapon, next door, that everybody in the neighborhood is going to hear it. So I think not only has it been proven beyond a reasonable doubt that children were present in Mrs. Lindauer's home, but I think it's proven that children next door heard the shots fired. The facts of the offense themselves, I believe, lend to an analysis that this is an aggravated case. She indicates that she had shot in the neighborhood before, that she had used a gun to try to either defend herself or her husband from the neighbors before. She had to take the report that the dog was in the yard. She had to think to go get the gun out from under the bed. She had to think to shoot out the window, and she shot twice. This was not a spur of the moment angry act. This was a premeditated angry act. Now, did she intend to kill Mrs. Stroud? No, I'm sure she did not. And there is no indication that she even knew Mrs. Stroud was present. Unfortunately, she was. The mitigating factors, as I see them are, Mrs. Lindauer has pled guilty, she has evinced remorse here in open court, she has apologized to the family, she did not run from the scene. The aggravating factors, I believe, outweigh the mitigating factors. Those aggravating factors are children were present during the time the crime was committed, she pre-meditated the actions that led to the crime and, of course, there is no possible way for her to atone for or mitigate the damages to Mrs. Stroud. The Court is left with a determination of what is a proper sentence between two and eight years. I know that Mrs. Stroud's family believes the only proper sentence is eight years. I feel because you don't know the law of Indiana, and how could you, that you do need to know

> that under Indiana Law for a judge to impose a maximum sentence that will stand up on appeal, the person who commits the offense normally has to have a serious criminal record, there have to be heinous actions beyond the crime itself. Now the crime here was certainly a heinous act, but not an intentional act to kill Mrs. Stroud. I do not think that a maximum sentence would stand review, as I understand Indiana Law. However, I do think that more than the advisory sentence is required and called for by the aggravators that outweigh the mitigators in this cause.

Transcript at 37-39. The court sentenced Lindauer to six years in prison. Lindauer now appeals, claiming the trial court abused its discretion in sentencing her.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Under the new sentencing scheme, a court may impose any sentence authorized by statute and permissible under the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances. *Id*. Thus, in *Anglemyer*, our Supreme Court held:

> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors.

Anglemyer v. State, 868 N.E.2d at 491. Circumstances under which a trial court may be found to have abused its discretion include: (1) failing to enter a sentencing statement, (2) entering a sentencing statement that includes reasons not supported by the record, (3) entering a sentencing statement that omits reasons clearly supported by the record, or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482.

Lindauer initially challenges the aggravating circumstances found by the trial court. The trial court found three aggravators: 1) children were present when the crime was committed; 2) the premeditated nature of Lindauer's actions that led to the crime; and 3) there is no way for her to atone for or mitigate the damages to Stroud. Lindauer claims that all of these aggravators were improper. We will address each in turn.

Ind. Code Ann. § 35-38-1-7.1(a)(4) (West, PREMISE through 2007 1st Regular Sess.) provides that the trial court may consider the following as an aggravating circumstance:

> (4) The person:
> (A) committed a crime of violence (IC 35-50-1-2); and
> (B) knowingly committed the offense in the presence or within hearing of an individual who:
> (i) was less than eighteen (18) years of age at the time the person committed the offense; and
> (ii) is not the victim of the offense.

Lindauer does not dispute that reckless homicide is statutorily defined as a crime of violence or that children were present or within hearing at the time she committed her crime. Lindauer simply argues that she did not knowingly commit the crime, as she only acted recklessly. Lindauer's argument is based on a misinterpretation of the statue. We agree with the State that reasonably interpreted, this statutory aggravator requires only that the defendant had knowledge children were present or within hearing when the crime of violence was committed. As it is undisputed that Lindauer knew three children were in her home and within hearing at the time she recklessly fired her gun and killed Stroud, the trial court properly found this aggravator.

Lindauer also attacks the second aggravator found by the trial court (i.e., that she premeditated the actions that led to the crime). She asserts that her anger was directed at the

dog, not Stroud, and that the crime could not have been premeditated because "it is difficult to understand how one can premeditate a reckless act." *Appellant's Brief* at 8. The trial court, however, did not find that Lindauer's anger was directed at Stroud or that the killing was premeditated.

With respect to this aggravator, it is evident that the trial court was referring to the nature and circumstances of this particular crime. The court explained:

> She had to take the report that the dog was in the yard. She had to think to go get the gun out from under the bed. She had to think to shoot out the window, and she shot twice. This was not a spur of the moment angry act. This was a premeditated angry act. Now, did she intend to kill Mrs. Stroud? No, I'm sure she did not.

Transcript at 38. Clearly, the nature and circumstances of this crime were aggravated as compared to the run-of-the-mill reckless homicide. Lindauer, who was known to have a hot temper and often feuded with her neighbors (on a prior occasion even displaying a gun in front of a child during a dispute), took the extreme measure on this Thanksgiving day of going to her bedroom, raising the window, retrieving her loaded .357 magnum from under her bed, aiming the gun toward the back of her yard near her neighbor's property, and firing two shots. As the trial court observed, this was not a spontaneous reckless act. Rather, the shooting resulted from a premeditated sequence of acts done out of anger because her neighbor's small dog had once again begun digging up her cat's grave. Under the circumstances, we cannot say the trial court abused its discretion in essentially finding the nature and the circumstances of the crime to be aggravating.

With respect to the final aggravator – Lindauer cannot atone for or mitigate the damages to Stroud -- the State concedes that this was improperly considered by the trial

court. We agree. Death is an essential element of reckless homicide, and in every case involving the death of a victim, it is, of course, impossible to atone for or mitigate such an ultimate damage. This aggravator was improperly found by the trial court. *Cf. Rodriguez v. State*, 785 N.E.2d 1169, 1177 (Ind. Ct. App. 2003) ("it is not appropriate to consider the impact of the victim's death on her family, because death is normally associated with the commission of the offense in question"). We observe, however, that the trial court mentioned this aggravator only in passing, in contrast to the other two aggravators properly found by the court. Thus, we are confident that the trial court would have issued the same sentence had it not considered this improper aggravator. *See Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007) (we may affirm sentence if "we can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators"); *Taylor v. State*, 891 N.E.2d 155 (Ind. Ct. App. 2008), *trans. denied*.

As set forth above, Lindauer also challenges the trial court's consideration of mitigating circumstances. The trial court found four mitigating circumstance: 1) Lindauer was remorseful and apologized to the victim's family; 2) she pleaded guilty; 3) she did not attempt to flee after the shooting; and, 4) she has no prior criminal history. Lindauer argues that in addition to these, the trial court should have found several other mitigating circumstances.

Because the trial court's recitation of its reasons for imposing sentence included a finding of aggravating and mitigating circumstances, the trial court was required to identify all significant mitigating circumstances. *See Anglemyer v. State*, 868 N.E.2d 482. "An allegation that the trial court failed to identify or find a mitigating factor requires the

defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Id*. at 493. Further, if the trial court does not find the existence of a mitigating factor advanced by the defendant, the court is not obligated to explain why it has found that the factor does not exist. *Anglemyer v. State*, 868 N.E.2d 482.

On appeal, Lindauer argues as a mitigating circumstance that she acted under strong provocation or that substantial grounds existed tending to excuse or justify her crime, though not rising to the level of an affirmative defense. Lindauer did not proffer this mitigator below and, therefore, may not raise it for the first time on appeal. *See Rogers v. State*, 878 N.E.2d 269 (Ind. Ct. App. 2007), *trans. denied*. Similarly, Lindauer did not argue below that her character and attitude indicate she is unlikely to reoffend.

While Lindauer did argue below that this crime was the result of circumstances unlikely to recur, we cannot agree that the trial court abused its discretion in failing to find this as a mitigator. The record reveals that Lindauer was well-known to have an explosive temper, and she initiated or was involved in several heated disputes with her neighbors over the years. Further, this was not the first time Lindauer turned to her gun to resolve a neighborhood problem. She not only fired her gun about a month earlier to scare Lizotte's dog, she also previously displayed her gun in front of Lizotte's fourteen-year-old grandson during a verbal argument between the boy's father and Lindauer's husband. It appears Lindauer had many "triggers", not just the neighbor's dog, and it is not clear that this crime was the result of circumstances unlikely to recur.[4] Moreover, the facts Lindauer asserts in

[4] Letters from Lindauer's own family indicated that she was a troubled person, with a hot temper, and that she was in need of professional help.

support of this mitigator (her lack of criminal history and her remorse) were fully considered by the trial court.

Lindauer also argues the trial court erred in failing to consider undue hardship to her family as a mitigating circumstance.[5] In addition to having a fourteen-year-old daughter, Lindauer claims her family is in substantial debt and relies on her income. The record reveals that Lindauer's minor daughter not only still has her father but is living with Lindauer's aunt. Further, Lindauer's home was already in foreclosure and the family had gone bankrupt prior to the imposition of her sentence. Our Supreme Court has recognized that "[m]any people convicted of serious crimes have one or more children, and absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). We cannot say that the trial court abused its discretion in declining to assign this mitigator significant weight. *See Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006) ("sentencing court is not required to find a defendant's incarceration would result in undue hardship on his dependents"), *trans. denied*.

Finally, Lindauer asserts as a mitigator that she is likely to respond affirmatively to probation or short-term imprisonment. In this regard, she notes she is married with three daughters (ages twenty, eighteen, and fourteen), has no prior criminal history, and has a stable work history. As set forth above, the trial court fully considered Lindauer's lack of a prior criminal history. Further, while there was evidence presented to support this additional

[5] Aside from providing statutory citations, we note that Lindauer provides us with no case law in support of any of her alleged mitigating circumstances.

mitigating circumstance, Lindauer has not established on appeal that the trial court abused its broad discretion by not finding this to be a separate mitigator.

The trial court's sentencing statement reveals a thoughtful consideration of the nature and circumstances of the crime and Lindauer's character. The court found a number of mitigating circumstances, as well as two valid aggravating circumstances. While the trial court certainly could have found undue hardship and likelihood to respond affirmatively to probation or short-term imprisonment as mitigators, we are confident that this would not have altered the sentence imposed by the trial court.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur