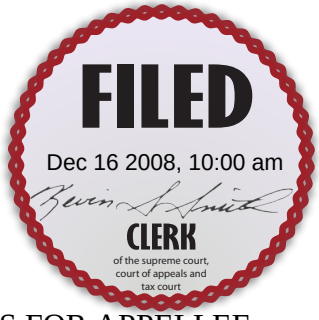

ATTORNEY FOR APPELLANT:

KURT A. YOUNG
Nashville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TERRY L. LIKENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-340
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0801-FA-001084

December 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After being charged with nine counts of criminal conduct, Terry Likens pled guilty to one count of child molesting as a Class B felony and one count of child molesting as a Class C felony. The trial court imposed an aggregate sentence of sixteen years with four years suspended to probation. Likens now appeals his sentence, arguing that the trial court abused its discretion by failing to find several mitigators and that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion in sentencing Likens and that his sentence is not inappropriate, we affirm the sentence. However, we remand for the trial court to correct the abstract of judgment.

Facts and Procedural History

On January 7, 2008, the State charged Likens with the following crimes: Count I, child molesting as a Class A felony; Count II, incest as a Class B felony; Count III, child molesting as a Class C felony; Count IV, child molesting as a Class C felony; Count V, child molesting as a Class C felony; Count VI, vicarious sexual gratification as a Class C felony; Count VII, vicarious sexual gratification as a Class D felony; Count VIII, vicarious sexual gratification as a Class D felony; and Count IX, vicarious sexual gratification as a Class D felony.

In March 2008, Likens pled guilty pursuant to a plea agreement to amended Count I, Class B felony as a lesser included offense of Class A felony child molesting,[1] and Count IV, Class C felony child molesting.[2] The State dismissed the remaining charges in

[1] Ind. Code § 35-42-4-3(a).

[2] Ind. Code § 35-42-4-3(b).

exchange for the guilty plea. The plea agreement provided that sentencing was open to argument in all respects.

At Likens' guilty plea and sentencing hearing, the State established the following factual basis for Counts I and IV: sometime between September 1, 2007, and January 1, 2008, Likens made his five-year-old biological daughter, J.L., watch a pornographic movie with him in their Indianapolis home. Twenty minutes later that same evening, Likens entered his daughter's bedroom, pulled down her underpants, and licked her vagina. At some point during the same time span, while Likens was masturbating in the bathtub he asked his four-year-old biological daughter, K.L., to touch his penis, which she then did.

The trial court entered a judgment of conviction pursuant to the plea agreement for amended Count I, child molesting as a Class B felony,[3] and Count IV, child molesting as a Class C felony. The trial court sentenced Likens to twelve years for Count I and four years for Count IV, to be served consecutively. The trial court suspended the four years for Count IV to probation. When sentencing Likens, the trial court discussed the following aggravators and mitigators:

> The Court has read the pre-sentence investigational report, has listened to the statements made by counsel as well as the statement made by the mother of the children as well as that made by Mr. Likens. . . . This sentence is based on the Court's finding that there are mitigating circumstances which are the following: That Mr. Likens is taking responsibility for these offenses; that he does show what I believe to be sincere remorse; and that he has no prior convictions. However, I find that there are aggravating factors. I find that when you committed these offenses, children, your own children were in a position of trust with you;

[3] Although the CCS correctly reflects that the trial court entered a judgment of conviction for Count I as a Class B felony, the abstract of judgment reflects that the trial court entered a judgment of conviction for Count I as a Class A felony.

> that position of trust that you violated. And I consider to be an aggravator the very young age of these children, four years and five years old. I find, further, that an aggravator is that more than one of your children has been abused by, by you. I find that these aggravators substantially outweigh the mitigators, which is the reason for sentence that is somewhat above the [advisory] sentence in this case.

Tr. p. 35-37. After sentencing concluded, Likens complained about suffering pain caused by his Crohn's disease. The trial court told Likens it would send a note to the jail about his medical issues.

Likens now appeals his sentence.

Discussion and Decision

Likens contends that his sentence is inappropriate in light of the nature of the offenses and his character. However, interspersed within Likens' inappropriate sentence discussion are arguments that must be analyzed under an abuse of discretion standard. Inappropriate sentence and abuse of discretion claims are to be analyzed separately. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

I. Abuse of Discretion

Likens argues that the trial court abused its discretion by failing to find the following facts as mitigators: Likens suffered mentally and physically abusive treatment from his father during his childhood, Likens was sexually abused once by a customer on his childhood newspaper route, Likens' Crohn's disease would cause him undue hardship in prison, the circumstances that gave rise to these offenses are unlikely to recur, and Likens is likely to respond affirmatively to a shorter term of imprisonment.

In general, sentencing decisions lie within the discretion of the trial court. *Anglemyer*, 868 N.E.2d at 490. As such, we review sentencing decisions only for an abuse of discretion. *Id.* "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *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*. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Anglemyer*, 868 N.E.2d at 493. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." *Sherwood v. State*, 749 N.E.2d 36, 38 (Ind. 2001). 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. *Anglemyer*, 868 N.E.2d at 493.

Likens claims that the trial court erred by overlooking the fact that his father was mentally and physically abusive because his father made him get up at 3 a.m. to deliver newspapers and failed to obtain medical treatment for Likens' Crohn's disease. However, Likens failed to establish how his painful childhood was relevant to his culpability for molesting his daughters. Thus, the trial court was not required to grant this proposed mitigator any weight. *See Loveless v. State*, 642 N.E.2d 974, 977 (Ind. 1994).

Likens next claims that the trial court erred by overlooking the fact that he was sexually abused by a stranger when he was a child. The PSI indicates only that when he was fourteen years old, Likens was fondled by a forty-year-old newspaper customer. The trial court was not obligated to afford any weight to Likens' childhood history as a mitigating factor because Likens never established why his past victimization led to his current behavior. *Hines v. State*, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006), *trans. denied*.

Likens also argues that the trial court should have found that imprisonment would result in undue hardship to him because of his Crohn's disease and other ailments, which according to the PSI include blood clots, migraine headaches, and anemia. The Indiana Supreme Court has noted that the trial court can properly assign no weight to the undue hardship mitigator when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for some shorter term. *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002). Likens makes no such showing here and points to no evidence that the Department of Correction will be unable to provide Likens with proper medical care for his illnesses. Additionally, we note that the trial court was sensitive to Likens' medical needs, inquiring as to Likens' health and telling Likens it would send a message to the jail to ensure that Likens received care.

Likens argues that, because of the sex-offender restrictions placed on him, the circumstances that gave rise to these offenses are unlikely to recur. However, at sentencing, Likens' counsel stated that Likens might "at some point in the future be able to live a productive life and perhaps even have some kind of a future life with his

children . . . ." Tr. p. 27. Although we recognize that Likens asked at his guilty plea hearing for help with his urges to molest, Likens points to no significant evidence in the record that demonstrates that the circumstances that gave rise to these offenses are unlikely to recur. We cannot say the trial court abused its discretion in failing to find this proffered mitigator. *See Rowe v. State*, 867 N.E.2d 262, 269-70 (Ind. Ct. App. 2007); *Hardebeck v. State*, 656 N.E.2d 486, 493 (Ind. Ct. App. 1995) (finding court did not abuse its discretion in rejecting the circumstances unlikely to recur mitigator even though defendant presented expert testimony that defendant lacked the propensity to commit future crimes), *trans. denied*.

As for Likens' contention that he is likely to respond affirmatively to short-term imprisonment, Likens argues that his recognition that he is at fault and needs help justifies the finding of this mitigator. Without more, these self-serving statements do not clearly indicate that Likens is likely to respond affirmatively to short-term imprisonment. *See Taylor v. State*, 681 N.E.2d 1105, 1112 (Ind. 1997) (requiring more than speculation to support the respond affirmatively to short-term imprisonment mitigator).

Here, the trial court considered the pre-sentence investigation report, counsels' statements, the statements made by Ginnie Likens, the children's mother and Likens' wife, and the statements made by Likens. We cannot say that the mitigators Likens proposes are both significant and clearly supported by the record. Nonetheless, it is clear from the record that even if the trial court abused its discretion by failing to identify the mitigators Likens requests, any such error is harmless in light of the aggravating circumstances found by the trial court. Because the trial court identified three

aggravators that Likens does not challenge, we are confident that the trial court would have imposed the same sentence had it found the mitigators Likens proposes. *See Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007).

II. Inappropriate Sentence

Next, Likens contends that his aggregate sentence of sixteen years with four years suspended is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Here, the trial court sentenced Likens to twelve years for the Class B felony and four years suspended to probation for the Class C felony, with the terms to be served consecutively. The advisory term for a Class B felony is ten years. Ind. Code § 35-50-2-5. At sentencing, the trial court found several aggravators and mitigators, as discussed above, and found that the aggravators substantially outweighed the mitigators.

As for the nature of the offenses, Likens molested his two young daughters, who were in his care. Specifically, Likens forced five-year-old J.L. to watch a pornographic

movie and licked her vagina and forced four-year-old K.L. to touch his penis while he was masturbating. Likens' conduct traumatized his daughters. At the sentencing hearing, Ginnie testified that the children were having nightmares and were angry. Ginnie testified that J.L. was "crying all the time. She can hardly make it through school." Tr. p. 29. Nothing about the nature of the offenses persuades us that Likens' sentence of sixteen years with four years suspended is inappropriate.

As for the character of the offender, we recognize that Likens has no previous criminal convictions. However, Likens molested his two biological daughters when they were five and four years old. Likens swore his daughters to secrecy, and it is five-year-old J.L. who bore the burden of reporting this crime to her mother. Although Likens initially confessed his crimes to police after J.L. reported his behavior, he later tried to recant his story before finally pleading guilty. Additionally, Likens reported to Detective Gustavia Dodson that he has had the urge to touch children sexually since he was a teenager and that he often wondered what it would feel like to touch children sexually. Appellant's App. p. 17. Nonetheless, Likens did not seek treatment for these urges. Based upon our review of the evidence, we see nothing in the nature of the offenses or the character of the offender that would suggest that Likens' sentence is inappropriate.

As a final matter, because the abstract of judgment incorrectly shows that Likens pled guilty to child molesting as a Class A felony, we remand for the trial court to correct the abstract of judgment to reflect that Likens pled guilty to child molesting as a Class B felony.

Affirmed in part and remanded.

KIRSCH, J., and CRONE, J., concur.