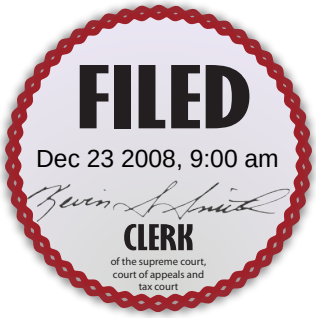

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IN THE
COURT OF APPEALS OF INDIANA

JARA CLAIRDAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 38A05-0806-CR-375
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause No. 38C01-0709-FC-12

December 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jara Clairday appeals her sentence for criminal recklessness resulting in serious bodily injury as a class D felony.[1] Clairday raises one issue, which we revise and restate as whether the trial court abused its discretion in sentencing her.[2] We affirm.

The relevant facts follow. On September 13, 2007, Clairday struck Glenn Pfeiffer on the head several times with a metal dog chain. This striking resulted in extreme pain, lacerations, bleeding, bruising, and impaired vision.

On September 17, 2007, the State charged Clairday with battery resulting in serious bodily injury as a class C felony. On March 18, 2008, the State charged Clairday with criminal recklessness resulting in serious bodily injury as a class D felony. That same day, Clairday pled guilty to criminal recklessness as a class D felony, and the State agreed to dismiss the charge of battery. Clairday also agreed to admit to a probation violation under cause number 38D001-0607-CM-120, and the State agreed not to file a probation violation under cause number 38D01-0608-FD-82.

The trial court found the following aggravators: (1) Clairday's prior criminal history; (2) Clairday was on probation at the time of the current offense; and (3) the victim lost sight in his eye as a result of Clairday's actions. The trial court found Clairday's statement of remorse as a mitigator but did not give it much weight. The trial

[1] Ind. Code § 35-42-2-2 (Supp. 2006).

[2] Clairday mentions Ind. Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute 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." However, Clairday makes no argument as to why her sentence is inappropriate in light of the nature of the offense and the character of the offender. Therefore, the argument is waived for failure to make a cogent argument. See Ind. Appellate Rule 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999).

court found that the aggravators outweighed the mitigators and ordered Clairday to serve two years in the Jay County Security Center.

The sole issue is whether the trial court abused its discretion in sentencing Clairday. The Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id. A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. The relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id. Clairday argues that the trial court abused its discretion by considering: (A) the extent of the injury to the victim; (B) her probation status; and (C) her criminal history.

A. Extent of the Injury

Clairday argues that the trial court improperly considered the extent of the injury to the victim's eye as an aggravator and cites Page v. State, 878 N.E.2d 404 (Ind. Ct. App. 2007), trans. denied. In Page, the State charged Page with three counts of robbery as class C felonies. 878 N.E.2d at 407. Page pled guilty as charged and the State promised not to file any additional or enhanced charges. Id. The trial court found the victim's injury as an aggravator. Id. On appeal, Page argued that the trial court improperly considered the victim's injury as an aggravator because he was charged with Class C felonies and the trial court "could only make such an evaluation as a victim impact aggravator, and not under legal [sic] premise that the offense should have been charged as a Class B felony." Id. at 409. Robbery as class B felony is distinguishable from robbery as a class C felony because it requires that the offense "is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant." Ind. Code § 35-42-5-1 (2004). This court held that "[a]s long as the enhanced sentence does not equal or exceed the minimum sentence of the next greater felony, a trial court may consider the particular circumstances of a crime." 878 N.E.2d at 410-411.

Clairday argues that, based on Page, the victim's injury or circumstances of the offense could not be used as an aggravator because she was convicted of criminal recklessness as a class D felony and the minimum sentence for the next greater felony, a class C felony, is two years. However, as the State argues, Page involved the issue of

enhancing a sentence of a lesser included offense, robbery as a class C felony, by relying on an element that distinguishes the greater offense, robbery as a class B felony. Here, the fact that the victim lost sight does not distinguish the offense of criminal recklessness as a class D felony from the offense of criminal recklessness as a class C felony. See Ind. Code § 35-42-2-2(d) (providing that "the offense is a Class C felony if committed by means of a deadly weapon"). Because the trial court did not use an element of criminal recklessness as a class C felony to enhance Clairday's sentence, we do not find Page instructive and conclude that the trial court did not abuse its discretion on this basis.

B. Probation Status

Clairday argues that her punishment for violating her probation and the trial court's use of the fact that she was on probation at the time of the offense violate double jeopardy. Clairday does not develop this argument. Consequently, the issue is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument). Waiver notwithstanding, we note that a defendant's probation status can be a valid aggravating factor, see Prickett v. State, 856 N.E.2d 1203, 1208 (Ind. 2006), and a violation of a condition of probation does not constitute an offense within the purview of double jeopardy analysis. See Kincaid v. State, 736 N.E.2d 1257, 1259 (Ind. Ct. App. 2000), reh'g denied.

C. Criminal History

Clairday argues that the trial court improperly considered her criminal history as an aggravator. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999), reh'g denied. For example, a "non-violent misdemeanor ten years in the past . . . would hardly warrant adding ten or twenty years to the standard sentence" in a murder case. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001).

Clairday's appellant's appendix does not contain a copy of the presentence investigation report. We remind Clairday that Ind. Appellate Rule 50(B) provides that "[t]he appellant's Appendix in a Criminal Appeal shall contain . . . copies of the following documents, if they exist: . . . any other short excerpts from the Record on Appeal, in chronological order, such as pertinent pictures or brief portions of the Transcript, that are important to a consideration of the issues raised on appeal. . . ." Although pursuant to Ind. Appellate Rule 49(B)[3] this has not caused waiver of Clairday's sentencing claims, "the presentence report is a vital document that should be included in

[3] Ind. Appellate Rule 49(B) provides that "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument."

the appendix in any appeal that raises sentencing issues." Perry v. State, 845 N.E.2d 1093, 1094 n.2 (Ind. Ct. App. 2006), trans. denied.

At the sentencing hearing, the prosecutor stated that Clairday had a prior battery conviction and was on probation at the time of the current offense for possession of cocaine as a class D felony. Clairday did not object to the prosecutor's comment that Clairday had a prior battery conviction. The trial court stated that Clairday has "prior criminal *convictions* and prior felony *convictions*, in fact, by (inaudible) of your possession of cocaine charge and conviction you are non suspendable on this case which means you have serve [sic] at least six months executed." Sentencing Transcript at 9 (emphasis added). Based upon the record, we cannot say that the trial court abused its discretion in considering Clairday's criminal history as an aggravator. To the extent that Clairday argues that the trial court gave her criminal history too much weight, we cannot review the weight given to an aggravating factor for abuse of discretion. See Anglemyer, 868 N.E.2d at 491 (holding that the relative weight or value assignable to aggravating and mitigating factors properly found is not subject to review for abuse of discretion).

For the foregoing reasons, we affirm Clairday's sentence for criminal recklessness as a class D felony.

Affirmed.

ROBB, J. and CRONE, J. concur