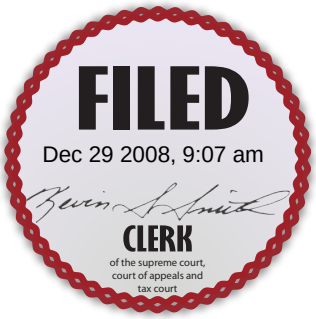

ATTORNEY FOR APPELLANT:

MARK SMALL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

STEPHEN TESMER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

J.V.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 54A05-0806-CR-370
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-9811-CF-94

December 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

J.V. (Appellant) appeals the sentence he received following his conviction of Child Molesting[1] and two counts of Sexual Misconduct With a Minor,[2] all as class B felonies, which were entered upon his guilty plea. Appellant presents the following restated issues for review:

1. Did the trial court err in finding aggravating and mitigating circumstances?

2. Did the trial court impose an inappropriate sentence?

We affirm.

The Appellant admitted at the guilty plea hearing that over a period of at least three years, he forced his daughter, then between the ages of approximately thirteen and sixteen, to perform oral sex on him. When the victim eventually told her brother about the molestations, the two of them went to the police on November 3, 1998 and reported what had been happening. Appellant was interviewed, admitted what he had done, and was arrested. Several days later, Appellant was charged with one count of child molesting as a class A felony and two counts of sexual misconduct with a minor as a class B felony. On June 18, 1999, Appellant entered into a plea agreement whereby he agreed to plead guilty to a reduced charge of child molesting as a class B felony, and to both charges of sexual misconduct with a minor as class B felonies. The parties agreed that the executed portion of the sentence would be capped at twenty-five years, but would otherwise be left to the trial court's discretion.

[1] Ind. Code Ann. § 35-42-4-3 (West, PREMISE through 2008 2nd Regular Sess.).
[2] I.C. § 35-42-4-9 (West, PREMISE through 2008 2nd Regular Sess.).

At the February 8, 2000 guilty plea/sentencing hearing, the court accepted the guilty plea and entered judgment of conviction consistent with the terms of the plea agreement. The court imposed the then-presumptive ten-year term of imprisonment for each of the three counts, and ordered Counts I and II to be served consecutive to each other and concurrent with the term for Count III, which was suspended to probation, for a total executed sentence of twenty years. Appellant contends the trial court erred in (1) citing improper aggravating circumstances, (2) failing to cite a valid mitigating circumstance, and (3) imposing an inappropriate sentence.

Effective April 25, 2005, the Indiana General Assembly amended our sentencing statutes to replace presumptive sentences with advisory sentences. Because Appellant committed his crimes before the amendment's effective date, the presumptive sentencing scheme applies. *See Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007). When evaluating sentencing challenges under the presumptive statutory scheme, it is well established that sentencing decisions lie within the trial court's discretion. *Williams v. State*, 861 N.E.2d 714 (Ind. Ct. App. 2007). Those decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007), *trans. denied*. The broad discretion of the trial court includes the discretion to determine whether to impose consecutive sentences. *Jones v. State*, 807 N.E.2d 58 (Ind. Ct. App. 2004), *trans. denied*. When, as here, the trial court imposes consecutive sentences, it must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reasons why each circumstance is aggravating or mitigating, and (3) evaluate and balance the

mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Trowbridge v. State*, 717 N.E.2d 138 (Ind. 1999). One valid aggravator alone is enough to support consecutive sentences. *Plummer v. State*, 851 N.E.2d 387 (Ind. Ct. App. 2006).

1.

Appellant contends the trial court erred in identifying aggravating and mitigating circumstances. The court set out those matters in its sentencing statement, as follows:

> The mitigating circumstances the Court finds are that he has no criminal record. These are his first convictions. The Court finds that like so many people that get started doing things and can't bring themselves to quit [sic]. [Appellant]'s not likely to have stopped this with [the victim] without some sort of intervention, which has occurred. With regard to the mitigating circumstances, he cooperated with law enforcement after he was caught and I wrote down here that he knew it was wrong but he wouldn't or couldn't quit and I didn't know whether to put that in the aggravating column or the mitigating column. It seems to me that he admits it's wrong, he knew it's wrong, he's glad he was stopped. But on the other hand it continued. And so I guess that the business about his being remorseful and accepting responsibility, his cooperation, his participation in the treatment sort of is washed out by the fact that he certainly over a period of three years knew what he was doing. He knew it was wrong. He knew he shouldn't do it but he continued to do it any way [sic]. I think that it's an aggravating circumstance that he is [the victim]'s father. It's an aggravating circumstance the frequency of occurrences and the length of time the occurrences continued. The ages, I think, are really irrelevant. They are dealt with by statute and I think the more telling aggravator is the family relationship. I think it's an aggravation, aggravating factor that he essentially used [the victim] for his own selfish purposes. That he would not yield to her complaints or protestations when she was hurt. That he occasionally engaged in physical force to try to get done what he wanted done. And I think to suspend or reduce the sentences would be to depreciate the seriousness of the offenses. As has been mentioned technically every time that this happened it's a B felony which carries six to twenty years. And if every occurrence were charged on, [Appellant] would never see the light of day outside the prison, but I think that that's a consideration that has to be recognized. The, I think the likelihood of re-offense is certainly a potential

> unless [Appellant] takes advantage of counseling and treatment programs that are available to treat people that have engaged in aberrant sexual activity.

Transcript at 42-44. Appellant challenges all but one of the aggravators cited by the trial court.

Appellant contends essentially that five of the aggravators found by the trial court (i.e., (1) the frequency of the molestations, (2) his use of the victim for his own selfish purposes, (3) his refusal to stop when the victim sometimes told Appellant he was hurting her, (4) his occasional use of force, and (5) the fact that there were many uncharged acts[3]) are improper because they constitute an impermissible use of the circumstances-of-the-crime aggravator. Citing *Page v. State*, 878 N.E.2d 404 (Ind. Ct. App. 2007), *trans. denied*, Appellant contends that a trial court may cite the circumstances of the crime as an aggravator only where the sentence imposed for a given offense is less than the minimum sentence of the next greater felony. In this case, Appellant was sentenced to twenty years based upon three B-felony convictions and the minimum sentence for the next greater felony, i.e., a class A felony, is precisely that – twenty years. Thus, the argument goes, this aggravator is improper.

Appellant's invocation of *Page* is misplaced. That case was decided under the new sentencing scheme and held most notably that when a defendant pleads guilty to an offense that is a lesser included offense of the one charged, the trial court may not cite the element distinguishing the lesser from the greater as an aggravating factor at sentencing. Also, *Page*

[3] At the guilty plea/sentencing hearing, Appellant acknowledged that he molested the victim "to[o] many times to count." *Appellant's Appendix* at 36.

stands for the proposition that a trial court may not impose the maximum sentence upon a defendant convicted of a lesser offense of the charged crime upon the rationale that the jury erred in not returning a guilty verdict on the greater offense. Neither of those circumstances are present here, so *Page* is inapposite.

Appellant does not contend that the circumstances of a crime cannot be a valid aggravator, nor could he. *See Sherwood v. State*, 702 N.E.2d 694 (Ind. 1998). Even assuming for the sake of argument that the five aggravators in question collectively should constitute only a single aggravator, it *is* a valid aggravator – and a significant one at that.

Appellant complains about two other aggravators cited in support of his enhanced sentence. First, he claims the trial court erred in citing as an aggravating circumstance the fact that a reduced sentence would depreciate the seriousness of the crime. He is correct in this regard. As we have stated on numerous other occasions, this aggravating circumstance is to be used only when the trial court considers imposing a sentence less than the presumptive. *See, e.g., Price v. State*, 725 N.E.2d 82 (Ind. 2000). Such was apparently not the case here.

The final challenge to the trial court's aggravators is as follows: "[Appellant]'s likelihood to re-offend unless he received counseling was too speculative." *Appellant's Brief* at 7. In point of fact, the trial court's comments on that aggravator reflect that the risk of re-offending was dependent on future events and something of an unknown. This explains its comment that there was a "potential" for re-offense unless Appellant receives counseling and enters treatment programs for those who have engaged in aberrant sexual activity. *Transcript* at 44. We fail to see the error in this statement. The risk of re-offense is statutorily

established as a valid consideration when sentencing. *See* Ind. Code Ann. § 35-38-1-7.1(b)(8) (West, PREMISE through 2008 2nd Regular Sess.); *see also Luhrsen v. State*, 864 N.E.2d 452 (Ind. Ct. App. 2007), *trans. denied*. Moreover, by definition, such involves a projection about future behavior and will therefore always involve some speculation. In view of these considerations, and considering how often Appellant molested the victim over a period of years, the trial court did not err in citing the risk of re-offense as an aggravating circumstance in this case.

We turn now to the sole argument made by Appellant concerning mitigating circumstances, i.e., that the trial court erroneously failed to find Appellant's difficult childhood as a mitigating circumstance. In fact, Appellant contends the trial court failed even to consider it. The latter contention can be readily disposed of. At the outset of its sentencing statement, the court noted, "[Appellant] has come from a rough and difficult background of his family life and he and other members of the family suffered abuse at the hands of their father." *Transcript* at 42. Clearly, the trial court considered this proffered mitigator. Did the trial court err in rejecting it? We conclude that it did not.

Although the trial court mentioned Appellant's difficult childhood, it nevertheless discounted that as a mitigating circumstance. This assessment finds support in our case law. Our Supreme Court has "consistently held that evidence of a difficult childhood warrants little, if any mitigating weight." *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000), *cert. denied*, 534 U.S. 1057 (2001). At best, even where found, the mitigating weight is in the low range. *See Peterson v. State*, 674 N.E.2d 528 (Ind. 1996), *cert. denied*, 522 U.S. 1078

(1998). The trial court did not err in failing to cite this as a significant mitigating factor.

2.

Citing Ind. Appellate Rule 7(B), Appellant challenges the appropriateness of his sentence. Although Appellant correctly identifies the relevant appellate rule, he makes no discernable argument that the nature of the offense or his character renders his sentence inappropriate. Neither does he cite cases applying App. R. 7(B), or even any cases discussing the relevant weight of the mitigating circumstance to which he claims the trial court gave insufficient weight. In short, other than claiming "[t]he trial court abused its discretion in entering an unduly harsh sentence", *Appellant's Brief* at 5, and asserting his "aggregate sentence of twenty (20) years should be reduced by the Court of Appeals", *id.*, Appellant offers no argument in support of this claim. Under these circumstances, Appellant has waived appellate review of the appropriateness of his sentence under App. R. 7(B). *See McMahon v. State*, 856 N.E.2d 743 (Ind. Ct. App. 2006) (the defendant waived his challenge to his sentence by failing to make a cogent argument or cite authority supporting his argument); *Gentry v. State*, 835 N.E.2d 569, 576 (Ind. Ct. App. 2005) (holding that the defendant's "failure to offer more than a mere conclusory statement that his sentence should be reduced waives his opportunity for appellate review").

Waiver notwithstanding, we have reviewed the appellate materials with an eye toward the appropriateness of the sentence and find ourselves in agreement with the trial court's decision. Although Appellant had a difficult childhood, whatever small mitigating weight that might carry is far outweighed by the long-term, repeated sexual abuse his young teenage

daughter was forced to endure at his hands. The sentence imposed was not inappropriate.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur