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**IN THE
COURT OF APPEALS OF INDIANA**

DUSTY L. JAMES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A05-0601-CR-47

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0404-FA-0124

December 1, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Dusty James appeals her sentence for two counts of child neglect arising from her role in allowing her boyfriend, Chad Strong, to abuse her two small children, leading to the death of her daughter and severe injuries to her son. First, she argues that the trial court improperly relied upon part of her testimony from Strong's trial for related charges as an aggravator. Second, James contends that her aggregate sentence of fifty-five years is inappropriate based on the nature of the offense and her character. First, we find that the trial court erred in relying on James' testimony in Strong's case as an aggravator. However, because that testimony was merely cumulative of other testimony from her own sentencing hearing, we find this error was harmless. Second, we find James' sentence is not inappropriate based on her character and the nature of her offenses. We therefore affirm her sentence.

Facts

On July 13, 2004, James left her three-year-old daughter, T.G., and her one-year-old son, I.G., in the care of her boyfriend, Chad Strong. Strong severely abused the children on that day, and he and James later took the children to the emergency room. T.G. subsequently died from blunt force to the abdominal area. I.G. had several broken bones from Strong stomping on his legs. Doctors also discovered that I.G. had severe head injuries consistent with an earlier incident of abuse that had taken place on or about July 1, 2004. It was determined that James was aware that Strong had abused her children on previous occasions. She knew of the July 1 injuries and failed to seek

medical care for her children's injuries. She also never reported this abuse and continued to leave her children in Strong's care.

James was subsequently charged with Class A felony neglect of a dependent resulting in death¹ and Class B felony neglect of a dependent causing serious bodily injury.² Criminal charges were also filed against Strong for his role as the abuser, and the trial court in James' case also presided over Strong's trial. James testified at Strong's trial, and she never sought nor received immunity for her testimony.

James eventually entered into a plea agreement with the State, in which she agreed to plead guilty to the crimes as charged. The agreement included a waiver allowing the trial court to find aggravating and mitigating factors. At James' sentencing hearing, the trial court found the following mitigators: James' youth, her lack of prior criminal history, her display of some degree of acceptance of responsibility, her willingness to sign a plea agreement, saving the State the cost and time of a trial, and the fact that James had taken advantage of opportunities for rehabilitation while awaiting trial. The trial court also found the following aggravators: the helplessness of the victims against their abuser because of their young age, the extended period of abuse that James allowed her children to suffer through, and—citing James' testimony at Strong's trial for support—James' lies to healthcare providers and social workers about the source of her children's injuries. The trial court accepted James' guilty plea and sentenced her to an enhanced sentence of forty years for neglect of a child resulting in death and an enhanced sentence

¹ Ind. Code § 35-46-1-4(b)(3).

² Ind. Code § 35-46-1-4(b)(2).

of fifteen years for neglect of a child resulting in injury.³ The trial court ordered the sentences to be served consecutively for an aggregate sentence of fifty-five years. James now appeals.

Discussion and Decision

On appeal, James contends that the trial court improperly enhanced her sentence based on testimony from Strong’s trial and that her sentence is inappropriate.⁴ We address these issues in turn.

I. Testimony From Strong’s Trial

James first argues that the trial court improperly relied upon her testimony in Strong’s trial as support for an aggravator at her sentencing hearing. Specifically, she cites the trial court’s reliance on testimony indicating that she lied to healthcare providers about the injuries inflicted upon I.G. by Strong. James relies upon *Nybo v. State*, 799 N.E.2d 1146 (Ind. Ct. App. 2003), as support for her contention that the trial court cannot use testimony obtained in the court proceedings under another cause number in a sentencing determination. In *Nybo*, we held that where a person gives testimony in a proceeding under a grant of immunity, a trial court may not rely upon that immunized testimony in any criminal proceedings against the immunized defendant. *Id.* at 1151.

³ Between the date of James’ offense, on or about July 13, 2004, and the date of sentencing, December 15, 2005, Indiana Code §§ 35-50-2-4 & -5 were amended to provide for “advisory” sentences rather than “presumptive” sentences. See P.L. 71-2005, §§ 7-8 (eff. Apr. 25, 2005). This Court has previously held that the change from presumptive to advisory sentences should not be applied retroactively. See *Walsman v. State*, 855 N.E.2d 645, 650-51 (Ind. Ct. App. 2006), *reh’g pending*; *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*; but see *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). Therefore, we operate under the earlier “presumptive” sentencing scheme when addressing James’ sentence.

⁴ James does not contest the trial court’s weighing of the aggravators and mitigators under *Blakely v. Washington*, 542 U.S. 296 (2004).

James' reliance on *Nybo* is misplaced because James was never promised, nor had she ever sought, immunity for her testimony. Nothing in James' argument persuades us to find that *Nybo* may be extended to cases where immunity has not been offered.

Nonetheless, we agree that testimony from Strong's trial as to James' lying to medical professionals was improperly used by the trial court. A trial court cannot take judicial notice of its own records in another case, even though the parties and the subject matter are related. *See Richard v. Richard*, 812 N.E.2d 222, 225 (Ind. Ct. App. 2004). However, in the instant case, we find this to be harmless error because other substantial evidence in the record corroborates the testimony used from Strong's trial. Similar to James' testimony in Strong's trial, testimony presented at her sentencing hearing indicated that James lied to social workers, medical professionals, and others about Strong's abuse of her children. James' testimony from Strong's trial, then, was merely cumulative of other evidence properly before the trial court at James' sentencing hearing.

II. Inappropriate Sentence

James also contends that her fifty-five year sentence is inappropriate based on the nature of the offense and her character. Indiana Rule of Appellate Procedure 7(B) provides in pertinent part that "the 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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad

conditions are satisfied.” *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied, cert. denied*, 126 S. Ct. 1580 (2006).

The nature of James’ offenses justifies the enhancement of her sentence imposed by the trial court. James’ awareness and subsequent disregard of the physical abuse of her children by Strong is sufficient to support a determination that the nature of her crimes was egregious, and in turn, supports the trial court’s decision to enhance her sentence. James allowed her children to remain in a situation endangering them under the care of a man who repeatedly physically abused them. James was aware of the children’s prior injuries, which were extensive and severe, and she knowingly endangered her children’s lives by leaving them in Strong’s care. Ultimately, her failure to properly care for and protect her children resulted in injuries to her one-year-old son, including broken bones and a head injury, and to the death of her three-year-old daughter. Nothing about the nature of James’ offenses persuades us that her sentence was inappropriate.

Likewise, we find James’ character supports an enhancement of her sentence. James left her extremely young and helpless children with their abuser even though she was aware that he had been abusing her children for an extended period of time, and she further neglected her children by not getting healthcare when she knew they were injured. Testimony at her sentencing hearing indicates that James had the opportunity to help her children, but either she lied to cover up the abuse or, at the very least, willingly failed to seize that opportunity. Her knowledge of the extent of Strong’s abuse of her children, along with her inaction to protect her children when she had opportunity to do so, speaks

volumes as to her character, and nothing about that character persuades us to find her sentence inappropriate.

We therefore conclude that James' sentence is not inappropriate and affirm the decision of the trial court.

Affirmed.

BAKER, J., and CRONE, J., concur.