

Jamar T. Stewart appeals the sentence he received after entering into a plea agreement with the State. The trial court did not err in finding as aggravating circumstances that the victims of Stewart's crime were shot in their home and Stewart had a prior criminal conviction. Nor was it error for the trial court to consider pending charges as a minimal aggravating circumstance or to decline to weigh as mitigating circumstances Stewart's age and drug use. We accordingly affirm.

FACTS AND PROCEDURAL HISTORY

Stewart was charged with Count I, attempted robbery resulting in serious bodily injury, a Class A felony,¹ and with Count II, criminal recklessness resulting in serious bodily injury, a Class C felony.² He agreed to enter an open plea of guilty to attempted armed robbery resulting in serious bodily injury as a Class B felony,³ in exchange for the dismissal of Count II.

Stewart was sentenced to 16 years⁴ to be served consecutively to the sentence he received in another case, Cause No. 22C01-0408-FB-279.⁵

¹ Ind. Code § 35-42-5-1(1).

² Ind. Code § 35-42-2-2(c)(1).

³ Ind. Code § 35-42-5-1.

⁴ In 2005, in response to *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004), our legislature modified the sentencing statutes to provide for "advisory" rather than "presumptive" sentences. Because Stewart's crime occurred prior to the enactment of the new sentencing statutes, we apply the prior versions. See *Creekmore v. State*, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006) ("the application of the new sentencing statutes to crimes committed before the effective date of the amendments violates the prohibition against *ex post facto* laws"), *reh'g petition pending*. At the time Stewart committed his crimes, the presumptive sentence for a Class B felony was ten years, and the court could add ten years for aggravators or subtract four years for mitigators. Ind. Code § 35-50-2-5 (Burns' 2004 Replacement Volume).

⁵ The sentence in Cause No. 22C01-0408-FB-279 was 16 years incarceration with 2 years suspended.

DISCUSSION AND DECISION

Stewart argues his sentence was “inappropriate under the circumstances,” (Br. of Appellant at 7), because an aggravating circumstance used by the trial court was inappropriate, he did not have a “prior” felony conviction as the trial court found, (*id.* at 8), and because the trial court should not have found the charges pending against him an aggravating factor. Stewart also contends the trial court should have taken into consideration that he was 17 years old when these crimes were committed and he was using drugs daily.

The trial court found:

[T]he harm, injury, loss or damage suffered by the victim of an offense was significant and greater than the elements necessary to prove the commission of the offense. Um, that’s under I. C. 35-38-1-7.1(a). And there’s no question that the harm suffered by Mr. Decker was the fact that he was shot and, uh, received injuries as a result of the shot. Uh, the shooting occurred inside his home. So there is some significant injury and harm to Mr. Decker.

(Tr. at 36-37.) Stewart argues this aggravator contained an element of the charge – serious bodily harm – so it was an improper aggravating circumstance. A factor constituting a material element of a crime cannot be considered an aggravating circumstance in determining a sentence. *Johnson v. State*, 687 N.E.2d 345, 347 (Ind. 1997).

The trial court did refer to Mr. Decker’s injuries, but it also noted the shooting occurred inside his house. Our Indiana Supreme Court has stated: “We think that invasion of the victims’ home, representing as it does a place of security in the minds of

most, can plausibly be used by a trial court as an aggravating circumstance.” *Id.* This aggravating circumstance is proper.

Stewart also argues, without citation to authority, that he “was not convicted in Cause 279 until Sept. 29, 2005, which was more than one year after he was charged in the instant cause. Apx. 25. Thus, it does not constitute a prior conviction.” (Br. of Appellant at 8-9.) Stewart’s conviction in the case before us was entered March 8, 2006; his conviction on September 29, 2005 was therefore a “prior” conviction. The trial court did not err in finding Stewart’s September 29, 2005 conviction an aggravating circumstance.

Stewart contends the trial court should not have considered as aggravators pending charges against him in Clark County, allegedly committed while he was out on bond. The sentencing court characterized this aggravating circumstance a violation of the conditions of “any probation, parole, pardon, community corrections placement or pre-trial release granted to the person.” (Tr. at 37.) The pre-sentence investigation report indicates pending charges of burglary/bodily injury as a Class A felony and conspiracy to commit burglary as a Class A felony, dated September 14, 2005, and dealing cocaine, a Class A felony, dated October 6, 2005. As the record is unclear regarding when those alleged crimes occurred, the court gave that aggravating circumstance “minimal” weight. (*Id.*) Because a trial court may consider pending charges and uncharged crimes, the trial court did not err in finding this an aggravating circumstance. *See Bacher v. State*, 722 N.E.2d 799, 804 (Ind. 2000) (sentencing court may properly consider as an aggravating

factor pending charges not reduced to convictions because they reflect the defendant's character and indicate a risk of future crime).

Stewart argues mitigating weight should have been given to his character, including his age and drug use. The trial court properly considered those things: "That's, that's what's difficult for me because, again, we have the youth of Mr. Stewart, his involvement in drugs which he admits, versus the harm that these other people have suffered due to his use of firearms and other matters." (Tr. at 40.)

Given the serious nature of Stewart's offense, his prior criminal history, and his apparent inability to follow the guidelines of society, we cannot find his sentence inappropriate.

Affirmed.

RILEY, J., and BAILEY, J., concur.