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IN THE
COURT OF APPEALS OF INDIANA

ROBERT A. HOSLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0604-CR-358
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Mark A. McIntosh, Judge
Cause No. 35C01-0504-FA-28

October 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Robert A. Hosler appeals from his sentence after he pleaded guilty to Battery, as a Class D felony. He presents the following issues for our review:

1. Whether the trial court abused its discretion when it identified aggravators and mitigators.

2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2003, Hosler married Diana Irene Hosler. The couple lived with Diana's two daughters, ages eighteen and twelve and the couple's daughter, age four. Diana was a full-time nursing student while Hosler ran the household and cared for the children.

In 2005, M.W. alleged that Hosler had sexually molested her once in 1999, when she was eleven years old and he was living with her mother. The State charged Hosler with child molesting, as a Class A felony, and battery, as a Class D felony. Pursuant to a plea agreement, Hosler pleaded guilty to battery, and the State dismissed the child molesting charge. The trial court sentenced Hosler to an enhanced sentence of three years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Sentence Enhancement

Hosler contends that the trial court abused its discretion when it enhanced his sentence. Sentencing determinations rest within the trial court's discretion. Powell v. State, 769 N.E.2d 1128, 1134 (Ind. 2002). We review trial court sentencing decisions

only for an abuse of discretion, including a trial court's decision to increase the presumptive[1] sentence because of aggravating circumstances. Id. When a trial court imposes an enhanced sentence, it must state the reasons underlying the sentencing decision. Ind. Code § 35-38-1-3. An adequate explanation contains at least three elements: (1) a list of the significant aggravating and mitigating factors, (2) a statement of the specific reason why each factor is aggravating or mitigating, and (3) an evaluation and balancing of the factors. Scheckel v. State, 655 N.E.2d 506, 509 (Ind. 1995).

Hosler contends that the trial court abused its discretion because it considered improper aggravators. The trial court identified three aggravators, namely, that the victim was less than twelve years old, that Hosler was in a position of trust, and Hosler's criminal history. Hosler does not contest the trial court's consideration that he was in a position of trust as an aggravator. Thus, we consider the remaining two aggravators in turn.

Hosler argues that the trial court should not have relied on the victim's age to support the enhancement of his sentence. Hosler is correct that where a victim's age is an element of the offense, then it may not also constitute an aggravator to support an enhanced sentence. See McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). However, the trial court may properly consider the particularized circumstances of the factual elements of an offense as aggravating factors. Id. Here, the victim's age is an element of

[1] Although the sentencing statutes were amended in April 2005 to provide for an advisory sentence within a range of years, the sentencing statutes in effect when Hosler committed the offense in 1999 provided for a presumptive sentence within a range. The law that was in effect at the time of the commission of the crime controls the resolution of sentencing issues. Peace v. State, 736 N.E.2d 1261, 1267 (Ind. Ct. App. 2000), trans. denied. Thus, we analyze the sentencing issues using the presumptive sentencing scheme in effect in 1999.

the offense,[2] and the State concedes that the victim's age, without more, may not be used as an aggravator to support an enhanced sentence. Thus, the trial court abused its discretion to the extent that it considered the victim's age as an aggravator.

Hosler also alleges that the trial court should not have considered his prior arrests when it considered his criminal history. Hosler cites to Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006) (citing Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005)), in support of his contention that "[i]t is not proper to consider arrests without convictions as evidence of a defendant's criminal history." Appellant's Brief at 4. Hosler misstates that rule of law.

The court in Patterson held that "[a] record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not properly be considered as evidence of criminal history." Patterson, 846 N.E.2d at 727 (emphasis added). By using the qualifier "without more," the court in Patterson implied that a record of arrest in conjunction with a history of convictions may properly be considered to support an enhanced sentence. Indeed, our supreme court held in Taylor v. State, 695 N.E.2d 117, 121 (Ind. 1998), that a trial court did not err when it considered uncharged criminal conduct as part of Taylor's criminal history to support the enhancement of his sentence. "Although we have stated that a defendant's arrest record alone cannot justify an enhanced sentence, it does not preclude a trial court from attributing to a defendant's arrest record the risk that defendant may commit a similar act in the future." Id. There, the trial court stated:

[2] Under Indiana Code Section 35-42-2-1(a)(2), battery is a Class D felony if the victim is less than fourteen years of age and the perpetrator is at least eighteen years of age. The information alleged that M.W. was eleven years old at the time of the offense.

> I can look at charged and uncharged, . . . and I can look at the cases in which he's charged and cases that were not brought down to conviction. But, I also think that the relative weight that I give to each one of those incidents. [sic] I give more weight to a conviction than I do [to] an arrest and I give more weight to an arrest than I do to somebody just coming in and saying such and such happened and nothing else to substantiate it.

Id. (omission in original).

Under the presumptive sentencing scheme, "a trial court may evaluate 'any other factor which reflects on the defendant's character, good or bad' when determining the appropriate sentence to impose." Id. (citing Tunstill v. State, 568 N.E.2d 539, 545 (Ind. 1991)). Thus, in Taylor, the supreme court held that "the trial court's focus on the defendant's behavior coupled with its prioritization of the relative weight assignable to different types of incidents appears to us to be an appropriate way to assess defendant's character." Id. (citing Ind. Code § 35-38-1-7.1(a)(1) to -(3) (Supp. 1994)). The court also noted that Taylor's uncharged conduct was not the sole factor used to support the enhancement of his sentence. Id.

Here, the trial court did not rely solely on a history of arrests when it found that Hosler had a criminal history. Instead, the record shows that Hosler had a 1984 juvenile adjudication for child molesting and convictions in 1994 and 2000 for battery. Hosler's criminal history is related in nature to the instant offense, as is his arrest record. We conclude that the trial court did not abuse its discretion when it considered Hosler's arrest record in conjunction with his history of convictions.

Even if the trial court had abused its discretion when it considered uncharged conduct as part of Hosler's criminal history to support an enhancement, Hosler has not met his burden of showing that the trial court abused its discretion when it relied on his

juvenile adjudication and prior battery convictions to support an enhanced sentence. Specifically, Hosler has not supported that contention with meaningful argument or citations to authority. Therefore, he has waived this issue for appellate review. See Ind. Appellate Rule 46(A)(8)(a).

Hosler next argues that the trial court failed to find two significant mitigators. A finding of mitigating circumstances lies within the trial court's discretion, and the court is not obligated to find that mitigating circumstances exist at all. Widener v. State, 659 N.E.2d 529, 533 (Ind. 1995). "Inclusion of mitigators in the sentencing statement is mandatory only if they are used to reduce the [advisory] sentence or to offset aggravators." Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997) (citation omitted). And only those mitigators found to be significant must be enumerated. Id. In addition, the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant. Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998). Although a trial court must consider evidence of mitigating circumstances presented by the defendant, it is not obligated to explain why it has found that the mitigator does not exist. Allen v. State, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000). Indeed "the 'proper' weight to be afforded by the trial court to the mitigating factors may be to give them no weight at all." Crain v. State, 736 N.E.2d 1223, 1242 (Ind. 2000).

Hosler first argues that the trial court should have found as a mitigator that he had "accepted responsibility for his actions by pleading guilty." Appellant's Brief at 4. But Hosler did not argue at the trial court that his guilty plea should be considered a

mitigator. Because he failed to raise the argument before the trial court, the issue is waived. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Waiver not withstanding, we address the issue here. "[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006). Here, Hosler received a substantial benefit by pleading guilty to battery, as a Class D felony, because in return the State dismissed the charge of child molesting, as a Class A felony. The presumptive sentence for a Class A felony was thirty years, Ind. Code § 35-50-2-4 (2005), but the presumptive sentence for a Class D felony was only one and one-half years, Ind. Code § 35-50-2-7 (2005). Hosler received a significant benefit under the guilty plea through the dismissal of the child molesting charge because he was exposed to a much lower possible sentence. Thus, we conclude that the trial court did not abuse its discretion when it failed to find that his guilty plea was a significant mitigator.

Hosler also alleges that the trial court should have found as a mitigator that an executed prison term would work a considerable hardship on his family. "A sentencing court is not required to find a defendant's incarceration would result in undue hardship on his dependents." Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied. "Our Indiana Supreme Court has often noted this mitigator can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term." Id. (citation omitted). Here, Hosler has not shown how imprisonment for an enhanced term of three

years will cause more hardship than incarceration for the presumptive term of one and one-half years. Thus, his argument fails.

In sum, the trial court abused its discretion when it identified the age of the victim as an aggravator, but the trial court properly considered Hosler's criminal history, including his arrest record, and his abuse of a position of trust as aggravators. Hosler has not shown that the trial court should have found any other significant mitigators. Considering the two valid aggravators in light of the mitigator identified by the trial court, we can say with confidence that the enhanced sentence should be affirmed on appeal. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005) (where the court balanced the valid aggravators and mitigators and stated "with confidence" that Trusley's sentence enhancement should be affirmed).

Issue Two: Indiana Appellate Rule 7(B)

Hosler also contends that his three-year sentence is inappropriate in light of the nature of the offense and his character. If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. App. R. 7(B). Hosler does not support his argument on this issue with citation to authority. As such, the issue is waived. See Ind. App. R. 46(A)(8). Waiver notwithstanding, we consider whether Hosler's sentence is inappropriate.

At the conclusion of the sentencing hearing, the trial court imposed sentence as follows:

> With regard to the offense, Mr. Hosler, you are sentenced to one and one-half years. The court will add one and one-half years for aggravating

> circumstances. Specifically, in this particular case, the victim was less than twelve years old at the time that the offense occurred; she was eleven years old. You were in a position of trust, acting as a father figure for the victim. Your prior criminal history consists of one prior child molesting [adjudication] as a juvenile. You have a battery in 1997, a battery in 2000. The court would also note that you had a battery in 1994, 1997, and the year 2003, which were dismissed.
>
> The court finds as mitigating circumstances that you have no prior felony offenses, although two of the prior offenses to which you pled guilty to started out as felonies. They were either pled to or sentenced as misdemeanor offenses. The court does not consider the defendant's plea of guilty to be a mitigator in this particular fact, nor an aggravator. The court would note that this case started as a Class A felony. The plea was to a Class D felony.
>
> The court finds that the aggravating circumstances outweigh the mitigating circumstances.
>
> You are sentenced to a period of three years. You are assessed court costs. You have four days credit.

Transcript at 123-25.

Regarding the nature of the offense, Hosler was a "father figure" to the victim when he committed the offense. Hosler does not contend that the trial court should not have considered as an aggravator that he was in a position of trust relative to the victim. Further, Hosler's criminal history, both charged and uncharged conduct, is similar in nature to the instant offense. He has a juvenile adjudication for child molesting, 1997 and 2000 convictions for battery, and 1994, 1997, and 2003 arrests for battery. And, significantly, Hosler was originally also charged with child molesting, but that charge was dropped pursuant to the plea agreement. On these facts, we cannot say that the three-year sentence is inappropriate in light of the nature of the offense.

Under the "character of the offender" prong of Appellate Rule 7(B), we note, again, Hosler's criminal history, which is similar in nature to the instant offense, and the fact that he was in a position of trust. His guilty plea was not so much an acceptance of responsibility as a method to avoid trial on the child molesting charge. Indeed, Hosler did not express any remorse or responsibility at the guilty plea hearing, at the sentencing hearing, or when given the opportunity to make a statement for the pre-sentence investigation report. On this record, we cannot say that the three-year sentence is inappropriate in light of Hosler's character.

Affirmed.

DARDEN, J., and BAKER, J., concur.