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**IN THE
COURT OF APPEALS OF INDIANA**

ERNEST DEAN THOMPSON,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 48A02-0606-CR-456

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0509-FA-384

December 14, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Ernest Thompson appeals from the sentence imposed by the trial court after pleading guilty to six counts of child molesting, all Class A felonies.¹ On appeal, Thompson raises two issues, which we consolidate and restate as whether his aggregate seventy-year sentence was proper and appropriate. Concluding that the trial court relied on two invalid aggravating circumstances to enhance Thompson's sentence, we reverse the forty-year sentence imposed for his conviction on count six, reduce it to the advisory sentence of thirty years, and order that it be served consecutive to the thirty-year sentence imposed on count two. We further hold that imposition of consecutive sentences is not inappropriate in light of the nature of the offense or Thompson's character.

Facts and Procedural History

Between May 1, 2005, and September 28, 2005, Thompson, who was approximately twenty-six years old, engaged in acts of intercourse and deviate conduct with his ten-year-old stepdaughter, J.C. During questioning, Thompson told police that he had been married to the girl's mother for over four years, and claimed to be a good father and husband. He characterized his relationship with J.C. as "[j]ust a daughter and father thing." State's Exhibit 1 at 7. He also admitted to penetrating J.C.'s vagina with his penis seven times, digital penetration of her vagina five or six times, oral touching of her vagina on numerous occasions, and digital penetration of her anus twice. Each occurrence took place in the morning before J.C. went to school.

At the guilty plea hearing, Thompson first denied molesting J.C., and then denied remembering the activity. Even so, he pled guilty without entering into a plea agreement with the State. After considering aggravating and mitigating circumstances, the trial court sentenced Thompson to five concurrent thirty-year terms, and a sixth term of forty years. Thompson's thirty-year sentence on count two was imposed consecutive to his forty-year sentence on count six, totaling a seventy-year aggregate sentence. Thompson now appeals.

Discussion and Decision

I. Sentence Enhancement

Thompson contends that the trial court enhanced his sentence based upon improper aggravating factors. Sentencing decisions are within the trial court's discretion and will be reversed only upon a showing of an abuse of that discretion. Edmonds v. State, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), trans. denied, cert. denied, --- S.Ct. ----, 2006 WL 2415754 (Oct. 30, 2006). The trial court's sentencing discretion includes determining whether to increase the sentence, to impose consecutive sentences on multiple convictions, or to do both. Id. If we find an irregularity in a trial court's sentencing decision, we may remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances at the appellate level. Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied.

The sentencing statute regarding Class A felonies, as amended effective April 25, 2005, states, "A person who commits a Class A felony shall be imprisoned for a fixed term of

¹ The State dropped one count of child molesting, which was based upon a date prior to those charged

between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.”

Ind. Code § 35-50-2-4. An advisory sentence is “a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.” Ind. Code § 35-50-2-1.3(a). Moreover, “regardless of the presence or absence of aggravating circumstances or mitigating circumstances,” a trial court may impose any sentence that is authorized by statute, and permissible under Indiana’s constitution. Ind. Code § 35-38-1-7.1(d). Although our supreme court has not yet interpreted the amended statute, its plain language seems to indicate that “a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.” Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. However, if a trial court does find, identify, and balance aggravating and mitigating factors, it must do so correctly, and we will review the sentencing statement to ensure that the trial court did so. See Ind. Code § 35-38-1-3 (“if the court finds aggravating circumstances or mitigating circumstances, [the trial court shall record] a statement of the court’s reasons for selecting the sentence that it imposes”). Thus, regardless of aggravators or mitigators, the trial court could not abuse its discretion by imposing the advisory thirty-year sentence for all but one of Thompson’s convictions. However, we review the enhancement of one of his convictions to a forty-year term, to run consecutive to one of his thirty-year terms, based on the trial court’s identification and weighing of aggravating and mitigating circumstances.

If a trial court imposes consecutive sentences, it is required to identify all significant

in the other six counts.

aggravating circumstances. Edmonds, 840 N.E.2d at 461. We examine the record to insure the trial court adequately explained its reasons for selecting the sentence imposed. Id. Indiana Code section 35-50-1-2(c) states that a sentencing court may consider the aggravating and mitigating circumstances listed in Indiana Code section 35-38-1-7.1 when deciding whether to impose consecutive sentences. These considerations include whether the “victim of the offense was less than twelve (12) years of age” and whether the defendant “was in a position having care, custody, or control of the victim of the offense.” Ind. Code § 35-38-1-7.1(a)(3), (8).

Here, the trial court indicated three reasons for enhancing Thompson’s sentence: (1) J.C. was under the age of twelve; (2) Thompson was in a position having care, custody, or control of J.C.; and (3) the “multiple victimizations” of J.C. Transcript at 64. Thompson questions each of these rationales. With regard to the trial court’s reliance on Thompson’s position as person having care, custody, or control of J.C., he argues, under Blakely v. Washington, 542 U.S. 296 (2004), that this fact must either be admitted by him or determined by a jury, which he contends did not occur. However, during questioning by police, Thompson explained that he had been married to the girl’s mother for over four years, and claimed to be a good father and husband. He characterized his relationship with J.C. as “[j]ust a daughter and father thing.” State’s Ex. 1 at 7. Moreover, during the guilty plea hearing, when directly asked by the trial court whether J.C. was his step-daughter and whether he was married to J.C.’s mother, Thompson replied “Yes, sir.” Tr. at 40. Additionally, J.C.’s mother testified at the sentencing hearing that she was married to

Thompson, who she said “was a good husband” who “supported us.” Id. at 53. Thompson’s admissions to police and the trial court, confirmed by testimony from J.C.’s mother, sufficiently support the trial court’s determination that Thompson was in a position having care, custody, or control of J.C.² Thus, we cannot say the trial court improperly enhanced Thompson’s sentence based on this aggravator.

However, the other two aggravating factors relied upon by the trial court were invalid. A fact comprising a material element of a crime may not also be used as an aggravating circumstance to support an enhanced sentence. Kien v. State, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003), trans. denied. Thompson argues, the State concedes, and we agree that the trial court’s reliance on Thompson’s multiple victimizations of J.C. was not a proper aggravating circumstance. See id. (trial court improperly considered as an aggravating circumstance that defendant committed several acts of molestation when defendant was convicted of each act). In the present case, the evidence supported only the six instances of molestation alleged against Thompson, who pled guilty and was convicted of each. Therefore, the trial court wrongly relied on the numerous instances of molestation as an aggravating circumstance.

Likewise, the trial court wrongly relied upon J.C.’s age at the time Thompson repeatedly molested her as an aggravator. Because under Indiana Code section 35-42-4-3 the victim must be a child under fourteen years of age, the age of the victim is a material element

² We note that a violation of Thompson’s Fifth and Sixth Amendment rights would have been implicated had the trial court solely relied upon Thompson’s failure to object to facts contained in his presentence report as evidence of Thompson’s position in relation to J.C. See Thomas v. State, 840 N.E.2d 893, 903 (Ind. Ct. App. 2006), trans. denied (citing Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005), cert. denied, 127 S.Ct. 90 (2006)) (concluding that using a defendant’s failure to challenge a presentence report to

of the crimes of which Thompson was convicted. Therefore, it was improper for the trial court to rely upon J.C.'s age as an aggravator.

The State argues that a trial court may properly consider the particularized circumstances of the material elements of the crime. In this regard, our supreme court has held that the age of a victim may properly be used as an aggravator in child molestation cases where the victim is of tender age. Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002); Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988); see also Kien, 782 N.E.2d at 411. Nevertheless, as we explained in Bear v. State, 772 N.E.2d 413, 427 (Ind. Ct. App. 2002), trans. denied, where the trial court merely reiterates the age requirement of the statute, and lists no other considerations pertaining to age, there is “no showing of the particularized individual circumstances required under Stewart to allow the age of [the victim] to constitute a separate aggravating factor.” Here, the trial court made no showing beyond stating that J.C. was under age twelve. The trial court did not use terminology of “tender years” and did not include observations such as those in Stewart, where the court noted that “the victim was not only a minor, but one of tender age, he was handicapped, and appellant’s acts caused the child[] serious emotional harm.” 531 N.E.2d at 1150.

Thompson also claims that the trial court failed to give significant mitigating weight to his lack of a criminal history, the fact that he pled guilty, and the fact that he was a productive member of society. A trial court is not obligated to find mitigating circumstances, or to assign the same weight to a mitigating circumstance as does the defendant. Patterson v.

establish an admission that he was married to victim’s mother does not constitute an admission that he was in

State, 846 N.E.2d 723, 727, 729 (Ind. Ct. App. 2006). Here, the trial court identified and gave weight to Thompson’s lack of criminal history and the fact that he pled guilty. However, the trial court determined that the aggravators outweighed the mitigators.

The trial court did not find Thompson’s history as a productive member of society to be mitigating, and was under no obligation to explain its reasoning. Id. at 727. “An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.” Garner v. State, 754 N.E.2d 984, 995 (Ind. Ct. App. 2001), aff’d, 777 N.E.2d 721 (Ind. 2002). Thompson does neither with regard to being a productive member of society. Thus, we cannot say the trial court erred by not assigning weight to this circumstance.

Ultimately, although J.C.’s multiple victimization and age were not proper aggravating circumstances, the trial court’s reliance on these factors was harmless error. A single aggravating circumstance may be sufficient to enhance a sentence, and a sentence enhancement may still be upheld when a trial court improperly applies an aggravator but another valid aggravator exists. Kien, 782 N.E.2d at 411. Nonetheless, in light of the mitigating weight given to Thompson’s lack of criminal history and his guilty plea, we decline to hold that the Thompson’s position as a person having care, custody, or control of J.C. is sufficient under the present circumstances to both enhance one of his sentences to a forty-year term and impose that sentence consecutive to a thirty-year sentence for another

a position of trust).

conviction. Instead, we reverse Thompson’s forty-year sentence imposed on count six and reduce it to the advisory term of thirty years, to be served consecutive to the thirty-year sentence imposed on count two, for an aggregate term of sixty years.³

II. Appropriateness of Thompson’s Sentence

Lastly, Thompson asks us to exercise our authority to review and revise his sentence, which we may do 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. Ind. Appellate Rule 7(B). We exercise great restraint in doing so, recognizing the special expertise of the trial bench in making sentencing decisions. Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), trans. denied. We need not discuss the appropriateness of Thompson’s sentence with regard to the enhancement of his sentence for count six, having reduced it from forty years to the advisory thirty-year term. However, to the extent that we maintain the trial court’s imposition of consecutive sentences, we consider the nature of his offenses and his character.

The nature of Thompson’s crimes, repeatedly violating his ten-year-old stepdaughter in numerous ways, is heinous. The direct effects of these molestations have been that J.C. is “stressed out,” in foster care, and getting counseling. Tr. at 54. Thompson’s character is evidenced by his decision to time and again, with periods between the molestations for him to reflect on his actions, take advantage of a position of trust and authority as J.C.’s

³ Two recent decisions from the Indiana Supreme Court confirm our reduction of Thompson’s sentence for count six in light of aggravators not meriting enhancement from the advisory sentence: Duncan

stepfather. Moreover, despite his guilty plea, Thompson's claim that he does not remember molesting J.C. reflects his failure to acknowledge the wrongness of his actions. As such, we cannot say imposition of consecutive sentences is inappropriate in light of Thompson's offense or his character.

Conclusion

The single valid aggravating factor relied upon by the trial court is not sufficient under the present circumstances to both enhance one of Thompson's sentences and impose it consecutive to another term, for an aggregate sentence of seventy years. Therefore we reverse Thompson's sentence on count six and impose the advisory sentence of thirty years. We cannot say the imposition of consecutively-served advisory sentences totaling sixty years is inappropriate given Thompson's character, or the heinous nature of Thompson's crime. We therefore affirm the trial court's imposition of advisory sentences for counts one through five, served concurrently, as well as its order that the sentence for count six be served consecutive to the sentence for count two.

Affirmed in part, reversed in part.

SULLIVAN, J., and BARNES, J., concur.