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IN THE COURT OF APPEALS OF INDIANA

JAMES E. TURPIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 80A02-0704-CR-312
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0411-FB-261

December 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, James Turpin appeals his conviction of battery, a Class B felony, and his twelve-year sentence. Turpin raises two issues, which we restate as whether sufficient evidence supports his conviction and whether the trial court abused its discretion in sentencing him. Concluding that sufficient evidence exists and that the trial court acted within its discretion in sentencing Turpin, we affirm.

Facts and Procedural History

On October 9, 2004, J.T., who was two months old at the time, attended his great-grandmother's birthday party with his parents, Turpin and Kelly Turpin. Many people held J.T., who was happy and calm throughout the party. That night, at 3:00 a.m. on October 10, Kelly awoke to change J.T.'s diaper and feed him. She put J.T. back to bed around 4:00 a.m. Kelly left for work around 5:15 a.m., at which time J.T. was still sleeping peacefully.

At 8:00 a.m. Turpin called Kelly and asked for help with J.T., whom Turpin said had been crying for an hour. Kelly could not leave work, and told Turpin to call her grandmother, Ann. When Ann arrived at Turpin's house, she found J.T. screaming in an unusual manner, and noticed a red mark on his leg. Turpin told Ann that he awoke that morning to find J.T.'s leg caught between the crib's slats. Ann rocked and fed J.T., who eventually settled down.

At 4:00 p.m. that day, Deborah Turpin, Turpin's stepmother, went to Turpin's apartment and found J.T. screaming. Deborah changed J.T. and took him home with her. Deborah rocked J.T., gave him some Tylenol, and put him on the couch, where he slept for

about fifteen minutes. After he woke up screaming, Deborah decided that "something was not right [because] [h]e never screamed and cried like that. He was always quiet and happy." Transcript at 233. Deborah then took J.T. back home and urged Turpin to take J.T. to the hospital. Turpin first stated that he did not have J.T.'s Medicaid card, and then indicated that he would wait until Kelly returned from work to take J.T. to the hospital.

When Kelly returned home that night she found J.T. crying and with a wet diaper. As she was pulling his leg out of the diaper, she heard a "pop," and immediately wrapped him up and took him to the hospital.

Doctor Susan Swindell examined J.T. in the emergency room. She quickly determined that J.T. had a broken bone in his leg and ordered an x-ray, which revealed a spiral fracture to J.T.'s left femur. Doctor Swindell testified that this injury was unusual, as "[t]he femur is one of the strongest bones in the body. It doesn't break easily." Tr. at 45. Doctor Swindell told Kelly that because of the injury's nature, she would be contacting child protective services. After Kelly gave this news to Turpin, who was outside sleeping in his vehicle, "he came in shortly afterwards and was irate and yelling and demanding that [Doctor Swindell] be taken off the case, that [she] not touch his child again, that another doctor be called in immediately to take care of him." Id. at 47. After a police officer came into the emergency room, Turpin calmed down and made no more complaints.

Further testing revealed a fracture in J.T.'s other leg and a fractured rib. Doctor Phillip Merk testified that the rib injury is "even more in the mind of abuse or indicative of abuse." Id. at 218.

On November 22, 2004, the State charged Turpin with battery, a Class B felony. A jury trial was held on December 12, 2006. At trial, Turpin testified and denied abusing J.T. He again stated that he awoke the morning of October 10 to find J.T.'s leg stuck in the crib. He also testified that he had been diagnosed with having night terrors, and that he was under a lot of stress around the time of J.T.'s injury.

At trial, all three doctors who testified stated that Turpin's explanation for J.T.'s injury was not credible. Doctor Swindell testified that the only way J.T. could have sustained a spiral fracture by getting his leg caught in the crib was if, while his leg was caught, he fell out of the crib and hung upside down. In terms of Turpin's explanation, Doctor Swindell stated, "there was no way [J.T.] could have put that kind of twist on it." Id. at 49. Doctor Jerry Powell testified that Turpin's explanation of the injury was not credible, as "the spiral fracture is more of a twisting type injury where the leg would have to be twisted to make that occur in the femur and the mechanism that [Turpin] was describing which was a falling of the actual crib gate would be more consistent with a regular fracture, straight line, consistent type fracture." Id. at 18-19. Doctor Phillip Merk also testified that in his opinion, J.T.'s injury was not the result of an accident.

The jury found Turpin guilty on December 14, 2006. The trial court held a sentencing hearing on March 14, 2007. At the hearing Turpin testified that at the time of the incident he had not been taking several prescribed medications because he could not afford them. He did not admit hurting J.T. but expressed remorse for his son's injuries. Following this testimony, a statement by Ann, and argument, the trial court made the following statement:

> [M[y main concern is for your son whose trust you totally stripped away when you injured him. . . . [T]he Court could find the circumstances are unlikely to recur again, and therefore, that could cause for a reduction of sentence . . . . But – and I wish I could find that in this case, but I can't because of what you said. I've never once heard you accept any responsibility for your actions that a jury of 12 people found that you did. I have never once heard you do anything other than blame other factors like lack of sleep or lack of medicine or stress for this brutal act that you committed on a helpless infant. I've never once seen you act in a remorseful way, even though you may be in your own way remorseful. . . . The aggravating factors found by the Court are that the victim in this case is less than 12 years of age. Even more importantly than that . . . it was your own child. . . . [Y]ou abused that position of trust. A reduced sentence in this case would depreciate the seriousness of this crime. That's another aggravating factor. There is a mitigating factor and that is that you have no prior criminal history. . . . I do find that the aggravating factors outweigh the mitigating factors.

Tr. at 338-40. The trial court issued a sentencing order that same day containing the following statement:

> The court considers the aggravating factors and the mitigating factors and now finds that there are no mitigating factors to justify a reduction in sentence. The aggravating factors are that the victim is less than 12 years of age (the Defendant's own child, an infant 2 ½ months old that he abused), and the Defendant was in a position of care and custody over the victim at the time of the offense. The only mitigating factor is that Defendant has no prior criminal history. The aggravating factors outweigh any mitigating factors. Any reduction in the sentence would depreciate the seriousness of the crime.

Appellant's App. at 16. The trial court then sentenced Turpin to an enhanced sentence of twelve years, with two years suspended to supervised probation. Turpin now appeals his conviction and sentence.

Discussion and Decision

I. Sufficiency of the Evidence

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

In order to sustain a conviction for battery as a Class B felony, sufficient evidence must exist that Turpin knowingly or intentionally touched J.T. in a rude, insolent, or angry manner, that the touching resulted in serious bodily injury, that J.T. was less than fourteen years old, and that Turpin was at least eighteen years old.[1] Ind. Code § 35-42-2-1(a)(4). Turpin argues that the State introduced insufficient evidence to identify Turpin as the person who committed the battery.

Turpin emphasizes in his brief that the evidence against him is purely circumstantial.

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[1] Battery is also a Class B felony if it results in the death of an endangered adult. Ind. Code § 35-42-2-1(a)(7).

We note that convictions may be based on purely circumstantial evidence, and that such evidence "need not exclude every reasonable hypothesis of innocence." Hampton v. State, 873 N.E.2d 1074, 1079 (Ind. Ct. App. 2007). "It is enough if an inference reasonably tending to support the verdict can be drawn from the circumstantial evidence." Id.

Turpin first argues the evidence does not establish when the injury occurred, pointing to the testimony of Doctor Merk, Doctor Powell, and Doctor Swindell. Doctor Merk testified that based on his observations, the injury could have occurred any time between September 28 and October 10. Doctor Powell testified that, based on the lack of callus formation on J.T.'s bones, the injury occurred within five to six days of his examination, which took place on October 11. Doctor Swindell testified that she believed, but could not be sure, that the injury had occurred within forty-eight hours of her examination on October 10.

This medical testimony, standing alone, does not pin down the time of the injury. However, in pointing to this testimony, Turpin ignores the testimony regarding J.T.'s behavior at the birthday party the evening before Kelly took J.T. to the hospital and Kelly's testimony indicating that J.T. was fine when she left the morning of October 10. Such testimony allows a reasonable inference that J.T.'s leg was not broken at the time of the party on October 9, and was injured sometime after Kelly left for work the morning of October 10. Ann also testified that when she arrived at Turpin's apartment on the morning of October 10, J.T. was screaming and that he had a red mark on his leg. Indeed, Turpin's own testimony and defense theory was that J.T.'s leg was injured the morning of October 10, but that J.T.'s injury was the result of an accident involving the crib, and not intentional abuse.

Turpin next argues that he did not have exclusive control of J.T. from the time that Kelly left until the time J.T. arrived at the hospital. He points out that Kelly was alone with J.T. before she left for work, and that other people throughout the day had contact with J.T. However, this lack of exclusive control throughout the day is largely immaterial, as the evidence discussed above permits the reasonable inference that J.T. was injured during a period where Turpin did have exclusive control of J.T. See Woodrum v. State, 498 N.E.2d 1318, 1323-24 (Ind. Ct. App. 1986) (concluding sufficient evidence existed to support conviction for reckless homicide where witness testified she left victim in good health with defendant, who had sole opportunity to inflict injuries).

We recognize that mere presence at the scene of a crime, standing alone, will not support a conviction. Roop v. State, 730 N.E.2d 1267, 1271 (Ind. 2000). However, such presence along with other circumstances may be sufficient. Id. Here, Turpin unquestionably had the opportunity to commit this crime, and the evidence permits the reasonable inference that the crime happened at a time when he was the only person with such opportunity. Further, three doctors testified that Turpin's explanation for J.T.'s injury was implausible. See Mitchell v. State, 557 N.E.2d 660, 664 (Ind. 1990) (noting defendant's explanation of victim's injuries was not consistent with extent of the injuries). The evidence of Turpin's opportunity, the testimony discounting his version of events, and the evidence of other injuries suggesting child abuse constitutes sufficient evidence to support his conviction. Cf. Roop, 730 N.E.2d at 1271 (defendant's statement that could be construed as an admission of guilt, physical evidence demonstrating that sexual abuse had taken place, defendant's

opportunity, and the lack of others' opportunity constituted sufficient evidence to support conviction for child molestation); Prewitt v. State, 819 N.E.2d 393, 416 (Ind. Ct. App. 2004) (concluding sufficient evidence existed where forensic evidence indicated victim's death was homicide, not suicide, and defendant had motive and opportunity), trans. denied; Dayton v. State, 501 N.E.2d 482, 484 n.3 (Ind. Ct. App. 1986) (holding State established prima facie case of battery where defendant's wife testified that the victim had no bruises when she dropped him off at the defendant's house, defendant had sole custody of child prior to wife's discovery of bruises, and defendant admitted he had spanked the child).

Although the evidence in this case is not perfect, such is rarely the case. We conclude the evidence introduced permits the reasonable inference that Turpin committed battery on J.T.

II. Sentencing

Under the presumptive sentencing scheme, which applies in this case,[2] if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating

[2] Both parties seem to believe this case is reviewed under the current "advisory" sentence scheme. However, Turpin committed this crime prior to April 25, 2005, when our legislature adopted this sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Because Turpin committed his crime before this date, the "presumptive" sentencing scheme applies. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Rose, 810 N.E.2d at 365. We will not modify the trial court's sentence unless the trial court's decision was clearly "against the logic and effect of the facts and circumstances before the court." Id.

B. Aggravating Circumstances

In sentencing Turpin to a sentence enhanced beyond the presumptive, the trial court found three aggravating circumstances: (1) J.T.'s age; (2) Turpin's position of trust with J.T.; and (3) a reduced sentence would depreciate the seriousness of the crime. The trial court found Turpin's lack of criminal history to be the sole mitigating circumstance.

1. Lack of Remorse

Turpin first argues that the trial court improperly found his lack of remorse to be an aggravating circumstance. However, our review of the trial court's oral and written sentencing statements indicates that the trial court did not find Turpin's lack of remorse to be an aggravating circumstance. Instead, the trial court merely declined to find it as a mitigating circumstance.

2. Depreciation of the Seriousness of the Crime

Our supreme court has held that it is improper for the trial court to use the aggravating circumstance "'that imposition of a reduced sentence would depreciate the seriousness of the crime'" when the trial court does not consider imposing a reduced sentence. Bacher v. State,

686 N.E.2d 791, 801 (Ind. 1997). Here, the trial court did consider imposing a reduced sentence. See tr. at 338 ("[T]he Court could find the circumstances are unlikely to recur again, and therefore, that could cause for a reduction of sentence."). Therefore, this aggravating circumstance was proper. See Loyd v. State, 787 N.E.2d 953, 961 (Ind. Ct. App. 2003).

3. The Victim's Age

In regard to the victim's age, we note that the victim's age is an element of battery as a Class B felony. See Ind. Code § 35-42-4-1(a)(4) (victim must be less than fourteen years old). "When the age of a victim constitutes a material element of the crime, then the victim's age may not also constitute an aggravating circumstance to support an enhanced sentence." McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). In order to properly use this aggravating circumstance, the trial court must identify "particularized circumstance[s] that would justify relying on the victim's age[] as [an] aggravating circumstance[]." Id.

At the sentencing hearing, the trial court repeatedly recognized that J.T. was not only under twelve, but also an infant, and referred to J.T. as "helpless" on two occasions. Tr. at 339. Although the trial court could have more explicitly indicated why it found the victim's age to be an aggravating circumstance, we think it obvious from the context of the case and the trial court's statement that it found J.T.'s age to be an aggravating circumstance because, as a two-month-old, J.T. was more helpless against abuse than an older victim. Cf. Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003) (trial court properly considered victim's age where trial court "specifically noted that a four or five-year-old child is extremely vulnerable

to sexual predation because of her 'tender years.'"), trans. denied. Thus, the trial court properly found this aggravating circumstance.

4. Position of Trust

Finally, Turpin concedes, and we agree, that Turpin's violation of a position of trust is a valid aggravating circumstance. See Ind. Code § 35-38-1-7.1(a)(8) (trial court may consider as an aggravating circumstance that the defendant "was in a position having care, custody, or control of the victim of the offense").

B. Mitigating Circumstances

We will conclude a trial court abused its discretion by failing to find a mitigating circumstance if the defendant establishes "that the mitigating evidence is both significant and clearly supported by the record." Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. Also, except for a defendant's guilty plea, the circumstance must have been advanced for consideration at the sentencing hearing. Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (opinion on reh'g).

1. Remorse

Turpin argues that the trial court improperly failed to find his remorse to be a significant mitigating circumstance. Although a defendant's remorse may serve as a valid mitigating circumstance, "[i]t is within the sentencing court's discretion to determine whether remorse should be considered as a 'significant' mitigating factor." Evans v. State, 727 N.E.2d 1072, 1083 (Ind. 2000). "[W]ithout evidence of some impermissible consideration by the trial court, a reviewing court will accept its determination as to remorse." Stout v. State,

834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied.

Here, the trial court's statement at the sentencing hearing indicates it considered remorse as a mitigating circumstance, but declined to find it as such. This decision was within the trial court's discretion. O'Neil v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (trial court did not abuse its discretion in declining to find remorse to be a mitigating factor after discussing defendant's remorse at the sentencing hearing); cf. Anglemyer, 868 N.E.2d at 493 (recognizing that the trial court did not overlook the defendant's mental illness, but merely determined that it was not a significant mitigating circumstance).

2. Inability to Afford Medication

At the sentencing hearing, Turpin testified that he had been prescribed medication "to help [him] sleep, some to keep seizures under control, some to control blood pressure," but that he was not taking them at the time of the battery because they were too expensive. Tr. at 324. Turpin has wholly failed to explain why this circumstance should be viewed as mitigating. If he is arguing that he had some sort of mental illness, he has failed to explain how this illness affected his ability to control his behavior and to identify any nexus between his illness and his commission of the crime. See Ankey v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005) (identifying factors sentencing courts should consider in regard to a defendant's mental illness), trans. denied. We conclude the trial court did not abuse its discretion in declining to find Turpin's inability to afford medication a mitigating circumstance.

C. Balancing

We recognize that Turpin's complete lack of criminal history is a significant mitigating circumstance. See Sherwood v. State, 749 N.E.2d 36, 40 (Ind. 2001). However, the trial court found three valid aggravating circumstances, which it found to outweigh Turpin's lack of criminal history. We note that the abuse of position of trust has traditionally carried significant weight. See Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) ("Abusing a position of trust is, by itself, a valid aggravator which supports the maximum enhancement of a sentence for child molesting."); Winters v. State, 727 N.E.2d 758, 762-63 (Ind. Ct. App. 2000) (where trial court had found an improper aggravating circumstance, remaining circumstances of defendant's position of trust with victim and the fact that the offense involved ongoing molestation supported maximum sentence), trans. denied. Based on the discretion we afford trial courts in sentencing matters, we cannot say that the trial court abused its discretion by ordering an enhanced sentence.

Conclusion

We conclude sufficient evidence exists to support Turpin's conviction. We further conclude the trial court acted within its discretion in sentencing Turpin.

Affirmed.

KIRSCH, J., and BARNES, J., concur.