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**IN THE
COURT OF APPEALS OF INDIANA**

TONY V. LOTT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 87A04-0604-CR-219
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0309-FA-172

November 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Tony V. Lott appeals his sentence following his convictions for Incest, as a Class B felony, and Child Molesting, as a Class C felony, pursuant to a guilty plea. We address a single issue on review, namely, whether the trial court abused its discretion when it enhanced his sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

In May of 1999, Lott's then-wife, Dara, learned that Lott had inappropriately touched their four-year-old daughter, S.L. When confronted, Lott told Dara that "it was just one time and . . . it would never happen again." Transcript at 30. Subsequently, Lott sought medical attention for depression. However, in August of 2001, Dara learned that Lott had molested S.L. "in excess of twenty times prior to [her] finding out about that one time." *Id.* at 32. Dara also learned that Lott, when he was a child, had been inappropriately fondled by his older brother and that he had a sexual relationship with his sister during their childhood. Dara "immediately informed him to get his stuff out of the house that evening, and that [she] would file for divorce the next day." *Id.* Dara also informed the local authorities, and the State brought charges against Lott for child molesting, as a Class A felony, incest, as a Class B felony, and child molesting, as a Class C felony.

Lott entered a preliminary plea of not guilty on September 29, 2003, followed by a Notice of Insanity Defense on May 21, 2004. On June 27, 2005, Lott pleaded guilty but mentally ill to the incest and Class C child molesting counts. In exchange, the State

dropped the Class A child molesting count. Lott then underwent three independent, court-ordered psychological evaluations, by Dr. Thomas Liffick, Dr. David Cerling, and Dr. John Ireland, for purposes of evaluating his claim of insanity.

On March 21, 2006, the trial court found Lott guilty but mentally ill on the incest and Class C child molesting counts. In sentencing Lott, the trial court found one aggravator, namely, Lott's position of trust with S.L. The trial court also explicitly considered the following mitigators: the hardship of incarceration on Lott, his remorse, and Lott's guilty plea. The trial court expressly declined to consider whether Lott posed a risk to commit future crimes, the victim's age, any criminal history Lott may have had, and Lott's potential need for correctional or rehabilitative treatment. After finding that the aggravator outweighed the mitigators, the trial court sentenced Lott to eighteen years on the incest count and seven years on the child molesting count. The trial court imposed the sentences concurrently per the plea agreement. This appeal ensued.

DISCUSSION AND DECISION

Sentencing decisions are generally within the discretion of the trial court and will only be reversed upon a showing of an abuse of discretion. Marshall v. State, 832 N.E.2d 615, 623 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. Id. The court may increase a sentence or impose consecutive sentences if the court finds aggravating factors. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001); Ind. Code § 35-38-1-7.1(b).¹

¹ Both parties agree that the sentencing statutes apply as written on the date of the commission of the crimes.

Indiana law requires that the trial court take the following steps during sentencing: (1) identify all significant mitigating and aggravating circumstances; (2) specify facts and reasons which lead the court to find the existence of each such circumstance; and (3) demonstrate that the mitigating and aggravating circumstances have been evaluated and balanced in determination of the sentence. Id. A single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained its reasons for the sentence. Vazquez v. State, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), trans. denied.

At the sentencing hearing, the trial court stated in pertinent part:

I have read the Defendant's sentencing memorandum, along with the State's sentencing memorandum. I've considered the factors that both sides have posed here, and I'm required to consider and weigh those. A couple of things I think are worthy of note, there's no doubt that incarceration of the Defendant poses a hardship. . . . [T]he Defendant will lose those [Social Security Disability] benefits if he is incarcerated. . . . Of course, it also occurs to me that . . . the government is already supporting the Defendant If the Defendant is incarcerated, the government is still supporting him. It's just a difference of which hand is feeding him. . . . [S]o . . . the hardship is not anything I'm willing to give any weight to. As to the remorse, I think the Defendant is remorseful. . . . And I don't have any reason to doubt that Mr. Lott is not sincere about his remorse, but I don't find it out of the ordinary. I also considered the fact that Mr. Lott pled guilty to this case. . . . But in this particular case, the charge was filed on September the fifth of 2003, and the Defendant pled guilty some twenty-three months later. . . . There were twelve Court appearances prior to the date that the Defendant pled guilty. There were numerous motions and pleadings that were filed on both sides, and the case has been contentious, which criminal cases should be contentious in the appropriate situation. So I point these out, not as a disparagement of the Defendant's rights, but to show that the State and the Court has [sic] spent significant time and resources on this case. So, in this case I give very little weight to the fact

that the Defendant has pled guilty. . . . The relationship between the parent and a child is just something the Court cannot overlook. You know, the abuse of that relationship is significant. I believe the parent/child relationship here indeed makes these offenses more heinous than ordinary, especially when you're dealing with the child molesting charge. Standing in the role of a parent, you know, the Defendant should've been a figure in whom his daughter could put her trust and to whom she could turn for protection. Instead, the Defendant violated that trust and became one his daughter needed to be protected from, instead of running to protection for. . . . And a parent enjoys a position of mental authority over their child, especially when they're living in the same home. And the child, especially a small child, to a great extent lives totally at the mercy of their parents. The child places trust in family members that he or she would not place in an unrelated adult. . . . The Defendant, as the victim's father, held a position of trust [that] facilitated these crimes, assaults, against the victim. He not only had access to the child, but he was in a position to conceal his actions. When these types of offenses occur in a parent-child relationship, the child is forced to submit to this abuse at any time the Defendant chooses, and there is no rational cause for the abuse [that] the child would understand. Moreover, a parent abusing a child is different than when a noncustodial person abuses the child, because the child's custodians have the opportunity to discover the injury. It's difficult for me to conceive of a circumstance wherein a child would be more vulnerable to such an offense than when the attack was perpetrated by a person entrusted with the victim's supervision and control. The Defendant, as a father of the victim, abused his position as a parent in a concrete way by using it as an occasion to engage in sexual activity. He exploited the close relationship with the victim that accompanied the role of a parent. . . . [Such an assault] constitutes by any standard a substantial aggravating circumstance. . . . Although the Defendant suffered from a mental illness, there's absolutely no semblance of justification for this offense. It is simply a manifestation of exceptional depravity on the part of the Defendant, and this Court sees no reason whatsoever why the Defendant should ever be allowed out of prison. But, unfortunately, the law circumscribes the maximum sentence that I'm authorized to give. . . . So, having considered the circumstances . . . the Court has determined that the balance is in favor of an enhanced sentence.

Transcript at 87-92.

Hence, the trial court enhanced Lott's sentence based exclusively on the position of trust aggravator. Lott, however, initially challenges the trial court's use of that

aggravator. Specifically, Lott contends that his “position of trust” of S.L. is a material element of the crime of incest and is therefore inappropriate for sentencing purposes. See Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988). We cannot agree.

Indiana Code Section 35-46-1-3(a) defines the crime of incest as: “A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew[.]” Lott does not dispute that the relationship contemplated in Section 35-46-1-3(a) is a biological one; rather, Lott contends that “position of trust is part and parcel of the biological relationship required.” Reply Brief at 4. In support of that position, Lott maintains that “[i]t is difficult to comprehend how a person, related to another biologically . . . could be considered as someone who does not occupy a ‘position of trust.’” Lott further asserts that “[t]he definition of the word ‘trust’ . . . cannot be separated from the biological relationship.” Id. at 5.

Although we agree that any number of incestual relationships might also involve an abuse of a position of trust, there is no necessary connection between the likelihood of an abuse of trust and the statutory requirements of incest. Indeed, a younger sibling could commit incest with an older sibling, even though the younger sibling never had a position of trust with the older sibling. Or a biological father could have an estranged relationship with a daughter such that either the daughter does not know of the biological father or the father otherwise lacks a position of trust over her, yet incest could still occur.

As such, the position of trust aggravator is not “part and parcel” of the statutory biological relationship, and Lott’s arguments on this issue are unpersuasive.

Lott further contends that the trial court erred in failing to consider his mental illness as a substantial mitigating factor. Specifically, Lott argues that the trial court acknowledged his mental illness by finding him guilty but mentally ill, yet ignored the mitigating effect of his mental illness and did not properly articulate why the need for correctional or rehabilitative treatment was not a mitigating circumstance. However, whenever a defendant is found guilty but mentally ill, the trial court shall sentence him in the same manner as a defendant found guilty of the offense. Ind. Code § 35-36-2-5(a). As noted above, a finding of mitigating circumstances lies within the trial court’s discretion. Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005) (quoting Corbett v. State, 764 N.E.2d 622, 630-31 (Ind. 2002) (citations omitted)), trans. denied. The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). And only those mitigators found to be significant must be enumerated. Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997). The allegation that the trial court failed to find a mitigating circumstance requires Lott to establish that the mitigating evidence is both significant and clearly supported by the record. See Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999).

The American Psychiatric Association’s definitions of mental illness, contained in the Diagnostic and Statistical Manual of Mental Disorders, have continued to expand to the point that a recent study declared that about half of Americans become mentally ill. Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). This suggests the need for a

high level of discernment when assessing a claim that mental illness warrants mitigating weight. Id. The supreme court has laid out several factors to consider in weighing the mitigating force of a mental health issue. Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. Covington, 842 N.E.2d at 349.

Here, Lott has not satisfied his burden of showing that the mitigating evidence is both significant and clearly supported by the record. Although all the doctors agreed that Lott suffered from depression, their opinions on the effect of the depression were varied. Dr. Ireland's diagnosis suggests that Lott was not highly limited by his depression: "He does not appear to have sociopathic features in general and was gainfully employed and was a reasonable member of the community for many years." Appellant's App. at 33. Indeed, Dr. Ireland specifically commented that "[Lott] uses excuses from accepting full accountability of his behavior as noted by items such as he was sad and depressed." Id. at 26. Further, although Dr. Cerling stated that "[i]t is this examiner's opinion that [Lott] was mentally ill with a depressive disorder that substantially interfered with his mood, his behavior, and his judgment [prior to and during the time of molestation]," Dr. Cerling qualified that statement by concluding that "[Lott's] depression did not impair his ability to perceive wrongfulness at that period of time." Id. at 36. Finally, Dr. Liffick specifically found that "there is . . . little or no objective evidence of significant impairment in Mr. Lott's functioning during the time frame in question." Id. at 43. The evidence in the record, to the extent that it addresses the factors noted by our supreme court in Covington, is not clearly in Lott's favor. Thus, we cannot say that the trial court

abused its discretion in not thoroughly considering Lott's proffered mental illness as a mitigator. See Dowdell, 720 N.E.2d at 1154.

Finally, to the extent that Lott argues that the trial court's sentencing was based on a personal bias or prejudice, Lott waived the issue by not objecting during the sentencing hearing. See Carr v. State, 799 N.E.2d 1096, 1098 (Ind. Ct. App. 2003). Lott's argument in his Reply Brief that "[o]ne cannot waive a claim of bias or prejudice until such bias or prejudice has been exhibited," Reply Brief at 10, contradicts his position in his initial brief that "[t]he trial court's personal bias in this case is clear from its statement[s] [at the sentencing hearing,]" Appellant's Brief at 19. As such, we are not persuaded by Lott's counterargument.

To the extent that Lott argues the trial court improperly weighed the aggravator and mitigators, we reiterate that a single aggravating circumstance is enough to justify a sentence enhancement. McCann, 749 N.E.2d at 1121. And, here, the trial court clearly articulated its rationale for the position of trust aggravator. Thus, we cannot say that the trial court abused its discretion in sentencing Lott.

Affirmed.

DARDEN, J., and FRIEDLANDER, J., concur.