

STATEMENT OF THE CASE

William Roger Zeider appeals his convictions on three counts of Disseminating Matter Harmful to Minors, each a Class D felony. Zeider raises six issues for our review, which we consolidate and restate as:

1. Whether he received the effective assistance of trial counsel.
2. Whether the trial court abused its discretion in excluding evidence relating to an ongoing investigation of an alleged victim-witness.
3. Whether the jury properly convicted Zeider on multiple counts of disseminating matter harmful to minors.
4. Whether the trial court properly sentenced Zeider.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

C.H.¹ first met Zeider when C.H. was eight or nine years old. Around 1996, when C.H. was thirteen, Zeider asked C.H. if Zeider “could see [C.H.’s] privates.” *Id.* at 137. C.H. said no, but Zeider proceeded to remove C.H.’s pants and touch C.H.’s penis with his hands and mouth. On a subsequent occasion, C.H. awoke from a nap on Zeider’s couch while Zeider was placing his lips on C.H.’s penis. And on a third occasion, Zeider entered into a locked bedroom where C.H. was sleeping, put his lips on C.H.’s penis, and touched C.H.’s buttocks.

J.W. knew Zeider since the sixth grade, and in the summer of 2004, when J.W. was fifteen years old, J.W. visited Zeider “just about every day.” Transcript at 258. J.W. introduced a friend, C.W., to Zeider. C.W. was fourteen years old at the time. C.W.

¹ At various points in the record and the State’s brief, the initial of C.H.’s first name is replaced by his middle initial, J.

visited Zeider three or four times. When C.W. visited, Zeider normally wore only underwear. During one of C.W.'s visits, Zeider touched C.W.'s penis with his hands and mouth. Zeider also touched C.W.'s buttocks. That act occurred while J.W. was in the same room.

C.W. introduced S.M. to Zeider. S.M. was fourteen years old. As with C.W., Zeider wore only his underwear when S.M. visited. On a number of occasions, S.M., C.W., and Zeider watched pornographic films together in Zeider's living room. On another occasion, S.M. witnessed Zeider perform oral sex on C.W. Zeider instructed C.W. to "tap on his head" when C.W. was about to ejaculate. Id. at 36. Zeider also touched S.M.'s penis with his hands and mouth.

On another of S.M.'s visits, Zeider, S.M., C.W., J.W., and a twelve-year-old child, S.A., all masturbated while watching pornographic films together in Zeider's living room. On a separate occasion, S.M. brought his younger brother, T.M., to Zeider's house. T.M. was eleven years old. While Zeider, C.W., and S.M. watched pornographic films, T.M. played pool in another room. While in that other room, T.M. could hear on the television "women and stuff dancing and . . . them saying stuff and touching." Id. at 99. However, when T.M. walked into the room with Zeider, C.W., and S.M., they turned off the television "right when" T.M. entered the room "[b]ecause he [was] too young." Id. at 45, 98.

On September 20, 2004, the State charged Zeider with two counts of Child Molesting, as Class A felonies; two counts of child molesting, as Class C felonies; and five counts of disseminating harmful matters to minors, each a Class D felony. On

January 19, 2005, the State filed four additional charges of child molesting, each as a Class A felony, against Zeider. On November 9, the trial court granted the State's three motions in limine, barring Zeider from introducing evidence relating to an ongoing investigation of C.H. The court reaffirmed those rulings over Zeider's objections during trial. The jury then convicted Zeider on counts one through nine and eleven, but acquitted him on Count Ten, child molesting against J.W. as a Class A felony. The State dropped counts twelve and thirteen.

On December 12, 2005, the trial court sentenced Zeider to an aggregate term of sixty-eight and one-half years in prison and a \$10,000 fine. Specifically, the trial court sentenced Zeider as follows:

[S]ixty-eight and one-half years is the sentence that I'm coming to. I'm going to tell you how I got there. . . . I did take into fact [sic] that you had no criminal history. I do however consider it an aggravator if you will, that you, [S.M.], while [Zeider] wasn't charged with it and the Jury obviously didn't find it, indicated that maybe the relationship that existed between you and him was more serious than what he or you had originally been charged with. But having said that, Roger, I'm going to sentence you to sixty-eight and one-half years in the Department of Corrections as follows: child molesting on Cou[n]t I [against C.W.] is thirty years; Count II[, child molesting against C.W.,] thirty years which is concurrent with Count I; Count III[, child molesting against C.W.,] Class C Felony is four years, that will be concurrent with Counts I and II; Count IV[, child molesting against S.M.,] a Class C Felony is going to be four years and that's consecutive to Counts I and II, that's a different victim. Essentially what I've done[,] even though we have no pre-sentence, we have no presumptive sentence anymore, in your circumstance I have attempted to give you what previously would have been [the] presumptive sentence for each additional victim and you obviously understand that there were many victims so I am not treating it as if a victim didn't exist by making a concurrent versus a consecutive sentence. Count V[, dissemination of matter harmful to C.W.,] which was the D Felony was one and one-half years and that's concurrent with Count I and II; Count VI[, dissemination of matter harmful to S.M.,] is a D Felony and I made that one and one-half years concurrent with Count IV, that was also on [S.M.]; Count VII[, dissemination of matter harmful to

S.A.,] which is a D Felony is one and one-half years consecutive to Counts I, II and IV; Count VIII[, dissemination of matter harmful to T.M.,] which was a D Felony I gave you one and one-half years which was consecutive to Counts I, II, IV and VII; Count IX[, dissemination of matter harmful to J.W.,] was a D Felony and I'm making that one and one-half years consecutive with Counts I, II, IV, VII and VIII; and, Count XI which was the A Felony [of child molesting] involving [C.H.], that is thirty years consecutive to Counts I, II, IV, VII, VIII, and IX.

Appellant's App. at 14-15. This appeal ensued. After Zeider filed his initial brief, he filed an addendum in light of our recent decision in Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006), trans. denied. The State filed a responsive brief on all issues.

DISCUSSION AND DECISION

Issue One: Effective Assistance

Zeider first contends that he did not receive the effective assistance of trial counsel. Specifically, Zeider argues that his counsel should not have conceded the issue that the pornographic films Zeider viewed with the children were harmful to minors. The State responds that that stipulation was part of the trial counsel's legitimate strategy. We agree with the State.

A defendant claiming ineffective assistance of trial counsel must satisfy two components. Clancy v. State, 829 N.E.2d 203, 212 (Ind. Ct. App. 2005), trans. denied. "First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." Id. (quoting McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002) (citing Strickland v. Washington, 466 U.S. 668 (1984))). Second, the defendant must show prejudice: a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. Further,

we afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Id. Where trial counsel's performance at issue can be explained by reasonable trial strategy, that performance is not ineffective. See id.

Here, the State charged Zeider with dissemination of matter harmful to minors. The Indiana Code describes that crime as occurring when a person knowingly or intentionally "displays matter that is harmful to minors" Ind. Code § 35-49-3-3(2).

The Indiana Code clarifies that:

A matter . . . is harmful to minors . . . if:

- (1) it describes or represents, in any form, nudity, sexual conduct, [or] sexual excitement . . . ;
- (2) considered as a whole, it appeals to the prurient interest in sex of minors;
- (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
- (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

I.C. § 35-49-2-2. At trial, S.M. and C.W. each testified that Zeider showed them pornographic films and that those films displayed sexual acts. Just before the State rested, Zeider's counsel stipulated that the videotapes met the definition of matter harmful to minors. Subsequently, Zeider and J.W. each testified that the tapes were accessed by the children without Zeider's knowledge or intent.

It is apparent from those facts that Zeider's trial counsel, in stipulating the matter to be harmful to minors, focused Zeider's defense on the mens rea element of the alleged crimes. That strategy of Zeider's trial counsel simplified the issues before the jury,

allowing it to focus entirely on what was likely Zeider's stronger defense to those charges. The strategy also kept possibly unsavory material out of the jury's consideration. As such, the actions of Zeider's trial counsel can be explained by reasonable trial strategy. Therefore, Zeider did not receive ineffective assistance of counsel.² See Clancy, 829 N.E.2d at 212.

Issue Two: Admission of Testimony

Zeider next maintains that the trial court improperly granted the State's motions in limine barring him from introducing evidence that C.H., a witness for the State, was the subject of a criminal investigation. Specifically, Zeider argues that Indiana Evidence Rule 616 allows him to demonstrate bias, prejudice, or interest on the part of a witness for the purpose of attacking that witness's credibility. The State responds that the trial court acted within its discretion in denying the evidence. We agree with the State.

As an initial matter, the issue here is not whether the trial court erred in granting the State's motions in limine, but whether the trial court abused its discretion in excluding the evidence at trial. Harmon v. State, 849 N.E.2d 726, 729 n.2 (Ind. Ct. App. 2006). In order to have preserved this issue for appellate review, Zeider was required to

² Zeider's additional arguments that trial counsel "may not have viewed the content of the tapes before making the stipulation," Appellant's Brief at 9, and that the stipulation amounted to a guilty plea are also not well-founded. Regarding the first argument, Zeider references a portion of the transcript in which his trial counsel states that he did not see specific acts occurring in the films. We note that this statement is not equivalent to the proposition that trial counsel did not view the content of the tapes before making the stipulation, although, in any event, Zeider cites no authority to support his position that trial counsel must watch the whole of a pornographic film to render effective assistance when that film is the basis of a charge. As such, that argument is waived. See Ind. Appellate Rule 46(A)(8)(a). Regarding the second argument, we are not persuaded that Zeider's case warrants deviating from the principle that "the stipulation to certain facts in no way transforms a trial into a guilty plea hearing." Corbin v. State, 713 N.E.2d 906, 908 (Ind. Ct. App. 1999) (citing Gann v. State, 570 N.E.2d 976, 978 (Ind. Ct. App. 1991), trans. denied, and Kelly v. State, 527 N.E.2d 1148, 1153 (Ind. Ct. App. 1988), summarily aff'd, 539 N.E.2d 25, 26).

make an offer of proof during the trial setting forth the grounds for the admissibility of the evidence and its relevance. Id. The State does not dispute that Zeider preserved the issue. Accordingly, we will reverse the trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. Barrett v. State, 837 N.E.2d 1022, 1026 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id.

During his offer to prove, Zeider questioned C.H. about an ongoing investigation into allegations that C.H. broke into Zeider's mother's property and that C.H. had had sexual contact with minor girls. In response, C.H. stated that he knew nothing about an investigation and denied the underlying allegations. C.H. also denied having told anyone, namely, Elizabeth Baker, to the contrary. Zeider also questioned Baker, and she stated that C.H. had told her that "he had thought about [breaking into Zeider's mother's property] since [Zeider] was incarcerated." Transcript at 241. However, Baker denied actual knowledge of a break-in at Zeider's mother's property. Finally, Zeider questioned Lieutenant Catherine L. Collins. Lieutenant Collins testified that at no time was an offer of leniency made to C.H. in exchange for his testimony against Zeider. Lieutenant Collins also stated that no threat of "bad consequences" was made to C.H. if he chose not to testify, nor had a communication of the accusations against C.H. been made to him. Id. at 128.

Zeider now argues that the trial court abused its discretion in denying admission of the allegations against C.H. into evidence for purposes of "expos[ing]" the witness's

motivation to testify. Appellant's Brief at 12. However, even if we ignore the hearsay issue underlying Baker's comments on what C.H. purportedly told her, the testimony of Lieutenant Collins supports the trial court's ruling on Zeider's Rule 616 objection. That is, the facts before the trial court demonstrate that C.H. did not give his testimony against Zeider in exchange for favorable treatment from the State in the investigation against him. As such, we cannot say that the trial court abused its discretion in its ruling on that issue.

Issue Three: Multiple Dissemination Convictions

Third, Zeider contends that his convictions on three of the five counts of dissemination of matter harmful to minors are improper because Indiana Code Section 35-49-3-3(2) does not permit multiple convictions for a single act of dissemination of harmful materials, albeit to multiple victims. The State responds by attacking the validity of Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006), trans. denied, on which Zeider bases this argument, but contends in the alternative that the record supports three of the five convictions. We must agree with Zeider, although for different reasons than those briefed.

We discussed the issue of multiple convictions for a single act of dissemination of matter harmful to minors in Scuro as follows:

[Defendant] Scuro directs us to Kelly v. State, 527 N.E.2d 1148 (Ind. Ct. App. 1988), summarily aff'd on trans. 539 N.E.2d 25 (Ind. 1989), as support for his argument. In Kelly, we considered a defendant who was driving while intoxicated, causing an accident that resulted in the death of one person and the serious injury of another. Kelly was convicted of one count of operating a vehicle while intoxicated causing serious bodily injury and one count of operating a vehicle while intoxicated causing death. We held, based on the statutory language, that Kelly had committed only one

offense, albeit with multiple results. At that time, the relevant statutes read as follows:

A person who operates a vehicle while intoxicated commits a class A misdemeanor. Ind. Code § 9-11-2-2 [now I.C. § 9-30-5-2].

A person who violates [IC 9-11-2-2] commits a class D felony if the crime results in serious bodily injury to another person. I.C. § 9-11-2-4 [now I.C. § 9-30-5-4].

A person who violates [IC 9-11-2-2] commits a class C felony if the crime results in the death of another person. I.C. 9-11-2-5 [now I.C. § 9-30-5-5].

We noted that in crimes such as murder and manslaughter, the result—causing the death or injury of another person—is part of the definition of the crime. We then contrasted the operating while intoxicated statutes to the result-oriented crimes:

in defining the subject offense, the legislature chose to use the result of serious bodily injury or death as a factor enhancing the punishment for the crime rather than as an aspect of the crime itself, i.e., as part of the definition of the crime. IC 9-11-2-2 defines the crime as operating a vehicle while intoxicated. That definition consists of the prohibited conduct, operating a vehicle, and the presence of an attendant circumstance, intoxication. It does not include or require the necessary conduct [to] produce a specific result. Thus, the crime is committed although no specific result occurs. This intent is irrebuttably evidenced by the language of IC 9-11-2-4 and 9-11-2-5 which identify the crime as a violation of IC 9-11-2-2: “A person who violates [IC 9-11-2-2] commits a class . . . felony if the crime results in. . . .” [] Thus, we are compelled to conclude Kelly committed only one offense of operating a vehicle while intoxicated although with multiple results. The multiple egregious results do not increase the number of crimes, only the penalty.

527 N.E.2d at 1155 (emphasis added). In other words, because the operating statutes focused on the prohibited conduct rather than the results of that conduct, multiple victims could increase the penalty but did not provide the basis for multiple convictions. Id. at 1155. Thus, we vacated

Kelly's conviction for operating a vehicle while intoxicated causing serious bodily injury.

As in Kelly, the dissemination statute at issue herein is conduct—rather than result—oriented. Specifically, it focuses solely on the display of the harmful matter rather than any specific types of harm it may cause to the minor—or minors—viewing the matter. Under these circumstances, we are compelled by the holding in Kelly to conclude that a defendant may not be convicted of more than one count of dissemination of matter harmful to minors based on one occurrence, even if there was more than one victim.

Id. at 686-87. Hence, Indiana Code Section 35-49-3-3(2) seeks to regulate conduct rather than results. As such, Zeider's convictions were based improperly on individual victims rather than on the occurrence of discrete acts.

In light of Scuro, the issues here are how many separate instances of dissemination Zeider engaged in, whether the jury unanimously found any such instances beyond a reasonable doubt, and, if so, whether the State presented sufficient evidence to support those convictions. Zeider argues that he should have been convicted on two counts of dissemination of matter harmful to minors; the State contends that the evidence supports three convictions. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

The record supports Zeider's convictions on two counts of dissemination of matter harmful to minors. As an initial matter, Zeider appears to concede in his addendum the

occurrence of two putative instances. Specifically, Zeider does not dispute an act of dissemination involving C.W., J.W., S.M., and S.A. (“incident one”), and a separate act involving C.W. and S.M. (“incident two”). A third incident (“incident three”), like incident two, involved Zeider, C.W., and S.M., but at that time T.M. also was in Zeider’s home and within hearing range of the television.

Although Zeider appears to concede incidents one and two, and Zeider suggests that we affirm his convictions on Count Five, pertaining to C.W., and Count Six, pertaining to S.M., in the place of those two incidents, we decline to follow Zeider’s suggestions. In Castillo v. State, 734 N.E.2d 299, 303-04 (Ind. Ct. App. 2000), summarily aff’d on trans., 741 N.E.2d 1196 (Ind. 2001), we held, in light of Richardson v. United States, 526 U.S. 813 (1999), that a jury must unanimously agree regarding which crime a defendant committed. Here, C.W. and S.M. were present at each of the three incidents. As such, the jury’s conviction on the basis of those victims, rather than the underlying events, does not allow this court to determine which of the three incidents the jury unanimously believed to have occurred beyond a reasonable doubt. We can only conclude that at least part of the jury thought that at least one of those incidents occurred to both C.W. and S.M.; it is even impossible to tell whether the jury found that C.W. and S.M. were simultaneously present at the incidents considered by any one jury member, despite the victims having apparently been at each incident. In light of Castillo, we must reverse and remand on Count Five and Count Six. On remand, the trial court is instructed to vacate Zeider’s convictions on those counts.

However, the record does support two of Zeider's convictions for dissemination of matter harmful to minors. Specifically, Zeider's convictions on Count Nine, pertaining to J.W., and Count Eight, pertaining to T.M., required the jury to unanimously find beyond a reasonable doubt the occurrence of, respectively, incident two and incident three. But Zeider challenges the sufficiency of the evidence supporting his conviction under both of those counts. We cannot agree with Zeider's contentions.

Sufficient evidence exists to support Zeider's conviction on Count Nine. Incident two involved J.W. C.W. and S.M. both testified as to the occurrence of incident two. However, Zeider contends that the evidence surrounding that incident was insufficient to establish the necessary mens rea. Specifically, Zeider maintains that both his testimony and the testimony of J.W. supported the conclusion that Zeider did not knowingly disseminate pornographic films at that time. But, as Zeider acknowledges, C.W. "testified that . . . Zeider placed the tape into the television." Appellant's Brief at 15. Zeider then argues that C.W.'s testimony was inconsistent. As such, Zeider's arguments on appeal amount to a request that we reweigh the evidence or judge the credibility of the witnesses, which we will not do. See Jones, 783 N.E.2d at 1139. Because this was the only incident that involved J.W., the jury's conviction on Count Nine necessarily required the unanimous jury to find beyond a reasonable doubt that incident two occurred. We therefore affirm Zeider's conviction on Count Nine. However, because Count Seven, pertaining to S.A., is superfluous to Count Nine in that S.A. also was only present at incident two, we must reverse and remand on Count Seven. On remand, the trial court is instructed to vacate Zeider's conviction on Count Seven.

Zeider also challenges the sufficiency of the evidence supporting the occurrence of incident three. Specifically, Zeider argues against Count Eight, in which the jury convicted him of dissemination of matter harmful to T.M., on the grounds that T.M.'s testimony was inconsistent and that T.M. did not visually witness any pornographic material. However, Zeider acknowledges that T.M., in his testimony, describes auditory access to the pornographic film, which is expressly prohibited under Indiana's prohibition on dissemination of matter harmful to minors. See I.C. § 35-49-3-3(2). Further, incident three's occurrence is supported by S.M.'s express testimony that, the first time he viewed pornographic films with Zeider, T.M. was not present. To the extent that Zeider asks us to reweigh witness testimony or to judge a witness's credibility, we decline to do so. See Jones, 783 N.E.2d at 1139. The evidence supports Zeider's conviction for the act of dissemination against T.M. Because incident three is the only act in the record involving T.M., the jury necessarily and unanimously found beyond a reasonable doubt that incident three occurred when it convicted Zeider on Count Eight. As such, we affirm that conviction.

In light of the evidence on record, we must reverse and remand Zeider's convictions on three of the five convictions for dissemination of matter harmful to minors. Because the counts are charged by victim rather than by incident, we reverse and remand on Count Five, Count Six, and Count Seven. On remand the trial court is ordered to vacate the convictions on those counts. Zeider's convictions for dissemination of matter harmful to minors on Count Eight and Count Nine are affirmed.

Issue Four: Zeider's Sentence

Last, Zeider contends that “the sentence handed down by the [t]rial [c]ourt was unreasonable and without adequate explanation.” Appellant’s Brief at 19. Specifically, Zeider maintains that “the trial court failed to properly consider mitigating circumstances,” *id.*, namely, Zeider’s work history, the hardship of Zeider’s incarceration on his mother, and his lack of criminal history. Zeider also argues that the trial court’s finding of an aggravator is unsupported.³

Standard of Review

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).⁴ However, “[w]hen a judge imposes the legislatively-established basic sentence, we presume that he properly considered all relevant information and imposed an appropriate

³ It is not clear from either of the briefs or the record whether Zeider’s trial counsel preserved the issues now raised on appeal. However, although “[g]enerally[] a failure to object to error in a proceeding, and thus preserve an issue on appeal, results in waiver[,] . . . a court may remedy an unpreserved error when it determines the trial court committed fundamental error. An improper sentence constitutes fundamental error and cannot be ignored on review.” Collins v. State, 835 N.E.2d 1010, 1017 (Ind. Ct. App. 2005) (quoting Groves v. State, 823 N.E.2d 1229, 1231-32 (Ind. Ct. App. 2005)). We interpret Zeider’s arguments on appeal to be that he received an improper sentence. As such, we reach the merits of his arguments.

⁴ The current versions of the sentencing statutes are not applicable here since the commission of the offenses was before the statutes’ effective dates. See Richards v. State, 681 N.E.2d 208, 213 (Ind. 1997).

sentence.” Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994).

Indiana law generally 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. However, 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). Rather, 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 the defendant 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). Further, 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.

During sentencing, the trial court stated the aggravators and mitigators as follows:

I did take into fact [sic] that you had no criminal history. I do however consider it an aggravator if you will, that you, [S.M.], while [Zeider] wasn’t charged with it and the Jury obviously didn’t find it, indicated that maybe the relationship that existed between you and him was more serious than what he or you had originally been charged with. . . . I have attempted to

give you what previously would have been [the] presumptive sentence for each additional victim.

Appellant's App. at 14-15. That is, the trial court stated that it considered Zeider's lack of criminal history to be a mitigator, but it considered Zeider's relationship with S.M. to be an aggravator. Id. The trial court did not expressly discuss how it weighed that aggravator with that mitigator, but it did impose the presumptive sentence for each of Zeider's convictions.

Mitigators

Zeider contends that the trial court failed to consider three purported mitigators: his work history, the hardship of his incarceration on his mother, and his lack of a criminal history. The burden is on Zeider to establish that the mitigating evidence is both significant and clearly supported by the record. See, e.g., Comer v. State, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005), trans. denied. Again, a trial court is not required to find mitigators or to explain why it has chosen not to do so. See Blanche v. State, 690 N.E.2d 709, 715 (Ind. 1998).

In support of his positive work history, Zeider cites only his presentence report. But in Comer we held that such support, without more, is insufficient. Comer, 839 N.E.2d at 730. Rather, it is proper for a trial court to not find a defendant's employment history a significant mitigating circumstance where the defendant did not present a specific work history, performance reviews, or attendance records. See id. (citing Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003), trans. denied).

Comer is also instructive on the proposed mitigator of undue hardship on Zeider's mother. As we stated: "Many persons convicted of serious crimes have one or more

children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Id. (quoting Dowdell, 720 N.E.2d at 1154). Here, the State does not dispute Zeider’s assertions that he was his mother’s primary caregiver at the time of his incarceration, but, as the State correctly points out, Zeider has presented no evidence that Zeider’s mother was unable to seek assistance from elsewhere due to Zeider’s incarceration. As such, we cannot say that the trial court abused its discretion regarding Zeider’s proposed mitigators of work history and the hardship of incarceration on Zeider’s mother.

Insofar as the proposed mitigator of Zeider’s lack of criminal history is concerned, the trial court did recognize it to be a mitigator. As such, Zeider’s appeal on that issue only goes to the weight the trial court gave that mitigator in relation to the aggravator. However, Zeider’s attack on the trial court’s balancing of factors only goes to the validity of the aggravator. As such, if the aggravator is valid, Zeider has waived any further argument regarding whether the trial court committed a manifest abuse of discretion in balancing the criminal history mitigator and the aggravator. See Ind. Appellate Rule 46(A)(8)(a); Losch v. State, 834 N.E.2d 1012, 1014 (Ind. 2005).

Aggravator

As an aggravator, the trial court found only that Zeider’s relationship with S.M. was “more serious” than originally charged. Appellant’s App. at 14. We emphasize two preliminary issues. First, a single aggravator is sufficient to justify the imposition of consecutive sentences. McCann, 749 N.E.2d at 1121. Second, in imposing only consecutive sentences it is not necessary for an aggravator to be found beyond a

reasonable doubt. As our supreme court recently stated, “even if an aggravator is not found beyond a reasonable doubt, and thus is incapable of supporting an enhanced sentence, the aggravator may still be used to impose consecutive sentences.” Neff v. State, 849 N.E.2d 556, 562 (Ind. 2006). Here, the trial court imposed consecutive, but nonenhanced, sentences and explicitly stated that the aggravator was “obviously” not found by the jury. Appellant’s App. at 14. Because the aggravator was used only to impose consecutive sentences and not to enhance any of Zeider’s convictions beyond their presumptive terms, there is no issue under Blakely v. Washington, 542 U.S. 296 (2004). See Neff, 849 N.E.2d at 562.

With that background, we cannot say that the trial court abused its discretion in finding the aggravator that Zeider’s relationship with S.M. was “more serious” than originally charged. Id. Indiana Code Section 35-42-4-3 delineates child molesting as a Class B and as a Class C felony as follows:

(a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony.

* * *

(b) A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.

Here, the State charged Zeider with child molesting as a Class C felony. However, at trial S.M. testified that Zeider had performed oral sex on him. “Deviate sexual conduct,” one of the bases of distinction between child molesting as a Class B felony and as a Class C felony, “means an act involving[a] sex organ of one person and

the mouth . . . of another.” I.C. § 35-41-1-9(1). As such, we cannot say either that the trial court abused its discretion in finding the aggravator for purposes of imposing consecutive sentences or that it improperly balanced the aggravator with the criminal history mitigator.

Conclusion

As discussed above, we affirm Zeider’s convictions on all counts except Count Five, Count Six, and Count Seven. We reverse and remand Zeider’s convictions on Count Five, dissemination of matter harmful to C.W., Count Six, dissemination of matter harmful to S.M., and Count Seven, dissemination of matter harmful to S.A. On remand, the trial court is instructed to vacate those convictions and their corresponding sentences. The sentences on Count Five and Count Six are concurrent with other sentences and, therefore, the vacation of those counts does not affect the total length of Zeider’s sentence. Thus, we instruct the trial court only to reduce Zeider’s overall sentence from sixty-eight and one-half years only to sixty-seven years, reflecting the vacated, nonconcurrent Count Seven.

Affirmed in part, reversed in part, and remanded with instructions.

MAY, J., and MATHIAS, J., concur.