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IN THE
COURT OF APPEALS OF INDIANA

DAVID P. GRIFFIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 25A04-0512-CR-740
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-0410-FB-202

August 29, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David Paul Griffin (Griffin), appeals his sentence for child molesting a Class B felony, Ind. Code § 35-42-4-3(a).

We affirm.

ISSUE

Griffin raises three issues on appeal, which we consolidate and restate as: Whether Griffin was properly sentenced.

FACTS AND PROCEDURAL HISTORY

On April 22, 2004, Griffin attended church services with his wife, Laura Griffin (Laura), her mother Cheryl Hall (Cheryl), and Cheryl's son and Laura's brother, the victim A.H. At the time, Griffin was sixteen years old and A.H. was three years old. During the service A.H. became "fussy." (Appellant's App. p. 4). Griffin offered to take A.H. to the daycare center in the church. Instead of taking A.H. to the daycare center, Griffin took A.H. to the nursery where, according to A.H., Griffin undressed and had A.H. kiss his penis five times. A.H. noted that Griffin had a large penis, holding up his hands to demonstrate the size. A.H. also stated that Griffin kissed A.H.'s penis and bottom.

Griffin and Laura were expecting a child at the time of this offense. Their child was born July 23, 2004. A second child was born to Griffin and Laura during the summer of 2005.

On October 22, 2004, the State filed an Information charging Griffin with child molesting, a Class B felony, I.C. § 35-42-4-3(a). On May 24, 2005, Griffin pled guilty

with sentencing left to the trial court's discretion. On August 16, 2005, the trial court sentenced Griffin to a twelve year sentence, six years executed and six years suspended to be served on probation.

Griffin now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

First, Griffin contends the trial court inappropriately recognized aggravating factors at the sentencing hearing. In particular, Griffin asserts that (1) A.H.'s age should not have been considered as an aggravator since it was an element of the crime, (2) there was insufficient evidence to support finding that he was in a position of trust with A.H., and (3) that neither of the recognized aggravators were properly documented on the Order of Judgment Conviction.

It is firmly established that sentencing decisions lie within the sound discretion of the trial court and will be reversed only for abuse of discretion. *White v. State*, 846 N.E.2d 1026, 1034 (Ind. Ct. App. 2006), *trans. denied*. When determining an appropriate sentence in light of the offense committed courts should initially focus on the presumptive sentence.[1] *Cotto v. State*, 829 N.E.2d 520, 524(Ind. 2005). Deviations from the presumptive sentence are governed by I.C. § 35-38-1-7.1. *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). If the trial court relies on aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each

[1] Public Law 71-2005, abolishing "presumptive sentences" in favor of "advisory sentences," is not applicable in the instant case since its effective date was April 25, 2005, whereas the commission of the offense IN this case was prior to April 25, 2005. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997).

circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *Cotto*, 829 N.E.2d at 523-24.

In the instant case, the trial court found Griffin's age, his involvement in counseling, the fact that he was married, and his two young children as mitigating factors. The trial court found the tender age of A.H. and that Griffin was trusted with the care of A.H. as aggravating factors. While I.C. § 35-38-1-7.1 prescribes several acceptable aggravating and mitigating factors, it does not provide an exhaustive list. The trial court is free to consider other relevant factors relating to the specific facts of the crime and the defendant's character. I.C. § 35-38-1-7.1(d); *Middlebrook v. State*, 593 N.E.2d 212, 214 (Ind. Ct. App. 1992).

I.C. § 35-38-1-7.1(a)(3) states that the trial court may consider that the victim of the offense was less than twelve years of age at the time the offense was committed as an aggravating factor. Griffin claims that when the age of a victim is an element of the crime, the victim's age cannot be used as an aggravating factor. *See McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). The State counters citing *Stewart v. State*, 531 N.E.2d 1146 (Ind. 1988), which holds that while "[a] fact which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence . . . the trial court may properly consider the particularized circumstances of the factual elements as aggravating circumstances." *Id.* at 1150 (citing *Townsend v. State*, 498 N.E.2d 1198, 1201 (Ind. 1986)). In *Stewart*, the victim of child molesting was the tender age of three, the same age as A.H. *Stewart*, 531 N.E.2d at 1150. Our supreme court held that the tender age of three constituted "particularized circumstances which

constitute separate aggravating factors." *Id.* We will not deviate from this precedent. Thus, we find that A.H.'s tender age of three in the instant case constitutes a particularized circumstance sufficient to constitute a separate aggravating factor. *See id.*

Next, Griffin claims the evidence was not sufficient to support the trial court's finding that he was in a position of trust with A.H. as an aggravating factor. Conversely, the State argues that in accordance with *Wilkie v. State*, 813 N.E.2d 794, 802 (Ind. Ct. App. 2004), *trans. denied*, the trial court clearly set forth the evidence relied upon in determining the aggravators. We agree. The transcript reflects that the trial court's statements during the sentencing hearing clearly set forth the evidence on which it relied in determining Griffin was entrusted with the care of A.H. as an aggravating factor. *See id.*

Lastly, Griffin argues the trial court erred by aggravating his sentence. Griffin claims the trial court did not properly articulate any reasons for aggravating the presumptive sentence, and also claims the trial court improperly balanced the aggravators and mitigators.

As we have previously discussed, both aggravators recognized by the trial court are proper. The trial court also recognized Griffin's age, his involvement in counseling, the fact that he was married, and his two young children as mitigating factors. Then, the trial court weighed the aggravating and mitigating factors before sentencing Griffin to a sentence two years greater than the presumptive. The sentence imposed by the trial court was clearly within the statutory limits, and in light of the facts of this crime and the particular aggravating and mitigating circumstances found by the trial court, we are

unable to find that that the sentence was inappropriate in light of Griffin's character and the nature of the crime. *See Middlebrook*, 593 N.E.2d at 215. Therefore, we find no error. *Id.*

CONCLUSION

Based on the foregoing, we find the trial court properly found and relied upon the aggravating factors and sentenced Griffin accordingly.

Affirmed.

VAIDIK, J., and DARDEN, J., concur.