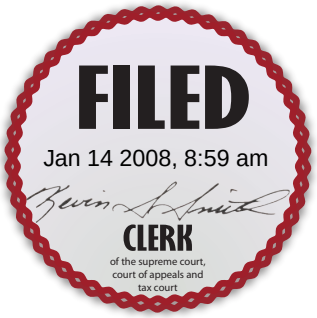

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IN THE
COURT OF APPEALS OF INDIANA

BRYON McCLAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0709-CR-760
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0608-FA-133

January 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Bryon McClain appeals the forty-five-year sentence imposed by the trial court after McClain pleaded guilty to Neglect of a Dependent Resulting in Death,[1] a class A felony. McClain argues that the trial court erroneously denied his motion for a mental health examination, found an improper aggravator, neglected to find two of McClain's proffered mitigators, and imposed a sentence that is inappropriate in light of the nature of the offense and his character. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On April 18, 2006, S.M. was born to McClain and Shana Taskey. S.M. lived with Taskey, and on August 14, 2006, McClain spent the night at Taskey's residence. S.M. awoke in the middle of the night and began crying after McClain, who was under the influence of prescription medication, dropped her onto a duffel bag near her crib. McClain became frustrated and shook the infant until she stopped crying. He then prepared a bottle for her, but she refused to drink it. Thereafter, McClain and Taskey discovered that S.M. was not breathing normally. McClain and Taskey took S.M. to the hospital, where she died on August 16, 2006.

On August 18, 2006, the State charged McClain with murder and class A felony neglect of a dependent resulting in death. On January 17, 2007, McClain agreed to plead guilty to neglect of a dependent resulting in death in exchange for the dismissal of the murder charge. The plea agreement left sentencing to the discretion of the trial court.

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[1] Ind. Code §§ 35-46-1-4(a)(1), -4(b)(3).

On February 5, 2007, McClain moved for a mental health examination. The trial court granted the motion but subsequently learned that the Department of Correction no longer performs those evaluations. Thereafter, McClain renewed his request for a mental health evaluation on June 8, 2007, and the trial court denied the request.

On July 5, 2007, following a sentencing hearing, the trial court found the following aggravating factors: McClain had one prior felony conviction that had occurred two months before S.M.'s death, was on probation at the time he committed the instant offense, the victim was under twelve years of age, and the circumstances of S.M.'s death involved Shaken Baby Syndrome. The trial court found the following mitigating circumstances: McClain cooperated with law enforcement officers, pleaded guilty, and pursued a GED. Ultimately, the trial court imposed a sentence of forty-five years imprisonment. McClain now appeals.

DISCUSSION AND DECISION

I. Mental Health Examination

McClain first argues that the trial court abused its discretion by refusing McClain's second request for a mental health examination. The decision to order a mental health examination prior to sentencing is within the trial court's discretion. Atwell v. State, 738 N.E.2d 332, 336 (Ind. Ct. App. 2000). In Atwell, a panel of this court concluded that the trial court did not abuse its discretion by denying a request for a mental health examination because the trial court had been presented with and considered the same evidence that the examination would have revealed. Id. at 336-37.

Here, McClain argues that a mental health examination would have provided "evidence as to his mental state," which would have been relevant to the trial court's consideration of aggravating and mitigating circumstances. Appellant's Br. p. 12-13. McClain does not describe specific information that an examination would have yielded, nor did he make an offer of proof to the trial court.

The presentence investigation report contains information regarding McClain's depression, suicide attempts, sleep disturbances, long periods of fatigue, and unplanned weight changes. Appellant's App. p. 47. Furthermore, McClain testified regarding his dysfunctional childhood, which allegedly included abandonment by his father and physical abuse by his mother. Tr. p. 42-46. It is apparent, therefore, that the trial court was presented with information that is similar, if not identical, to information that would have been revealed by a mental health evaluation. Under these circumstances, we find that the trial court did not abuse its discretion by denying McClain's request for a mental health examination.

II. Sentencing

A. Aggravators and Mitigators

Next, McClain argues that the trial court relied on an improper aggravator and erroneously failed to find two of his proffered mitigators. We review challenges to the trial court's sentencing process for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). The trial court may abuse its discretion in the following ways during the sentencing process: (1) by failing to enter a sentencing statement; (2) by entering a sentencing statement that includes reasons not supported by the record; (3) by entering a

sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) by entering a sentencing statement that includes reasons that are improper as a matter of law. Id. at 490-91.

Our Supreme Court has also held that "a trial court [cannot] now be said to have abused its discretion in failing to 'properly weigh'" aggravators and mitigators. Id. at 491. Thus, to the extent that McClain contends that the trial court erroneously weighed aggravating and mitigating circumstances, his argument fails.

The trial court found that "it would appear to me that the death of the victim was the result of Shaken Baby Syndrome. That is an aggravator." Tr. p. 69-70. McClain argues that this aggravator is improper as a matter of law. We agree. A fact that comprises a material element of a crime cannot also be used as an aggravating factor to support an enhanced sentence. Manns v. State, 637 N.E.2d 842, 844 (Ind. Ct. App. 1994). Here, McClain pleaded guilty to the offense as alleged in the charging information, which stated that S.M., who was under fourteen years of age, was in the care of McClain, who was over the age of eighteen, and that he knowingly endangered her life by "violently shak[ing] [her] several times," resulting in her death. Appellant's App. p. 30. The fact that he shook S.M. comprised a material element of the crime; indeed, the shaking was the neglect. Consequently, it cannot also be used as an aggravating factor.

McClain next contends that the trial court should have considered his age—twenty-two—to be a mitigating circumstance. Whether a defendant's age constitutes a mitigator is a decision within the trial court's sound discretion. Smith v. State, 872 N.E.2d 169, 178 (Ind.

Ct. App. 2007), trans. denied. Here, the trial court considered McClain's age but ultimately concluded that "[y]ou're an adult and you have been for four (4) years and to say that age 22 is young simply defies logic." Tr. p. 70. Nothing in the record persuades us that the trial court abused its discretion in arriving at that conclusion. Thus, McClain's argument to the contrary must fail.

Next, McClain argues that the trial court should have found his limited prior criminal history, which consisted of one prior conviction for class D felony receiving stolen property, to be a mitigating circumstance. Specifically, the trial court stated that it considered that conviction to be an aggravating factor because it "was within two months of this event so I can't really discount it." Id. at 69. Even a limited criminal history can be considered an aggravating factor, Pagan v. State, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004), and given the temporal proximity of McClain's felony conviction to the offense at issue herein, we cannot say that the trial court abused its discretion in considering his criminal history to be an aggravating, rather than a mitigating, factor.

Ultimately, therefore, the remaining, proper aggravators include McClain's prior felony conviction, the fact that he was on probation at the time he committed the instant offense, and the fact that S.M. was under the age of twelve years. The mitigating circumstances include the facts that McClain cooperated with law enforcement officers, pleaded guilty, and pursued a GED. Under these circumstances, we can say with confidence that the trial court would have imposed the same sentence if it had considered only the proper

aggravators. Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007). Thus, we decline to reverse on this basis.

B. Appropriateness

Finally, McClain argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. See Ind. Appellate Rule 7(B) (providing that the "[c]ourt may review a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender"). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Initially, we observe that although the trial court imposed an enhanced sentence, it did not order McClain to serve the maximum possible sentence. Pursuant to Indiana Code section 35-50-2-4, the advisory sentence for a class A felony conviction is thirty years, with a minimum term of twenty and a maximum term of fifty years imprisonment. Here, McClain faces a sentence of forty-five years imprisonment.

Turning to the nature of the offense, McClain was under the influence of prescribed medication when, in the middle of the night, he picked up his four-month-old infant daughter and dropped her. She began crying and McClain became frustrated when she would not stop. In his frustration, he shook her so violently that she ultimately died. We cannot conclude that the nature of the offense aids McClain's inappropriateness argument.

As for McClain's character, we acknowledge, as did the trial court, that he had a dysfunctional childhood, which allegedly included a father who abandoned him and a mother who abused him. The trial court ultimately concluded that although McClain's history

> explains a lot of what may have happened[, i]t does not excuse anything. You impressed me as a reasonably bright person who went through what you went through. I would have thought that you would have learned from that but apparently you didn't. But what also bothers me is that unlike a lot of people who come from these circumstances and who simply repeat the cycle, you were taken into a family which tried to help you and tried to show you that there were better alternatives, there were better ways to live. You didn't choose to accept what was offered to you.

Tr. p. 68-69. McClain also directs us to evidence allegedly establishing that he was a helpful and responsible son and father and that he was genuinely remorseful for his actions. As noted by the trial court, however, it also heard evidence to the contrary:

> Your character, I've heard both sides of your character. I think they cancel each other out. I'm not sure how remorseful you truly are. I've heard some things today that make me think that you were remorseful in this courtroom today but prior to today you were not. . . . I see you using [your state of mind] as a crutch. I don't give any credence to that.

Id. at 70. It is evident that the trial court, which is in a far better position than we are to evaluate and weigh the evidence, carefully considered all of the conflicting evidence and concluded that McClain's character does not aid his argument that an enhanced sentence is unwarranted. We see nothing in the record that leads us to second guess the trial court's conclusion. Thus, we find that the sentence imposed by the trial court is not inappropriate in light of the nature of the offense and McClain's character.

The judgment of the trial court is affirmed.

DARDEN, J., and BRADFORD, J., concur.