

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Rodney A. Vickery,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 13, 2022

Court of Appeals Case No.
21A-CR-2438

Appeal from the
Fountain Circuit Court

The Honorable
Stephanie Campbell, Judge

Trial Court Cause No.
23C01-2008-FC-289

Vaidik, Judge.

Case Summary

- [1] Rodney A. Vickery pled guilty to two counts of Class C felony child molesting and was sentenced to eight years. He now appeals, arguing the trial court erred in identifying an aggravator. We affirm.

Facts and Procedural History

- [2] Vickery is the biological father of J.B., born in April 2005, and the stepfather of L.H., born in August 2003. In 2020, the State charged Vickery with seven counts of Class C felony child molesting for touching and fondling J.B. and L.H. between January 1, 2009, and December 31, 2013, when J.B. was between three and eight years old and L.H. was between five and ten years old. Vickery and the State later entered into a plea agreement under which Vickery agreed to plead guilty to Count I (relating to L.H.) and Count III (relating to J.B.), the State dismissed the remaining five charges, and his sentence would be eight years, “with the Court to determine how the sentence is to be served.” Appellant’s App. Vol. II p. 58.
- [3] At the sentencing hearing, the trial court found three aggravators: (1) the victims were under twelve; (2) Vickery was in a position of care, custody, and control over the victims; and (3) the “span of time” during which the molestations occurred, meaning that Vickery had time to reflect on his actions “yet they occurred again.” Tr. p. 24. The court found three mitigators: (1) Vickery’s lack of criminal history, (2) his guilty plea, and (3) his remorse. *Id.*

The probation department recommended four years in prison, two years on community corrections, and two years suspended to probation; the State agreed with this recommendation. The court said it was inclined to sentence Vickery to all eight years in prison but felt constrained by the probation department's and the State's recommendation. As such, it sentenced Vickery to four years in prison, two years on community corrections, and two years suspended to probation.

[4] Vickery now appeals his sentence.

Discussion and Decision

[5] Vickery contends the trial court erred in finding as an aggravator that the victims were under twelve. Our trial courts enjoy broad discretion in identifying aggravating and mitigating factors, and we will reverse only for an abuse of that discretion. *Coy v. State*, 999 N.E.2d 937, 946 (Ind. Ct. App. 2013).

[6] Vickery argues the trial court should not have relied on the fact that the victims were under twelve as an aggravator, since their ages at the time of the offenses were an element of the charges against him. *See* Ind. Code § 35-42-4-3(b) (child molesting requires child to be “under fourteen (14) years of age”). While the victim being under twelve can be an aggravator, *see* I.C. § 35-38-1-7.1(a)(3), our Supreme Court has made clear that “[w]hen the age of a victim constitutes a material element of the crime,” the trial court cannot treat it as an aggravating circumstance unless it sets forth “particularized circumstances” justifying such

treatment, *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001); *see also McCoy v. State*, 96 N.E.3d 95, 99 (Ind. Ct. App. 2018). Here, the court did not set forth any such particularized circumstances.

[7] But even if the trial court erred by not setting forth any particularized circumstances, “we need not remand for resentencing if we can say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Vega v. State*, 119 N.E.3d 193, 203 (Ind. Ct. App. 2019). Here, we can say with confidence that the court would have imposed the same sentence had it not found the victims’ ages to be an aggravator. First, the court found two additional aggravators, neither of which Vickery challenges on appeal. Specifically, the court found that—as J.B.’s father and L.H.’s stepfather—Vickery was in a position of care, custody, and control over them. The court also found that Vickery had time to reflect on his actions yet committed the molestations again. Second, the court said it wanted to sentence Vickery to all eight years in prison but felt constrained by the probation department’s and the State’s recommendation. We have no doubt the court would have sentenced Vickery to the same sentence even without the under-twelve aggravator. Accordingly, we affirm Vickery’s sentence.

[8] Affirmed.

Crone, J., and Altice, J., concur.