MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sergio Diaz,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 30, 2023

Court of Appeals Case No. 22A-CR-2323

Appeal from the Lake Superior Court

The Honorable Natalie Bokota, Judge

Trial Court Cause No. 45G02-2011-F3-166

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

[1] Sergio Diaz pled guilty to Level 4 felony criminal confinement, and the trial court sentenced him to an executed eight-year term of incarceration in the Indiana Department of Correction (the DOC). Diaz asserts that the trial court abused its discretion by considering as an aggravator "unsubstantiated claims" made by the victim at the sentencing hearing during her victim impact statement. *Appellant's Brief* at 4.

[2] We affirm.

Facts & Procedural History

[3] In November 2020, Diaz and his girlfriend of six years, R.H., were living together in a residence, along with their two young children, ages four and two, and R.H.'s seven-year-old child from a prior relationship. On the morning of November 11, 2020, Diaz and R.H. argued for a couple of hours. When she told him she was leaving with the children, Diaz grabbed her from behind, fell on her, and choked her until she blacked out. The children were present and, at some point, Diaz pushed them out of the room. When R.H. regained consciousness, Diaz was beating her. Eventually, R.H. and her seven-year-old were able to run out of the residence. R.H. went to the hospital, where it was determined that she suffered a concussion, lacerations, and bruising. Police located and arrested Diaz.

[4] On November 13, 2020, the State charged Diaz with two counts of Level 3 felony criminal confinement, Level 5 felony domestic battery by means of a

deadly weapon, Level 5 felony domestic battery resulting in serious bodily injury, Level 6 felony domestic battery in the presence of a child, and Level 6 felony strangulation. On April 20, 2022, the parties entered into a plea agreement in which Diaz agreed to plead guilty to an added count of Level 4 felony criminal confinement, and the State agreed to dismiss the remaining charges.

[5] Diaz failed to appear for his sentencing hearing on July 20, 2022, and the court reset it to August 10, when he again failed to appear and the court issued an arrest warrant. Diaz failed to appear a third time on August 31. Diaz's counsel moved for a continuance, and the State objected, noting that this was the third time that R.H. had come to court to provide a victim impact statement. The trial court denied the motion to continue and proceeded to sentencing Diaz in abstentia.

[6] During the hearing, R.H. gave a victim impact statement. R.H. recounted the events of November 11, 2020, including that the children were present, and when she and her son escaped, Diaz threw a metal pipe at them, nearly striking the child. R.H. described that she endured four years of abuse by Diaz, which her children "were subjected to watch." *Transcript* at 26. She stated that her now eight-year-old son feels unsafe and cries about what he had witnessed "over the years," and "to this day, it is still hard [for him] to speak about in therapy[.]" *Id*. at 28. R.H. described that the five-year-old exhibited emotional trauma through nightmares and screaming, has trust issues, and is slowly adjusting to being able to express his emotions. The youngest, who was non-

verbal at the time but was currently learning to speak, expressed his trauma in "a horrible physical way where he would damage things physically, hit me, and laugh[.]" *Id*. at 27-28. R.H. described that she and the children were all in "recovery," which has required hours of "therapists, doctors . . . coaching and redirection." *Id*. at 28, 29.

[7] The court took judicial notice of its file, and then the parties proceeded to argument. The State discussed Diaz's criminal history that included a juvenile adjudication and two felony convictions, one of which was for strangulation of the mother of his first child. The State noted that Diaz had "juvenile detentions, DOC commitments, probation, jail, prison, parole, misdemeanor treatments" and had not been successful on probation. *Id.* at 41. The presentence investigation report rated Diaz at a moderate risk to reoffend. At one point, the State referenced that "the children are in therapy," and counsel for Diaz objected on the basis that the State was "arguing facts not in evidence" because that information came from R.H.'s statement and a victim impact statement is not evidence. *Id*. at 43, 44. In response, the State withdrew the argument.

[8] Counsel for Diaz argued that Diaz's statements in the PSI reflected remorse for the impact his actions have had upon his children, and counsel urged that Diaz's lack of judgment stemmed from his family history and significant substance abuse. Counsel also argued that R.H.'s injuries were not more serious than what would be necessary to prove moderate bodily injury and thus the injuries were not an aggravating factor. As for mitigators, counsel

highlighted that Diaz recently completed community corrections programs including Awakenings and Coping with Anger, which was indicative of responding positively to alternative treatments, and that Diaz had been diagnosed with PTSD. Counsel requested an advisory sentence of six years with three of that being served in community corrections and three years suspended to probation.

[9] In opposing this request, the State noted that Diaz was released on bond from community corrections in the present case on February 10, 2022 and then failed to appear on April 6, 2022; the plea was entered on April 20, 2022 "and he's never returned to court since that date," indicating a blatant disregard for the court. *Id.* at 55.

[10] Following argument, the trial court found that Diaz's character "is violent, immature, and in this instance, sadistic." *Id*. The court commented that it was going to "utilize the victim impact statement in crafting at least one of the aggravating factors[.]" *Id.* at 56. Diaz's counsel again objected "on the grounds of the confrontation clause," and the court overruled the objection "based on the fact that the defendant has willfully absented himself from these proceedings." *Id*. at 57.

[11] The court identified four aggravating circumstances. The court found, first,

> that that the harm, injury, loss or damage suffered by the victim of the offense was significant and greater than the elements necessary to prove the commission of the offense, in that as the victim was battered during the confinement, the minor children

> were present who observed the battery, and *were profoundly traumatized* which affects the victim in this case as she must raise them and respond to the challenges they now will face. One of the children, at least, was a toddler who was nonverbal. Following this offense, he now hits his mother and laughs. The *mental damage to the children* differs with each of the children and *cannot be overstated*.

Id. at 57 (emphases added); *see also Appendix* at 99 (sentencing order containing substantially same language). Second, the trial court recognized and reviewed Diaz's criminal history. Third, the court noted that, despite opportunities for probation and anger management, Diaz continued to commit violent offenses, observing as "most disturbing" that Diaz continued to commit crimes against women who are intimate partners and parents of his children. *Transcript* at 58. Fourth, the trial court found the nature and circumstances of the crime to be "a significant aggravating factor," explaining:

> Again, the defendant's minor children were present and the defendant knew this and brutality [sic] beat the victim, preventing her from leaving the residence to the point of unconsciousness. He continued to bludgeon her in the head with objects leaving her with multiple injuries including a concussion, all of which did require hospitalization, albeit less than 24 hours.

Id.; *see also Appendix* at 100.

[12] The trial court found as mitigating that Diaz completed rehabilitative programs through community corrections while the case was pending. It also considered as a mitigating circumstance, but of "relatively low weight," that he had been

diagnosed with PTSD. *Transcript* at 59. It rejected Diaz's proposed mitigator that imprisonment would pose an undue hardship on his dependents.

[13] The trial court imposed a "straight eight-year sentence" in the DOC, "without the opportunity to transition to [] Community Corrections." *Id*. Counsel for Diaz asked to clarify his objection regarding the victim impact information and the following colloquy occurred:

> Counsel: The Sixth Amendment objection, specifically confrontation clause, was based not on his absence but based on the fact that the information received [was] unsworn and without the opportunity to cross-examine.
>
> Court: I understand.
>
> Counsel: Additionally, under the Sixth Amendment, I believe it's the Sixth Amendment, the unsworn testimony doesn't rise to proof beyond a reasonable doubt, as necessary for the finding of an aggravator.

Id. at 60.

[14] The trial court issued a written sentencing order, which identified the four aggravators and two mitigators consistent with its oral statements at the hearing. As is relevant here, the order included the following concerning the aggravators:

> [T]he last and first [] are based, *in part*, on information communicated to the Court by the victim during her Victim Impact Statement; Counsel for the Defendant objects under the 6th Amendment arguing that his client's rights are violated

> because the Victim Impact Statement is not made under oath, thereby not subject to cross examination and incapable of constituting proof beyond a reasonable doubt; the objection is overruled.

Appendix at 99 (emphasis added). Diaz now appeals.

Discussion & Decision

[15] Victim impact statements "are an integral part of the sentencing process" and their purpose "'is to guarantee that the interests of the victim of a crime are fully and effectively represented at the sentencing hearing.'" *Keene v. State*, 118 N.E.3d 801, 803 (Ind. Ct. App. 2019) (quoting *Cloum v State*, 779 N.E.2d 84, 92-93 (Ind. Ct. App. 2002)), *trans. denied*. Diaz asserts that the trial court improperly cited to and relied on "unsupported accusations" made by R.H. in her victim impact statement, and he asks us to remand for a new sentencing hearing. *Appellant's Brief* at 5, 6.

[16] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. So long as a sentence is within the statutory range, it is subject to review only for an abuse of discretion.[1] *Anglemyer*, 868 N.E.2d at 490.

> An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn

[1] Diaz's sentence fell within the statutory range for a Level 4 felony, which is two to twelve years with an advisory sentence of six years. Ind. Code § 35-50-2-5.5.

> therefrom. A trial court abuses its discretion by: (1) issuing an inadequate sentencing statement, (2) finding aggravating or mitigating factors that are not supported by the record, (3) omitting factors that are clearly supported by the record and advanced for consideration, or (4) finding factors that are improper as a matter of law.

Crouse v. State, 158 N.E.3d 388, 393 (Ind. Ct. App. 2020) (internal citations and quotation marks omitted). If an abuse of discretion occurs, remand is only necessary when the appellate court cannot say with confidence that the trial court would have imposed the same sentence if it had properly considered reasons that enjoy support in the record. *Ackerman v. State*, 51 N.E.3d 171, 194 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 491).

[17] Here, Diaz argues that R.H.'s victim impact statement "detailed the perceived effect this incident had on her children," namely causing emotional and behavioral issues and requiring them to go to therapy, and that although the State withdrew argument about those matters, the trial court still cited these allegations in its first aggravating factor where it found that the children were "profoundly traumatized" and noting that their mental damage "cannot be overstated." *Appellant's Brief* at 7; *Appendix* at 99. Diaz maintains that this finding, "based only on unsubstantiated, unsworn statements," was an abuse of the trial court's discretion. *Appellant's Brief* at 8.

[18] When a trial court uses a victim impact statement, it "must provide an explanation." *Rhoiney v. State*, 940 N.E.2d 841, 848 (Ind. Ct. App. 2010) (citing *Davenport v. State*, 689 N.E.2d 1226, 1232 (Ind. 1997), *clarified on other grounds*,

696 N.E.2d 870 (Ind. 1998)), *trans. denied*. As is relevant here, Ind. Code § 35-38-1-7.1(a)(1) lists aggravating circumstances that the trial court may consider when imposing a sentence, including whether "[t]he harm, injury, loss, or damage suffered by the victim of an offense was: (A) significant; and (B) greater than the elements necessary to prove the commission of the offense." The legislature considers the typical harm caused by a particular crime when enacting a statutory penalty. *See Harris v. State*, 824 N.E.2d 432, 441 (Ind. Ct. App. 2005) (citing *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997)), *trans. denied*. Thus, we have held that "in order to validly use victim impact evidence, the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime." *Rhoiney*, 940 N.E.2d at 848.

[19] In the present case, the trial court identified as the first aggravator that the harm suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense. The court's finding recognized – using information gleaned from R.H.'s victim impact statement – that the children were "profoundly traumatized," which has manifested in emotional and behavioral issues, and that R.H. "must deal with the consequences of their trauma." *Appendix* at 99. That is, in raising the children, R.H. "must respond to the challenges they now will face." *Transcript* at 57. We are satisfied that the court provided an adequate explanation of why and how the impact on the victim, R.H., was greater than that normally associated with the crime.

[20] In urging that the trial court abused its discretion, Diaz relies on *Cloum*, where this court directed that "when a victim impact statement *strays from the effect that*

a crime had upon the victim and others and begins delving into substantive, unsworn, and otherwise unsupported allegations of other misconduct or poor character on the part of the defendant, caution should be used in assessing the weight to be given to such allegations, especially where the defendant is not provided an opportunity to respond directly to them." 779 N.E.2d at 93 (emphasis added). Diaz argues that, here, "the trial court not only failed to show the type of caution suggested in *Cloum*, but went the opposite course, explicitly assigning significant weight to those allegations." *Appellant's Brief* at 10. We, however, find no conflict with *Cloum*. The trial court limited the use of information from R.H.'s victim impact statement and did not "stray from" or rely on any information that was unrelated to the effect of Diaz's crime upon R.H. and the children. *See Cloum*, 779 N.E.2d at 93. Accordingly, we conclude that the trial court did not abuse its discretion when it used information from the victim impact statement about the ongoing emotional trauma to the children, and the corresponding effect on R.H., as a partial basis for an aggravating factor.[2]

[21] Furthermore, even if the trial court improperly considered R.H.'s victim impact statement as support for an aggravating circumstance, other valid aggravating

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[2] To the extent that Diaz claims that it was error for the trial court to rely on any of R.H.'s "allegations" because they "were not subject to cross examination" and because he was not "afforded [an] opportunity" to refute them, we reject those arguments. *Appellant's Brief* at 6, 9. We have recognized that a defendant does not have the right to cross-examine a victim who has provided a victim impact statement. *Keene*, 118 N.E.3d at 803. And Diaz had the opportunity to rebut R.H.'s statements but chose not to appear at any of the three sentencing dates.

circumstances exist, and it is well settled that a single aggravating circumstance may be sufficient to enhance a sentence. *Buford v. State*, 139 N.E.3d 1074, 1081 (Ind. Ct. App. 2019). Among other things, the trial court identified Diaz's criminal history as an aggravating circumstance. His history includes a juvenile adjudication and two felony convictions, for Class C felony burglary and Class D felony strangulation, and multiple probation violations. The victim of the strangulation was the mother of his first child who was pregnant at the time of the offense. The trial court observed that, despite having been given opportunities for probation and rehabilitative programs, Diaz continued to commit crimes. The trial court also identified the nature and circumstances of the crime as "a significant aggravating factor," highlighting that he "brutally beat" and "bludgeon[ed]" R.H., in the presence of the children, and prevented her from leaving. *Appendix* at 100.

[22] We are confident that, even excluding that part of the court's finding referencing information from the victim impact statement, the trial court would have imposed the same sentence. *See Ackerman*, 51 N.E.3d at 194; *see also Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) (although trial court improperly considered impact on the victim's family as an aggravator, "confidence in the sentence" was not diminished where the trial court also relied on six proper aggravating circumstances). Accordingly, we find no abuse of discretion in the trial court's decision to sentence Diaz to an eight-year executed sentence for his Level 4 felony criminal confinement conviction.

[23] Judgment affirmed.

Riley, J. and Pyle, J., concur.