## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Nancy Iris Sperling,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

May 2, 2022

Court of Appeals Case No. 21A-CR-1901

Appeal from the Sullivan Superior Court

The Honorable Hugh R. Hunt, Judge

Trial Court Cause No. 77D01-2007-F5-405

**Molter, Judge.**

[1] Nancy Iris Sperling failed to timely take her eight-month-old child to the hospital after he suffered injuries believed to be inflicted by her boyfriend, and

she was charged with Level 5 felony neglect of a dependent resulting in bodily injury and Level 6 felony neglect of a dependent. Sperling pleaded guilty to Level 5 felony neglect of a dependent resulting in bodily injury and was sentenced to three years with one and one-half years executed in the Department of Correction and one and one-half years suspended to probation. She appeals her sentence and argues (a) that the trial court abused its discretion in sentencing her because it failed to find several mitigating factors which were significant and clearly supported by the record, and (b) that her sentence is inappropriate in light of the nature of the offense and her character. Because we find that the trial court did not abuse its discretion and that Sperling's sentence is not inappropriate, we affirm.

## Facts and Procedural History

[2] On May 17, 2020, Sperling woke up and found her then eight-month-old baby, J.S., with a swollen face which was black and blue. He had a bruised forehead, black eyes, a bruise behind his left ear, bruises and scrapes on his lower back, and a bruise on his inner thigh. He also had a scabbed-over injury on the back of his head. State's Ex. 4. Sperling asked her boyfriend of five months, Austin Barnard, what happened to J.S., and Barnard replied that J.S. looked that way when they went to bed.

[3] They argued over whether they should take J.S. to the hospital. Barnard told Sperling that CPS would take her children away if she went to the hospital because J.S. had been given THC oil the day before. Sperling spoke with her mother on the phone, and they decided to wait for Sperling's mother to come

over for a birthday party later in the day before deciding whether to take J.S. to the hospital.

[4] When Sperling's mother arrived at the home and saw J.S., she asked who hit him. Sperling told her mother that she had been sitting on the floor and put J.S. in her lap, and while trying to get J.S. onto her lap, he fell over and hit his head on the hardwood floor. Sperling's mother told her that was not what happened and that J.S. needed to go to the hospital. While the family ate cake and opened gifts at the birthday party, J.S. was acting "very blah" and not like himself, so after the party, they took J.S. to the emergency room. Appellant's App. Vol. II at 24, 25, 29.

[5] Sperling, Barnard, and J.S. rode in one car, and Sperling's family rode in another car. On the way to the hospital, Sperling called her family and told them the hospital wanted Sperling to drive J.S. straight to Riley Hospital. Sperling's family did not believe her and continued driving to their local hospital instead. *Id*. Once they arrived, Sperling's family asked the nurse whether Sperling had been advised to take J.S. straight to Riley, and the nurse said no.

[6] Once Sperling, Barnard, and J.S. arrived at the local hospital, they went inside, and Barnard left a short time later. Sperling later texted Barnard and told him not to come back to the hospital because the police thought he caused J.S.'s injuries. The doctors determined that J.S.'s injuries were not caused by him falling from Sperling's lap while she sat on the floor and that someone had

inflicted the injuries on J.S. After an evaluation, the doctors determined that J.S. had a head and brain injury and called the police before transporting him to Riley Hospital.

[7] When speaking to the police, Sperling stated that, the night before, while she was still awake, Barnard had been alone with J.S. while she cleaned the house. Sperling heard J.S. crying and tried to get into the room where he was with Barnard, but the door was blocked. Sperling entered the room through another door just as Barnard turned off the light. He blocked the light so that Sperling could not turn it on, so she felt J.S.'s chest and found that he was still breathing. Sperling went back to cleaning, and when she finished, she went to her room, and played games on her phone until falling asleep.

[8] About a month later, Sperling again spoke to the police and explained to a detective that the day she discovered J.S.'s injuries, she woke up around 8:00 a.m., and Barnard was just coming to bed. She asked him why he was just coming to bed, and he told her that he had been up with J.S., who had been screaming all night. He told Sperling that J.S. had pooped all over himself and that Barnard had to bathe J.S. and change his clothes. But when Sperling went to check, she did not find any soiled clothes or diapers. When she questioned Barnard about this, he replied, "Why do you think I hurt the kids all the time?" Appellant's Conf. Vol. II at 28.

[9] On July 28, 2020, the State charged Sperling with Level 5 felony neglect of a dependent resulting in bodily injury and Level 6 felony neglect of a dependent.

On July 30, 2021, Sperling entered into a plea agreement in which she agreed to plead guilty to Level 5 felony neglect of a dependent, and the State agreed to dismiss the count of Level 6 felony neglect of a dependent. Under the plea agreement, sentencing was to be left to the discretion of the trial court under the conditions that the total sentence would not exceed three and one-half years and the executed portion would not exceed one and one-half years. The trial court accepted Sperling's guilty plea, and a sentencing hearing was held.

[10] At the sentencing hearing, the detective who interviewed Sperling and her boyfriend described both of them as not truthful and "equally deceitful." Tr. Vol. 2 at 37. The detective testified that Sperling's stories about the events surrounding J.S.'s injuries changed several times, and Sperling continued to lie even when Barnard was in jail and there was a no-contact order in place. The detective found photos on Sperling's phone that were not taken on the day J.S. went to the hospital, which showed J.S. "screaming in pain" with "bruises and marks" on his body. Appellant's Conf. App. Vol. II at 22. Sperling said that Barnard thought it was funny that he made J.S. cry, and that she could not stop Barnard. There was also a photo on Sperling's phone with a timestamp of 1:14 p.m. on May 16, 2020, more than twenty-four hours before Sperling took J.S. to the hospital, that showed J.S. with what appeared to be bruising and redness on the right side of his head and a mark on his ear, which contradicted Sperling's story that the injuries occurred on the night of May 16. Tr. Vol. 2 at 35–36; State's Ex. 9. The detective stated that Sperling had previously called 911 on her boyfriend when he had stolen her car. The detective also found pictures on

Sperling's phone that showed her "smoking blunts." Appellant's Conf. App. Vol. II at 28.

[11] A family case manager ("FCM") with the Department of Child Services, who worked with Sperling, testified that Sperling "never would take responsibility for any of the—her actions." Tr. Vol. 2 at 57. Sperling once told the FCM that she could not attend a medical appointment for J.S. because Sperling was with her home-based case manager, but Sperling told the home-based case manager that she was looking for employment that day. *Id*. at 59–60. When the FCM was first assigned to Sperling's case, Sperling's parents were forthcoming with the FCM, but when she tried to address issues with Sperling, she would get mad, and Sperling's parents "really didn't want to have arguments with her," so they stopped openly talking to the FCM. *Id*. at 60–61.

[12] Another FCM testified and described Sperling as "reluctant" to engage in services and stated that Sperling missed many of her therapy appointments and some of her home-based appointments. *Id*. at 67. The FCM also testified that Sperling never took responsibility for what happened to J.S., and she was not forthcoming and fully committed to receiving services. *Id*. A home-based caseworker who worked with Sperling testified about the effects of parental incarceration on children and stated that incarceration "can be" as damaging as abuse, but that it depends on "a lot of different factors." *Id*. at 90–91. Sperling's therapist testified that Sperling had been involved in multiple domestic-violence relationships and that she had shown some improvement in her therapy. *Id*. at 80, 81.

[13] Before Sperling began dating Barnard, she and her children lived with her parents, but when she started dating him, Sperling's parents did not allow him in their home, so Sperling moved out of her parents' house and moved in with him. Sperling had two other children, but her oldest child continued to live with Sperling's parents because he did not like Barnard. Besides the time that Sperling moved out and lived with Barnard, she and her children had lived with Sperling's parents most of their lives. After J.S. was injured, DCS placed Sperling's other two children with her parents, and J.S. was placed with his biological father. From May 2020, when J.S. was injured, until March 2021, DCS required that Sperling live outside of her parents' home and without her children.

[14] At the sentencing, the pre-sentence investigation report ("PSI") was presented to the trial court. In her interview for the PSI, Sperling stated:

> I don't feel as if I had any involvement. I was in an abusive relationship and could not get out of the house soon enough. However, I'm being charged with neglect. I was not able to get my baby to the hospital in a timely manner. I went into the hospital with bruises and [Barnard's] handprints around my neck [t]o basically be told I was not involved in an abusive relationship. I'm trying to repair my children's and my life to the best of my ability. I watched somebody I thought I loved start hanging with the wrong people.

Appellant's Conf. App. Vol. III at 21. When sentencing Sperling, the trial court made the following statement:

> I can't look past your actions here. I just can't. In looking at these pictures, I just can't get my mind around how we didn't get immediate attention for this child, as badly as he was hurt. I get that you might have been in fear from [Barnard], but I can't absolve you of not getting attention for this child . . . he depended upon you for his health and his welfare and . . . you blew it.

Tr. Vol. 2 at 137. Sperling's plea agreement limited her maximum sentence to three and one-half years with a maximum of one and one-half years executed. Appellant's Conf. App. Vol. III at 36–38. In sentencing Sperling, the trial court did not explicitly find any aggravating or mitigating factors. Tr. Vol. 2 at 137; Appellant's Conf. App. Vol. II at 14–15. The trial court sentenced Sperling to three years with one and one-half years executed in the Department of Correction and one and one-half years suspended to probation. Sperling now appeals.

## Discussion and Decision

## I. Mitigating Factors

[15] Sperling argues the trial court abused its discretion when it sentenced her because it failed to find several mitigating factors which she asserts were significant and supported by the record. Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). An abuse of discretion will be found where 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 from them. *Hudson v.*

*State*, 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). A trial court may abuse its discretion in several ways, including: (1) failing to enter a sentencing statement; (2) entering a sentencing statement that includes aggravating and mitigating factors unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482, 490–91 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007).

[16] Sperling contends that the trial court abused its discretion by failing to identify five mitigators: (1) that the crime resulted from circumstances unlikely to recur; (2) substantial grounds tending to excuse or justify her crime, though failing to establish a defense, existed; (3) her complete lack of criminal history; (4) imprisonment would result in undue hardship to Sperling's children; and (5) Sperling's diagnoses of post-traumatic stress disorder and major depressive disorder. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Davis v. State*, 173 N.E.3d 700, 704 (Ind. Ct. App. 2021) (citing *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000)). The trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance. *Id*.

[17] Sperling first argues that the trial court failed to find that crime was the result of circumstances unlikely to recur to be a mitigating factor. She asserts that evidence was presented that she was involved in an abusive relationship at the

time of the crime but that, at sentencing, she was no longer in that relationship, and she was getting her life back on track.

[18] Even acknowledging Sperling's evidence that she was trying to get her life back on track and was out of the abusive relationship with Barnard, we do not believe that the trial court abused its discretion in not finding that her crime was the result of circumstances not likely to recur as a mitigating factor. In *Mehringer v. State*, this court found that where an offense was not an isolated event and the defendant refused to accept responsibility for his actions, the defendant's claim that the circumstances were unlikely to recur was not supported by the record. 152 N.E.3d 667, 674 (Ind. Ct. App. 2020), *trans. denied*.

[19] Here, the evidence presented at sentencing showed that although she was out of her relationship with Barnard, Sperling had a history of being in abusive relationships and that prior to the date J.S. was taken to the hospital, she had allowed Barnard to hurt J.S. There were pictures on Sperling's phone of J.S. "screaming in pain," which were not dated on the day J.S. was taken to the hospital. Appellant's Conf. App. Vol. II at 22. Sperling told the police that Barnard thought it was funny when he made J.S. cry. The evidence also showed that, at least twenty-four hours before Sperling took J.S. to the hospital, J.S. showed signs of injuries consistent with the ones he had when he arrived at the hospital, including bruising and redness on the right side of his head and a mark on his ear. Tr. Vol. 2 at 35–36; State's Ex. 9. This evidence contradicted Sperling's story that the injuries occurred on the night before when Barnard

hurt J.S. while she cleaned, and when he did not let her see J.S., she went back to cleaning and then played games on her phone before falling asleep.

[20] Further, similar to the defendant in *Mehringer*, Sperling refused to take responsibility for her actions. During her PSI interview, Sperling said, "I don't feel as if I had any involvement." Appellant's Conf. App. Vol. III at 21. There was also testimony from two FCMs that Sperling had not taken responsibility for her actions. Therefore, the evidence showed that Sperling had a pattern of dating abusive men, not protecting her child, and refusing to take responsibility for her actions. The trial court did not abuse its discretion in not finding as a mitigator that Sperling's neglect of J.S. resulted from circumstances unlikely to recur.

[21] Sperling next argues that the trial court abused its discretion in not finding as a mitigating factor that substantial grounds tending to excuse or justify the crime, though failing to establish a defense, existed. She contends that the fact that she was in an abusive relationship and that abusive situation led to the conduct in this case should have been found to be mitigating. But the trial court did consider the alleged abuse Sperling suffered and found that it did not justify or mitigate her actions. In its oral sentencing statement, the trial court remarked, "I get that you might have been in fear from [Barnard], but I can't absolve you of not getting attention for this child." Tr. Vol. 2 at 137. A trial court does not have to credit mitigating circumstances in the same manner as the defendant. *Henderson v. State,* 769 N.E.2d 172, 179 (Ind. 2002). Evidence was presented that Sperling had called the police on Barnard in the past when he stole her car

but here chose not to do so when he injured her child. The trial court considered Sperling's alleged abuse and was within its discretion when it found the abuse did not justify her actions.

[22] Sperling also argues that it was an abuse of discretion for the trial court not to find her lack of a criminal record as a mitigating factor. In *Bostick v. State*, we affirmed the defendant's sentence where the trial court declined to give a lack of criminal history any mitigating weight because there was evidence that the defendant was "leading a less than law-abiding life." 804 N.E.2d 218, 225 (Ind. Ct. App. 2004). Here, J.S. was only eight months old when he was taken to the hospital for his injuries and unable to speak up for himself. There was evidence that Sperling had not intervened previously when Barnard abused and caused harm to J.S. Evidence was also presented that J.S. had been given THC oil shortly before he suffered his injuries, and Sperling did not intervene or seek help. Pictures were also found that showed Sperling "smoking blunts." Appellant's Conf. App. Vol. II at 28. Therefore, although Sperling may not have had a criminal history, the record showed she was not living a law-abiding life. The trial court did not abuse its discretion by not finding her lack of a criminal history as a mitigating circumstance.

[23] Sperling next asserts that the trial court abused its discretion in failing to find that imprisonment would result in undue hardship to her children as a mitigating factor. "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." *Dowdell v. State,* 720

N.E.2d 1146, 1154 (Ind. 1999). The evidence showed that except for the time that Sperling lived with Barnard, she and her children had lived with Sperling's parents in their home most of their lives and that at the time of sentencing, Sperling's two older children were living with her parents and J.S. was living with his biological father. While we recognize her children will be affected by Sperling's incarceration, she has shown no special circumstances to establish that the trial court abused its discretion in not finding as a mitigating factor that her incarceration will result in undue hardship to her children, especially where they will remain in the homes where they already live with familiar caregivers.

[24] Lastly, Sperling argues the trial court abused its discretion in not finding her diagnoses of post-traumatic stress disorder and major depressive disorder as a mitigating factor. "[I]n order for a mental history to provide a basis for establishing a mitigating factor, there must be a nexus between the defendant's mental health and the crime in question." *Corralez v. State*, 815 N.E.2d 1023, 2016 (Ind. Ct. App. 2004). Sperling does not put forth any argument about the nexus between her diagnoses and her crime. She has, therefore, waived this argument for lack of cogent argument. *Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."); Ind. Appellate Rule 46(A)(8).

[25] Because Sperling has not shown that her proffered mitigating factors were significant and clearly support by the record, we conclude that the trial court did not abuse its discretion in sentencing her.

## II. Inappropriate Sentence

[26] The Indiana Constitution authorizes appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). "That authority is implemented through Appellate Rule 7(B), which permits an appellate court to revise a sentence if, after due consideration of the trial court's decision, the sentence is found to be inappropriate in light of the nature of the offense and the character of the offender." *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019).

[27] Our review under Appellate Rule 7(B) focuses on "the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Cardwell*, 895 N.E.2d at 1225. Our role is only to "leaven the outliers," which means we exercise our authority only in "exceptional cases." *Faith*, 131 N.E.3d at 160. Thus, we generally defer to the trial court's decision, and our goal is to determine whether the defendant's sentence is inappropriate, not whether some other sentence would be more appropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[28] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as the appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a Level 5 felony is between one and six years, with the advisory sentence being three years. Ind. Code § 35-50-2-6(b). Here, Sperling received three years with one and one-half years executed and one and one-half years suspended to probation. Sperling was thus given a sentence equal to the advisory sentence for a Level 5 felony. Additionally, under Sperling's plea agreement she agreed that she could receive up to a three and one-half year maximum sentence with up to one and one-half years executed.

[29] As to the nature of her offense, Sperling acknowledges the seriousness of her conduct, but asserts that, because she pleaded guilty and took responsibility for her actions, her sentence is inappropriate. To show her sentence is inappropriate, Sperling must portray the nature of her offense in a positive light, "such as accompanied by restraint, regard, and lack of brutality." *Stephenson*, 29 N.E.3d at 122. Sperling minimizes the extent of J.S.'s injuries by stating only that J.S. "was admitted into the emergency room with several bruises and scrapes on his body." Appellant's Br. at 16–17. But the evidence showed that J.S. was admitted to the hospital because his face was swollen, black and blue, and he had black eyes, a bruise behind his left ear, bruises and scrapes on his lower back, a bruise on his inner thigh, a scabbed-over injury on the back of his head, and a bruised forehead. Because he had a head and brain injury, he was later transported to Riley Hospital for treatment.

[30] The evidence established that Sperling delayed taking J.S. to the hospital for over twenty-four hours, and when her family arrived to investigate J.S.'s injuries, they all ate cake and opened gifts before taking J.S. to the hospital to assess his injuries. Sperling allowed Barnard to harm J.S. and make him cry for Barnard's own entertainment and did not intervene when J.S. was given THC oil. The night before J.S. was taken to the hospital, Sperling knew he was injured but did not attempt to assess his injuries or take him to the hospital and, instead, continued her normal activities. Throughout the case, and up to the date of the PSI interview, she continued not taking responsibility for her conduct. At the sentencing hearing, the trial court stated, "I just can't get my mind around how we didn't get immediate attention for this child, as badly as he was hurt . . . he depended upon you for his health and his welfare and . . . you blew it." Tr. Vol. 2 at 137. Sperling has not shown that her advisory sentence is inappropriate in light of the nature of the offense.

[31] As to her character, Sperling argues that, at the time of the crime, she was in an abusive relationship and under the coercive control of Barnard. She asserts that she had left the relationship, was working toward rehabilitation, and was improving her parenting. Here, although Sperling did not have a criminal history, the evidence showed that she was not living a law-abiding life because she had not intervened when someone gave J.S. THC oil, she smoked marijuana, and pictures on her phone suggested she previously allowed Barnard to hurt J.S.

[32] Sperling's delay in taking J.S. to the hospital for his injuries, and her protection of the man who injured him, also does not put her character in a positive light. After taking J.S. to the hospital, Sperling warned Barnard not to come back to the hospital because the police suspected he was responsible for J.S.'s injuries. Additionally, Sperling chose to live separately from one of her children when she moved in with Barnard as the child did not like Barnard. In *Hudson v. State*, we found that mother's "admitted choice to put 'having a man in front of' the care of her young and vulnerable children reflects poorly on her character." 135 N.E.3d 973, 981 (Ind. Ct. App. 2019). Further, although she ultimately took responsibility for her actions by pleading guilty, Sperling changed her story of what occurred several times, even after Barnard was in jail with a no-contact order in place, and a police detective described her as "deceitful." Tr. Vol. 2 at 37, 39–40. Throughout the case, she refused to take responsibility for what happened to J.S., and as of the time of the PSI interview, she stated, ""I don't feel as if I had any involvement. I was in an abusive relationship and could not get out of the house soon enough. However, I'm being charged with neglect." Appellant's App. Vol. III at 21. Sperling has not met her burden to show "substantial virtuous traits or persistent examples of good character" such that her requested reduction of her sentence is warranted based on her character. *Stephenson*, 29 N.E.3d at 122. We, therefore, do not find that Sperling's sentence is inappropriate in light of her character.

[33] Thus, Sperling has not shown that her sentence is inappropriate in light of the nature of the offense and the character of the offender.

[34] Affirmed.

Riley, J., and Robb, J., concur.