MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Kenneth C. Pierce, II
Meghan F. Campbell
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Shannon M. Hubbard,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 7, 2021

Court of Appeals Case No. 21A-CR-506

Appeal from the Ripley Circuit Court

The Honorable Ryan J. King, Judge

Trial Court Cause No. 69C01-1910-F5-35

Altice, Judge.

Case Summary

[1] Shannon Hubbard appeals the five-year sentence that was imposed following her conviction for reckless homicide, a Level 5 felony. Hubbard claims that the trial court abused its discretion by identifying improper aggravators and overlooking various mitigating factors that were supported by the record. Hubbard also contends that the sentence was inappropriate when considering the nature of the offense and her character.

[2] We affirm.

Facts and Procedural History

[3] At approximately 3:30 p.m. on June 14, 2019, Hubbard was driving southbound in Ripley County on U.S. 421, a two-lane highway with a speed limit of 55 miles per hour. Twenty-one-year-old Henry Finney was driving northbound on the highway. At some point, Hubbard drove into the northbound lane while attempting to pass a truck that was pulling a large trailer. Hubbard crashed into Finney's vehicle, killing him.

[4] The data recorder from Hubbard's vehicle showed that she was driving approximately 75 miles per hour prior to the crash and had accelerated to 78 miles per hour two seconds before the crash. Although Hubbard began evasive action at that point, she was still traveling 59 miles per hour at the time of impact.

[5] Finney, who was traveling 67 miles per hour five seconds before the crash, took evasive action four seconds prior to impact and had slowed his speed below 30 miles per hour when the impact occurred.

[6] A witness driving southbound on U.S. 421 reported that only a few miles north of the crash, Hubbard had passed her vehicle and two other cars. The witness stated that Hubbard had been following dangerously close and was speeding before passing.

[7] Hubbard had previously received two speeding tickets in 2018 and 2019. The ticket issued in 2019 was pending when this incident occurred. At the time of the crash, it was determined that Hubbard had a low level of THC, a Schedule I controlled substance, in her blood.

[8] During an interview with police officers after the crash, Hubbard denied ever driving over 60 miles per hour and claimed that she had passed only one other vehicle prior to the collision. Hubbard also blamed the truck driver for the incident, claiming that the driver had increased his speed to prevent her from passing. Both the truck driver and his passenger denied Hubbard's allegation.

[9] On October 24, 2019, the State charged Hubbard with Level 5 felony reckless homicide. Hubbard subsequently pled guilty as charged in exchange for the State's agreement not to file any additional charges arising out of the incident. It was further agreed that sentencing would be "left open" to the trial court. *Appendix Vol. II* at 8, 72.

[10] At the March 16, 2021, sentencing hearing, the trial court identified the following aggravating factors: 1) Hubbard's propensity for engaging in similar reckless behavior, as demonstrated by her recent speeding tickets and conduct shortly before the crash; 2) the significant effect on Finney's family that went beyond that inherent in the crime; and 3) Hubbard was operating with a controlled substance in her blood. The trial court found Hubbard's lack of criminal history as a mitigating factor, and while it considered the undue hardship that Hubbard's incarceration would have on her dependents, it declined to recognize it as a mitigating factor. The trial court also rejected Hubbard's decision to plead guilty as a mitigating factor because she received a benefit from her plea, the evidence of her guilt was very strong, and Hubbard declined to accept full responsibility for her actions because she blamed the truck driver for the crash.

[11] After finding that the aggravating factors outweighed the mitigating circumstances, the trial court sentenced Hubbard to five years of incarceration. Hubbard now appeals.

Discussion and Decision

I. Abuse of Discretion

[12] In addressing Hubbard's claims that the trial court abused its discretion in sentencing her, we initially observe that sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on*

reh'g 875 N.E.2d 218 (Ind. 2007); *Hudson v. State,* 135 N.E.3d 973, 979 (Ind. Ct. App. 2019). A trial court abuses its discretion when it fails to enter a sentencing statement at all, its stated reasons for imposing the sentence are not supported by the record, its sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or its reasons for imposing the sentence are improper as a matter of law. *Anglemyer,* 868 N.E.2d at 490-91; *Hudson,* 135 N.E.3d at 979. The relative weight assignable to reasons properly found by the trial court to enhance a defendant's sentence is not subject to review for abuse of discretion. *Gross v. State,* 22 N.E.3d 863, 869 (Ind. Ct. App. 2014), *trans. denied*.

[13] The determination of mitigating circumstances is within the trial court's discretion, and it is not obligated to explain why a proposed mitigator does not exist or why the court found it to be insignificant. *Sandleben v. State,* 22 N.E.3d 782, 796 (Ind. Ct. App. 2014), *trans. denied.* Additionally, a trial court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor, and it is not required to give the same weight to proffered mitigating factors as does a defendant. *Rogers v. State,* 878 N.E.2d 269, 272 (Ind. Ct. App. 2007), *trans. denied*. The trial court need not consider alleged mitigating factors that are highly disputable in nature, weight, or significance. *Newsome v. State,* 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. So long as a sentence is within the statutory range, the trial court may impose it without regard to the existence of aggravating or mitigating factors. *Anglemyer,* 868 N.E.2d at 489.

[14] Hubbard argues that the trial court abused its discretion in sentencing her because it should have identified as mitigating factors the hardship that her dependents would face because of her incarceration, her decision to plead guilty, and the unlikelihood that she would commit another offense.

[15] As for the hardship that Hubbard's dependents would suffer, this court has observed that "[m]any 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." *Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002). At sentencing, Hubbard presented no evidence demonstrating that the hardship to her family would be any worse than that normally suffered by a family whose relative is imprisoned. It was established that Hubbard has two adult daughters, one of whom lives next door to Hubbard's mother. Both daughters can assist their grandmother while Hubbard is serving her sentence. In short, Hubbard presented no evidence that her incarceration would result in an undue hardship to her relatives.

[16] As for Hubbard's decision to plead guilty, we note that a guilty plea is not automatically a significant mitigating factor. *Trueblood v. State,* 715 N.E.2d 1242, 1257 (Ind. 1999). When a defendant receives a benefit from a plea, where the decision to plead is pragmatic, or where the defendant still shifts some blame rather than accepting full responsibility, a trial court acts well within its discretion in declining to accord significant weight to the plea. *Hollins v. State,* 145 N.E.3d 847, 852 (Ind. Ct. App. 2020), *trans. denied*.

[17] All three factors are implicated here. The State agreed not to file additional charges in exchange for Hubbard's guilty plea, and the trial court noted that there was overwhelming evidence of Hubbard's guilt. Hubbard also shifted blame for the collision to the truck driver for allegedly increasing his speed to prevent her from passing. Moreover, Hubbard was not truthful about her speed and the number of vehicles that she had passed just prior to the crash. These were all valid reasons for the trial court to reject Hubbard's decision to plead guilty as a significant mitigating factor.

[18] Although Hubbard asserts that the trial court should have found the unlikelihood that she would commit another offense as a mitigating circumstance, the trial court noted that Hubbard, in fact, demonstrated a propensity to engage in the type of dangerous conduct that resulted in this tragedy. Hubbard had received two speeding tickets in less than a year, and the latest violation was still pending when this incident occurred. It was also established that Hubbard was speeding when she passed other vehicles shortly before the crash. Given this conduct, it was reasonable for the trial court to conclude that Hubbard had a propensity to engage in speeding and reckless driving. Thus, the trial court properly rejected this proffered mitigator.

[19] In sum, the trial court did not overlook any of Hubbard's proffered mitigators. Rather, it simply disagreed with Hubbard as to whether they warranted significant mitigating weight. The trial court's reasons for rejecting them were proper and supported by the record.

[20] Hubbard also contends that the trial court cited improper aggravating factors, including Hubbard's propensity to engage in the same or similar behavior, her operation of a vehicle with THC in her blood, and the effect that the crime had on Finney's family.

[21] For the reasons discussed above, the trial court properly found that Hubbard had a propensity to engage in speeding and dangerous driving. Thus, it was proper for the trial court to identify such conduct as an aggravating circumstance.

[22] Hubbard claims that the trial erred in identifying the presence of a controlled substance in her blood at the time of the crash as an aggravating factor. Notwithstanding Hubbard's contention, the evidence was undisputed that there was THC—a Schedule I controlled substance—in her blood when the collision occurred. Operating a vehicle with a Schedule I controlled substance metabolite in the blood is a felony. *See* Ind. Code §§ 9-30-5-1, -5. A trial court may view the fact that a defendant was committing another criminal offense at the time as an aggravating circumstance. *See Bethea v. State,* 983 N.E.2d 1134, 1145 (Ind. 2013) (observing that underlying facts of charges that are dismissed, or unfiled, pursuant to a plea agreement may be considered as an aggravating circumstance for sentencing purposes).

[23] Finally, Hubbard contends that the trial court abused its discretion in identifying the harm to Finney's family as an aggravating factor. Pursuant to Ind. Code § 35-38-1-7.1(a)(1), a trial court may assign aggravating weight to the

harm, injury, loss, or damage suffered by the victim of an offense if such harm was significant and greater than the elements necessary to prove the commission of the offense. Under normal circumstances, the impact upon family is not an aggravating circumstance for sentencing purposes. *See Pickens v. State,* 767 N.E.2d 530, 535 (Ind. 2002). The impact on the family of a homicide victim must go beyond that which is inherent in the loss of any loved one to rise to the level of an aggravating circumstance. *Id.*

[24] In this case, the trial court did not delineate what impact it was considering that would not normally be associated with the loss of Finney's life. Finney's family certainly experienced the grief that is normally associated with this type of offense. We acknowledge the devastating impact that Finney's family has experienced as a result of this senseless tragedy, but nothing in the trial court's statement suggests that the impact on Finney's family is of the type so distinct as to rise to the level of an aggravating circumstance. Thus, this aggravator was improperly considered. We note, however, that even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist. When an improper aggravator is identified, we will remand for resentencing only "if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *McCann v. State*, 749 N.E.2d 1116, 1121 (Ind. 2001). When considering the two remaining aggravating circumstances that the trial court properly identified in this case, we are

confident that the trial court would have imposed the same sentence for this offense. Thus, re-sentencing is not warranted.

B. Inappropriate Sentence

[25] Hubbard also argues that the five-year sentence is inappropriate when considering the nature of the offense and her character. Hubbard contends that the sentence must be revised because the offense was no more egregious "compared to the typical offense of reckless homicide," and she "has lived a . . . life of good character." *Appellant's Brief* at 25.

[26] Indiana Appellate Rule 7(B) authorizes this court to independently review and revise the sentence imposed if, "after due consideration of the trial court's decision," it is determined that the sentence imposed is inappropriate when considering the nature of the offense and the character of the offender. Whether a sentence is inappropriate ultimately depends upon "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference. *Id.* at 1222. That 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)." *Gerber v. State,* 167 N.E.3d 792, 797 (Ind. Ct. App. 2021) (quoting *Stephenson v. State*, 29

N.E.3d 111, 122 (Ind. 2015)), *trans. denied*. We reserve our sentence revision power only for "exceptional cases." *Faith v. State,* 131 N.E.3d 158, 160 (Ind. 2019).

[27] When reviewing a sentence, we seek to "attempt to leaven the outliers, not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225. On appeal, the defendant bears the burden of persuading the appellate court that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). In determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Id.*

[28] In this case, Hubbard was convicted of a Level 5 felony, which carries a sentencing range of between one to six years, with an advisory sentence of three years. I.C. § 35-50-2-6. After considering various mitigating and aggravating factors, the trial court sentenced Hubbard to two years above the advisory sentence.

[29] When examining the nature of the offense, we consider the details and circumstances of the offense, along with the defendant's participation therein. *Lindhorst v. State,* 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). Here, the evidence showed that Hubbard was driving twenty miles per hour over the speed limit and decided to pass a truck that was pulling a large trailer when there was an oncoming vehicle. No evidence was offered to show that Hubbard's view

might have been obstructed, and she took no evasive action to avoid the collision until she slowed down only two seconds before impact.

[30] It was further established that Hubbard passed at least two other vehicles at a high rate of speed shortly before she collided with Finney. Hubbard had also ingested a controlled substance prior to the incident. Hubbard's argument that her sentence was inappropriate when considering the nature of the offense avails her of nothing and we are unpersuaded that a revision of the sentence is warranted on this basis.

[31] In evaluating a defendant's character, we engage in a broad consideration of his or her qualities. *Moyer v. State,* 83 N.E.3d 136, 143 (Ind. Ct. App. 2017), *trans. denied.* A defendant's life and conduct are illustrative of character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied.*

[32] Although Hubbard correctly points out that she has no criminal history, she has a recent record of speeding infractions. One of those tickets was issued less than three months prior to this incident and was still pending. Hubbard engaged in a pattern of driving too fast that resulted in fatal consequences that cost a twenty-one-year-old his life.

[33] Hubbard lied to law enforcement during the investigation, claiming that she was only driving fifty to sixty miles per hour, while the data recorder showed that she was driving nearly eighty miles per hour just prior to the collision. Although Hubbard claimed that she had passed no more than one vehicle on the highway before crashing into Finney, a witness observed her pass three

vehicles only a few miles north of where the accident occurred. And while Hubbard claimed that the truck driver was only driving thirty to thirty-five miles per hour and sped up to prevent her from successfully passing, both the truck driver and his passenger denied that account. Hubbard also did not accept full responsibility for the collision because she placed partial blame on the truck driver that she was attempting to pass.

[34] Based on the nature of the offense and Hubbard's character, the five-year sentence that the trial court imposed is not inappropriate. Thus, we decline to revise Hubbard's sentence.

[35] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.