



Larry W. Baehl appeals his sentence for sexual misconduct with a minor as a class D felony.<sup>1</sup> Baehl raises two issues, which we restate as whether the trial court abused its discretion in sentencing him. We reverse and remand for resentencing.

The relevant facts follow. In 1993, Baehl married Regina Utley, who had a thirteen-year-old daughter, A.B. Soon after marrying Utley, Baehl began going into A.B.'s bedroom at night, touching A.B. under her clothes, and rubbing her upper body, including her bare breasts, with his hands. Baehl continued this behavior until A.B. was sixteen or seventeen.

The State initially charged Baehl with child molesting as a class C felony.<sup>2</sup> The State filed an amended information, which added Count II, sexual misconduct with a minor as a class D felony, and Count III, child molesting as a class C felony. A jury found Baehl guilty of Count II, sexual misconduct with a minor, and not guilty of Counts I and III.

At the sentencing hearing on January 9, 2004, the trial court identified two aggravators: (1) the risk that Baehl would commit another crime because he did not understand that his actions were wrong; and (2) the nature and circumstances of the crime because Baehl touched A.B. with his bare hands, he was her stepfather, and he was more than thirty years older than A.B. The trial court also identified five mitigating factors: (1) Baehl had no prior criminal history; (2) he paid \$28,000 to A.B.; (3) he had maintained

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<sup>1</sup> Ind. Code § 35-42-4-9(b) (Supp. 2003).

<sup>2</sup> Ind. Code § 35-42-4-3(b) (1998).

employment; (4) he had a high school diploma; and (5) his mother was infirm and needed assistance. However, the trial court found that the aggravators outweighed the mitigators and sentenced Baehl to two and one-half years in the Indiana Department of Correction with two years executed.

The sole issue is whether the trial court abused its discretion in sentencing Baehl. Baehl argues that the aggravating factors used by the trial court were improper and that he should have been sentenced to no more than the presumptive sentence.<sup>3</sup> Neither Baehl nor the State argue that the enhanced sentence violates the United States Supreme Court's opinion in Blakely v. Washington, 124 S. Ct. 2531 (2004), reh'g denied. Although we would not normally raise this issue sua sponte, we do so here because of the short duration of Baehl's sentence and the unusual circumstances of this case.<sup>4</sup>

In Blakely, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000)). The

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<sup>3</sup> Ind. Code § 35-50-2-7(a) provides that "[a] person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances."

<sup>4</sup> The United States Supreme Court recently noted that when one of its decisions "results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schiro v. Summerlin, 124 S. Ct. 2519 (2004) (quoting Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708 (1987)) (holding that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2000), which applied Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000), to a death sentence imposed under Arizona's sentencing scheme, "announced a new procedural rule that does not apply retroactively to cases already final on direct

Court defined the “statutory maximum” as “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” Id. at 2537 (emphasis in original). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” Id. (emphasis in original). Thus, in Blakely, the Court held that the defendant’s sentence violated his Sixth Amendment’s right to trial by jury because the trial court enhanced the sentence above the “statutory maximum” based upon the defendant’s “deliberate cruelty,” a fact that was not reflected in a jury verdict or admitted by the defendant. Id. at 2537-2538.

Our supreme court has not yet examined the viability of Indiana’s sentencing scheme in light of Blakely. Indiana’s current sentencing scheme allows a trial court to use aggravating circumstances to enhance a presumptive sentence if it: (1) identifies all significant mitigating and aggravating circumstances; (2) states the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulates the court’s evaluation and balancing of the circumstances. Crawford v. State, 770 N.E.2d 775, 782 (Ind. 2002). The trial court enhanced Baehl’s sentence beyond the one and one-half year presumptive sentence based upon two aggravating factors that were not reflected in the jury’s verdict and were not admitted by Baehl. The enhancement of Baehl’s sentence beyond the presumptive sentence for a class D felony violates the

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review”). Baehl’s appeal was pending on direct review at the time that the Supreme Court issued Blakely. Consequently, Blakely is applicable here.

Supreme Court's holding in Blakely, 124 S. Ct. 2537-2538. Consequently, we reverse Baehl's sentence and remand for resentencing consistent with Blakley and Apprendi.

For the foregoing reasons, we reverse Baehl's sentence and remand for resentencing.

Reversed and remanded.

BAILEY, J. and MAY, J. concur