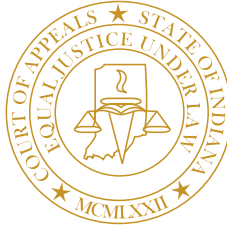


## MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

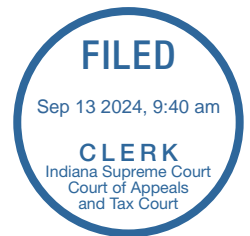


# IN THE Court of Appeals of Indiana

Mary Elizabeth Yoder,  
*Appellant-Defendant*

v.

State of Indiana,  
*Appellee-Plaintiff*



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September 13, 2024

Court of Appeals Case No.  
24A-CR-307

Appeal from the LaPorte Circuit Court  
The Honorable Thomas J. Alevizos, Judge  
Trial Court Cause No.  
46C01-2110-F1-1398

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**Memorandum Decision by Judge Mathias**  
Judge Bailey concurs.  
Chief Judge Altice concurs in result with separate opinion.

**Mathias, Judge.**

[1] The LaPorte Circuit Court sentenced Mary Elizabeth Yoder to forty-two years in the Department of Correction after she pleaded guilty to Level 1 felony neglect of a dependent causing death and Level 5 felony domestic battery. Yoder appeals, arguing that the trial court abused its discretion in its consideration of the aggravating circumstances.

[2] We affirm.

**Facts and Procedural History**

[3] Yoder and her boyfriend, Alan Morgan, tortured their four-year-old son, J.M., which ultimately resulted in his death on October 11, 2021. When J.M. was four months old, he was removed from Yoder's home and placed with a paternal cousin. He remained in that placement for over three years and was returned to Yoder's home shortly before his fourth birthday.

[4] In 2021, Yoder had a seven-year-old child, M.Y., and three children who were fathered by Alan: four-year-old J.M., twenty-three-month-old D.M., and one-year-old L.M. The four children lived in Alan and Yoder's home.

[5] During the summer of 2021, Yoder was pregnant with her fifth child. She made arrangements with Morgan Fulton to adopt her unborn child, and they exchanged numerous text messages during Yoder's pregnancy. In the messages, Yoder told Fulton that she "never wanted [J.M.] to come home" because she

“always had an issue with him,” referred to him as a “f\*\*\*ing dumb shit” and a “f\*\*\*ing a\*\*hole.” Tr. Vol. 2, pp. 50-51.

- [6] In the days leading up to J.M.’s death, Yoder and Alan kept J.M. in a dark, cold basement for many hours, including for nearly twenty-four-straight hours on one occasion. J.M. was naked and duct-taped to a pole in the basement. The family often left the house with the other children, leaving J.M. in the home alone. J.M. was also malnourished.
- [7] On October 7, security cameras in the house captured video of Yoder and Alan bringing J.M. up from the basement to the main level of the house. J.M. was naked and covered in bruises. Thirty minutes after J.M. was released from the basement, Alan punched J.M. fourteen times while Yoder was in the adjoining room.
- [8] On October 8, cameras again recorded a naked J.M. emerging from the basement after approximately six-and-one-half hours. Alan punched J.M. fifteen times while Yoder was in the kitchen. J.M. then went to the bathroom while Alan and Yoder stood nearby. When J.M. exited the bathroom, Alan punched him in the stomach. Alan and Yoder then followed J.M. into the basement. Later that evening, Alan picked J.M. up by his neck and throat while Yoder was standing next to them.
- [9] On October 9, the cameras recorded Alan kicking J.M.’s bottom and forcibly picking him up to carry him to the basement. During the morning and early

afternoon hours, Yoder and Alan went to the basement several times. Later that afternoon, Yoder left the house to go to the hospital to give birth.

[10] On October 10, Alan and Yoder exchanged several text messages. Shortly before 12:00 a.m., Alan texted that he did not know what Yoder wanted him to do about the situation with J.M. Yoder replied that Alan needed to “figure out how to fix the bruises.” *Id.* at 74. Approximately an hour later, Alan told Yoder to call him. Shortly thereafter, Yoder told Morgan Fulton that J.M. was cold and that Alan “beat his ass.” *Id.* at 43. Fulton told Yoder to call 9-1-1, but Yoder told her they needed to wait until she could return to the home to collect her other children. Fulton called 9-1-1. Responding officers discovered J.M. unresponsive in a bedroom. His cause of death was multiple blunt force trauma injuries, with malnutrition and neglect as contributing factors. State’s Ex. 14, p. 110.

[11] Between October 6 and 11, 2021, Yoder and Alan left J.M. in the basement for over ninety hours. The officers observed that the basement had no working electricity and a concrete floor. There was used duct-tape all over the floor and pieces attached to a wooden truss. There was one blanket and one towel and a small infant toilet that contained fecal matter. Yoder’s DNA was found on pieces of tape in the basement. She later admitted that she and Alan had bound J.M.’s wrists behind his back with tape, wrapped the tape around a pole, bound his feet with tape, and covered his mouth with tape on at least one occasion. Tr. Vol. 2, pp. 77-78. When J.M.’s body was discovered, he had lines on his legs from the duct-tape adhesive. *Id.* at 79-80.

[12] The security cameras also recorded Yoder hitting twenty-three-month old D.M. with an open hand on October 6. She then grabbed his arm and yanked him off the couch before throwing him to the floor. Yoder then kicked D.M. Next, she forced him to his feet, but after he fell back to the floor, Yoder kicked him five times.

[13] The State charged Yoder with Level 1 felony neglect of a dependent causing death, Level 5 felony neglect of a dependent, Level 5 felony domestic battery, two counts of Level 6 felony neglect of a dependent, Class A misdemeanor cruelty to an animal,<sup>1</sup> and Class B misdemeanor failure to report child abuse. Yoder agreed to plead guilty to Level 1 felony neglect of a dependent causing death and Level 5 felony domestic battery for striking D.M. The remaining charges were dismissed. During the plea hearing, Yoder admitted that she and Alan punished J.M. by sending him to the basement and withholding food. Tr. Vol. 2, p. 9. She also admitted that she knew Alan was physically abusing J.M. and binding him with duct tape. *Id.* at 8-9.

[14] The trial court held Yoder's sentencing hearing on January 5, 2024. Yoder told the trial court how much she loved J.M. and admitted that she had failed to protect him. The trial court did not find her statement credible. *Id.* at 105. The court also expressly rejected Yoder's claim of remorse. *Id.* at 116. The court heard evidence from Fulton, who adopted Yoder's three youngest children,

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<sup>1</sup> The officers found a malnourished dog in the home when they responded to the 9-1-1 call.

concerning the impact Yoder's offenses had had on L.M. and D.M., including attachment disorders, behavioral issues, issues with eating, and physical delays.

[15] The trial court found five aggravating circumstances before imposing a thirty-seven-year sentence for Yoder's Level 1 felony neglect of a dependent conviction causing death: 1) Yoder's criminal history, 2) that J.M. was "far younger" than the age necessary to be a dependent, 3) that her crimes of violence were committed in the presence of children less than eighteen years old, 4) that Yoder's offenses left an impact on others far beyond what was normal and foreseeable for the crime, and 5) Yoder's lack of remorse. The court found those same aggravating circumstances when imposing a five-year sentence for Yoder's Level 5 felony domestic battery conviction. And the court found one additional aggravating circumstance when imposing sentence for that offense, namely, that the harm, injury, or loss suffered by D.M. was significant and greater than the elements necessary to prove the offense. The court considered Yoder's guilty plea to be a mitigating circumstance. The trial court ordered her sentences to be served consecutively, resulting in an aggregate forty-two-year sentence.

[16] Yoder now appeals her sentence.

## **Discussion and Decision**

[17] Yoder appeals her sentence and argues that "the aggravating circumstances identified by the trial court are improper to impose the near maximum

sentence[s]” for her offenses.<sup>2</sup> Appellant’s Br. at 8. Sentencing decisions are left to the sound discretion of the trial court, and we review the trial court’s decision only for an abuse of discretion. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). 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 therefrom. *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

[18] A trial court may abuse its discretion by: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are 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 that are improper as a matter of law. *Id.* at 490-91. The relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. *Id.*

[19] Except for her criminal history,<sup>3</sup> Yoder challenges each of the aggravating factors the trial court considered during the sentencing hearing.

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<sup>2</sup> Yoder received less-than-maximum sentences for both convictions. The maximum sentence for a Level 1 felony is forty years and the maximum sentence for a Level 5 felony is six years. See Ind. Code §§ 35-50-2-4, - 6. Yoder incorrectly asserts that she received the maximum sentence for a Level 5 felony, and, therefore, the court did not give her any benefit for her guilty plea. But the trial court imposed a sentence that is one year less than the maximum and expressly considered her guilty plea before imposing sentence.

<sup>3</sup> Yoder has prior convictions for trespass, intimidation, and theft.

## 1. Age of the Victim

[20] The trial court found J.M.'s age to be an aggravator because he was only four, which is "far younger" than the age necessary to be a dependent child. Tr. p. 116. Yoder argues that J.M.'s age was an element of the offense, and, therefore, the court improperly considered this aggravating circumstance. A trial court abuses its discretion when it uses an element of the offense as an aggravating circumstance to justify an enhanced sentence. *Salhab v. State*, 153 N.E.3d 298, 304 (Ind. Ct. App. 2020). Indiana Code section 35-46-1-4(b)(3) defines a dependent for the purposes of a Level 1 felony neglect of a dependent conviction as "less than fourteen (14) years of age . . . ."

[21] We have often observed that the trial court may consider the nature and particularized circumstances of a crime as a valid aggravating factor. *Buford v. State*, 139 N.E.3d 1074, 1081 (Ind. Ct. App. 2019). Here, J.M. was defenseless against the torture inflicted upon him by Yoder because he was only four years old. Given his young age, he was also unable to seek help from another adult. The same is true for twenty-three-month-old D.M. For these reasons, the trial court did not abuse its discretion when it considered this aggravating circumstance. *C.f. Gellenbeck v. State*, 918 N.E.2d 706, 712 (Ind. Ct. App. 2009) (concluding that the trial court did not abuse its discretion when it considered the age disparity between the defendant and victim in determining the defendant's sentence for his child seduction convictions).



## 2. Crime of Violence

[22] Yoder claims the court abused its discretion when it found that Yoder committed crimes of violence in the presence of other children under the age of eighteen. Yoder observes that neglect of a dependent is not statutorily defined as a crime of violence. Appellant's Br. at 10 (citing [Ind. Code § 35-50-1-2](#)). However, Yoder does not acknowledge that Level 5 domestic battery is defined as a crime of violence. See [I.C. § 35-50-1-2\(a\)\(7\)](#).

[23] By finding this aggravating circumstance when imposing sentence for the Level 1 felony offense, the trial court was once again considering the nature and particularized circumstances of Yoder's crimes. The torture inflicted on J.M. was unquestionably violent. And Yoder's three other children were present in the home at the relevant times.<sup>4</sup> The trial court did not abuse its discretion when it considered this aggravating circumstance.

## 3. The Impact of the Crimes on Individuals Other than J.M. and D.M.

[24] The trial court also found as an aggravating circumstance that Yoder's offenses had an impact "beyond what's normal and foreseeable" on J.M's siblings, the Hulletts (J.M.'s foster family), and the Fultons, who have filed to adopt L.M.

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<sup>4</sup> Yoder argues that the State failed to prove that the other children were in the home on October 6 when she battered D.M. And she notes that she did not stipulate to that fact. In support of her argument, she cites to [Blakely v. Washington](#), 542 U.S. 296 (2004). But our General Assembly long-ago amended our sentencing statutes in response to the Sixth Amendment issues identified in [Blakely](#). See [Anglemyer](#), 868 N.E.2d at 489. Thus, Indiana's trial courts are not prohibited "from identifying facts in aggravation or mitigation." *Id.* From the evidence presented during the plea and sentencing hearings, the trial court reasonably concluded that Yoder's other children were in the home when she battered D.M.

and D.M.<sup>5</sup> Tr. p. 116. The impact on the victim’s family is generally not a proper aggravating circumstance. See *Comer v. State*, 839 N.E.2d 721, 727 (Ind. Ct. App. 2005), *trans. denied*. The advisory sentence for a crime accounts for the impact of the crime on others, including a victim’s family. See *Harris v. State*, 824 N.E.2d 432, 441 (Ind. Ct. App. 2005), *trans. denied*. In *Gober v. State*, 163 N.E.3d 347, 354 (Ind. Ct. App. 2021) (quoting *Comer*, 839 N.E.2d at 727), *trans. denied*, we observed that “[t]he impact on others may qualify as an aggravator only where the defendant’s actions ‘had an impact on other persons of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.’” See also *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (quoting *Mitchem v. State*, 685 N.E.2d 671, 680 (Ind. 1997) (holding that “where ‘[t]here is nothing in the record to indicate that the impact on the families and victims in [a] case was different than the impact on families and victims which usually occur in such crimes,’ this separate aggravator is improper”).

[25] At the sentencing hearing, Morgan Fulton testified to the significant psychological and behavioral impact suffered by L.M. and D.M., who were one year old and twenty-three months old in October 2021, because they were present in the home where their brother was tortured. But D.M.’s psychological issues also likely stem from Yoder’s abuse of him. Yoder’s neglect of J.M. and

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<sup>5</sup> The Fultons’ adoption of Yoder’s fifth child has been finalized.

his resulting death certainly had a devastating impact on the Hulletts and J.M.'s siblings. But the evidence presented at the sentencing hearing establishes only that the victims and foster family members suffered impacts normally associated with Yoder's offenses. The impact was not so destructive that it rose to the level of an aggravating circumstance. *Cf. Gober v. State*, 163 N.E.3d 347, 354 (Ind. Ct. App. 2021) (affirming the use of the "impact" aggravator where the defendant's neglect, i.e. leaving her children alone in their apartment for 15 hours during which time the children started a fire, destroyed the apartment building, displaced residents from 80 units, and resulted in the death of two of the children). We conclude that the trial court improperly considered this aggravating circumstance.

#### **4. Lack of Remorse**

[26] Yoder claims that the trial court abused its discretion when it considered her lack of remorse as an aggravating circumstance. It is well-settled that lack of remorse may be considered as an aggravating circumstance. *See Kedrowitz v. State*, 199 N.E.3d 386, 406 (Ind. Ct. App. 2022), *trans. denied*.

[27] In support of her argument, Yoder relies on her statement at the sentencing hearing and claims that because she expressed remorse at the hearing, the court improperly considered "her degree of remorse as an aggravator . . . ." Appellant's Br. at 12. Contrary to Yoder's claim, the trial court was not required to credit Yoder's remorseful comments at sentencing especially when weighed against the evidence that she lacked remorse for the torture inflicted on J.M. Moreover, in her statement, Yoder did not specifically express any

remorse for battering D.M. *See* Tr. Vol. 2, pp. 99-105. The trial court did not abuse its discretion when it considered this aggravating circumstance.

### **5. The Harm, Injury, Loss, or Damage to D.M.**

[28] Finally, when it imposed sentence for Yoder's Level 5 felony domestic battery offense against D.M., the court considered an additional aggravator: that the harm, injury, loss, or damage suffered by D.M. was significant and greater than the elements necessary to prove the offense. Yoder pleaded guilty to Level 5 felony domestic battery and admitted that she struck and kicked D.M. in a rude, insolent, or angry manner causing him pain. *See* [Ind. Code § 35-42-2-1.3](#); Appellant's App. p. 70.

[29] We agree with the trial court that Yoder harmed D.M. significantly more than what was required to prove the offense. Yoder hit D.M. with an open hand and then grabbed his arm and yanked him off the couch before throwing him to the floor. Yoder kicked D.M. Next, she forced him to his feet, but after he fell back to the floor, Yoder kicked him five times. And over two years after he was battered, D.M. continues to suffer psychologically and behaviorally. Tr. pp. 45-46. For these reasons, the trial court did not abuse its discretion when it considered this aggravating circumstance.

### **Conclusion**

[30] The trial court considered one improper aggravating circumstance but also considered several other valid aggravating circumstances. "Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld

if other valid aggravators exist.” *McCain v. State*, 148 N.E.3d 977, 984 (Ind. 2020) (citation omitted). We will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Anglemyer*, 868 N.E.2d at 491. Given the remaining, proper aggravating circumstances, we are confident that the trial court would have imposed the same sentence even if it had not considered the impact Yoder’s heinous crimes had on people other than her victims. We therefore affirm Yoder’s thirty-seven-year sentence for Level 1 felony neglect of a dependent resulting in death and her five-year sentence for Level 5 felony domestic battery.

[31] Affirmed.

Bailey, J., concurs.

Altice, C.J., concurs in result with separate opinion.

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**Altice, Chief Judge, concur in result.**

- [32] I cannot agree with the majority’s determination that the trial court abused its discretion by finding as an aggravator that the impact on others was “far beyond what’s normal and foreseeable for this crime.” *Transcript* at 116.
- [33] Our Supreme Court has long held that “where ‘[t]here is nothing in the record to indicate that the impact on the families and victims in [a] case was different than the impact on families and victims which usually occur in such crimes,’ this separate aggravator is improper.” *McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (quoting *Mitchem v. State*, 685 N.E.2d 671, 680 (Ind. 1997)). Further, a trial court may consider impact on others only where the impact is of a destructive nature that is not normally associated with the commission of the offense and is foreseeable to the defendant. *See Smith v. State*, 770 N.E.2d 818, 821-22 (Ind. 2002); *Gober v. State*, 163 N.E.3d 347, 354 (Ind. Ct. App. 2021), *trans. denied*.
- [34] In this case, there is evidence in the record that J.M.’s siblings were impacted not just by his death but also by living in a home where J.M. was systematically tortured by their parents. Indeed, M.Y., who was seven years old at the time, reported seeing and hearing J.M. being physically abused, witnessing J.M.’s hands and feet bound by duct tape, and seeing Yoder and Morgan, individually and collectively, forcibly taking J.M. to the basement where J.M. “normally” stayed. *Appendix* at 74. Further, Fulton testified that as a result of their

traumatic home environment, D.M. and L.M. suffered from attachment disorders, developmental delays, behavioral issues, and eating issues.

[35] With respect to the propriety of this aggravator, I find most notable the destructive impact on the Hullett family as reflected in Jenna Hullett's impact statement and those of her children. The Hullett family raised J.M. for the vast majority of his short life, and they were forced to give him back to Yoder and Morgan only a few months before his death. The Hulletts loved and desperately wanted him; Yoder clearly did not. Yet Yoder kept J.M. from this loving home and confined him in her cold, dark basement where he was tortured over time until his ultimate death. This crime devastated the Hullett family and was a collateral consequence of which Yoder should have been aware and one that is not typical of these crimes.

[36] In sum, I believe there is evidence in the record showing that the impact on J.M.'s siblings and the Hulletts was different and greater than the impact on families and victims that is usually associated with the crime of neglect of a dependent causing death.