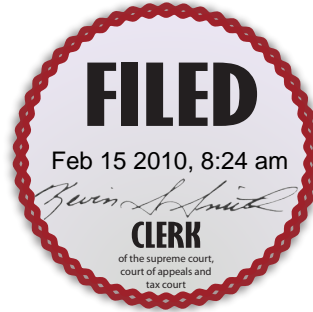


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GILDARDO PEREZ-JOSE,  
Appellant- Defendant,

vs.

STATE OF INDIANA,  
Appellee- Plaintiff,

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No. 32A04-0910-CR-580

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APPEAL FROM THE HENDRICKS SUPERIOR COURT  
The Honorable Stephanie LeMay-Luken, Judge  
Cause No. 32D05-0812-FA-6

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**February 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Following a guilty plea, Gildardo Perez-Jose was convicted of attempted robbery, a Class A felony, and sentenced to forty years at the Indiana Department of Correction (“DOC”). Perez-Jose appeals his sentence, raising one issue for our review: whether the trial court abused its discretion in the finding of aggravating and mitigating circumstances. Concluding the trial court did not abuse its discretion in sentencing Perez-Jose, we affirm.

### Facts and Procedural History

On December 23, 2008, Elizabeth Gilbreath left the Target store in Avon, Indiana, and got into her car while talking to her mother on her cell phone. Perez-Jose entered Gilbreath’s car through the passenger door and pointed a knife at her. Gilbreath and Perez-Jose struggled, and Perez-Jose stabbed Gilbreath in the abdomen, as well as causing cuts and abrasions to her left hand and face. Gilbreath kicked, screamed, and honked her horn during the incident, and eventually, Perez-Jose fled the scene in his truck. Other people in the Target parking lot helped Gilbreath and called police. When Perez-Jose was apprehended soon after the incident, he was in possession of a knife and his right hand was bleeding. He admitted he attempted to rob Gilbreath of her purse. Perez-Jose is a Mexican citizen in the United States illegally.

Perez-Jose was charged with attempted robbery causing serious bodily injury, a Class A felony; aggravated battery, a Class B felony; criminal confinement, a Class B felony; and attempted theft, a Class D felony. Pursuant to a plea agreement, Perez-Jose pled guilty to attempted robbery as charged, the remaining charges were dismissed, and

the sentence was left to the trial court's discretion. Following a hearing, the trial court sentenced Perez-Jose to forty years at the DOC.

### Discussion and Decision

#### I. Standard of Review

A sentencing decision rests within the sound discretion of the trial court and, as long as the sentence is within the statutory range, is 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. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court or the reasonable, probable, and actual deductions to be drawn therefrom. Id. We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we do not review the relative weight given to these reasons. Id. at 491.

The trial court must enter a sentencing statement that includes reasonably detailed reasons for imposing a particular sentence. Id. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion. Id. The trial court may abuse its discretion if the record fails to support the reasons given for imposing a sentence, if the statement omits reasons that are clearly supported by the record and advanced for consideration, or if the reasons are improper as a matter of law. Id. at 490-91.

#### II. Aggravating and Mitigating Circumstances

Perez-Jose was convicted of attempted robbery, a Class A felony, which is subject to a sentencing range of twenty to fifty years, with an advisory sentence of thirty years.

See Ind. Code § 35-50-2-4. The trial court's oral sentencing statement recited the mitigating and aggravating circumstances it considered in sentencing Perez-Jose to forty years. As mitigating circumstances, the trial court found there was no evidence Perez-Jose had a criminal history, and he accepted responsibility for his crime and extended a benefit to the State by pleading guilty. The trial court did not give "a whole lot of weight" to the lack of criminal history, and found Perez-Jose also received a benefit from his plea bargain. As aggravating circumstances, the trial court found that Perez-Jose was in the United States illegally, demonstrating a "propensity to break the law," transcript at 94; the crime occurred two days before Christmas; Perez-Jose used a deadly weapon in committing the offense; Perez-Jose did not seek medical attention for Gilbreath; Gilbreath suffers from continuing emotional and psychological trauma beyond that typically caused by the crime; Perez-Jose caused injuries beyond those required to establish the crime; and Perez-Jose lacked remorse for his actions. The trial court found the aggravating circumstances outweighed the mitigating circumstances, and imposed a sentence of forty years, midway between the advisory and the statutory maximum sentence.

#### A. Aggravating Circumstances

Perez-Jose argues several of the aggravating circumstances found by the trial court are improper. First, he argues the fact he is an illegal alien does not "bear any relationship to the crime for which he was convicted" and he should not be subjected to an increased sentence as "compared to an American defendant that committed the same crime." Brief of the Appellant at 11-12. Perez-Jose admitted during the pre-sentence

investigation he did not obtain documents to enter the country legally. We have held that being an illegal alien is properly viewed as an aggravating circumstance. Samniego-Hernandez v. State, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005) (citing Yemson v. United States, 764 U.S. 816, 819 (D.C. App. 2001), for the proposition that “in sentencing a criminal defendant, court cannot treat defendant more harshly than any other citizen solely due to his national origin or alien status, but that does not mean that [the] court must close its eyes to defendant’s illegal alien status and disregard for the law, including immigration laws”), abrogated on other grounds by Anglemeyer, 868 N.E.2d 482. Perez-Jose cites Sanchez v. State, 891 N.E.2d 174 (Ind. Ct. App. 2008), and Alexander v. State, 837 N.E.2d 552 (Ind. Ct. App. 2005), disapproved on other grounds, Ryle v. State, 842 N.E.2d 320 (Ind. 2005), for the proposition that without evidence of other illegal activity, the trial court abused its discretion in finding his illegal alien status to be an aggravating circumstance. In both Sanchez and Alexander, we noted the defendant was using citizenship documents that could only have been obtained by fraudulent means. 891 N.E.2d at 177; 837 N.E.2d at 556. However, in Sanchez, we discussed the additional illegal activity in the context of assessing the character prong of inappropriate sentence review and in Alexander, we discussed the additional illegal activity in considering the defendant’s claim his illegal alien status should not be an aggravating circumstance because his parents brought him to the United States when he was a child and he had no choice. We do not read either of these cases to require evidence of additional illegal activity in order for the trial court to properly find Perez-Jose’s illegal alien status as an aggravating circumstance.<sup>1</sup>

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<sup>1</sup> Moreover, we note the pre-sentence investigation report indicates Perez-Jose has held several jobs since

Perez-Jose also argues the trial court improperly found as aggravating circumstances the following facts: Perez-Jose used a deadly weapon, Gilbreath suffered injuries greater than required to commit the crime, and Gilbreath has suffered lasting emotional trauma. When evaluating the nature of the offense, the trial court may consider the particularized circumstances of the factual elements as aggravating factors but must detail why the defendant deserves a sentence greater than the advisory under the particular circumstances. McElroy v. State, 865 N.E.2d 584, 589-90 (Ind. 2007). In other words, the “particularized individual circumstances” outside of the factual elements may be a valid aggravating circumstance. Meadows v. State, 785 N.E.2d 1112, 1127 (Ind. Ct. App. 2003), trans. denied. Attempted robbery as a Class A felony requires proof that force was used or threatened and serious bodily injury resulted. See Ind. Code § 35-42-5-1. As the trial court noted, the crime could have been accomplished without the use of a deadly weapon. See Tr. at 95 (trial court stating, “for [those] of us in this system every day, we see Robbery Causing Serious Bodily Injury committed without deadly weapons; without knives, without guns.”). Instead, Perez-Jose was armed with a knife which could not be automatically or accidentally opened. Indiana Code section 35-38-1-7.1(a)(1) provides that a trial court may assign aggravating weight to the harm, injury, loss, or damage suffered by the victim of the offense if such harm was significant and greater than the elements necessary to prove the commission of the offense. Although serious bodily injury is an element of the offense, the trial court noted Perez-Jose stabbed Gilbreath more than once, “reach[ing] beyond . . . what would [be] require[d] to meet

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arriving in the United States, and presumably would have had to give a social security number to his employers, which he could only have obtained fraudulently.

count one (1) and its elements only.” Tr. at 98. Gilbreath suffered not only a potentially fatal puncture wound to her abdomen, but also lacerations to her hand that required seventeen stitches to repair and an abrasion to her face from Perez-Jose grabbing it. In addition, she has scar tissue and continued soreness as a result of her injuries. Moreover, the trial court noted “[e]motional and psychological injuries are not encompassed within this type of crime automatically for every individual.” Id. at 96. Almost a year after the commission of the offense, Gilbreath remained fearful of being among strangers, had delayed college courses, and rarely went anywhere alone; in short, “[h]er whole world has been altered in how she views this world.” Id. at 97.

Finally, Perez-Jose contends the trial court improperly found as aggravating circumstances the following facts surrounding the crime itself: the date and the fact Perez-Jose failed to seek medical assistance for Gilbreath. “Trial courts clearly are allowed to consider various circumstances relating to the nature of the crime.” Roney v. State, 872 N.E.2d 192, 203 (Ind. Ct. App. 2007), trans. denied. That Perez-Jose committed the crime two days before Christmas factored into the impact of the crime on Gilbreath: she spent most of Christmas Eve day in the hospital, was required to rely on her family to help her finish Christmas preparations, and was in pain and unable to fully participate in Christmas festivities with her two young children. Although Perez-Jose argues the fact he did not seek medical assistance for Gilbreath is an improper aggravating circumstance, he also acknowledges caselaw supporting this fact as an aggravating circumstance. See Georgopoulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000); Rogers v. State, 878 N.E.2d 269, 274 (Ind. Ct. App. 2007), trans. denied. Although there

is no evidence Gilbreath suffered greater injuries as a result of Perez-Jose's failure to call for medical assistance, Perez-Jose stated at the sentencing hearing that it was not his intention to hurt Gilbreath. The trial court stated that if it was truly not his intention to hurt her, "he would have stopped what he was doing, realized that he made a horrible error . . . and would have sought medical attention . . . ." Tr. at 96. In this case, the failure to seek medical attention is an additional circumstance of the crime on which the trial court could properly rely. The trial court sufficiently detailed the specific circumstances of the crime that merited a sentence in excess of the advisory.

#### B. Mitigating Circumstances

Perez-Jose contends the trial court should have found his remorse to be an additional mitigating circumstance. Because the trial court's sentencing statement included a finding of mitigating circumstances, the trial court was required to identify all significant mitigating circumstances. Anglemyer, 868 N.E.2d at 492-93. When the appellant alleges the trial court failed to find a mitigating circumstance, the appellant must establish the mitigating evidence is both significant and supported by the record. Id. at 493. "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." Id. (quotation omitted).

Rather than failing to explain why it did not find remorse to be a mitigating circumstance, the trial court here found lack of remorse to be an aggravating circumstance: "I think his remorse really more so is for himself and that he is in this situation." Tr. at 98. Perez-Jose did apologize at the sentencing hearing; however, he



also stated he did not know why he did it “[o]r who to blame for everything that I’ve done. I think it’s destiny. . . . I don’t know my, my knife just . . . [I] couldn’t control it.” Id. at 76. A trial court’s determination of the sincerity of a defendant’s profession of remorse is similar to a determination of credibility, and we generally accept the trial court’s determination. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). Under these circumstances, the trial court did not abuse its discretion in not finding remorse to be a mitigating circumstance.<sup>2</sup>

### Conclusion

The trial court did not abuse its discretion in sentencing Perez-Jose. Accordingly, his forty-year sentence is affirmed.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.

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<sup>2</sup> As we have found the trial court did not abuse its discretion in sentencing Perez-Jose and as Perez-Jose does not advance an Appellate Rule 7(B) claim for independent review of his sentence, see King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (“[I]nappropriate sentence and abuse of discretion claims are to be analyzed separately.”), we need not consider whether the sentence is inappropriate, see Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding where trial court abuses its sentencing discretion, we may remand or may exercise our authority to review and revise the sentence).