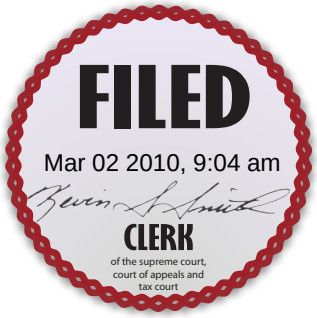

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IN THE COURT OF APPEALS OF INDIANA

JIMMY CLARK, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A05-0911-CR-635
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Thomas G. Wright, Judge
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-9604-CF-31

March 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

In this belated appeal, Jimmy Clark Jr. appeals his forty-year sentence for Class A felony robbery resulting in serious bodily injury for beating and taking property from an elderly woman. Specifically, he contends that the trial court abused its discretion in failing to identify two mitigators and that his sentence is inappropriate. Finding no abuse of discretion and that Clark has failed to persuade us that his sentence is inappropriate, we affirm.

Facts and Procedural History

In April 1996 the State charged Clark with Class B felony conspiracy to commit burglary, Class A felony burglary resulting in serious bodily injury, and Class A felony robbery resulting in serious bodily injury. In September 1996 Clark and the State entered into a plea agreement whereby Clark pled guilty to Class A felony robbery resulting in serious bodily injury,[1] and the State would dismiss the remaining counts. The parties agreed "that the sentence shall be left to the discretion of the court." Appellant's App. p. 45.

At the guilty plea hearing, the following factual basis was presented. On April 11, 1996, Clark and two other men drove to the rural home of eighty-year-old Matrice Nottingham in Grant County, Indiana. They told Nottingham that they were having car problems and asked if they could use her phone. Once inside her house, the men repeatedly beat and kicked Nottingham. The men then took purses, a VCR, and a cordless phone. Nottingham was knocked unconscious and had to be taken to the

[1] Ind. Code § 35-42-5-1.

hospital. She suffered a broken nose, loss of blood, and permanent injuries to her ear and nose.

At the November 1996 sentencing hearing, the trial court identified as aggravators that Clark was on probation at the time of this offense, Tr. p. 90, 92, and Nottingham's age, *id.* at 92. The trial court found as mitigating that Clark assisted the police with its investigation of this case. *Id.* at 91. However, the court did not afford this mitigator much weight because it found that the police

> mostly . . . could have prosecuted this case on the basis of Mr[s]. Nottingham saying, that's Mr. Clark, and that's Mr. Cook, that's the one that kicked me in the head. They pretty much had you guys nailed to the wall without your testimony. But nevertheless, you did give testimony in this matter, and the Court notes that.

Id. at 91-92. As such, the trial court sentenced Clark to forty years with five years suspended to probation. The trial court's written sentencing order provides in pertinent part:

> That [Clark] be committed to the Indiana Department of Correction[] for a term of imprisonment of thirty (30) years plus ten (10) years for aggravating circumstances, to-wit: the victim being eighty (80) years of age; the imposition of a lesser sentence would depreciate the seriousness of the crime as the facts are particularly heinous; the defendant is in need of correctional or rehabilitative treatment by commitment to a correctional institution, and the defendant committed this offense while on probation. . . . That five (5) years of such sentence herein be suspended and the defendant be placed on probation for a period of five (5) years under written rules of probation.

Appellant's App. p. 63-64. Having been granted permission to file a belated notice of appeal, Clark now appeals his sentence.

Discussion and Decision

Although Clark's Statement of the Issue sets forth the single issue of inappropriate sentence, Clark actually makes the following arguments: the trial court failed to identify two mitigators and his sentence is inappropriate. The State treats them as separate issues, as do we.

I. Abuse of Discretion

We begin by noting that Clark committed this crime in 1996; therefore, the sentencing statute in effect at that time governs the sentence for this crime. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007). At the time of the offense in this case, the legislature had not yet amended Indiana's sentencing statute, and consequently, the presumptive sentencing scheme applies. *Id.* Under that scheme, sentencing determinations are within the trial court's discretion and are reviewed on appeal only for an abuse of that discretion. *Padgett v. State*, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007), *trans. denied*. It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Id.* When the trial court does enhance a sentence, it must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.*

Clark first argues that there is a question as to whether the trial court considered his cooperation with the police as a mitigator because, although the trial court's oral

sentencing statement mentions his cooperation, the court's written sentencing statement does not. Therefore, Clark asserts that remand is required.

The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (citing *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) ("In reviewing a sentencing decision in a non-capital case, we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings."); *Strong v. State*, 538 N.E.2d 924, 929 (Ind. 1989) ("In addition to the discussion set forth in the separate sentencing order, this Court has reviewed the trial court's thoughtful comments at the conclusion of the sentencing hearing.")). "Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court." *Id.* We have the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. *Id.* (citing *Willey v. State*, 712 N.E.2d 434, 446 n.8 (Ind. 1999) ("[T]he trial court issued its written sentencing order that was consistent with the Abstract of Judgment, but at odds with the oral pronouncement at the sentencing hearing. . . . Based on the unambiguous nature of the trial court's oral sentencing pronouncement, we conclude that the Abstract of Judgment and Sentencing Order contain clerical errors and remand this case for correction of those errors.")). "This is different from pronouncing a bright line rule that an oral sentencing statement trumps a written one." *Id.*

Here, we find no discrepancy between the oral and written sentencing statements. In the oral sentencing statement, the trial court recognized that Clark cooperated with the police, but the court did not find his "cooperation to be offsetting as, as the aggravating factor of, of the victim in this case and her age, as old as she is." Tr. p. 92. The court continued:

> It'll be the judgment of this Court you be sentenced to . . . a term of thirty years, the mid term, and the Court finds the aggravating factor in the age of the victim, and your particular case, I find that you committed the crime while on probation as a further aggravation; however, I'm only going to . . . pick you up because of the double aggravation, I'm only going to aggravate it ten years and subtract five. . . . So that you have thirty plus ten minus five on probation.

Id. The written sentencing statement does not mention any mitigators, and it is clear from the oral sentencing statement that the court did not consider Clark's cooperation to be a significant mitigating circumstance. A trial court is only required to articulate in the sentencing statement those proffered mitigating circumstances that it determines to be significant. *Harris v. State*, 659 N.E.2d 522, 528 (Ind. 1995). As such, the trial court did not abuse its discretion in failing to identify as a significant mitigator Clark's cooperation with the police. Therefore, remand is not necessary.

Clark next argues that the trial court abused its discretion in failing to identify his guilty plea as a mitigator. We observe that a guilty plea does not automatically amount to a significant mitigating factor. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). "[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." *Wells v. State*, 836 N.E.2d

475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, the evidence shows that Clark pled guilty to one Class A felony, and the State dismissed a Class B felony and another Class A felony. In addition, the evidence against Clark was strong because of Nottingham's identification. The trial court did not abuse its discretion in failing to identify Clark's guilty plea as a significant mitigator.

II. Inappropriate Sentence

Finally, Clark contends that his forty-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

At the time of Clark's offense, the presumptive sentence for a Class A felony was thirty years, with no more than twenty years added for aggravating circumstances and no more than ten years subtracted for mitigating circumstances. Ind. Code Ann. § 35-50-2-4 (West 1998). The trial court sentenced Clark to forty years with five years suspended to probation.

As for the nature of the offense, Clark acknowledges the "brutal nature" of this crime, which was directed against an "elderly woman." Appellant's Br. p. 6. In addition, Clark and his cohorts tricked Nottingham into letting them inside her rural home. Once inside, they repeatedly hit and kicked Nottingham. Clark even assisted in kicking the chair out from underneath her. Nottingham was knocked unconscious, had a broken nose, and suffered permanent injuries, all so they could take her property. These facts demonstrate a callous disregard for an elderly woman's welfare and a disturbing level of cruelty.

As for Clark's character, he was on probation for felony theft at the time of the offense here. He also had a juvenile record for criminal conversion. In addition, this was not the first time that Clark and his cohorts had broken into someone's home to take their property. In sum, Clark has demonstrated an escalating pattern of taking other people's property with the introduction of violence. Clark has failed to persuade us that his forty-year sentence for Class A felony robbery resulting in serious bodily injury is inappropriate.

Affirmed.

RILEY, J., and CRONE, J., concur.