ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNBACHER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KERWIN M. WARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0912-CR-581
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0812-FD-1150

June 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kerwin M. Ward appeals the sentence imposed by the trial court after a jury found him guilty of two counts of battery upon law enforcement officer, a class D felony; one count of battery by bodily waste, a class D felony; one count of resisting law enforcement, a class A misdemeanor; and one count of disorderly conduct, a class B misdemeanor.

We affirm.

ISSUES

1. Whether the trial court abused its discretion at sentencing.

2. Whether the sentence is inappropriate.

FACTS

At approximately 11:30 p.m. on December 18, 2008, Officers Michael Bell and Joshua Franciscy of the Fort Wayne Police Department were dispatched to Ward's apartment. According to Ward, they were dispatched as a result of his loud verbal altercation with his girlfriend, Bianchi Shears. The officers arrived to find Ward in the apartment building hallway. They placed him under arrest and handcuffed him,[1] with Ward being "very agitated . . . upset . . . yelling." (Tr. 167).

Ward, clad in boxer shorts, "asked if he could go put some pants on," and Bell escorted him into his apartment while Franciscy talked with Shears in the hallway. Bell

[1] At trial, the jury was advised that the parties had stipulated that he was "lawfully placed in custody." (Tr. 89). Ward testified that his arrest was because "[he] had a warrant for driving while suspended." (Tr. 228). The trial court admonished the jury to disregard his testimony "about the warrant." (Tr. 234).

seated Ward, still spouting "profanities, a lot of loud abrasive language," (tr. 93), in a recliner and assisted him in putting on trousers and socks. When Franciscy and Shears entered the apartment, Ward screamed "get the f*** out of my house b****," and "continued to yell and scream at the officers." (Tr. 167). After the officers told Ward for a second time to quiet down, Ward "stood up abruptly and took and aggressive stance" directed at Fanciscy, "c[oming] towards [him] really fast." (Tr. 168). Franciscy "delivered one palm heel strike to [Ward]'s chest area" as a defensive tactic; Ward fell back into the recliner, and it tipped over backward.

When Franciscy attempted to assist him up, Ward "takes his foot and rears up like a horse kick and kicks Officer Franciscy in the groin." (Tr. 98). The kick "really hurt a lot"; Franciscy stepped back and bent over in pain. (Tr. 172). Bell deployed a one-to-two second burst of OC, or pepper spray, to Ward's face. Both officers attempted to assist Ward up; Ward "bent over at the waist" and "started charging towards" Bell, "using his head as a battering ram" to strike Bell's right knee. (Tr. 101, 172, 101). The blow to Bell was painful, and later resulted in swelling, inflammation, and discomfort in walking. Bell brought Ward to the floor, and while on the floor, Ward "continued to physically resist . . . flailing his legs violently and moving his body," with "no cooperation . . . whatsoever." (Tr. 173, 105). The officers stood Ward, whose "passive resistance" of hanging limp "like a dead weight" required them to "carry him out" of the building to the squad car. (Tr. 107).

There, he continued "yelling" and "screaming at the top of his lungs" (tr. 109, 110), despite their ordering him to be quiet. From his seated position in the back of the squad car, Ward "came up" and again "lunged at" Franciscy. (Tr. 174). Franciscy deployed a "one second burst of spray" at him. *Id.* Franciscy then poured water over Ward's face to "flush[] his eyes out." (Tr. 175).

The officers transported Ward to the hospital for medical clearance before delivering him to the jail. At the hospital, Ward "was swearing, stating f*** you, f*** the police, other profanities continuously." (Tr. 115). Franciscy told Ward to quiet down, and Ward "said f*** you and . . . spit" bloody saliva on the officer's face and chest. (Tr. 176). Ward continued to scream profanities and managed to break the rail of the hospital bed to which he was handcuffed.

On December 24, 2008, the State charged Ward with two counts of battery upon a law enforcement officer, a class D felony; one count of battery with bodily waste, a class D felony; one count of resisting arrest, as a class A misdemeanor; and one count of disorderly conduct, as a class B misdemeanor.[2] On October 22, 2009, a trial was held. The foregoing evidence was heard, and the jury found Ward guilty on all counts.

On November 9, 2009, the sentencing hearing was held. Ward stated that he "want[ed] to apologize to the Court for this matter"; asserted that he had "lost everything" during his pretrial incarceration; and asked the trial court to "dismiss this case on the inconsistencies of the statements of the officer" regarding what was "just a

[2] Ward was also charged with one count of criminal mischief, as a class A misdemeanor, for allegedly damaging hospital property. However, this count was dismissed several months before trial.

misunderstanding." (Sent. Tr. 6). His counsel asked for "a minimum of jail sentence," and "all concurrent"; asserted that Ward had been "beaten up pretty badly for a couple of traffic, driving while suspended situations," and noted "inconsistencies in the testimony." *Id.* at 5. The State noted Ward's lengthy criminal history of "two prior felonies" and "twelve prior misdemeanors," including both battery and resisting offenses. *Id.* at 8.

The trial court then stated as follows:

> I'm going to find that there are no mitigating circumstances and there are aggravating circumstances. Number one, [Ward]'s extensive criminal history beginning with burglary and auto theft in 1988, two, three . . . , four batteries, possession of cocaine as a misdemeanor, resisting. I'm just naming the ones I consider to be significant. I'm overlooking the operating while suspended, public intoxication, criminal trespass, and further this particular incident, it is clear that Mr. Ward perpetrated each and every act alleged. I found testimony presented by the State of Indiana to be highly credible. And I want to be very careful here because it is not my intent to be critical or disrespectful to the officers. Perhaps they could have handled it differently and perhaps they were over zealous. I think they dealt with what they were confronted with and I don't find anything really wrong with anything they did. They could have handled it differently and maybe it would have had a different result. I don't think they had an obligation to handle it differently. I think you did, you committed serious acts of battery on both of these officers and totally, and irrelevant to a sentence here, and I'm not considering this as an aggravator, you were totally disrespectful to each and every person that had anything to do with this case. From the moment the officers walked in the door until the time they took you to the hospital, and the way you treated hospital personnel, besides the police and everybody else involved. You could have handled this differently and the results would have been substantially different.

Id. at 11-12. The trial court further noted that it found the battery by bodily waste offense "particularly offensive" so as to "justif[y] a separate sentence." *Id.* at 12. The trial court sentenced Ward to two years for each battery, one year for resisting law

enforcement, and sixty days for disorderly conduct, with those terms served concurrently but consecutive to the two-year sentence it imposed for the battery by bodily waste offense, for a total executed sentence of four (4) years.

DECISION

1. Abuse of Discretion

Ward argues that the trial court abused its discretion by failing "to find mitigating factors that where [sic] both significant and clearly supported by the record." Ward's Br. at 12. Specifically, he contends the trial court should have found as mitigating factors the following: his expression of remorse; that the officers "induced or facilitated" his offenses; that "substantial grounds tend[ed] to excuse of justify" his offenses; that he "acted under strong provocation"; that he had "led a law-abiding life for a substantial period before commission of the crime[s]"; and that imprisonment would result in undue hardship to him. *Id.* at 14, 15. We disagree.

A sentence within the statutory range of the sentencing statutes is "subject to review only for abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). The trial court's sentencing statement explains its reasons for imposing a sentence – including a finding of aggravating factors and mitigating factors, if any. *Id.* On appeal, we review for an abuse of discretion (1) the trial court's reasons – specifically, whether they are supported by the record, and proper as a matter of law; and (2) whether any reasons "clearly supported by the record and advanced for consideration" were omitted by the trial court. *Id.* at 491.

However, the weight given to those reasons, *i.e.*, to particular aggravators or mitigators, is not subject to appellate review. *Id.*

As to Ward's argued expression of remorse, his statement that he "want[ed] to apologize" to the court, (tr. at 6), fails to include any expression of remorse for his criminal acts or any apology to the officers. Moreover, his statement thereafter that the incident was "simply a misunderstanding," *id.*, belies the existence of remorse on the part of Ward. *See Hape v. State*, 903 N.E.2d 977, 1003 (Ind. Ct. App. 2009) (expression of remorse belied by subsequent attempts to blame others for situation), *trans. denied*. Further, the sincerity of a defendant's "proclaimed remorse" is a matter for determination by the trial court. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002).

As to Ward's other purported mitigating circumstances, they were not "advanced for consideration" by him to the trial court. *Anglemyer*, 868 N.E.2d at 491. When the defendant fails to assert to the trial court a circumstance purported to be a mitigating factor, he "waive[]s any . . . argument" that the trial court erred when it failed to find that circumstance to be a mitigating factor. *Rogers v. State*, 878 N.E.2d 269, 273 (Ind. Ct. App. 2007), *trans. denied*; *see also*, *McKinney v. State*, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007), (failure to proffer mitigating circumstance to trial court waives appellate review), *trans. denied*; *Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (defendant who fails to raise proposed mitigators at trial court level is precluded from advancing them for first time on appeal).

2. Inappropriate Sentence

The Indiana Constitution authorizes independent appellate review and revision of a sentence, authority implemented through Appellate Rule 7(B). *Anglemyer*, 868 N.E.2d at 491. The Rule 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." *Id.* (quoting Ind. Appellate Rule 7(B)). "The burden is on the defendant to persuade" the appellate court that his or her sentence is inappropriate. *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006)).

Ward argues that his previous crimes had been committed years earlier, and that inasmuch as the officers "physically beat and struck Mr. Ward multiple times and used a chemical agent on Mr. Ward during this routine traffic stop [sic]," the offenses here are not so "significant" as to "warrant a [sic] aggravated consecutive four (4) year sentence." Ward's Br. at 20. We are not persuaded.

Regarding the nature of the offenses, two law enforcement officers were dispatched to Ward's residence, where they lawfully took him into custody. Thereafter, Ward continuously yelled profanities at the officers; physically lunged at Officer Franciscy, then kicked him in the groin; charged at Officer Bell, ramming his head against Bell's knee, causing him physical pain and discomfort; lunged a second time at Franciscy, and then spat bloody saliva upon him. Ward never complied with the multiple orders to quiet down, and he continuously refused to submit to the officers' control.

Regarding Ward's character, the record supports the trial court's recitation of his twenty-year criminal history. We also find it a reflection on Ward's character that despite his convictions on all counts after a jury trial, he believed that his criminal acts against the officers were "just a misunderstanding." (Tr. 6).

Ward bore the burden of persuading us that the sentence imposed is inappropriate. *See Reid*, 876 N.E.2d at 1116. Considering Ward's multiple violent and uncivil acts and the evidence of his character, we are not persuaded that his four-year sentence is inappropriate.

Affirmed.

BAKER, C.J., and CRONE, J., concur.