

STATEMENT OF CASE

Jason Montgomery (“Montgomery”), appeals his sentence, following a plea of guilty to burglary, a class B felony.

We affirm.

ISSUE

Whether the trial court erred in sentencing Montgomery.

FACTS

On the evening of February 11, 2009, Kevin Galligher (“Galligher”) and Travis Sneary (“Sneary”) were at Galligher’s apartment when they heard a knock on the door. When Galligher opened the door, Montgomery and, co-defendant, Zeth Snook (“Snook”), forced their way into the apartment. Although Montgomery was wearing a ski-mask, Galligher immediately recognized him from his physical features and “mannerisms.” (App. 8). Montgomery pointed a handgun at Galligher and Sneary as he and Snook ordered them into the bedroom and duct-taped their hands behind their backs. Montgomery and Snook then took a container holding approximately 2-3 ounces of marijuana and some video games before leaving the apartment. Galligher and Sneary told investigating officers that they were very frightened by having a handgun pointed at them and being confined by duct-tape. Galligher also told them that of the two individuals, Montgomery was more aggressive than Snook.

On March 25, 2009, the State charged Montgomery with Count 1, robbery while armed with a deadly weapon, a class B felony; and Count 2, criminal confinement while armed with a deadly weapon, a class B felony. On November 30, 2009, Montgomery

entered into a plea agreement wherein he pled guilty to burglary, a class B felony. In return, the State dismissed the criminal confinement charge and agreed to leave sentencing to the discretion of the trial court. The trial court scheduled a sentencing hearing for January 25, 2010. After Montgomery failed to appear at the hearing, the trial court issued a bench warrant for his arrest. Montgomery was arrested on February 7, 2010, and the trial court held a sentencing hearing on February 12, 2010.

At sentencing, Montgomery testified that he was sorry for what he had done and was not in the “right state of mind” when he committed the crime. (Tr. 19). Furthermore, his attorney argued that Montgomery had a “relatively minor prior criminal history.” *Id.* He also asserted that Snook was involved in the incident and asked the court to impose a sentence no worse than the sentence imposed on Snook. *Id.*

The State noted that the plea agreement required “that [it] stand silent” regarding sentencing. (Tr. 19). However, according to the Pre-Sentence Investigation (“PSI”) Report to the trial court, as a juvenile, Montgomery had true findings for delinquency for visiting a common nuisance, theft, and truancy. After being placed on probation, his probation was revoked by the juvenile court’s finding that Montgomery possessed a handgun and was ordered to serve sixty (60) days in home detention. (App. 78).

At the sentencing hearing the following discussion took place:

COURT: Well, as [Defense Counsel] pointed out, there was a co-defendant. There were two guys that were involved in this, what ended up being burglary of a residence. Uh, however, by all accounts, including primarily the victim’s account, uh, Mr. Montgomery was armed and the more aggressive of the two people involved. . . . Mr. Montgomery’s past history, while relatively light, I wouldn’t disagree with [Defense Counsel’s] characterization. It does involve a juvenile incident in which he was, uh,

found to have been involved in a case in which a handgun was stolen and possessed So, this is the, at least, second, uh incident involving a handgun and Mr. Montgomery.

[Defense Counsel]: Your Honor, for your information my client advises that the gun was not stolen.

COURT: Well, the, what I know about it is at the bottom of page one, it states, a probation violation was filed on August 1st alleging the Defendant had violated probation by committing numerous curfew violations, leaving home without permission and stealing and possessing a handgun.

(Tr. 19-20). Subsequently, the trial court sentenced Montgomery to ten years, with two years suspended to probation.

DECISION

Montgomery raises one issue in his appellate brief: whether the trial court's sentence was appropriate in light of the nature of the offenses and his character. However, Montgomery argues both that the trial court abused its discretion at sentencing by failing to consider mitigating circumstances and that his sentence is inappropriate. Thus, we consider whether the trial court abused its discretion in sentencing Montgomery, and whether the sentence was inappropriate based on the nature of the offense and character of the defendant.

1. Mitigating Circumstances

Montgomery argues that the trial court abused its discretion by failing to consider certain mitigating factors at sentencing. Specifically, he argues that the trial court failed to consider his guilty plea, cooperation with the police, and expression of remorse as mitigating factors, and that the trial court cited no aggravating factors at sentencing.

“[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Smith v. State*, 929 N.E.2d 255, 258 (Ind. Ct. App. 2010) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)). A trial court may impose any sentence “within the allowable range for a given crime without a requirement to identify specific aggravating or mitigating circumstances.” *Id.* When a defendant offers evidence of mitigation, the trial court has the discretion to determine whether the factors are mitigating, and it is not required to explain why it does not find the proffered factors to be mitigating.” *Smith*, 929 N.E.2d at 259. The trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence. *Cardwell*, 895 N.E.2d at 1223. However, the weight or value assigned to any mitigating or aggravating factors that the trial court may properly find is not subject to review for abuse of the trial court’s discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007).

We first address Montgomery’s contention that the trial court failed to properly consider proffered mitigating factors and cited no aggravating factors. Although, at sentencing, the trial court found that Montgomery’s adult history was “relatively light,” it held that it must also consider his juvenile record and subsequent probation violations, as well. (Tr. 20). The trial court acknowledged that it took into consideration that Montgomery was one of two defendants involved in the burglary. However, as an aggravating factor, it found that of the two defendants, Montgomery was armed and was the more aggressive of the two. Therefore, the trial court clearly identified on the record the aggravating and mitigating factors that it found significant.

As to Montgomery's argument that the trial court overlooked his expression of remorse, we find that "[t]he trial court is in the best position to judge the sincerity of a defendant's remorseful statements." *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005). Furthermore, Montgomery argues that the trial court failed to consider his guilty plea, cooperation with the police, and expression of remorse as mitigating factors, and that the trial court offered no aggravating factors to support the sentence. It is worth noting the trial court is not obligated to explain why it does not find a particular mitigator to be significant; and standing alone, a guilty plea "is not automatically a significant mitigating factor." *Brown v. State*, 907 N.E.2d 591, 594 (Ind. Ct. App. 2009) (quoting *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)). A guilty plea is not a significant mitigating factor where the defendant received substantial benefit from the pleas or where there is overwhelming evidence against him such that the decision to plead guilty is pragmatic. *Edrington v. State*, 909 N.E.2d 1093, 1100 (Ind. Ct. App. 2009). Here, immediately after commission of the crime, Galligher identified Montgomery as his attacker. Further, in return for Montgomery's guilty plea, the State dismissed the criminal confinement charge and agreed not to argue at sentencing. Hence, the record reflects that Montgomery could have made a pragmatic decision to plead guilty and received a significant benefit in return.

As to Montgomery's argument that the trial court failed to consider his cooperation with the police as a mitigator, we decline to hold that a trial court is obliged to consider cooperation with the police as a mitigating factor. We also decline to hold that cooperation is entitled to mitigating weight when the decision to cooperate comes

after an arrest, and thus may have been a pragmatic decision. *Smith*, 929 N.E.2d at 259 (citing *Glass v. State*, 801 N.E.2d 204, 209 (Ind. Ct. App. 2004)). Likewise, rather than turn himself in voluntarily, Montgomery admitted that he had been involved in the incident only after being interviewed by investigating officers. Thus, the trial court did not abuse its discretion in declining to consider his cooperation with the police as a mitigating factor.

Based on the foregoing, we do not find that the trial court abused its discretion in sentencing.

2. Inappropriate Sentence

Montgomery argues that his sentence is inappropriate in light of the nature of the offense and his character. According to Indiana Appellate Rule 7(B), this court will not revise the sentence imposed unless it is inappropriate in light of the nature of the offense and the character of the offender. “It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record” *Anglemyer*, 868 N.E.2d at 491.

Indiana Code section 35-50-2-5 provides that a person who commits a class B felony shall be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years. The trial court sentenced Montgomery to the advisory sentence of ten years, with eight years to be executed and two years suspended to probation.

Montgomery argues that “the nature of the offense does not justify an eight year executed sentence where [he] had no prior felony convictions and his co-defendant, Snook, received only four years.” Montgomery’s Br. 2. He further asserts that he should have received the sentence recommended by the probation department because it was “most in keeping with the nature of the offense” and his character. *Id.* at 4. We do not agree.

The record reflects that Montgomery, while armed with a handgun, forcefully pushed his way into Galligher’s home. He and his co-defendant confined Galligher and Sneary with duct-tape behind their backs and moved them into the bedroom. Galligher stated that, of the two defendants, Montgomery was the more aggressive. Additionally, it was Montgomery who pointed the firearm at the two men, an act which could have led to serious injury or death. Based on the nature of the offense, the sentence was appropriate.

Regarding his character, Montgomery only argues that his sentence was inappropriate because he has no previous felony convictions. Indeed, this would be his first felony conviction; however, we cannot ignore his extensive juvenile record, or his driving record as an adult.

This court has found that when considering the “character of the offender,” the defendant’s criminal history is relevant. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). A criminal history can reflect poorly on the defendant’s character and may reveal that he has not been deterred even after having been previously subjected to the court process and/or incarceration. *Id.* (citing *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005)).

Despite his prior experiences with the judicial system, Montgomery has not been deterred from committing further offenses. At the time of the current offense he was twenty-three years old and, according to the PSI, he was sixteen years old when he first was adjudicated a juvenile delinquent. His delinquent referrals include visiting a common nuisance, theft, and truancy. After being placed on probation, he violated his probation, within two months, by committing numerous curfew violations, leaving home without permission, and stealing and possessing a handgun. Over a seven-year span, the nature and severity of the crimes that Montgomery committed appears to have escalated.

We find it worth noting, as an adult, Montgomery has multiple driving related offenses, such as driving with a suspended license, driving without insurance, speeding, and a conviction for driving without a valid license. Moreover, he was sentenced to ninety days, for driving with a suspended license, all suspended, and one year probation. Subsequently, Montgomery violated his probation and was ordered to serve thirty days incarceration, including ten consecutive weekends, with a specific time to report. Again, he failed to abide by the court's order and a warrant was issued for his arrest and he was incarcerated.

Though his criminal record contained no prior felony conviction, it is extensive. Montgomery has demonstrated on numerous occasions that he has failed or is unwilling to comply with the law and follow court orders. Furthermore, he failed to appear at his first sentencing hearing in this matter, resulting in his arrest on a bench warrant. Given his extensive criminal history and several failed attempts at probation, we find the sentence was proper.

Based on the foregoing, we cannot say that Montgomery's sentence is inappropriate in light of the nature of his offense and his character.

Affirmed.

BRADFORD, J., and BROWN, J., concur.