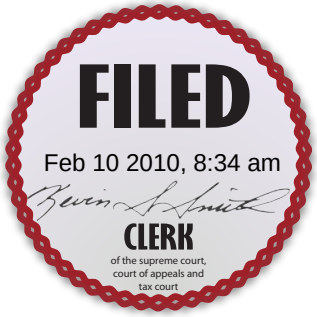

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IN THE
COURT OF APPEALS OF INDIANA

MARK A. AMBURGY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 36A05-0905-CR-276
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0803-FB-6

February 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Mark A. Amburgy appeals his sentence after he was convicted of battery, as a Class B felony, pursuant to a guilty plea. Amburgy raises the following two issues for our review:

1. Whether the trial court abused its discretion in its identification of mitigators.

2. Whether Amburgy's sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 8, 2008, eighteen-year-old Amburgy and others confined three thirteen-year-old boys in a house in Jackson County. Amburgy interrogated the boys about whether they had "snitched" on him by using his name in connection with a pending runaway investigation. Appellant's App. at 9, 12. Amburgy then began "hittin' and kickin' and elbowin' and kneein' and headbuttin'" the boys for about forty-five minutes. Id. at 13. Amburgy also "'repeatedly' bounced [one of the boy's] head off of [Amburgy's] knee 'several times.'" Id. One of the boys, R.V., sustained a broken nose and a broken arm. Another of the boys suffered two broken fingers and a broken nose, and the third boy suffered "facial and scalp contusions." Id. at 11. Amburgy threatened to kill the boys if they were "ever [to snitch] again." Id. at 13.

Afterwards, R.V. went to a nearby emergency room and, after being released, spoke to the police. While the police were in the process of obtaining a warrant to search Amburgy's home, Amburgy turned himself in. He gave a voluntary statement admitting

to his involvement in the beating of the three boys. At the time of the attack, Amburgy was on probation for a prior juvenile-battery adjudication.

On March 14, 2008, the State charged Amburgy as follows: two counts of battery resulting in serious bodily injury to a person less than fourteen years of age, each as a Class B felony; one count of battery resulting in bodily injury, as a Class D felony; one count of criminal gang recruitment, as a Class C felony; one count of criminal gang activity, as a Class D felony; and one count of intimidation, as a Class D felony. On February 13, 2009, Amburgy agreed to plead guilty to the Class B felony battery of R.V., in exchange for which the State agreed to dismiss all of the remaining charges. According to the plea agreement, sentencing was left open to the trial court's discretion.

The court held a sentencing hearing on April 13, during which Amburgy argued that his youth, remorse, guilty plea, and surrender to police were mitigating circumstances. At the conclusion of the hearing, the court stated as follows:

> You [got] several people involved to commit a crime, then you have a gang. This was particularly nasty. [Y]ou get people who in the situation they were faced with [were] defenseless. You put them in a situation where they have no freedom of movement and you just start beating them up. That's what happened here. It's a particularly vicious and senseless crime and that's just all there is to that. I have considered those matters which the law tells me that I must consider in sentencing. I am aware that the defendant was on probation at the time that this crime was committed. I am aware that the defendant has a history of prior criminal activities, juvenile history. Though, I am also aware that that is not extensive. I am aware that these offenses, the offense to which he pled guilty occurred in the presence of other individuals less than eighteen years of age . . . [which] becomes an aggravating circumstance. I have also searched to find mitigating circumstances in this case. The only one that I can find is the youthful age of the offender. . . . It should also be noted that the defendant does receive the benefit of having . . . five . . . counts . . . dismissed in this particular case. It is my decision that the defendant be sentenced to the Indiana

> Department of Correction[] for a period of fourteen years. And that sentence is to be executed and none of that sentence [is to] be suspended.

Transcript at 41-42. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Abuse of Discretion

Amburgy first asserts that the trial court abused its discretion when it sentenced him because the court failed to identify the following proposed mitigating circumstances: his prompt surrender to police, his guilty plea, and his remorse. "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007) ("Anglemyer I"), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007) ("Anglemyer II"). "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." Id. (quotation omitted).

As our supreme court has explained:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy 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.
>
> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence . . . a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors. . . .

* * *

> Because the trial court's recitation of its reasons for imposing sentence included a finding of mitigating circumstances, the trial court was required to identify all significant mitigating circumstances. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. However, "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. at 490-93 (citations omitted; emphasis added).

Amburgy received a fourteen-year sentence, which is greater than the advisory sentence for a Class B felony but less than the maximum permitted by statute. See Ind. Code 35-50-2-5 (specifying that the sentencing range for a Class B felony is six to twenty years, with an advisory sentence of ten years). As noted above, the trial court identified the following aggravators in imposing that sentence: (1) Amburgy formed a gang to commit the battery; (2) the victim was defenseless; (3) the "vicious and senseless" nature of the battery; (4) Amburgy was on probation at the time of the crime; (5) Amburgy has a prior juvenile history, albeit a minor one; and (6) the battery was committed in the presence of minors. Transcript at 41-42. The only mitigating circumstance identified by the court was Amburgy's youth. And the court emphasized that Amburgy "receive[d] the benefit of having . . . five . . . counts . . . dismissed in this particular case." Id. at 42.

On appeal, Amburgy first argues that the trial court abused its discretion because it failed to identify his surrender to the police as a mitigating factor. Again, "[a]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the

record." Anglemyer I, 868 N.E.2d at 492-93 (emphasis added). That Amburgy surrendered to the police is clearly supported in the record. But its significance is debatable. At the time he surrendered, the crime had already been reported by the victim, numerous witnesses had been identified, and the police were in the process of obtaining a search warrant. Thus, we cannot say that the trial court abused its discretion in not identifying this potential mitigator as significant.

Amburgy next contends that the trial court failed to recognize his guilty plea as a mitigating factor. It is well established that a defendant who pleads guilty deserves "some" mitigating weight in return. Anglemyer II, 875 N.E.2d at 220-21. But "the significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating . . . when the defendant receives a substantial benefit in return for the plea." Id. at 221. Here, in exchange for his guilty plea, Amburgy received the dismissal of five felony charges. Had he been convicted of each of the six original charges, Amburgy would have faced a possible maximum sentence of fifty-seven years. The dismissal of five of those charges, then, "was a substantial benefit." Id. Accordingly, the trial court did not abuse its discretion when it refused to give Amburgy a second benefit by finding his guilty plea to be a mitigating factor.

Finally, Amburgy asserts that the court abused its discretion when it did not identify his remorse as a significant mitigator. But whether Amburgy's assertions of remorse were genuine and entitled to significant weight are not questions we will

reconsider on appeal. Anglemyer I, 868 N.E.2d at 490-91. The court did not abuse its discretion in not identifying this potential mitigator as significant.

Issue Two: Appellate Rule 7(B)

Amburgy also contends that his fourteen-year sentence is inappropriate in light of his character and the nature of the offense. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration original).

Here, Amburgy asserts that his sentence is inappropriate in light of his character because he was only nineteen years old at the time of his sentencing. But the trial court expressly took Amburgy's youth into account as a mitigating circumstance in imposing the fourteen-year sentence. And Amburgy ignores the fact that he had a prior

adjudication for battery and that he committed the instant offense while on probation. We cannot say that his sentence is inappropriate in light of his character.

Amburgy also argues that his sentence is inappropriate in light of the nature of his offense because the trial court improperly considered an element of the crime as an aggravating circumstance. Specifically, he states that "[a]ny battery resulting in serious bodily injury to a person less than 14 years of age is going to be 'vicious.'" Appellant's Brief at 8. But Amburgy ignores the fact that Indiana law expressly permits a trial court to consider as an aggravating circumstance "harm [or] injury . . . suffered by the victim [that] was: (A) significant; and (B) greater than the elements necessary to prove the commission of the offense." I.C. § 35-38-1-7.1(a)(1). That is what the trial court's statements during sentencing reflect, in light of the defenselessness of the victim and the victim's extensive injuries. Amburgy has not carried his burden of demonstrating that his fourteen-year sentence is inappropriate in light of the nature of the offense.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.