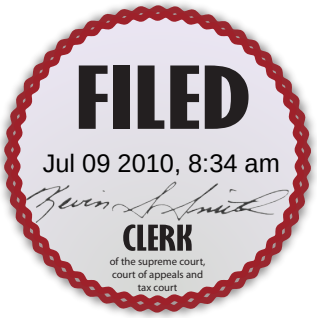

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IN THE
COURT OF APPEALS OF INDIANA

BEN GILL,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A05-0912-CR-734
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kimberly Brown, Judge
Cause No. 49G16-0908-FD-074152

July 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Ben Gill entered a plea of guilty to intimidation, a Class D felony, battery, a Class A misdemeanor, and battery, a Class B misdemeanor, without a written plea agreement, leaving the sentence open to the trial court. The trial court sentenced Gill to 545 days for intimidation, 365 days for the Class A misdemeanor battery, and 180 days for the Class B misdemeanor battery, all to be served concurrently. Gill appeals, contending his sentence is inappropriate. Concluding the sentence is not inappropriate, we affirm.

Facts and Procedural History

On August 19, 2009, Gill entered his estranged wife's home uninvited, punched his wife's boyfriend, and grabbed and threw his wife against a wall. He left the house, but called to say he we was going to "shoot the house up," transcript at 8, and then drove by the house. When Gill was arrested a short time later, it was discovered that he was driving with a suspended license. The State charged Gill with ten counts. On the morning his jury trial was set to begin, the State dismissed seven counts and Gill entered a plea of guilty to the three remaining counts. Gill's sentence was left to the discretion of the trial court.

At the sentencing hearing, the State proferred as aggravating circumstances the facts that Gill's wife was a victim of one his crimes and that he was on parole at the time of the crime. Gill proferred as mitigating circumstances his remorse, his expressed desire to improve himself, and the fact that he would likely get substantial executed time for his parole violation. Without commenting on the aggravating or mitigating circumstances, the trial court imposed the advisory sentence for the Class D felony intimidation count,

the maximum sentence of one year for the Class A misdemeanor battery, and the maximum sentence of 180 days for the Class B misdemeanor battery. The trial court ordered the three sentences to be served concurrently. Gill now appeals his sentence.

Discussion and Decision

Pursuant to Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218, trial courts are required to enter a sentencing statement whenever imposing sentence for a felony offense, including a reasonably detailed recitation of the reasons for imposing the particular sentence that identifies all significant mitigating and aggravating circumstances. See also Ind. Code § 35-38-1-3. When a trial court does not enter a sentencing statement as required, we may remand to the trial court for clarification or a new sentencing determination, or we may exercise our authority to review and revise sentences pursuant to Indiana Appellate Rule 7(B). Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007). As Gill points out, he was convicted of a Class D felony and the trial court therefore erred in failing to enter a sentencing statement.[1] Because Gill has made a 7(B) challenge to his sentence,[2] we will exercise our authority pursuant to that rule and examine whether his sentence is inappropriate.

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of

[1] Our review is not limited to a written sentencing statement; we may also consider the trial court's comments in the transcript of the sentencing proceedings. Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002). In this case, however, the trial court made no statement, either orally or in writing, explaining the sentence it imposed.

[2] Although Gill states in his summary of argument that the trial court "erred in failing to acknowledge the clearly present mitigating circumstances," Brief of Appellant at 4, he does not specifically argue the trial court abused its discretion in failing to do so, rather focusing his argument on the nature of the offense and his character. Abuse of the trial court's discretion in sentencing a defendant and the appropriateness of a sentence are two distinct issues, however, see King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008), and we therefore address Gill's proferred mitigators only in the context of his inappropriate sentence challenge.

the offense and the character of the offender." Ind. Appellate Rule 7(B). In determining whether a sentence is inappropriate, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Gill was sentenced to an aggregate of one and one-half years, which is the advisory sentence for his most serious crime, Class D felony intimidation. See Ind. Code § 35-50-2-7. The advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). Gill touched his wife in an angry manner; hit her boyfriend, causing injury to him; and made a threat with the intent to place the occupants of the house in fear. He committed the batteries in front of his wife's three young daughters, and he drove by the house after making a threat to "shoot the house up." Tr. at 8. Although nothing about the crimes is particularly egregious, there is also nothing about the nature of the offenses that makes the advisory sentence inappropriate.

As for Gill's character, the State pointed out at the sentencing hearing that he was on parole at the time he committed these crimes.[3] Gill himself acknowledged that he knew his behavior was unacceptable but acted out because he lost his temper. See Tr. at 17-18. Gill contends that he showed remorse and accepted responsibility for his actions by pleading guilty without benefit of a sentencing recommendation, reflecting favorably on his character. Although Gill entered his plea of guilty on the morning his jury trial was scheduled to start, the State's motion to dismiss the seven remaining counts indicates the reason for dismissal was "evidentiary problems." Appellant's Appendix at 51. It is difficult to discern what, if any, benefit was extended to Gill and to the State as a result of the plea. A plea of guilty is entitled to some mitigating weight, but it is not necessarily entitled to significant mitigating weight. See Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). To the extent Gill's guilty plea reflects favorably on his character, it is offset by his criminal history and the fact that out of anger and in the presence of children, he struck two people and after leaving, further victimized them by calling with a threat to shoot at the house and then actually driving by the house. In short, it is Gill's burden to demonstrate that the advisory sentence was inappropriate, and we conclude he has failed to meet that burden.

Conclusion

Gill's aggregate sentence of one and one-half years for convictions of intimidation

[3] The record does not include a copy of the pre-sentence investigation report.

and two counts of battery is not inappropriate in light of the nature of his offenses and his character. The sentence is affirmed.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.