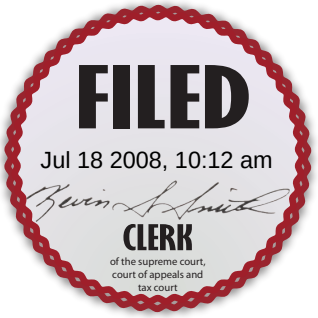

ATTORNEY FOR APPELLANT:

E. PAIGE FREITAG
Bauer & Densford
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHNNIE D. PERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 07A01-0803-CR-112
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0506-FD-330
Cause No. 07C01-0706-FD-236

July 18, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Johnnie D. Perry appeals the sentence imposed following his guilty plea to two counts of Battery Resulting in Bodily Injury,[1] a class D felony. Specifically, Perry claims that the trial court abused its discretion when it did not identify his decision to plead guilty plea as a mitigating factor and that the sentences were inappropriate in light of the nature of the offenses and his character. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

In 2001, Perry was convicted of battery resulting in bodily injury against his girlfriend, A.P. In September 2005, Perry again battered A.P. As a result, the State charged Perry with battery as a class D felony (hereinafter referred to as the "FD-0330 charges") because of the previous conviction. After Perry was released on bond, he again battered A.P. in May 2007. Thus, the State charged Perry with battery as a class D felony (the "FD-0236 charges").

On January 7, 2008, Perry pleaded guilty to both counts of class D felony battery. While the plea agreement negotiated with the State provided that the sentences would run consecutively to each other, the length of the sentences was otherwise left to the trial court's discretion.

The trial court accepted the plea agreement, and at a sentencing hearing that was conducted on February 4, 2008, the trial court identified two aggravating factors: (1)

[1] Ind. Code §§ 35-42-2-1, -1.3.

Perry committed the FD-0236 charges when he was on bond; and (2) Perry violated a condition of his bond that he have no violent contact with A.P. The trial court also identified as a mitigating factor in both cases that a lengthy period of incarceration would pose an undue hardship on Perry's family.

Perry was sentenced to eighteen months with one year executed and the balance suspended to probation on the FD-0330 charges.[2] The trial court then sentenced Perry on the FD-0236 charges to the maximum term of three years for a class D felony with two and one-half years executed and the balance suspended to probation. The sentences were ordered to run consecutively to each other, and the trial court imposed the following conditions of probation in both cases: "Batterer's Intervention Program, substance abuse evaluation, and no violent contact with the victim." Appellant's App. p. 22. Perry now appeals.

DISCUSSION AND DECISION

I. Plea Bargain—Mitigating Factor

Perry first claims that his sentence must be set aside because the trial court did not identify his decision to plead guilty plea as a mitigating factor. As a result, Perry argues that he must be resentenced.

We initially observe that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). It is within the trial court's discretion to determine the existence of a significant mitigating circumstance.

[2] Pursuant to Indiana Code section 35-50-2-7, the minimum sentence for a class D felony is six months imprisonment, the maximum is three years, and the advisory sentence is one and one-half years.

Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

We also note that our Supreme Court has determined that a guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a plea bargain does not constitute a substantial mitigating factor when the defendant has already received a significant benefit from the plea agreement. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Moreover, a guilty plea may not rise to the level of significant mitigation where the evidence against the defendant 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). In other words, the significance of a guilty plea varies from case to case. Anglemyer v. State, 875 N.E.2d 218, 221 (Ind. 2007).

In this case, Perry received a significant benefit from pleading guilty. More specifically, the terms of the plea agreement reduced the amount of executed time that the trial court could have imposed by one-third. Moreover, Perry's decision to plead guilty

did not clearly reflect his acceptance of responsibility for his actions. Indeed, Perry testified at the sentencing hearing that: "I may have battered her. I don't think that . . . that it was an act of aggression. I don't think that. I don't . . . I blacked out. I didn't know what I was doing when . . . when . . . the major ones happened." Tr. p. 70.

In sum, even if we assume that the trial court abused its discretion by not finding Perry's guilty plea to be a mitigating factor, any error was harmless in light of the substantial benefit Perry received pursuant to the plea agreement and his testimony at the sentencing hearing demonstrating that he was not accepting responsibility for his actions.

II. Inappropriate Sentence

Perry next contends that the "advisory sentence in [FD-0330] and the maximum sentence in [FD-0236] are inappropriate in light of the nature of the offenses and [his] character." Appellant's Br. p. 9. Thus, Perry maintains that we should exercise our authority under Indiana Appellate Rule 7(B) to revise his sentences.

Pursuant to Indiana Appellate Rule 7(B), we observe that in reviewing a challenge to the appropriateness of a sentence, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that the sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of Perry's offenses, the record shows that he has battered the same victim over the course of many years. Tr. p. 9-10, 18-19, 32-33. A.P.'s daughter testified that she observed Perry slam A.P.'s head into a wall sometime in 1998. Id. at 18-19. As a result of that attack, A.P. suffered a broken nose, two black eyes, and numerous bruises. Id. at 19. A friend of A.P. testified that Perry had beaten A.P. on at

least five occasions over a two-and-one-half-year period. Id. at 32-33. A.P. indicated that she did not go to the hospital or report the incidents to the police because she was "terrified of Perry." Id. at 32.

When Perry beat A.P. in May 2007 after he had been released on bond on the FD-0330 charges, he caused her face and nose to bleed. Id. at 27. A.P. told a friend that she thought Perry was trying to kill her on that occasion. Id. Perry's convictions in the instant cases represent the second and third times that he has been convicted of battering A.P. Id. at 9-10. In light of these circumstances, Perry's nature of the offense argument does not aid his inappropriateness claim.

As for Perry's character, the record shows a clear pattern of his propensity for violence. Even though Perry had been released on bond on the pending FD-0330 charges, he again battered A.P. Moreover, he violated the trial court's no violent contact order when he committed the subsequent battery. Thus, it is apparent that Perry has not been deterred from criminal conduct and he has shown a clear disregard for the law. Put another way, even though Perry had numerous opportunities to reflect on the illegality of his behavior and the horrendous impact that his actions have had on A.P., he continued to engage in the same behavior. In considering these circumstances, the trial court may well have been justified in ordering a term of incarceration much greater than the advisory sentence that was imposed on the FD-0330 charges. Therefore, when considering the nature of the offenses and Perry's character, we cannot conclude that his sentences were inappropriate.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.