

felony strangulation¹ and one year for Class A misdemeanor battery.² He argues the court improperly ignored mitigators and imposed a sentence inappropriate in light of his character and offense. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 1, 2007, Gorman knocked on the door of a trailer occupied by Shani Smith and her daughter, K.S., and asked for a cup of ice. Smith provided the cup of ice, and Gorman invited her to have a beer at his uncle's nearby trailer. Soon thereafter, Smith went to the uncle's trailer, had a beer, and returned home. Gorman knocked on Smith's door again and asked to use the phone to call a cab. After calling for the cab, Gorman left.

A little later, Gorman knocked on Smith's door a third time. He claimed he missed the cab and needed to call again. After using the phone, Gorman went into Smith's restroom. Gorman was in the restroom an unusually long time, so Smith went to the door to ask if everything was okay. Gorman opened the door quickly, grabbed Smith, and pulled her into the bathroom with such force that she fell down. Gorman pulled Smith's pants down, held her knees, and began performing oral sex on her. Smith told Gorman to stop and reminded him that her daughter was in the trailer. Gorman said he did not care and pulled his pants down to expose his penis. When Gorman released one of Smith's knees, she was able to get up from the floor. Gorman grabbed Smith's face, covered her mouth and nose, and impaired her ability to breathe. Smith was able to pry away Gorman's fingers and call for help. Gorman twisted her neck with a rapid,

¹ Ind. Code § 35-42-2-9.

² Ind. Code § 35-42-2-1.

snapping motion. When K.S. came to the bathroom door to find out why her mother yelled, Gorman threw K.S. into the wall with such force that the wall was damaged. Smith opened the back door to call for help, but Gorman closed the door, threw Smith on the ground, and kicked her in the face and ribs. While Gorman and Smith struggled, K.S. called police. Gorman again ran toward K.S., and Smith yelled out the trailer door for help. When neighbors came to their assistance, Gorman fled from the trailer.

The State charged Gorman with Class B felony criminal deviate conduct, Class D felony strangulation, Class A misdemeanor battery of Smith, and Class A misdemeanor battery of K.S. Gorman pled guilty to strangulation and to battery of K.S., in exchange for dismissal of the other two charges. The plea agreement left sentencing to the discretion of the trial court.

The court found as aggravators that Gorman had a criminal history, his suspended sentences had been revoked, he was on parole when these crimes occurred, he lacked remorse, his crime involved two victims, and he was belligerent during the sentencing hearing.³ As mitigators, the court noted Gorman's guilty plea and his history of mental

³ After the court pronounced its sentence, the following exchange occurred:

[Gorman]: I don't understand what you just said, Judge Schmoll. Am I going to prison for 4 years?

COURT: Three years, sir.

[Gorman]: I'm going to prison for three years?

COURT: Do you understand sir that you have the right to appeal the sentence that we just entered?

[Gorman]: You're sending me to prison for three years for something that Mr...

COURT: Mr. Gorman, I'm not going to argue with you this morning. The sentence is three years executed. Do you understand that you have the right to appeal the sentence?

[Gorman]: Can I have-will my sentence be...

COURT: Mr. Gorman, Mr. Gorman...

[Gorman]: ...on probation or anything?

COURT: Mr. Gorman, listen. Do you understand sir, that you have the right to appeal the sentence that was just entered?

illness. The court found the aggravators outweighed the mitigators and sentenced Gorman to the maximum terms of three years for strangulation⁴ and one year for battery.⁵ The court initially ordered those sentences served concurrently, but changed them to consecutive when Gorman would not end his in-court outburst. (*See* Tr. at 13.)

DISCUSSION AND DECISION

1. Mitigators

A trial court abuses its discretion in assigning a sentence if it fails to identify a mitigating circumstance advanced by the defendant, if the circumstance is significant and clearly supported by the record. *Anglemyer v. State*, 868 N.E.2d 482, 493 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind. 2007).

Gorman claims the court should have found four mitigators: Gorman's mental health history, his lack of substantial criminal record, his use of alcohol at the time of the offenses, and his guilty plea demonstrating acceptance of responsibility.

The trial court found Gorman's plea to be a mitigator, but did not give it much

[Gorman]: I understand that this Court is full of shit. I really do and I don't agree with nothing that you're saying right now, Judge Schmoll, and I don't agree with how you represented me, Bill Lebrato, and you will (unintelligible words). Hopefully you will (unintelligible words). God will get you for what you did. You can take me out of here please. Please. I don't want you all to have to jump on me, please. I'm asking you.

COURT: Mr. Gorman, ...

[Gorman]: Please.

COURT: ...we've hear[d] quite enough this morning. If you open your mouth again you're only going to make this situation worse for you.

[Gorman]: (Unintelligible words).

COURT: Do not open your mouth.

[Gorman]: (Unintelligible words). Will you please let me out of here.

[COURT]: I misspoke. We will show count number IV is consecutive to count number II.

(Tr. at 11-13.)

⁴ Ind. Code § 35-50-2-7 (sentencing range for Class D felony is six months to three years).

⁵ Ind. Code § 35-50-3-2 (sentence for Class A misdemeanor shall be not more than one year).

weight because the State dismissed a Class B felony and because Gorman's comments at sentencing suggested he was not accepting responsibility. (Tr. at 11.) The court also announced it would "show the mental history as being a mitigator." (*Id.*) Because the trial court recognized those two mitigators, we find no abuse of discretion. *See Anglemyer*, 868 N.E.2d at 491 ("court can not now be said to have abused its discretion in failing to 'properly weigh' such factors").

As for Gorman's assertion his criminal record was a mitigator, the trial court found an aggravator in Gorman's criminal history because it included "three prior misdemeanor battery's [sic], one prior felony. Note that he was on parole when this offense occurred. We would show that he has a history of violating programs." (Tr. at 11.) Because the trial court's statement adequately explains why it found Gorman's criminal history was an aggravator, we cannot find the court abused its discretion in declining to find that criminal history a mitigator.

The final alleged mitigator is Gorman's claim that he was using alcohol on the night of the crimes. At sentencing, when discussing errors in the presentence investigation report ("PSI"),⁶ counsel noted "the day of the offense alcohol was used, also in the PSI." (*Id.* at 6.) However, there is no evidence regarding how much alcohol Gorman drank prior to attacking Smith and K.S., nor as the State notes, has Gorman explained why that fact is significant or was a mitigator. Because Gorman has not demonstrated this alleged mitigator was "both significant and clearly supported by the record," we cannot find the trial court abused its discretion when it did not identify Gorman's alcohol use as a mitigating factor. *See Anglemyer*, 868 N.E.2d at 493.

⁶ We note the parties have not provided us a copy of Gorman's PSI.

2. Appropriateness

Gorman next argues we should find his maximum four-year sentence inappropriate in light of his character and the nature of his 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 of a sentence imposed by the trial court.” This appellate authority is implemented through Appellate Rule 7(B), which provides that the “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. at 491. We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Gorman’s character justifies a four-year sentence. He was convicted of misdemeanor battery in 1992 and 1994 and of domestic battery in 2002, which makes this his fourth conviction of battery.⁷ *See Bryant v. State*, 841 N.E.2d 1154, 1156-157 (Ind. 2006) (“The significance of a criminal history ‘varies based on the gravity, nature and number of prior offenses as they relate to the current offense.’”) (citation omitted). Prior efforts to rehabilitate Gorman have been ineffective,⁸ and instead, his attempt to

⁷ We also note that Gorman, as a juvenile, had a true finding for an act that would have been a felony sex crime if Gorman had been an adult. While Gorman did not plead guilty to criminal deviate conduct against Smith, we need not ignore that sexual violence was also a repeated behavior for Gorman.

⁸ At sentencing, the prosecutor said: “He was on parole at the time of this offense He’s had a sentence modified, he’s been on probation, he’s had probation revoked, he’s been in boy’s school, and he’s been to DOC. Nothing seems to be helping Mr. Gorman. He continues to commit crimes” (Tr. at 7-8.) We were unable to confirm the validity of all of those statements, as we were not provided a PSI,

suffocate Smith suggests his level of violence against people is increasing.

Gorman's crime is heinous. He "befriended" a woman who lived with her daughter in a trailer near Gorman's uncle's trailer. After gaining Smith's trust by inviting her to have a beer with him and his uncle and by using her phone without incident earlier in the day, Gorman attacked Smith in her own home. When Gorman was unable to quiet Smith by suffocating her, he tried to snap her neck by twisting her head rapidly to the side.⁹ As if the suffocation and physical and sexual assault of Smith were not enough, Gorman battered Smith's daughter by throwing her into the wall with such force that the wall was damaged. Nothing about these facts suggests a four-year sentence is inappropriate.

Affirmed.

NAJAM, J., and ROBB, J., concur.

but Gorman does not challenge their accuracy.

⁹ Gorman asserts "the nature of this offense cannot be considered the absolute worst under the Strangulation and misdemeanor Battery statutes." (Appellant's Br. at 9.) Smith reported to police that she believed Gorman was attempting to kill her. While it is hard to define the "absolute worst" of any crime, when we consider the circumstances surrounding Gorman's strangulation of Smith, we see his behavior as within "the class of offenses and offenders that warrant a maximum punishment." *Ritchie v. State*, 875 N.E.2d 706, 725 (Ind. 2007), *reh'g denied*.