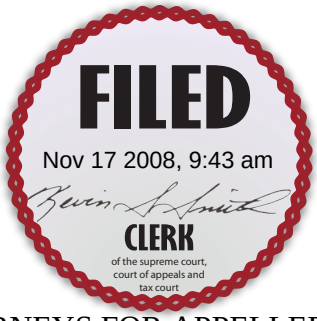

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IN THE COURT OF APPEALS OF INDIANA

JAY STANBACK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-324
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
Cause No.49F18-0705-FD-94775

November 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Jay Stanback appeals his sentence for sexual battery, a Class D felony. On appeal, Stanback raises one issue, which we expand and restate as 1) whether the trial court abused its discretion in sentencing Stanback and 2) whether Stanback's sentence is inappropriate in light of the nature of the offense and his character. Concluding that the trial court did not abuse its discretion when it sentenced Stanback and that Stanback's sentence is not inappropriate, we affirm.

Facts and Procedural History

On the evening of May 25, 2007, an intoxicated Stanback entered the apartment of his ex-girlfriend, S.B., while she was bathing and touched her inappropriately. According to the probable cause affidavit, S.B. retreated to the living room, but Stanback followed and continued "to grab at her and grope her." Appellant's Appendix at 26. When S.B. threatened to contact the police, Stanback stated he "would take care of her" and "shoot up the police." Id. A neighbor of S.B.'s heard the commotion and alerted a nearby police officer, who arrested Stanback. While Stanback was in handcuffs and awaiting transport to jail, he began yelling and screaming, which attracted several passersby.

On May 30, 2007, the State charged Stanback with sexual battery, a Class D felony; intimidation, a Class D felony; residential entry, a Class D felony; battery, a Class A misdemeanor; disorderly conduct, a Class B misdemeanor; and public intoxication, a Class B misdemeanor. On July 25, 2007, and again on October 16, 2007, the State filed motions notifying Stanback that it would seek sentence enhancement based on his alleged

status as an habitual offender "if good faith plea negotiations are unsuccessful." Id. at 39, 44. Plea negotiations were successful; Stanback agreed to plead guilty to the sexual battery charge with sentencing left to the trial court's discretion, and the State agreed to dismiss the remaining charges and not seek sentence enhancement.

On March 12, 2008, the trial court conducted a sentencing hearing, at which it found that Stanback's criminal history was an aggravating circumstance and that hardship to Stanback's dependent children as a result of incarceration was a mitigating circumstance. The trial court concluded that the aggravating circumstance outweighed the mitigating circumstance and sentenced Stanback to three years with the Indiana Department of Correction, subject to credit for time served. Stanback now appeals.

Discussion and Decision

I. Imposition of Sentence

Stanback argues the trial court abused its discretion when it sentenced him because it failed to find that his acceptance of responsibility, remorse, and good behavior while in jail awaiting sentencing were mitigating circumstances. A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). A trial court is still required, however, to issue a sentencing statement when sentencing a defendant for a felony. Ind. Code § 35-38-1-1.3; Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating

or aggravating." Anglemyer, 868 N.E.2d at 490. We will conclude the trial court has abused its discretion 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." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

Turning first to the propriety of the trial court's failure to find that Stanback's acceptance of responsibility was a mitigating circumstance, we note the record indicates that Stanback accepted responsibility only after entering into a plea agreement. This plea agreement resulted in the State dismissing two felony and two misdemeanor charges and not pursuing an habitual offender sentence enhancement. This court has stated repeatedly that acceptance of responsibility in the form of a guilty plea is a significant mitigating circumstance unless the defendant received a substantial benefit from the plea. See Sanchez v. State, 891 N.E.2d 174, 177 (Ind. Ct. App. 2008); Page v. State, 878 N.E.2d 404, 408-09 (Ind. Ct. App. 2007), trans. denied; Patterson v. State, 846 N.E.2d 723, 729 (Ind. Ct. App. 2006). Having four charges dismissed and avoiding habitual offender sentence enhancement extended a substantial benefit to Stanback, and we therefore conclude the trial court did not abuse its discretion when it failed to find that Stanback's acceptance of responsibility was a mitigating circumstance.

Nor are we convinced the trial court abused its discretion when it failed to find that Stanback's statement of remorse was a mitigating circumstance. The record indicates the trial court was skeptical of Stanback's purported remorse. See Transcript at 23 ("[Trial Court]: "Okay. You want to make any statement to the Court? [Stanback]:

I'm sorry for what I did, sir. [Trial Court]: Is that it? [Stanback]: Yes, sir."). Given the discretion afforded to the trial court in determining the mitigating weight to assign to the defendant's purported remorse, see Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) (stating that a trial court's determination of whether a defendant's purported remorse is genuine is "similar to a determination of credibility" and will not be disturbed absent "impermissible considerations"), we cannot say the trial court abused its discretion.

Finally, regarding Stanback's alleged good behavior, our review of the record indicates that Stanback's counsel merely argued his client "never complained" and was a "model" prisoner while in jail. Tr. at 23. Arguments are not evidence, Thompson v. State, 875 N.E.2d 403, 407 (Ind. Ct. App. 2007), trans. denied, and Stanback's failure to present evidence on this point compels a conclusion that the trial court did not abuse its discretion when it failed to find that his alleged good behavior was a mitigating circumstance, see Page v. State, 689 N.E.2d 707, 711-12 (Ind. 1997).[1]

II. Appropriateness of Sentence

Indiana appellate courts have 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 the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize that the

[1] We note that even if Stanback had presented substantial evidence of good behavior, the trial court's failure to find that his good behavior was a mitigating circumstance would have been harmless because our supreme court has stated that good behavior "is expected of persons who are incarcerated" and that "[e]ven if it is an appropriate mitigator, its weight is modest . . . ." Corcoran v. State, 774 N.E.2d 495, 500 (Ind. 2002). We also note that because a defendant generally is entitled to credit for pre-sentence jail time as a matter of statutory right, see Ind. Code §§ 35-50-6-3(a) and 4(a); Weaver v. State, 725 N.E.2d 945, 947-48 (Ind. Ct. App. 2000), a finding by the trial court that the defendant's good behavior is a mitigating circumstance would tend to reward the defendant twice for the same conduct.

advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, 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. However, "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Stanback to three years, which is the statutory maximum sentence for a Class D felony. See Ind. Code § 35-50-2-7(a) ("A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."). This court has observed that maximum sentences should be reserved for the worst offenses and offenders. See, e.g., Roney, 872 N.E.2d at 802; Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003). At the same time, however, reading this observation narrowly "would reserve the maximum punishment for only the single most heinous offense." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. Instead, a reviewing court "should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the

defendant's character." Id. We therefore address the appropriateness of Stanback's sentence with these observations in mind.

Turning first to the nature of the offense, we hesitate to attribute the facts described in the probable cause affidavit to Stanback because he did not admit to them during the guilty plea hearing. Instead, Stanback admitted to the charging information, which merely provided a recitation of the elements of sexual battery and bare-bones details such as the date and location of the offense, as well as the identities of Stanback, S.B., and other witnesses. The record of facts to which Stanback admitted therefore limits our review and leads us to conclude that the offense was not more egregious than a typical sexual battery.

Regarding Stanback's character, we note initially that we reject Stanback's argument that his mental illnesses – mild mental retardation and chronic schizophrenia – are entitled to mitigating weight. Four factors inform the mitigating weight to assign to a mental illness: 1) the extent of the defendant's inability to control his behavior due to the disorder or impairment; 2) overall limitations on functioning; 3) the duration of the mental illness; and 4) the extent of any nexus between the disorder or impairment and the commission of the crime. Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied. Stanback makes no effort to establish any of these factors, and even assuming he could establish the first three, two psychiatric evaluations of Stanback do not indicate there was a nexus between his illnesses and his commission of the crime. To the contrary, the report from one of the evaluations discounts Stanback's mental illnesses as

contributing to the offense because he "[p]resent[ed] an alibi at the time of his arrest,"[2] which "is generally considered to be evidence of an appreciation of the wrongfulness of one's prior behavior," appellant's app. at 38, while the other report states Stanback "was able to appreciate the wrongfulness of his conduct" because "he fled the crime scene and threatened violence to anyone who would call the Police," id. at 42.

Against the unremarkable nature of the offense and the lack of mitigating weight of Stanback's mental illnesses is Stanback's extensive criminal history. The record indicates that within the last six years, Stanback has one felony conviction for criminal confinement and another for resisting law enforcement, as well as two misdemeanor convictions for battery, one for domestic battery, and another for resisting law enforcement.[3] See Tr. at 24. "[T]he significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary based on the gravity, nature, and number of prior offenses as they relate to the current offense." Smith v. State, 889 N.E.2d 261, 263 (Ind. 2008) (citations omitted). Three battery convictions in the span of six years coupled with the current offense, which is itself more egregious than a typical battery, comments very negatively on Stanback's character and convinces us that Stanback's criminal history alone is sufficient to sustain his sentence. To use the prosecuting attorney's words, Stanback "[c]learly . . . has trouble conforming to the standards of our society." Tr. at 25.

[2] The probable cause affidavit states that shortly after he was arrested, Stanback claimed four men, including the man who alerted the police officer, had attacked him.

[3] Citing the presentence investigation report, the State claims Stanback also has a third misdemeanor battery conviction and a Class C felony conviction for child molesting. However, we are reluctant to rely on this claim because the State has not included the presentence investigation report in the record. Instead, we rely on the prosecuting attorney's listing of Stanback's criminal history during the sentencing hearing and note that Stanback did not object to this listing.

After due consideration of the trial court's decision and of the record, we conclude that Stanback has not sustained his burden of establishing that his sentence, though the statutory maximum, is inappropriate in light of the nature of the offense and his character.

Conclusion

The trial court did not abuse its discretion when it sentenced Stanback, and Stanback's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

NAJAM, J., and MAY, J., concur,