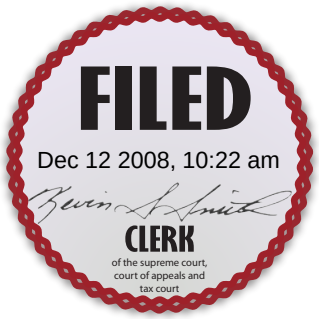

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IN THE
COURT OF APPEALS OF INDIANA

JAMAAR PATTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0808-CR-489
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0708-FC-370

December 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jamaar Patton pleaded guilty to two counts of class C felony Criminal Recklessness (Counts I and II),[1] one count of class C felony Battery Resulting in Serious Bodily Injury (Count III),[2] and one count of class A misdemeanor Dangerous Possession of a Firearm (Count IV).[3] Pursuant to the plea agreement which capped the executed sentence at eight years, the trial court imposed eight-year sentences with four years suspended to probation on each of the class C felonies and a six-month sentence on the class A misdemeanor. The court ordered the sentences on Counts I and II to run concurrently, as well as the sentences on Counts III and IV, but ordered Counts I and II to run consecutive to Counts III and IV. Thus, Patton received an aggregate sentence of sixteen years with eight of those years suspended to probation. The court also ordered Patton to pay restitution as a condition of probation with the amount to be determined upon Patton's release from incarceration. On appeal, Patton presents the following restated issues for review:

1. Did the trial court properly sentence Patton?

2. Did the trial court properly leave the amount of restitution to be determined until after Patton was released from incarceration?

We affirm in part and reverse and remand in part.

In the early morning hours of July 28, 2007, seventeen-year-old Patton was at a party in Anderson, Indiana, when a large brawl broke out in the lodge and eventually spilled out into the parking lot. Patton and two companions went into the van that they had driven from

[1] Ind. Code Ann. § 35-42-2-2 (West, PREMISE through 2008 2nd Regular Sess.).
[2] I.C. § 35-42-2-1(a)(3) (West, PREMISE through 2008 2nd Regular Sess.).
[3] Ind. Code Ann. § 35-47-10-5(1) (West, PREMISE through 2008 2nd Regular Sess.).

Indianapolis. After retrieving a semi-automatic assault rifle from inside, Patton opened the side door of the van and indiscriminately fired three rounds into a crowd of people, seriously wounding three men. Two of these men, Keith McMillan and Marquise Welch, testified at Patton's sentencing hearing. Neither of the men knew Patton, and they had not been involved in the altercation that apparently led to the shooting.

McMillan suffered life-threatening injuries when his femur was shattered by one of the bullets. After five surgeries and nearly $100,000 in medical bills, McMillan testified that he still suffered from pain and was working on rehabilitation of his leg. Welch, who was also shot in the leg, similarly suffered debilitating injuries, requiring past and possible future surgeries. Despite significant medical bills, Welch testified that he was most concerned about his lost wages because he had not been able to work since the injury. Prior to the shooting, Welch worked approximately fifty hours per week at Machine Drive in Noblesville earning twelve dollars an hour.

Patton was charged with multiple counts on August 3, 2007. On the morning of his scheduled jury trial, January 29, 2008, Patton pleaded guilty as charged pursuant to a plea agreement that capped his executed sentence at eight years. The plea agreement further provided that Patton would pay restitution to the victims. On March 13, 2008, the trial court sentenced Patton to an aggregate sentence of sixteen years incarceration with eight of those years suspended to probation. The court also ordered Patton to pay restitution as a condition of probation with the amount to be determined when he was released from incarceration. Patton now appeals.

1.

Patton initially challenges his aggregate sentence. He contends the trial court abused its discretion by finding as an aggravator that there were multiple victims. Patton further argues that his sentence is inappropriate in light of his character. We will address each argument in turn.

Sentencing 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 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Under the new sentencing scheme, a court may impose any sentence authorized by statute and permissible under the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances. *Id*. Thus, in *Anglemyer*, our Supreme Court held:

> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors.

Anglemyer v. State, 868 N.E.2d at 491. Circumstances under which a trial court may be found to have abused its discretion include: (1) failing to enter a sentencing statement, (2) entering a sentencing statement that includes reasons not supported by the record, (3) entering a sentencing statement that omits reasons clearly supported by the record, or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482.

In the instant case, the trial court adopted all of the mitigating circumstances proffered by Patton (guilty plea, no juvenile or criminal history, remorse, young age, and cooperation

with law enforcement). As aggravating circumstances, the trial court found that there were multiple victims and that the shooting was an excessive response to pushing and shoving.

As set forth above, Patton asserts that the court abused its discretion in considering as an aggravating circumstance that there were multiple victims. We cannot agree. Time and again, our Supreme Court has indicated that the existence of multiple victims is an aggravating circumstance. *See e.g.*, *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003) ("enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person"); *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001) ("[i]njury to multiple victims has been cited several times by this Court as supporting enhanced and consecutive sentences"); *Walton v. State*, 650 N.E.2d 1134, 1137 (Ind. 1995) (listing multiple killings as a "non-statutory aggravating circumstance"). The trial court did not abuse its discretion in finding this aggravating circumstance.

With regard to his sentence, Patton next notes that he pleaded guilty, he has no prior criminal or juvenile history, and he expressed remorse for his actions. The trial court found these, among others, to constitute mitigating circumstances. Therefore, to the extent Patton is arguing the trial court abused its discretion by failing to accord adequate weight to these mitigators, we observe that such a claim is no longer available on appeal. *See Anglemyer v. State*, 868 N.E.2d 482.

Apparently relying on these mitigating circumstances, Patton also asserts that his sentence is "inappropriate in light of the nature of the defendant." *Appellant's Brief* at 9. We

find the issue waived for failure to present cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a). To be sure, we have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Indiana Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482. Patton, however, bears the burden of persuading this court that his sentence is inappropriate. *See Childress v. State*, 848 N.E.2d 1073 (Ind. 2006); *Rutherford v. State*, 866 N.E.2d 867 (Ind. Ct. App. 2007). He has not done so here with only a cursory discussion of certain mitigating circumstances related to his character and a total failure to address the nature of the offense. *See Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) ("revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of *both* the nature of his offenses and his character") (emphasis in original).

2.

Patton also challenges the order of restitution. He claims the trial court improperly left restitution open to cover future expenses. The State concedes that remand is appropriate in order to set the amount of restitution.

The plea agreement provided that Patton would pay restitution to the victims. At the sentencing hearing, two of the victims testified regarding their expenses. McMillan indicated that his medical bills had reached nearly $100,000, while Welch testified regarding his substantial lost wages. At the close of the sentencing hearing, defense counsel asked the court to order restitution to each of Patton's three victims. Accordingly, the court ordered

Patton to pay restitution to the victims as a condition of probation. The court, however, determined that the amount of restitution would not be calculated until after Patton was released from incarceration "because the meter is still running" with respect to the victims' losses. *Transcript* at 73.

A restitution order is within the trial court's discretion and will be reviewed only for an abuse of that discretion. *Bennett v. State*, 862 N.E.2d 1281 (Ind. Ct. App. 2007). An abuse of discretion occurs, among other ways, when the trial court misinterprets or misapplies the law. *Id*.

The restitution statute, Ind. Code Ann. § 35-50-5-3(a) (West, PREMISE through 2008 2nd Regular Sess.), provides that in ordering restitution the court:

> shall base its restitution order upon a consideration of:
>
> * * * *
>
> (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
>
> * * * *
>
> (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
>
> * * * *

Id. In light of the statute, it is well settled that the trial court may consider only those expenses incurred by the victim prior to the date of sentencing in formulating its restitution order. *Bennett v. State*, 862 N.E.2d 1281. Further, the amount of actual loss is a factual matter that can be determined only upon the presentation of evidence. *Id*.

The open-ended restitution order in this case clearly violates the restitution statute, as it contains no set amount and contemplates the award of future expenses. Therefore, we

reverse this portion of Patton's sentence and remand with instructions to the trial court to hold a hearing to determine the amount of actual expenses (including medical/hospital costs and lost wages) incurred by the victims prior to the date of sentencing. *See id.*

Judgment affirmed in part and reversed and remanded in part.

DARDEN, J., and BARNES, J., concur