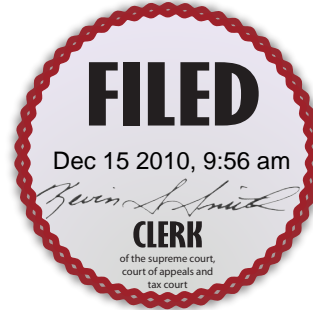


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSE CARLOS ARCE,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 88A01-1003-CR-155

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Frank Newkirk, Jr., Judge
Cause No. 88D01-0905-FB-180

December 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Jose Arce appeals his twelve-year sentence following his guilty plea to robbery, a Class B felony. Arce raises three issues for our review: 1) whether he may appeal his sentence; 2) whether the trial court abused its discretion in sentencing him; and 3) whether his sentence is inappropriate in light of the nature of his offense and his character. We conclude Arce did not waive his right to appeal his sentence, the trial court properly found multiple aggravating circumstances and did not overlook any significant and clearly supported mitigating circumstances, and while it erred in its finding of two aggravating circumstances, the error was harmless in light of the other valid aggravators. Further concluding Arce's sentence is not inappropriate, we affirm.

Facts and Procedural History

On May 21, 2009, Arce entered the National City Bank in Campbellsburg, Indiana armed with a CO₂-powered BB gun. Tellers Melissa Badger and Gina Singleton were working at the bank. Arce ordered Singleton to lie down on the floor and ordered Badger to give him money from both her cash drawer and Singleton's cash drawer. Once Badger gave him the money, he ordered her to lie down on the floor as well. Arce then fled the bank and was apprehended by police approximately one hour later. The police found him in the vehicle that was reported leaving the bank, and in possession of the BB gun, a disguise, and the bank's money. Arce confessed his crime to the police at that time.

The State charged Arce with robbery while armed with a deadly weapon, a Class B felony. Arce pleaded guilty pursuant to a plea agreement that capped his sentence at

twelve years. The trial court held a sentencing hearing and issued the following sentencing statement:

The aggravating factors considered by the Court are:

A. The harm, injury, loss or damage suffered by the victims of the offense was significant and greater than the elements necessary to prove commission of the offense, in that [Arce] held a weapon on the victims, forcing one victim to lay on the ground and the other to move from place to place retrieving money. These actions not only constitute robbery, but go further and also constitute the crime of criminal confinement.

B. [Arce] has a substantial history of criminal behavior. Though [he] has no known prior convictions, he has been violation [sic] the laws of this country every day for several years, [b]y remaining in this country illegally. He stole a license plate before committing this robbery and he created and used false social security cards and number [sic].

C. [Arce] subjected multiple victims to the terror and mental injury of the crime.

D. [Arce] is an illegal alien.

E. Subsequent to his plea of guilty, [Arce] was uncooperative with an agent of the Immigration and Naturalization Service regarding his status as an illegal alien, resulting in a federal detainer being placed on [Arce].

F. Evidence in the form of research of multiple other southern Indiana banks was located in [Arce]'s apartment, indicating preparation for the robbery of other banks.

G. Multiple copies of a social security card bearing [Arce]'s name and a number assigned to a valid citizen were located in [Arce]'s residence, indicating [his] continued desire to defraud valid United States citizens.

H. The offense was premeditated.

* * *

[Arce]'s request to make [his] offer to pay for victim counseling a mitigating factor is denied. He has actually paid no restitution, will lack the ability to pay for counseling during his twelve (12) year sentence, and he placed unreasonable conditions upon the offer by saying he would pay the individuals but not the bank.

The mitigating factors include:

A. [Arce] has admitted his crime.

Appellant's Appendix at 118-19.

The trial court sentenced Arce to twelve years executed at the Department of Correction. Following the trial court's denial of Arce's pro se motion to reconsider, he now appeals pro se.¹ Additional facts will be provided as necessary.

Discussion and Decision

I. Right to Appeal Sentence

Arce and the State address as a threshold issue whether his plea agreement contains a binding waiver of his right to appeal his sentence. A defendant may, as part of a written plea agreement, waive the right to appeal his sentence; the waiver is binding only if it is knowing and voluntary. Creech v. State, 887 N.E.2d 73, 74-75 (Ind. 2008). “The content and language of the plea agreement itself, as well as the colloquy where necessary, govern the determination as to the validity of the waiver.” Id. at 76 (quotation and alteration omitted). In Ricci v. State, 894 N.E.2d 1089 (Ind. Ct. App. 2008), trans. denied, this court held that where the trial court clearly and unambiguously stated at the plea hearing that the defendant would retain the right to appeal his sentence, and neither the prosecutor nor defense counsel contradicted the trial court on this point, the plea agreement waiver of the right to appeal became a nullity. Id. at 1093-94.

Similarly here, at the plea hearing and before Arce pleaded guilty, the trial court stated unequivocally that he would retain the right to appeal his sentence. Transcript at 7

¹ Arce has included the pre-sentence investigation report as part of his Appellant's Appendix on white paper. Appellate Rule 9(J) requires a pre-sentence report, made confidential by Indiana Code section 35-38-1-13, to be filed in accordance with Trial Rule 5(G). Thus, a pre-sentence report should be tendered on light green paper or have a light green coversheet marked “Not for Public Access” or “Confidential.” T.R. 5(G)(1). However, we are not ordering Arce to re-file his appendix because, by not marking the pre-sentence report as confidential, he has effectively waived the confidentiality of which he is the intended beneficiary. See Malenchik v. State, 928 N.E.2d 564, 566 n.2 (Ind. 2010) (concluding that where defendant challenged his sentence and particularly the manner in which trial court considered information in pre-sentence report, report would be declared publicly accessible pursuant to the exception for “specific authorization by the court and the convicted person”) (quoting Ind. Code § 35-38-1-13(b)).

("[I]f this [plea agreement] is accepted, then you'll be found guilty and you can't appeal that part but you could appeal the sentence that's imposed I should say that you can appeal the sentence that's imposed. And that would be to the Indiana Supreme Court or the Indiana Court of Appeals"). Neither the State nor defense counsel disputed this point or mentioned the sentence of the plea agreement that provided, "I hereby waive my right to appeal my sentence so long as the judge sentences me within the terms of my plea agreement." Appellant's App. at 8. In light of these circumstances, the State concedes and we agree Arce did not knowingly and voluntarily waive his right to appeal his sentence, and therefore the waiver contained in his plea agreement is not binding.

II. Abuse of Discretion

A. Standard of Review

In imposing sentence for a felony, a trial court must enter a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion." Id. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. at 490. The trial court may abuse its discretion if it (1) fails to enter a sentencing statement at all, (2) enters findings of aggravating and mitigating circumstances that are not supported by the record, (3) enters a statement that omits reasons clearly supported by the record and advanced for consideration, or (4) considers reasons that are improper as a matter of law. Id. at 490-91.

B. Omission of Mitigators

Arce contends the trial court abused its discretion by failing to find several mitigating circumstances. When a defendant claims a trial court abused its discretion by failing to find a mitigating circumstance, the defendant must establish the claimed mitigator is both significant and clearly supported by the record. Id. at 493. This is so because a trial court “does not err in failing to find mitigation when a mitigation claim is highly disputable in nature, weight, or significance.” Smith v. State, 670 N.E.2d 7, 8 (Ind. 1996) (quotation omitted). We examine each of Arce’s proffered mitigators in turn.

Arce contends the trial court abused its discretion by failing to find that his crime neither caused nor threatened serious harm to persons or property or he did not contemplate it would do so. See Ind. Code § 35-38-1-7.1(b)(1) (providing trial courts “may” consider this factor to be mitigating). A surveillance video of the robbery was admitted into evidence at sentencing and showed Arce holding the BB gun close to Badger and Singleton. Badger testified the BB gun looked very much like a real gun. While Arce testified the gun was unloaded, that fact, even if true, was unknown to Badger and Singleton, who both testified they feared for their lives. Both tellers also testified to their continuing emotional effects from the robbery, specifically, their heightened fear and nervous reactions when a new customer walks into the National City Bank, where they still work, or when a customer moves to pull something from his pocket. Thus, at least from the standpoint of the victims, Arce’s crime threatened serious physical harm and actually caused serious emotional harm. Arce admitted he planned his crime for three weeks in advance, thus having ample time to contemplate these harms.

The trial court did not err by declining to find significant mitigation as to the degree of harm caused, threatened, or contemplated.

Arce contends the trial court abused its discretion by failing to find as a mitigating circumstance his cooperation with police after he was apprehended. However, Arce confessed his crime only after he was apprehended and his cooperation therefore has less significance than if he had turned himself in before being apprehended. In Smith v. State, 929 N.E.2d 255 (Ind. Ct. App. 2010), trans. denied, we concluded the trial court was not required to find the defendant's cooperation with police to be mitigating factor when he cooperated only after being apprehended. Id. at 259. Similarly here, the trial court did not abuse its discretion by declining to find Arce's post-apprehension cooperation a significant mitigator.

Arce contends the robbery was motivated solely by financial need and the trial court erred by overlooking this as a mitigating circumstance. The record indicates Arce was unemployed at the time of the robbery and had only thirty-five dollars in his bank account. Yet we disagree with Arce's contention that his financial straits were a significantly mitigating circumstance, because as explained below, they do not tend to excuse or justify his crime. The trial court therefore did not abuse its discretion by omitting this circumstance from its sentencing statement.

Arce contends the trial court abused its discretion by failing to find substantial grounds tending to excuse or justify his crime, though failing to establish a defense. See Ind. Code § 35-38-1-7.1(b)(4) (providing trial courts may consider this circumstance mitigating). Arce's argument in this respect also focuses on his financial need as a result

of his unemployment. We strongly disagree with Arce's proposition that poverty can tend to excuse or justify armed robbery. As Arce admitted in his statement for the pre-sentence investigation report ("PSI"), he knew his financial difficulties were "no excuse for what I did." Appellant's App. at 40. We also point out that, as evidenced by his witnesses at the sentencing hearing, he had a network of friends and fellow church members who would have tried to help him financially if he had found the courage or humility to ask them. Arce's financial need did not equate to any sort of need to rob National City Bank, and the trial court properly rejected this assertion of a mitigating circumstance.

Arce contends the trial court abused its discretion by failing to find that his crime resulted from circumstances unlikely to recur. See Ind. Code § 35-38-1-7.1(b)(2) (providing trial courts may consider this factor mitigating). Arce points to his statement in the PSI that he has been awarded a workers' compensation settlement, and contends the financial need that was his motive for the robbery is therefore unlikely to recur. Yet there is no documentation in the record regarding the amount of the settlement, only his statement in his pro se motion to reconsider his sentence that the amount of the settlement was approximately \$54,536. Appellant's App. at 129. In the PSI, Arce stated he would use the settlement to pay his outstanding medical bills. He also stated he had no current income or assets. Thus, the record lacks clear or strong support for the proposition that Arce's financial difficulties are permanently solved. As a result, the trial court did not abuse its discretion by declining to find that Arce's crime resulted from circumstances unlikely to recur.

Arce argues the trial court abused its discretion by failing to find as a significant mitigator that he has no history of delinquency or criminal activity, or that he led a law-abiding life for a substantial time before committing the present offense. Arce has no prior convictions. The trial court acknowledged this fact by stating in its finding of aggravating circumstances:

[Arce] has a substantial history of criminal behavior. Though [he] has no known prior convictions, he has been violation [sic] the laws of this country every day for several years, [b]y remaining in this country illegally. He stole a license plate before committing this robbery and he created and used false social security cards and number [sic].

Appellant's App. at 118. We read the trial court's finding as a determination that Arce's absence of prior convictions lacked significant mitigating weight due to his history of illegal behavior. As noted below in our further discussion of the aggravating circumstances, the record supports the trial court's finding that Arce had a history of illegal behavior. As for the trial court's decision not to afford weight to Arce's lack of prior convictions, our supreme court has made clear that appellate courts no longer review for abuse of discretion the weight assignable to mitigating circumstances which were properly found or should have been found. Anglemyer, 868 N.E.2d at 491. In sum, because the trial court did not overlook Arce's lack of prior convictions but merely did not afford this factor the weight Arce requested, we cannot say the trial court abused its discretion.

Arce argues the trial court abused its discretion by failing to find that he is likely to respond affirmatively to probation or short-term imprisonment. See Ind. Code § 35-38-1-7.1(b)(7) (providing trial courts may consider this circumstance mitigating). Arce

acknowledges that facts regarding his purportedly good conduct while in jail were not presented to the trial court. He argues that because he was a productive and law-abiding member of society before the robbery, he has shown a desire to better himself and a strong probability he would respond well to short-term imprisonment. However, short-term imprisonment was not an available sentencing option in this case. Because Arce's offense was robbery while armed with a deadly weapon, a Class B felony, the trial court was required to impose at least six years of executed time. See Ind. Code § 35-50-2-5 (providing the minimum sentence for a Class B felony is six years); Ind. Code § 35-50-2-2(b)(4)(I) (providing a sentence for robbery with a deadly weapon may not be suspended below the minimum). Further, a probation officer testified that any period of probation was infeasible because Arce will likely be deported upon completing his imprisonment, and he could not possibly be monitored or subjected to probation after he has left this country. Thus, whether Arce would respond well to short-term imprisonment or probation was not a significant consideration for his sentencing, and the trial court did not abuse its discretion by declining to find it a significant mitigator.

Arce argues the trial court abused its discretion by failing to find that his character and attitudes indicate he is unlikely to commit another crime. See Ind. Code § 35-38-1-7.1(b)(8) (providing trial courts may consider this circumstance mitigating). This statutory mitigator focuses on a defendant's likely future conduct. See J.S. v. State, 928 N.E.2d 576, 578 (Ind. 2010). We acknowledge, as did the trial court, Arce's lack of prior convictions. At the sentencing hearing, various witnesses testified on behalf of his good character, and Arce testified that since his arrest he has experienced a renewal of his

religious convictions that will lead him to refrain from new crimes. The trial court was not obligated to give this testimony the same weight and credibility Arce would attach to it. Rather, the trial court was obligated to consider the favorable testimony and weigh it against the fact that Arce's character and attitudes did not prevent him from committing the relatively serious crime of armed robbery. See Dylak v. State, 850 N.E.2d 401, 410 (Ind. Ct. App. 2006) (noting a trial court is not required to give the same weight to proffered mitigators as the defendant does, and appellate courts defer to the trial court's determinations of credibility), trans. denied. While Arce did present evidence supporting this mitigator, inferences regarding his future conduct are not so clearly compelled by the record as to enable us to conclude the trial court abused its discretion. Therefore, the trial court did not abuse its discretion in this regard.

Arce argues the trial court abused its discretion by failing to find that his imprisonment will result in undue hardship to his mother. See Ind. Code § 35-38-1-7.1(b)(10) (providing trial courts may consider as mitigating any "undue hardship" to defendant's dependents as a result of imprisonment). Arce's brother testified his incarceration would cause pain and suffering to their sixty-nine year old mother, and his sister wrote a letter to the trial court expressing the same point. However, many persons convicted of crimes have dependents and, absent special circumstances showing the hardship is "undue," a trial court is not required to find this a significant mitigating factor. Benfield v. State, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), trans. denied. Arce provided financial support to his mother when he was able to work, but he has several siblings who can presumably do the same. His brother opined that his mother "will die"

if told of Arce's incarceration. Tr. at 73. However, this testimony was speculative, the trial court was not obligated to credit it, and Arce did not present the trial court with any special circumstances that would lead us to conclude the trial court abused its discretion.

To sum up, we conclude the trial court did not overlook any significant and clearly supported mitigating circumstances, and therefore did not abuse its discretion in this respect.

C. Finding of Aggravators

Arce further challenges the trial court's finding of aggravating circumstances, several of which he contends were unsupported by the record or otherwise improper. We examine each in turn.

Arce contends the trial court abused its discretion by finding the nature and circumstances of his crime to be an aggravating factor, specifically, the trial court's finding he "held a weapon on the victims, forcing one victim to lay on the ground and the other to move from place to place retrieving money," actions the trial court found constituted a further crime of confinement. Appellant's App. at 118. Arce acknowledges these actions but argues they did not go beyond the force or threat of force inherent in the robbery, citing the principle that a trial court may not use a material element of the crime as an aggravating circumstance. See Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000).

Arce accomplished the elements of robbery when he pointed the BB gun at Badger and Singleton, ordered Badger to give him the money, and took the money from the presence of Singleton. See Appellant's App. at 7 (charging information alleging Arce took money from "Gina Singleton . . . by using or threatening to use force on any person,

or by putting any person in fear”). His additional actions of ordering first Singleton and then Badger to lie down on the floor were unnecessary to prove the elements of the robbery. They each constituted an additional confinement, which occurs where a person knowingly or intentionally “confines another person without the other person’s consent.” Ind. Code § 35-42-3-3(a); see Ind. Code § 35-42-3-1 (defining “confine” as “to substantially interfere with the liberty of a person”). While confinement can be a lesser included offense of robbery, “any confinement of the victim beyond that inherent in the force used to effectuate the robbery constitutes a violation of the confinement statute apart from the violation inherent in the offense of robbery.” Ryle v. State, 549 N.E.2d 81, 84-85 (Ind. Ct. App. 1990), trans. denied. In Brim v. State, 471 N.E.2d 676 (Ind. 1984), our supreme court affirmed a conviction for confinement as a “separate and distinct” crime from robbery where the defendant forced the store employee to move behind the counter and lie down on the floor, then to assist in opening the cash drawer and to lie on the floor again. Id. at 676-77. Similarly here, Arce made Badger and Singleton lie down on the floor, which went beyond the force inherent in the robbery and was therefore a valid aggravating circumstance.

Arce further contends the trial court abused its discretion by finding as an aggravator that he “subjected multiple victims to the terror and mental injury of the crime,” Appellant’s App. at 118-19, arguing terror and mental injury were a material element of the offense. While fear or the threat of force was an element of the robbery, the gist of the trial court’s finding concerned the multiple victims. The presence of multiple victims can be a valid aggravating circumstance. Gilliam v. State, 901 N.E.2d

72, 74 (Ind. Ct. App. 2009). Both Badger and Singleton were victims of Arce's crime and testified to the terror Arce inflicted on them and which they continue to feel. The trial court did not abuse its discretion by finding this to be an aggravating circumstance.

Arce disputes the trial court's finding that "[e]vidence in the form of research of multiple other southern Indiana banks was located in [Arce]'s apartment, indicating preparation for the robbery of other banks." Appellant's App. at 119. Detective Brent Miller of the Washington County Sheriff's Department testified that after the robbery, he executed a search warrant of Arce's apartment and found a sheet of paper, admitted as State's Exhibit G, that contained the handwritten addresses of six banks. One address was crossed out and two addresses were circled: the National City Bank that Arce robbed, and the address of a bank in Orleans, Indiana. Detective Miller testified this sheet of paper "could" indicate Arce was planning other bank robberies. Tr. at 130. Also in Arce's apartment, Detective Miller found laid out a map of Southern Indiana and a map of the Campbellsburg area.

Arce's research of other banks, standing alone, could evidence merely his planning that went into selecting the National City Bank in Campbellsburg as the one to rob. However, the fact two bank addresses were circled increases the likelihood that Arce planned to rob both, or that the Orleans bank was Arce's backup plan in case he failed to get enough money from National City. Arce's explanation of his motive – his desire to steal enough money to solve his financial problems – is consistent with a plan to rob multiple banks if necessary. Thus, while the inference of Arce's preparation to rob other banks was not indisputably compelled by the evidence, neither was it unsupported

by the evidence or merely speculative. Therefore, the trial court did not abuse its discretion by finding it as an aggravating factor.

Arce challenges the trial court's finding that "[m]ultiple copies of a social security card bearing [Arce]'s name and a number assigned to a valid citizen were located in [Arce]'s residence, indicating [his] continued desire to defraud valid United States citizens." Appellant's App. at 119. The evidence presented at sentencing was that Arce possessed a social security card with his name, his signature, and a nine-digit number. Three unsigned copies of the same card were found when officers executed the search warrant for his apartment. Arce admitted he knew social security cards could be validly issued only by the Social Security Administration, but he bought a social security card from another person, made up a number, and printed several copies in case he should misplace one. He testified he used the card for purposes such as obtaining employment and opening bank accounts. Arce admitted knowing his use of the card could affect the valid holder of the social security number, if indeed there was a valid holder, although he did not believe there was one. Detective Miller testified that he called the Social Security Administration regarding the number on Arce's card, and was informed the number was validly assigned to somebody but not assigned to Arce.

Given this evidence, the trial court did not abuse its discretion by finding a degree of culpable dishonesty in Arce's use of the social security card. To the extent the trial court reasoned Arce's mere possession of the card bearing a number assigned to a valid citizen gave rise to an inference of continuing intent to defraud, its logic expressed in its written finding was inaccurate. Yet in reviewing a trial court's finding of aggravating

circumstances, we focus on the substance of the finding rather than its precise wording, and “decline to over-analyze the trial court’s semantics.” Cloum v. State, 779 N.E.2d 84, 87-88 (Ind. Ct. App. 1992). Arce used the social security card despite knowing it was false and that his use of it could affect a valid holder of the number. The trial court did not err by finding these facts aggravating. Arce also contends the trial court should have disregarded the testimony that the social security number he used belonged to somebody else, on the basis the testimony was hearsay. However, hearsay is admissible in sentencing hearings if reliable. See Ind. Evidence Rule 101(c)(2) (providing the rules of evidence, except concerning privileges, do not apply to sentencing); Thomas v. State, 562 N.E.2d 43, 48 (Ind. Ct. App. 1990) (noting common law principles prohibit reliance on inaccurate or invalid information in sentencing). Merely positing that the representative of the Social Security Administration may have made a mistake, Arce points to no circumstances from which it could be inferred the report was unreliable. Therefore, the trial court did not abuse its discretion.

Arce contends the trial court abused its discretion by finding as an aggravating factor that he was uncooperative with an agent of the Immigration and Naturalization Service (“INS”) when questioned regarding his illegal immigration status. Arce admitted to the trial court that he is in the United States illegally. Arce does not dispute that he refused to speak cooperatively with the INS agent, but contends the trial court’s use of this as an aggravator was improper because he was not obligated to cooperate regarding matters unrelated to the present case. When asked why he was uncooperative with the INS agent, Arce testified “because I didn’t have to be cooperative,” and because he was

bothered by “the way that the gentleman spoke to me.” Tr. at 119-20. The record contains no other information regarding this incident, and as a result fails to support an inference that Arce had any obligation to cooperate with the INS. Given the absence of any showing Arce was obligated to cooperate with questioning, his decision not to cooperate is not probative of his character and is therefore not a proper aggravating circumstance. Thus, trial court abused its discretion by finding Arce’s noncooperation with the INS to be an aggravating circumstance.

Arce further contends the trial court abused its discretion by treating his unlawful immigration status as a separate aggravator, when it already used that status as support for its finding Arce had a history of criminal or illegal activity. We agree, because this court has held unlawful immigration status is a valid aggravator to the extent it shows a defendant’s disregard for the law. Sanchez v. State, 891 N.E.2d 174, 176-77 (Ind. Ct. App. 2008). In other words, courts may not treat a defendant more harshly “solely due to his national origin or alien status,” but may consider a defendant’s “illegal alien status and disregard for the law, including immigration laws.” Id. at 176 (quotation and emphasis omitted). The trial court did not articulate any other reason why Arce’s unlawful immigration status was aggravating. Consequently, we conclude the trial court abused its discretion by effectively double-counting Arce’s unlawful immigration status.

While two of the aggravating circumstances found by the trial court were invalid, we also conclude, as explained below, that the error was harmless and we need not remand for resentencing. We first address Arce’s other claims of sentencing error.

D. Other Contentions

Arce's other contentions include that the trial court abused its discretion by failing to explain why certain factors were determined to be aggravating. A trial court's statement of mitigating or aggravating circumstances must "explain why each circumstance has been determined to be mitigating or aggravating." Anglemyer, 868 N.E.2d at 490. The two primary purposes of requiring a reasonably detailed sentencing statement are to guard against arbitrary and capricious sentencing and to provide a basis for appellate review. Id. at 489.

While the trial court did not explain why Arce's premeditation of the robbery was determined to be aggravating, this omission was inconsequential because Arce admitted he planned the crime for three weeks, and settled precedent holds planning or premeditation is a valid aggravator. See Shane v. State, 769 N.E.2d 1195, 1199 (Ind. Ct. App. 2002). Because the facts were undisputed and the law clear, no more detailed explanation was required in order to provide a basis for this court's review and guard against an arbitrary sentence. Thus, the trial court's sentencing statement was not deficient in this respect.

Arce also contends the trial court abused its discretion by not explaining why his theft of a license plate, which he admitted he stole to use in the robbery, was determined to be aggravating. However, this fact formed part of the trial court's explanation for its finding Arce had a history of criminal or illegal behavior, and was not counted as a separate aggravator. Therefore, the trial court's sentencing statement was sufficient in this respect as well.

Arce further argues the trial court abused its discretion by denying him the opportunity to present a written sentencing memorandum. He relies on Indiana Code section 35-38-1-11, which provides: “At any time before sentencing, the convicted person may file with the court a written memorandum setting forth any information he considers pertinent to the question of sentence.” However, the transcript of the sentencing hearing shows only that Arce asked to “submit a statement” to the trial court before it imposed his sentence. Tr. at 171. Arce did not specifically request the trial court to consider a written memorandum. When the sentencing hearing reconvened, the trial court permitted Arce to make a “further statement,” which he did in the form of an additional allocution. Id. at 172, 174-75. Thus, the trial court afforded Arce the opportunity he requested, which it reasonably construed as a request for a verbal allocution rather than a written memorandum. The trial court therefore did not abuse its discretion, and we need not address Arce’s argument concerning the interpretation of Indiana Code section 35-38-1-11.

E. Evaluation and Conclusion

Given our conclusion the trial court abused its discretion in its finding of two aggravating circumstances, but properly found multiple other aggravators and did not overlook any significant and clearly supported mitigators, we must determine whether remand for resentencing is required. Our supreme court has directed that remand for resentencing is the appropriate remedy “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Anglemyer, 868 N.E.2d at 491.

In sentencing Arce to twelve years, the trial court imposed the maximum sentence permitted under Arce's plea agreement, which was two years above the advisory sentence for a Class B felony. See Ind. Code § 35-50-2-5. The trial court found eight aggravating circumstances; two of these were invalid but the other six were proper and supported by the record. The trial court found as the sole mitigating circumstance Arce's guilty plea. Given that the proper aggravators still outnumber and outweigh the sole mitigator, we can confidently say the trial court would have imposed the same modestly enhanced sentence had it considered only the proper factors. Therefore, we need not remand for resentencing, and we proceed to address Arce's inappropriateness claim.

III. Inappropriate Sentence

Article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review of the appropriateness of a sentence, an authority implemented through Indiana Appellate Rule 7(B). Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This court may 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." App. R. 7(B). In making this determination, 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. The defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress, 848 N.E.2d at 1080.

With regard to the nature of Arce's offense, he planned and premeditated the bank robbery for three weeks, including such actions as researching the bank, buying a BB gun, and stealing a license plate. As explained above, his difficult financial

circumstances were not a significantly mitigating motive. In his commission of the crime, he threatened two tellers with a BB gun that appeared to them to be a real firearm, and he used the threat of force to confine both tellers to the floor. While there is no evidence to contradict Arce's claim the BB gun was unloaded, that fact was unknown to the tellers. Arce's actions not only placed people in fear, but because the crime was in a bank open to business by the public, created a risk that others might respond with weapons or violence in the face of an obviously threatening situation. Thus, while we do not regard Arce's offense as among the worst in its category, it still supports the trial court's modest enhancement of his sentence.

As for Arce's character, we acknowledge his lack of prior convictions but also note that, given his illegal immigration status and use of a false social security card and number, he has not been leading a law-abiding life. His admission of his crime to police after he was apprehended and his guilty plea reflect favorably upon his character, but not to a high degree because they also appear to be pragmatic decisions. In return for his guilty plea, Arce received the substantial benefit of capping his sentence at twelve years, when he would otherwise have been subject to up to twenty years imprisonment. See Ind. Code § 35-50-2-5. The trial court found, by comparing Arce's testimony at sentencing with the video recording of the robbery, that "some [of Arce's] statements . . . were not truthful" in attempting to minimize how close to the tellers he pointed the BB gun. Tr. at 180.

Considering all of these factors together, Arce has failed to persuade us that his twelve-year sentence is inappropriate. See Sanchez, 891 N.E.2d at 176-77 (concluding

defendant's moderately enhanced sentence was not inappropriate; defendant received substantial benefit in exchange for guilty plea, and while lacking prior convictions, his disregard of immigration laws and use of false social security number commented negatively upon his character).

Conclusion

While the trial court erred in its finding of two aggravating circumstances, the error was harmless in light of the multiple and substantial valid aggravators, and the trial court did not otherwise abuse its discretion in sentencing Arce. Further, his twelve-year sentence is not inappropriate in light of the nature of his offense and his character.

Affirmed.

MAY, J., and VAIDIK, J., concur.