

Defendant-Appellant Terry A. Killebrew (“Defendant”) appeals after pleading guilty to the offense of battery resulting in serious bodily injury, a Class C felony, Ind. Code §35-42-2-1(a)(3).

The factual basis for Defendant’s guilty plea reveals that on April 15, 2004, Defendant and Janice Dublin (“Janice”) were part of a research group conducting a study of kindergarten and first grade students’ reading skills in Plainfield, Indiana. They were employed by Education Innovations, a research company located in Memphis, Tennessee. Janice did not know Defendant prior to working with him on this research study, but was acquainted with Defendant’s sister, LaRuth Lofties.

On the evening of April 15th, at the hotel where Defendant was staying with his partner, Tremaine, Defendant took a bath, smoked some marijuana, had a couple of drinks, and experienced an acute psychotic episode during which he believed that God was speaking to him and that the Devil was trying to control him. Defendant, who was naked, fought with his partner, ran into the hallway of the hotel, and encountered several people including his sister, and Janice, who were also staying there at the hotel separately. Defendant believed that Janice was a witch and that she was trying to kill him. Defendant grabbed Janice and repeatedly beat her head against a door, punched her in the face, and rammed his hand down her throat, broke her arm, and bit her several times in the abdomen and neck.

The State charged Defendant with battery resulting in serious bodily injury, a Class C felony; criminal mischief, a Class A misdemeanor; battery on law enforcement, a

Class A misdemeanor; public indecency, a Class A misdemeanor; resisting law enforcement, a Class A misdemeanor; and possession of marijuana, a Class A misdemeanor. Janice's injuries included a broken jaw, a broken arm, a broken orbital floor of her left eye, two broken ribs, a number of serious bites, and severe swelling and bruising. Janice was not able to work for seven weeks. Janice also learned that Defendant was HIV positive. She has to undergo prophylactic treatment and testing for HIV infection. Her out-of-pocket expenses were \$4,284.86.

Defendant pled guilty to the offense of battery resulting in serious bodily injury, a Class C felony. Ind. Code §35-42-2-1(a)(3). In exchange for Defendant's plea, the State agreed to dismiss the remaining charges against Defendant. The sentence was left to the trial court's determination.

Defendant's sentencing hearing was held on July 20, 2005. The trial court issued its order of commitment sentencing Defendant to 2,914 days, with 900 days suspended. Defendant was given credit for 7 days actually served plus 7 days good time credit. Defendant was placed on probation for 2,900 days. Defendant was remanded to the custody of the Hendricks County Sheriff to begin the executed portion of his sentence.

The trial judge found the following aggravating factors in reaching his sentencing decision. First, the Defendant's prior criminal history for an assault in 1995, and 2002 conviction for possession of marijuana and driving while impaired as an adult, were considered. The trial court also noted that Defendant is in need of correctional or rehabilitative treatment best provided through commitment to a penal facility. The trial court also found that imposition of a reduced or suspended sentence would depreciate the

seriousness of the crime. The trial court found that at the time of the offense Defendant was HIV positive and caused bodily fluids to be exchanged with the victim.

As for mitigating factors, the trial judge found that Defendant was likely to respond affirmatively to probation or short-term imprisonment. The trial judge also found that the character and attitudes of the Defendant indicated that he was remorseful, and willing to make restitution. The trial judge found that Defendant accepted responsibility for the crime, and that Defendant had cooperated with counsel and the court throughout the criminal proceedings, traveling to Indiana from Tennessee for every hearing.

Defendant filed a Motion to Correct Errors on August 18, 2005, which was denied on August 23, 2005. This appeal followed, in which Defendant challenges the sentence imposed by the trial court.

In general, sentencing decisions are left to the sound discretion of the trial court, are given great deference on appeal, and will be reversed only for an abuse of discretion. *Puckett v. State*, 843 N.E.2d 959, 962 (Ind. Ct. App. 2006). One aggravating circumstance may be sufficient to warrant an enhanced sentence. *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998). Whether a circumstance is mitigating is within the trial court's discretion. *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003). The trial court is not required to explain why it does not find a circumstance mitigating. *Prowell v. State*, 787 N.E.2d 997, 1003 (Ind. Ct. App. 2003). Furthermore, the trial court's determination of the proper weight to be given an aggravating or mitigating circumstance

is entitled to great weight and will be set aside only upon a showing of a manifest abuse of discretion. *Teer v. State*, 738 N.E.2d 283, 291 (Ind. Ct. App. 2000).

The court's statement must identify all significant aggravating and mitigating factors, state why each is considered to be aggravating or mitigating, and weigh the aggravating factors against the mitigating factors. *Montgomery v. State*, 694 N.E.2d 1137, 1141 (Ind. 1998). When a defendant challenges on appeal a sentence more severe than the presumptive, the reviewing court will examine the record to insure that the sentencing court explained its reasons for selecting the sentence it imposed. *Neale v. State*, 826 N.E.2d 635, 636 (Ind. 2005).

In the present case, Defendant agreed to plead guilty to the Class C felony, and the State agreed to drop the remaining charges against him. Pursuant to the plea agreement, sentencing was left to the trial court's discretion. Defendant claims that the trial court erred by finding as aggravating circumstances that Defendant was in need of corrective or rehabilitative treatment best provided by a penal facility, and that a reduced or suspended sentence would depreciate the seriousness of the crime.

The trial judge's statement regarding those factors during the sentencing hearing is a recitation of those factors. In addition, the trial judge stated that those two factors "get us to the four years executed," meaning the presumptive sentence.

The factor "reduced sentence would depreciate the seriousness of the crime" is appropriately used to support a trial court's refusal to impose less than the presumptive sentence. *Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005). It does not serve as a valid aggravating factor supporting an enhanced sentence. *Id.*

Arguably, the trial court's statement that "those two factors get us to the four years executed" could be interpreted to mean that the trial court was considering the imposition of less than the presumptive sentence. In that event, there would be no error. Regardless, for reasons discussed below, any error in the consideration of that factor is harmless.

The factor "in need of rehabilitative treatment" as an aggravating circumstance applies when the trial court explains why the specific defendant needs treatment provided in a penal facility. *Id.* In order to support use of that factor, however, the trial court must give a specific and individualized statement explaining why extended incarceration is appropriate. *Id.* Here, the trial court did not give a specific and individualized statement explaining why extended incarceration is appropriate. Therefore, use of this factor to enhance Defendant's sentence was error. But for reasons discussed below, any error in the consideration of that factor is harmless.

When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. *Id.* at 525. Where there is an irregularity in the trial court's sentencing decision, the matter can be remanded to the trial court for a clarification or new sentencing determination, can be affirmed if the error is harmless, or the aggravating and mitigating circumstances can be reweighed independently here on review. *Id.*

Here, the trial court cited Defendant's prior criminal history as an aggravating circumstance. Defendant argues that his criminal history and the other factor, that Defendant was HIV positive at the time of the offense and caused bodily fluids to be

exchanged, are not sufficient to support imposition of nearly the maximum sentence in his case.

The record reveals that Defendant's criminal history consisted of a misdemeanor conviction for assault, and a conviction in 2002 for possession of marijuana and first offense of driving while impaired as an adult, from the State of Tennessee. The trial court noted that the current offense was a crime of violence as was the misdemeanor conviction for assault.

The significance of a defendant's prior criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense. *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004). In the present case it is true that Defendant does not have a large number of prior offenses. However, the record supports the trial court's statement that the current offense and a prior offense involved crimes of violence.

Furthermore, the trial court also found that Defendant was HIV positive at the time he committed the current offense. He caused bodily fluids to be exchanged with the victim by biting her repeatedly in the abdomen and neck. Janice will have to undergo testing and treatment for HIV. The trial court properly considered the significant harm suffered by the victim as a result of Defendant's actions. *See* Ind. Code §35-38-1-7.1(a).

Defendant claims that those two aggravating factors are not sufficient to outweigh the mitigating factors found by the trial court. The trial court found as mitigating factors that Defendant was remorseful, accepted responsibility for his crime, cooperated with the court and counsel, was willing to make restitution, and had traveled from Tennessee to the hearings in his case in Indiana.

While the trial court did find two aggravating circumstances that were improper, there were two properly considered aggravating circumstances that remained. The mitigating circumstances found by the trial court were proper. Defendant received the benefit of having five misdemeanor charges against him dropped as a result of his agreement to plead guilty. Furthermore, the trial court suspended 900 days of Defendant's sentence. Following the two-step process in reviewing a non-*Blakely* challenge to an enhanced sentence, Defendant's sentence was appropriate and supported by the record. *See Hope v. State*, 834 N.E.2d 713, 717 (Ind. Ct. App. 2005). Any irregularity in the trial court's sentencing was harmless.

Defendant also challenges the trial court's treatment of his proffered mitigating circumstance involving his mental illness. Defendant claims that the trial judge abused his discretion by not considering Defendant's mental illness to be a significant mitigating factor.

The transcript of the sentencing hearing reflects that the trial judge did take into consideration Defendant's proffered mitigating circumstance involving his mental health. The trial judge explained that he looked at mental illness as affecting a person by diminishing his or her capacity on an ongoing basis, and not as something that causes someone to snap one minute, and then be better several minutes later. The trial court addressed Defendant's mental health by ordering that a note be placed on Defendant's record requesting an emphasis on mental health treatment while in the Department of Correction. The trial court ordered that Defendant receive anger control counseling, and that Defendant cooperate with any mental health counselor and program that is

determined necessary while Defendant is on probation. The trial court appropriately considered Defendant's mental health in regard to placement of Defendant and the programs available to him while there.

Affirmed.

SULLIVAN, J., and RILEY, J., concur.