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**IN THE  
COURT OF APPEALS OF INDIANA**

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RAYMOND HOWARD-LEAR, )

Appellant-Defendant, )

vs. )

No. 45A03-0601-CR-02

STATE OF INDIANA, )

Appellee. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
Criminal Division, Room III  
The Honorable Diane Ross Boswell, Judge  
Cause No. 45G03-0309-FD-191

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**November 21, 1006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Following remand by our court and re-sentencing by the trial court, Appellant, Raymond Howard-Lear, challenges his sentence of five years incarceration for his conviction for Battery as a Class C felony.<sup>1</sup> Upon appeal, Howard-Lear claims that the trial court abused its discretion upon balancing the aggravators and mitigators in re-sentencing him.

We affirm.

In reciting the underlying facts in this case, we refer to our earlier decision remanding this case for re-sentencing, Howard-Lear v. State, No. 45A05-0411-CR-585 (Ind. Ct. App. Aug. 18, 2005):

“The facts are that Howard-Lear and the victim, Joyce Haney, lived together for more than fifteen years. On September 5, 2003, they were no longer living together. In fact, at that time, Howard-Lear was then the subject of a protective order forbidding him from contacting Haney. Nevertheless, on that day, Howard-Lear appeared at Haney’s residence and the two began to argue. Howard-Lear grabbed Haney and took her to the ground. During the ensuing struggle, Haney suffered injuries that caused extreme pain.

The State charged Howard-Lear with two counts of confinement, one as a class B felony and the other as a class D felony, and two counts of battery, one as a class [C] felony and the other as a class [A misdemeanor]. [(App. 17-18, 50)]. On May 14, 2004, Howard-Lear pled guilty to a single charge of battery as a class C felony in exchange for the State’s agreement to drop all other charges. Following a sentencing hearing, the court imposed an enhanced, six-year sentence, with three years suspended.” Slip op. at 2.

On March 29, 2005, Howard-Lear, after serving eighteen months of his six-year sentence, was released from the Department of Correction and placed on probation.

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<sup>1</sup> Ind. Code § 35-42-2-1 (Burns Code Ed. Repl. 2004); Ind. Code § 35-50-2-6 (Burns Code Ed. Repl. 2004).

On May 8, 2005, Howard-Lear was arrested in Illinois for violating Haney's<sup>2</sup> protective order against him. It appears that Howard-Lear met police at Haney's mother's nursing home, where Haney was visiting, and that once there, Howard-Lear handed the police various papers in an attempt to have them take Haney into custody for purposes of having her "committed." Sentencing Tr. at 7. According to Haney, when she informed the police that she had a protective order against Howard-Lear, they arrested him. On October 20, 2005, Howard-Lear entered a plea of guilty in Illinois to violating the protective order and was sentenced to 166 days in the Cook County Jail.

On August 18, 2005, which was subsequent to Howard-Lear's arrest in Illinois but prior to his guilty plea on that charge, we determined in his first appeal of the instant case that the trial court's consideration of five separate aggravators was erroneous due to the fact that two of the aggravators constituted elements of Howard-Lear's offense and two others ran afoul of Blakely v. Washington, 542 U.S. 296, 301 (2004). We therefore reversed the sentence and remanded to the trial court for a new sentencing hearing.

On December 1, 2005, the court held a hearing for purposes of re-sentencing Howard-Lear. Upon re-sentencing him to five years with the Department of Correction, the court found as a mitigating circumstance Howard-Lear's lack of criminal history, and the court found as an aggravating circumstance that Howard-Lear had violated the protective order. The court also considered Howard-Lear's risk to re-offend, which it

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<sup>2</sup> Haney's last name is now Turner.

determined was “medium” based upon the fact that he had a GED<sup>3</sup> and had not had a steady job since 1995. App. at 94.

Upon appeal, Howard-Lear claims that the trial court gave undue weight to the aggravator of his violating a protective order and that it abused its discretion by allowing this aggravator to “completely trump” what he claims was the substantial mitigator of his lack of criminal history. Appellant’s Brief at 7.

Sentencing determinations, including whether to adjust the presumptive<sup>4</sup> sentence, are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances to modify the presumptive sentence, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Fugate v. State, 608 N.E.2d

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<sup>3</sup> At the subsequent December 15, 2005 sentencing hearing, Howard-Lear indicated to the court that he had not completed his GED.

<sup>4</sup> The amended version of Ind. Code § 35-50-2-6 (Burns Code Ed. Supp. 2006) references the “advisory sentence,” reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely. Since Howard-Lear committed the crime in question on September 5, 2003, before the effective date of the amendments, we apply the version of the statute then in effect and refer instead to the presumptive sentence. See Ind. Code § 35-50-2-6 (Burns Code Ed. Repl. 2004) (“A person who commits a Class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances.”)

1370, 1374 (Ind. 1993). A single aggravating circumstance may be sufficient to justify an enhanced sentence. McNew v. State, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005).

After finding Howard-Lear's violation of Haney's protective order to be an aggravator and his lack of criminal history to be a mitigator, the court stated the following in its sentencing order:

“After considering the pre-sentence investigation report, having read the transcripts from prior proceedings, and the above factors the Court after weighing the aggravating and mitigating circumstances, now finds the defendant guilty of the amended charge of Battery, a Class C Felony. The Court sentences the defendant to five (5) years in the Indiana Department of Correction. Imposition of a reduced sentence or granting of probation would depreciate the seriousness of the crime.” App. at 95.

In explaining its sentence to Howard-Lear, the court later specifically stated, “You have an aggravated sentence because you violated the protective order.”<sup>5</sup> Sentencing Tr. at 30.

Howard-Lear claims it was an abuse of discretion for the trial court to attribute such aggravating weight to his violation of the protective order in light of his lack of criminal history.<sup>6</sup> We find no such abuse of discretion on that basis.

As the trial court found, the aggravator<sup>7</sup> that Howard-Lear had violated Haney's protective order merited serious weight because the circumstances indicate Howard-Lear

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<sup>5</sup> In a subsequent hearing, the court further clarified that it had decided against placing Howard-Lear on probation also due to his violation of Haney's protective order.

<sup>6</sup> Howard-Lear does not challenge the court's consideration of the “depreciate the seriousness” factor. We therefore do not address it.

<sup>7</sup> The use of Howard-Lear's violation of the protective order at the time of the instant crime as an aggravator does not present Blakely concerns because, as we determined in the first appeal, Howard-Lear admitted to such violation. Howard-Lear, slip op. at 5.

poses an ongoing threat to Haney.<sup>8</sup> The initial conviction in this case involved Howard-Lear battering Haney, a crime which at the time was a violation of her protective order against him. Following Howard-Lear's conviction, less than two months after his release from serving eighteen months of his sentence, and while he was still on probation, Howard-Lear again violated the protective order in what appeared to be a fairly sophisticated ruse to come into contact with Haney again. For that violation he was sentenced to 166 days incarceration in Illinois. Yet at the re-sentencing hearing in the instant case, after serving extensive prison time in both Indiana and Illinois for crimes in which he had victimized Haney, Howard-Lear nevertheless maintained that his attempts to contact Haney were for her benefit only and that any fear she had of him was attributable to her mental health rather than to his malice. Haney testified to her terror of Howard-Lear, how she feels like a prisoner, and how she fears his coming back to "get" her, which, she testified, he has proven he will do. Sentencing Tr. 5. We agree with the trial court that Howard-Lear's violation of the protective order was indeed a weighty aggravator.

Further, we must note that although the court appeared to consider Howard-Lear's lack of criminal history as a mitigator, by the time Howard-Lear was re-sentenced, he had

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<sup>8</sup> There is some confusion as to whether the court considered both of Howard-Lear's violations of the protective order, or only the one occurring at the time of the instant offense. As Howard-Lear claims, the court made the statement that it was aggravating the sentence due to the fact that Howard-Lear violated the protective order "in order to commit this crime." Sentencing Tr. at 39. The court made this statement, however, after being erroneously "corrected" by defense counsel that there was only one violation of the protective order rather than the actual two violations. Sentencing Tr. at 30. In any event, the finding of a single violation of a protective order may serve as a proper aggravator. See Mitchem v. State, 685 N.E.2d 671, 679 (Ind. 1997) ("The nature and circumstances of a crime may be considered an aggravating factor.")

acquired a criminal history consisting of a conviction in Illinois for again violating Haney's protective order, for which he had received a 166-day-sentence in the Cook County Jail. Upon re-sentencing a defendant whose sentence has been set aside, a court may take into consideration identifiable conduct by that defendant which occurred after the imposition of the original sentence. See Ind. Post-Conviction Rule 1(10)(b), cited in Hicks v. State, 729 N.E.2d 144, 146 (Ind. 2000).<sup>9</sup> While the trial court did not attribute any criminal history to Howard-Lear, given the evidence of such criminal history and our ability to consider it, we question the defendant's position upon appeal that his "lack" of criminal history merits more weight than the trial court apparently attributed to it. If anything, we would consider the court's weighing of this "mitigator" to be noticeably lenient. It certainly does not weigh heavily counter to the substantial weight of Howard-Lear's violation of the protective order.

Having found that the trial court engaged in an appropriate weighing process upon re-sentencing Howard-Lear, we conclude it did not abuse its discretion by giving him a five-year sentence with the Department of Correction for his conviction of battery.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

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<sup>9</sup> Indiana Post-Conviction Rule 1(10)(b) has been cited by our Supreme Court with approval in the direct appeal context. Hicks, 729 N.E.2d at 146, cited in Fields v. State, 852 N.E.2d 1030, 1032 n.2 (Ind. Ct. App. 2006), trans. denied. This rule allows a court to consider such conduct and to impose a more severe penalty than was originally imposed if the court indicates its reasoning on the record. Howard-Lear was originally sentenced to six years and was subsequently re-sentenced to five years, so this rule is applicable to the instant case only insofar as it demonstrates the court's ability to consider conduct by the defendant occurring after the imposition of the original sentence.