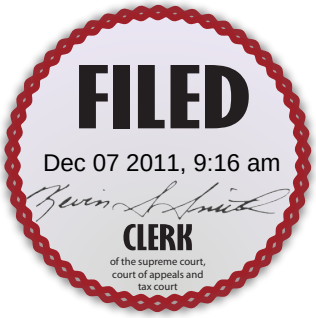

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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH D. HILLENBURG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-1103-CR-126
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM LAWRENCE SUPERIOR COURT
The Honorable Michael A. Robbins, Judge
Cause No. 47D01-0904-MR-207

December 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

. Appellant-Defendant Joseph Hillenburg was convicted, pursuant to a guilty plea, of Class A felony Voluntary Manslaughter[1] and Class C felony Battery By Means of a Deadly Weapon[2] for which he received an aggregate sentence of fifty-eight years in the Department of Correction, with two years suspended to probation. Upon appeal, Hillenburg raises several challenges to his sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 24, 2009, in Lawrence County, Hillenburg knowingly used a knife to stab his cousin and best friend, Garris Hillenburg, seven times, including once through the heart. Garris died from his injuries. Hillenburg also knowingly stabbed his friend Brandon Smith with a knife. At the time, Hillenburg, who had been consuming alcohol and medication or controlled substances, was highly agitated and acting under sudden heat. Apparently Hillenburg had been fighting with his girlfriend, with whom he had a volatile relationship, causing Garris and Smith to intervene. Hillenburg responded by stabbing them.

On March 25, 2009, the State charged Hillenburg with murder (Count I), Class C felony battery by means of a deadly weapon (Count II), and two counts of Class A misdemeanor battery resulting in bodily injury (Count III and IV). On June 2, 2010, the State filed an amended information alleging Class A felony voluntary manslaughter in Count I. That day, the parties entered into a plea agreement whereby Hillenburg agreed

[1] Ind. Code § 35-42-1-3(a) (2008).

[2] Ind. Code § 35-42-2-1(a)(3) (2008).

to plead guilty to amended Count I and Count II, and the State agreed to dismiss Counts III and IV.

Following Hillenburg's June 2, 2010 guilty plea, Hillenburg moved to withdraw his plea, which the trial court denied. During Hillenburg's February 9, 2011 sentencing hearing, Hillenburg presented testimony from his jail nurse indicating he was on prescription medication for depression and bipolar disorder. Hillenburg also presented testimony that his father and step-father had abused him as a child and that he had had childhood diagnoses of attention deficit disorder and manic depression. During the sentencing hearing, the trial court asked various questions regarding Hillenburg's relationship with Garris.

The trial court ultimately sentenced Hillenburg to maximum consecutive terms of fifty years in the Department of Correction for Count I and eight years for Count II. The court suspended two years to supervised probation. In imposing this sentence, the trial court listed as aggravating factors Hillenburg's violation of his position of trust with his victims, the nature and circumstances of the crimes, and Hillenburg's lack of remorse. The trial court found no mitigating factors. This appeal follows.

I. Judicial Inquiry

Hillenburg first argues that the trial court stepped into a prosecutorial role by making inquiries during the sentencing hearing. In Hillenburg's view, the court's inquiries established the fact of a relationship of trust between himself and Garris, which the court later used as an aggravating factor.

In the trial context, a trial judge may, within reasonable limits, question a witness provided it is to aid the jury in its fact-finding duties, and the questioning is done in an impartial manner so the judge does not improperly influence the jury. *See Decker v. State*, 515 N.E.2d 1129, 1134 (Ind. Ct. App. 1987). Thus, while a trial judge may interrogate a witness to clarify his testimony, he exceeds his fact-finding role when asking questions calculated to impeach or discredit a witness. *Id.*

Here, the trial court asked the questions at issue during the sentencing hearing. Notably, Hillenburg failed to object to these questions which generally waives his argument unless fundamental error occurred, which Hillenburg does not claim. *See id.* at 1131-32.

On the merits, Hillenburg does not argue that the questions were calculated to impeach or discredit a witness, only that they brought to light the aggravating factor of Hillenburg's position of trust with Garris. Significantly, the court's questions functioned merely to expand upon what had already been established to be their close relationship. Perhaps more importantly, Hillenburg presents no authority that a trial court's inquiry into facts constituting an aggravating factor constitutes an impermissible purpose. To the contrary, it is the trial court's role to consider the existence of aggravating and mitigating circumstances. Hillenburg presents no authority to support his suggestion that the trial court is limited in its consideration to only those factors presented by counsel. Indeed, this argument contravenes statutory directive. *See* Ind. Code § 35-38-1-7.1(2008) (permitting trial court, without qualification, to consider various aggravating

and mitigating circumstances upon sentencing, including factors which are not enumerated). We find no abuse of discretion.

II. Sentence

A. Abuse of Discretion

Hillenburg challenges his sentence by claiming that the trial court abused its discretion in considering various sentencing factors. Hillenburg's offenses were committed after the April 25, 2005 revisions to Indiana's sentencing scheme. Under the current sentencing scheme, "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State* (*Anglemyer I*), 868 N.E.2d 482, 491 (Ind. 2007), *modified on other grounds on reh'g,* 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. *Id.* at 490. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Id.* (internal quotation omitted).

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are 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. If the trial court has abused its discretion, we will remand for resentencing "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." *Id.* at 491. However, under the new statutory

scheme, the relative weight or value assignable to reasons properly found is not subject to review for abuse of discretion. *Id.* We may review both oral and written statements in order to identify the findings of the trial court. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

1. Aggravating Factors

Hillenburg argues that the trial court abused its discretion by relying upon a material element of Count I, namely sudden heat, to enhance his sentence. In referring to Hillenburg's sudden heat, the trial court stated as follows:

> The nature and circumstances of the crime are being treated by this court as an aggravator for purposes of both the issue of finding of consecutive sentences and enhancement. The fact of the matter of this situation is he was in a position of trust with both victims certainly as I said with the victim who was killed, Garris Hillenburg. But this went beyond that. This was a defendant who went into an uncontrolled, based upon the testimony here today and the probable cause information that the Court has available to it, uncontrolled rage, stabbing one friend who tried to protect him from himself and killing a second by repeated seven stab wounds. It was based upon the wording of the probable cause affidavit that was not necessarily supported today, but is there, was done without expectation and without warning to the victim. It was thus an out of control rage done by deception. And was, you can call it whatever you want to, it was a vicious killing and I can't dress it up. Stabbing somebody seven times and stabbing them in the heart is nothing that can be made nice by anybody and it has no place in civil society.

Tr. p. 136.

Hillenburg is correct that the trial court may not use a material element of his crime as an aggravating circumstance to enhance his sentence. *See McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001). But the nature and circumstances of a crime do constitute a proper aggravating circumstance. *See id.* While the court referred to

Hillenburg's uncontrolled rage, which arguably constitutes the sudden heat element of his manslaughter conviction, it did so in an effort to convey the overall vicious nature of his crime. Hillenburg stabbed at least two victims, one seven times—including in the heart—in what the court viewed to be a vicious and deceptive act. The fact that Hillenburg was in an uncontrolled rage at the time merely completes the picture. We must conclude that, to the extent the trial court considered Hillenburg's uncontrolled rage as an aggravating circumstance, it was included in the nature and circumstances of the crime. *See id.* We find no abuse of discretion.

2. Mitigating Factors

Hillenburg challenges the trial court's refusal to find his remorse, guilty plea, and history of psychological problems to be mitigating factors. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. *Anglemyer v. State*, (*Anglemyer II*), 875 N.E.2d 218, 220-21 (Ind. 2007).

a. Remorse

Hillenburg stated during the sentencing hearing that he was very sorry and that he regretted what had happened every day. The trial court rejected Hillenburg's claim of remorse, stating as follows:

> The Court finds that there was significant, immediate, continuing lack of remorse. Not once, based upon the testimony we heard or any of the documents that were submitted to the Court, did I see any indication other than the statement of the Defendant today as he faces the judgment of this Court, did I, did the officer or any of the other officers that were reporting,

> that I saw information on, indicate not only remorse but how are these guys that he is supposedly so close to. There was no question even asked, instead he attempted to excuse himself by alleging blackouts. Voluntary intoxication is neither a defense or a justification. In addition, the Defendant not only did not express any care or concern when he was caught at the time of the event, instead of having any understanding of nature of his actions at that time or any other time in the coming hours to try to help either one of these victims he ran, he hid.

Tr. pp. 136-37.

As the trial court found, Hillenburg showed no remorse until it came time to request a lenient sentence, in spite of the fact that he had killed his own cousin/best friend and injured another friend. Although Hillenburg ultimately claimed to be remorseful, he also blamed drugs and alcohol for Garris's death. As the trial court found, Hillenburg had a decade of experience with drugs and alcohol, would have understood their destructive effects, and should not be permitted to shift the blame for his actions on them. Given the trial court's ability to directly observe Hillenburg and assess the tenor of his voice, it was in a better position than we to assess and reject his claim of remorse. *See Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). We find no abuse of discretion.

b. Guilty Plea

Hillenburg also challenges the trial court's refusal to find the fact of his guilty plea to be a significant mitigating factor. The trial court stated the following in rejecting this claimed mitigator:

> Defense counsel proposed that by pleading guilty the defendant saved the system, stepped up to the plate and is taking his punishment. I find that frankly to be unacceptable. He is he got the benefit of a plea bargain. He plead [sic] guilty to an amended charge of Voluntary Manslaughter by

> Means of a Deadly Weapon, a class "A" felony and that was, that charge was a reduced charge from the original charge of murder. I don't find that getting the benefit of a bargain is, is part and parcel of stepping up to the plate and taking responsibility for you[r] action.

Tr. p. 134.

The Indiana Supreme Court has held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Anglemyer II*, 875 N.E.2d at 220. The significance of a guilty plea as a mitigating factor varies from case to case. *Id.* at 221. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea. *Id.*

Here, by pleading guilty, Hillenburg was able to avoid a murder charge as well as battery charges relating to two additional victims. The trial court was within its discretion to conclude that Hillenburg's plea was more a strategic move than an effort to take responsibility. We find no abuse of discretion in its failure to consider this factor to be a significant mitigating circumstance.

c. Psychological Problems

Hillenburg points to his psychological problems and troubled family history and claims that the trial court, in failing to mention these problems, abused its discretion by failing to consider them to be mitigating. While there was testimony that Hillenburg took medication for depression and bipolar disorder and that he had certain psychological diagnoses as a child, Hillenburg presented no testimony to indicate that these conditions were responsible for his actions. Indeed, even Hillenburg blamed his actions on his

alcohol and drug abuse. The trial court was within its discretion in refusing to consider Hillenburg's psychological problems to be mitigating. *See Anglemyer I*, 868 N.E.2d at 493 (concluding from trial court's failure to mention mental illness as mitigating factor, in case where record contained evidence of defendant's depression and bipolar disorder, that trial court had determined it was not a significant factor). As for Hillenburg's troubled childhood, the Supreme Court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight. *See Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000). We find no abuse of discretion in the trial court's failure to consider this to be a significant mitigating factor.

B. Appropriateness

Hillenburg's final challenge is to the alleged inappropriateness of his maximum fifty-eight-year sentence. Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute 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." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App.

2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

In committing Class A felony voluntary manslaughter, Hillenburg was subject to a sentencing range of twenty to fifty years with the advisory sentence being thirty years. *See* Ind. Code § 35-50-2-4 (2008). In committing Class C felony battery, Hillenburg was subject to a sentencing range of two to eight years with the advisory sentence being four years. *See* Ind. Code §35-50-2-6 (2008). The trial court imposed the maximum sentence for each crime and ordered that they run consecutively.

We are unpersuaded that Hillenburg's aggregate fifty-eight-year sentence is inappropriate. Hillenburg stabbed two people, one to death, when they were simply trying to prevent him from harming himself and his girlfriend. Hillenburg has a history of violence and substance abuse and would have known he was subject to especially violent reactions. In spite of his history, Hillenburg consumed alcohol and drugs, became aggressive with his girlfriend, attacked his friends for their efforts to intervene on his behalf, killed one of them, and had little sign of remorse. While Hillenburg has problems with mental illness, he voluntarily chose to treat it with illegal substances, turning himself into a threat and imposing his problems on those most trying to help. These particularly egregious circumstances and Hillenburg's violent character demonstrate that a maximum fifty-eight-year sentence is warranted.

The judgment of the trial court is affirmed.

KIRSCH, J., and BARNES, J., concur.