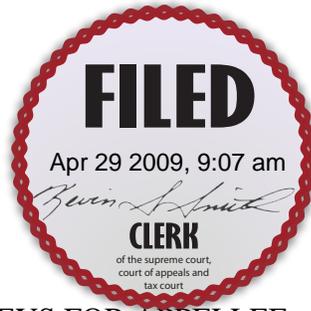


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRADY FROST,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0810-CR-930
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark Rogers, Judge
Cause No. 49G16-0806-FD-144820

April 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brady Frost appeals his aggregate five-year sentence for class D felony confinement, class A misdemeanor battery, and habitual offender determination. We affirm.

Issues

- I. Did the trial court abuse its discretion by failing to find certain mitigating circumstances?
- II. Is Frost's sentence inappropriate in light of the nature of his offenses and his character?

Facts and Procedural History

On June 10, 2008, Frost and his girlfriend, Beth Adams, began to argue while in a room at the Knights Inn in Indianapolis. Frost blocked the room's exit with a table, a chair, and his body. He threw Adams on the bed, choked her, and repeatedly threatened her life. Adams broke free and ran from the room, but Frost caught her, choked her, and told her that she was "going to die." Presentence Investigation Report ("PSI") at 14. Adams escaped and called police from the hotel office.

On June 16, 2008, the State charged Frost with class D felony strangulation, class D felony confinement, and class A misdemeanor battery. On August 20, 2008, the State added a habitual offender allegation. On September 12, 2008, Frost filed a written plea agreement with the trial court. Pursuant to the agreement, Frost agreed to plead guilty to all but the strangulation charge, which the State agreed to drop. Also on that date, the trial court accepted Frost's plea and held a sentencing hearing. The trial court sentenced Frost to concurrent terms of one-and-one-half years for confinement and one year for battery. The

court also ordered Frost to serve a consecutive term of three-and-one-half years for the habitual offender enhancement, with one year suspended to probation. The result was an aggregate sentence of five years, with one year suspended. Frost now appeals.

Discussion and Decision

I. Mitigating Circumstances

Frost contends that the trial court erred by failing to find certain mitigating circumstances. So long as a sentence is within the applicable statutory range, it is subject to review only for an abuse of discretion.¹ *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* If the trial court does not find the existence of a mitigating factor after it has been argued, the trial court is not obligated to explain why it has found that the factor does not exist. *Id.* at 493. However, the trial court may abuse its discretion if its sentencing statement omits a mitigating circumstance that is clearly supported by the record and advanced for consideration. *Id.* at 490-91.

First, Frost argues that the trial court failed to find the mitigating circumstance of undue hardship. Frost testified that he has two children and that he paid support and exercised frequent parenting time before he was incarcerated. “[M]any persons convicted of

¹ The trial court sentenced Frost to terms within the applicable statutory ranges, which are, for a class D felony, six months to three years, with an advisory sentence of one-and-one-half years, and for a class A misdemeanor, not more than one year. *See* Ind. Code §§ 35-50-2-7, 35-50-3-2. The habitual offender finding requires a term “not less than the advisory sentence for the underlying [felony] offense nor more than three (3) times the advisory sentence for the underlying offense.” Ind. Code § 35-50-2-8(h).

serious crimes may have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” *Roney v. State*, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007), *trans. denied*. Frost failed to demonstrate any special circumstances. Both his children live with their mothers, and one of them apparently lives out of state. Although Frost testified that he is ordered to pay a combined amount of \$105 per week for both children, he was approximately \$1500 in arrears for one or both children at the time of sentencing. The degree to which his children rely on him is debatable at best. *See Anglin v. State*, 787 N.E.2d 1012, 1018 (Ind. Ct. App. 2003) (trial court did not err in failing to find undue hardship as a mitigator where defendant testified about his desire to be with his ailing daughter but did not demonstrate the degree of her reliance upon him), *trans. denied* (2004). Moreover, Frost failed to demonstrate that any hardship suffered by his children will be worse than that suffered by *any* children whose father is incarcerated. *See Nicholson v. State*, 768 N.E.2d 443, 448 n.13 (Ind. 2002). The trial court did not abuse its discretion in choosing not to find undue hardship to be a mitigator.

Second, Frost argues that the trial court was required to find his remorse to be a significant mitigator. While Frost did state that he was “very sorry” for his crimes, he also blamed his behavior on his drug use. Tr. at 18. Considering that Frost committed several similar violent crimes prior to this one and that he has used drugs regularly since childhood, his statement of remorse seems somewhat disingenuous. At any rate, it is well settled that a trial court is in the best position to observe a defendant’s demeanor and determine whether his remorse is genuine. *Golden v. State*, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007), *trans.*

denied; see also Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) (holding that an expression of remorse requires a trial court function similar to a determination of credibility, which the reviewing court generally accepts). Therefore, we cannot conclude that the trial court abused its discretion by refusing to find Frost’s expression of remorse as a mitigator.

Finally, Frost contends that the trial court should have found his guilty plea to be a mitigating circumstance. Where it is clear from the record that a defendant has received a significant benefit from pleading guilty, a trial court does not abuse its discretion by not identifying the guilty plea as a mitigator. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied*. Clearly, Frost received a benefit in exchange for his guilty plea, as the State dropped the class D felony strangulation charge. Also, a guilty plea is not necessarily significant where the State does not reap a substantial benefit in saved time or money. *Lindsey v. State*, 877 N.E.2d 190, 198 (Ind. Ct. App. 2007), *trans. denied*. Frost entered his plea on the morning of trial, after the State had prepared its case and subpoenaed its witnesses. Based on these facts, the trial court did not abuse its discretion by choosing not to find Frost’s guilty plea as a mitigator.

II. Appropriateness of Sentence

Frost asks us to review his sentence pursuant to Indiana Appellate Rule 7(B), which states that we “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.”

Our review of the record indicates that Frost’s convictions in this case resulted from an incident where he, in his words, “lost [his] temper” while on a three-day “cocaine binge” with his girlfriend. PSI at 16. He confined her in their hotel room, threw her on the bed, strangled her, and threatened her life. When she attempted to escape, he grabbed her and again strangled her. We are certainly not compelled to reduce Frost’s sentence in light of the serious nature of these offenses.

As for his character, the record reveals that Frost has a long criminal history, including several charges and convictions for domestic battery as well as other violent crimes such as battery and aggravated assault. He has two property-related felony convictions as well. Frost has been placed on probation four times in the past and has never successfully completed a probationary term. Frost asks us to revise his sentence because of the factors he put forth as mitigating circumstances—his financial support of his children, his remorse, and his guilty plea. The fact that Frost has supported his two children at times is not particularly persuasive considering his significant arrearage in those payments. Also, we question the sincerity of Frost’s expressions of remorse in light of his long history of domestic violence against various women. As discussed above, he already received a substantial benefit in exchange for his guilty plea when the State dropped the felony strangulation charge, and his last-minute plea saved the State little time and money. In short, we are not persuaded by the nature of Frost’s offense or his character that his sentence is inappropriate. *See Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (burden is on defendant to demonstrate that his sentence is inappropriate).

Affirmed.

BRADFORD, J., concurs.

BROWN, J., concurs with separate opinion.

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BROWN, Judge concurring

Would that the State had asked for an increased sentence under our Appellate Rule 7(B) review pursuant to the authority of our Supreme Court in McCullough v. State, 900 N.E.2d 745, 746 (Ind. 2009), I would have voted for an increased sentence. Defendant’s proffered explanation placed blame not on himself, but rather on the three-day cocaine binge he was on at the time of the offenses, as though his cocaine usage, in itself felonious behavior, should serve to excuse his actions. As the State pointed out in its brief, over the past decade Frost has been charged with or convicted of domestic battery and related offenses in nine separate cases and against at least four different women. His six prior convictions include four felonies. The two felony convictions used to support the

habitual offender finding were a 1999 conviction for aggravated assault in Tennessee and a 2004 conviction for felony battery in Indiana. In addition he was convicted of receiving and concealing stolen property in 1989 and of auto theft in 1990. In three prior cases his probation was revoked. He pled guilty to the instant offenses, but on the day of trial after all preparation had been made by the court and the State.

In sum this is an individual whose behavior demonstrates that he has not learned from his mistakes. Unless he uses his current, relatively brief period of incarceration to make positive life-altering decisions about how he will conduct himself when released from prison, he will go back to his drug-abusing criminal ways and find himself back in the system, likely requesting of this court another 7(B) review of a newly-imposed sentence.

Judge Rogers was more than fair in his sentencing decision to this defendant. For these reasons I concur.