

Pursuant to a plea agreement, Christopher Gibson pled guilty to Class B felony attempted burglary,¹ Class C felony attempted battery,² Class A misdemeanor resisting law enforcement,³ and Class A misdemeanor possession of marijuana.⁴ When the prosecutor requested a thirty-year sentence, Gibson and his counsel indicated they believed the plea agreement called for a maximum sentence of twenty years. Gibson then moved to withdraw his guilty plea. The trial court denied the motion and sentenced Gibson to thirty years. We affirm.

FACTS AND PROCEDURAL HISTORY

On November 28, 2008, Gibson went to the home of Virginia Setzer, peered through the windows, and attempted to push a window air conditioner into the house. Setzer's neighbors, Kyle and Ted Moss, noticed Gibson's suspicious behavior, called the police, and then confronted Gibson. Gibson started to flee, and the Mosses tried to restrain him. During the struggle, Gibson tried to stab Ted with a screwdriver and a knife. An officer arrived while they were still fighting. Gibson then struggled with the officer. After subduing Gibson, the officer searched him and found marijuana in a pocket.

Gibson was charged with Class A felony attempted burglary, Class C felony attempted battery, Class A misdemeanor resisting law enforcement, and Class A misdemeanor possession of marijuana. Gibson's trial was scheduled for August 18, 2009. On that date,

¹ Ind. Code § 35-43-2-1.

² Ind. Code § 35-42-2-1(a)(3).

³ Ind. Code § 35-44-3-3(a)(1).

⁴ Ind. Code § 35-48-4-11.

after the potential jurors had arrived, Gibson agreed to plead guilty, and a change of plea hearing was held. The prosecutor described the agreement as follows: “Judge, he is pleading to attempting burglary as a B felony in Count I and then the rest of the counts as charged, it’ll be an open sentence.”⁵ (Tr. at 3.) Gibson and his counsel both confirmed that this was the agreement.

A sentencing hearing was held on September 9, 2009. Gibson indicated he was involved in a welding program and was working toward becoming A-Plus certified by the American Welding Society. Gibson stated he enjoyed welding, felt he was good at it, and thought it would help him maintain employment and stay out of trouble. Gibson apologized to the court and the victims for his actions.

The prosecutor, highlighting Gibson’s criminal record, requested maximum, consecutive sentences, for a total of thirty years.⁶ Defense counsel then stated he believed the plea agreement had a sentence cap of twenty years and he had so advised Gibson. Gibson confirmed he believed there was a cap of twenty years and asked to withdraw his plea. The court denied the motion and sentenced Gibson.

The court found as aggravating factors that Gibson had a lengthy record of similar offenses, he was on probation when he committed the current offenses, and one of the

⁵ Apparently the agreement never was reduced to writing. We note plea agreements are required to be in writing, Ind. Code § 35-35-3-3; nevertheless, we have held an oral plea agreement may be enforced. *See Shepperson v. State*, 800 N.E.2d 658, 659-60 (Ind. Ct. App. 2003). Gibson makes no argument that the agreement is unenforceable.

⁶ The maximum sentence for a Class B felony is twenty years, the maximum sentence for a Class C felony is eight years, and the maximum sentence for a Class A misdemeanor is one year. Ind. Code §§ 35-50-2-5, 35-50-2-6, and 35-50-3-2.

victims was over sixty-five.⁷ As a mitigating circumstance, the court recognized that Gibson had pled guilty. However, the court found Gibson’s guilty plea was not entitled to significant weight given the substantial evidence of his guilt and his criminal record. The court imposed the maximum sentence of thirty years.

DISCUSSION AND DECISION

1. Motion to Withdraw Guilty Plea

Motions to withdraw guilty pleas are governed by Ind. Code § 35-35-1-4. At any time before the imposition of the sentence, a court may grant the motion for “any fair and just reason.” *Id.* The court is required to grant the motion to prevent “manifest injustice,” but is required to deny the motion if the State would be “substantially prejudiced.” *Id.* The trial court’s ruling “arrives in our Court with a presumption in favor of the ruling.” *Johnson v. State*, 734 N.E.2d 242, 245 (Ind. 2000). A defendant appealing an adverse decision must prove by a preponderance of the evidence the trial court abused its discretion. *Id.*

Ind. Code § 35-35-1-4(b) requires the motion to be in writing, to be verified, and to state the facts in support of the motion. “A defendant’s failure to submit a verified, written motion to withdraw a guilty plea generally results in waiver of the issue of wrongful denial of the request.” *Carter v. State*, 739 N.E.2d 126, 128 n.3 (Ind. 2000). Gibson’s motion was oral; therefore, he has waived this issue. *See id.*

Waiver notwithstanding, Gibson has not shown manifest injustice required the court to

⁷ Ind. Code § 35-38-1-7.1(3) provides the court may consider as an aggravating circumstance that the victim was less than twelve years of age or at least sixty-five years of age at the time of the offense.

allow him to withdraw his plea. At the change of plea hearing, the prosecutor told the court the agreement included an open sentence, but made no mention of a sentencing cap. Gibson confirmed the prosecutor had accurately described the agreement. Gibson presented no evidence at sentencing to support his contention that he had agreed to a cap of twenty years. As Gibson has not demonstrated manifest injustice, it was within the trial court's discretion to deny the motion.

2. Appropriateness of Sentence

We may revise a sentence if it is “inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*. The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Gibson argues his sentence is inappropriate, emphasizing his guilty plea and his educational accomplishments while in prison. The trial court found these factors not to be significant mitigators because there was substantial evidence of Gibson's guilt. A guilty plea “may not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one.” *Brown v. State*, 907 N.E.2d 591, 594 (Ind. Ct. App. 2009). Furthermore, Gibson significantly decreased the range of potential sentences by pleading guilty to a Class B felony instead of the Class A felony that had been charged. *See id.* (“When the defendant has already received a substantial

benefit from the plea agreement, a guilty plea may not be a significant mitigator.”). Gibson’s plea also was entitled to less weight because he did not plead guilty until after the potential jurors had arrived on the day of his trial. *See Flickner v. State*, 908 N.E.2d 270, 274 (Ind. Ct. App. 2009) (Flickner’s guilty plea was not entitled to mitigating weight because he waited nearly six years to plead guilty).

The trial court found any mitigators were substantially outweighed by Gibson’s criminal history. As a juvenile, in the span of four years, Gibson had two true findings of burglary, one of theft, and four of criminal conversion. In 1995, Gibson was waived into adult court, where he was convicted of Class B and Class C felony burglary. In 2001, he was convicted of possession of marijuana and escape. In 2002, he had one conviction of Class D felony theft, two of Class D felony auto theft, and one of Class A misdemeanor resisting law enforcement. Throughout these years, Gibson was offered treatment and leniency. However, he violated probation on several occasions and absconded from work release.⁸ Gibson was released from prison to serve a term of probation in August 2008, and, according to the pre-sentence investigation report, he began using Xanax and other drugs daily. He committed the instant offenses just a few months later.

As noted by the trial court, Gibson attempted to burglarize an elderly woman. He then attacked the neighbors who intervened on her behalf and resisted arrest. We cannot say Gibson’s sentence is inappropriate in light of his character or the nature of the offense.

⁸ This led to his conviction of escape.

Affirmed.

BAILEY, J., and BARNES, J., concur.