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ATTORNEY FOR APPELLANT:

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MATTHEW WHITMIRE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANTHONY J. NIEBRUGGE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A01-0808-CR-365
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable J. David Holt, Judge
Cause No. 28D01-0707-FA-499

May 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Anthony J. Niebrugge appeals his convictions for Class D felony residential entry and Class C felony criminal recklessness and his seven-year sentence with three years suspended to probation. Specifically, he contends that his Sixth Amendment right to confrontation was violated when the trial court admitted a witness's deposition and evidence of that witness's 911 calls because the statements were testimonial and he did not have an adequate opportunity for cross-examination. He also contends that the evidence is insufficient to support his convictions, that the trial court erred in refusing to instruct the jury on the use of force to protect a third person, that the trial court erred in finding an aggravator and in not finding two mitigators, and that his sentence is inappropriate. We find no Sixth Amendment violation for the admission of the deposition because Niebrugge had a prior opportunity for cross-examination of the witness and for the admission of the 911 calls because they are nontestimonial. We also conclude that the evidence is sufficient to support Niebrugge's convictions, the trial court properly refused to instruct the jury on defense of a third person because such an instruction is not supported by the evidence, the trial court did not abuse its discretion in sentencing Niebrugge, and his sentence is not inappropriate. We therefore affirm the trial court in all respects.

Facts and Procedural History

The facts most favorable to the verdicts reveal that Niebrugge and Susan Pritchard began dating in 2004. In the summer of 2005, Niebrugge moved into Pritchard's Linton, Indiana, home. Niebrugge and Pritchard had a son in May 2006. Niebrugge moved out

in November 2006, and they dated off and on until the spring of 2007, when Niebrugge began dating Gentry Sapp and Pritchard began dating Benjamin Schunk.

On July 12, 2007, Pritchard and Schunk went to a birthday party for Schunk's father in Ellettsville and then to a bar in Linton. While at the bar, Pritchard received a text message from Sapp, Niebrugge's current girlfriend. Pritchard replied, and she and Schunk arranged to meet Sapp at a bar a few doors down from Pritchard's house. When Pritchard and Schunk met up with Sapp, she was upset and wanted to talk about Niebrugge. Schunk hung around for a few minutes but then left the bar and walked to Pritchard's house. Pritchard, however, stayed at the bar and talked with Sapp. While at the bar, Pritchard began texting Niebrugge. At one point, Niebrugge called Pritchard, but she handed her phone to Sapp to answer. This confused Niebrugge, because he did not know why his former and current girlfriends would be together. When the bar closed, Pritchard walked Sapp to her car, and then Sapp drove Pritchard home. When they arrived at Pritchard's house, Sapp asked if she could come inside and use the restroom, and Pritchard said yes.

Shortly after Pritchard and Sapp arrived at Pritchard's house, Niebrugge began banging on the back door, which was locked. Pritchard, who stood at the top of the steps leading down to the back door, yelled at Schunk to call the police. Schunk complied. Pritchard then walked halfway down the steps and told Niebrugge to go home. Niebrugge asked where their son was. Pritchard said that their son was not there and again told him to go home. Niebrugge became angry and said he was entitled to be there. Pritchard laughed at him because they had been in an argument about their son the day

before. At this point, Niebrugge reached around into the back of his pants and pulled out a gun, saying "F-it bit**." Tr. p. 195. Niebrugge then shot the gun through the door. When Pritchard saw the gun, her instinct "was [to] go [back upstairs] and hide . . . in the refrigerator." *Id.*

After the shot failed to open the door, Niebrugge picked up a flower pot and threw it at the window in the back door. When that failed to break the window, Niebrugge grabbed a patio chair and broke the window. He then reached inside the broken window and unlocked the door. Niebrugge then entered the house and started yelling at Sapp. Niebrugge pulled Sapp toward him in an effort to talk to her and in the process pushed Pritchard onto a couch. Schunk then walked into the room, which surprised Niebrugge. Niebrugge told Schunk "to get the fu** out of [my] house before [I] put a bullet in [your] head." *Id.* at 203. According to Schunk, Niebrugge had a gun. But according to Pritchard and Sapp, Niebrugge did not have a gun. In any event, Schunk "put his hands up in the air and shimmied out" of the house, simultaneously saying "there's no problem." *Id.* Schunk again called the police once he was outside the house. Pritchard told Niebrugge the police were on the way, and Niebrugge left.

On July 16, 2007, the State charged Niebrugge with ten counts; however, the State dismissed five counts and amended two counts in mid-April 2008,[1] leaving the following five counts: burglary as a Class A felony (bodily injury to Pritchard) (amended), criminal recklessness as a Class C felony, intimidation with a deadly weapon as a Class C felony

[1] The State dismissed the following five counts: Class C felony intimidation with a deadly weapon (Pritchard); Class D felony pointing a firearm (Pritchard); Class A misdemeanor domestic battery (Pritchard); Class A misdemeanor battery resulting in bodily injury (Sapp); and Class B misdemeanor criminal mischief (Pritchard's back door).

(threatening to shoot Schunk) (amended), pointing a firearm as a Class D felony (Schunk), and Class D felony residential entry. A jury trial was held in late April 2008. During the jury trial, the deposition of Schunk was published to the jury because he was called to active military duty in Iraq. Niebrugge was convicted of criminal recklessness as a Class C felony[2] and Class D felony residential entry[3] and acquitted of the remaining charges. The trial court sentenced him to an aggregate term of seven years with three years suspended to probation. Niebrugge now appeals.

Discussion and Decision

Niebrugge raises several issues on appeal. First, he contends that his Sixth Amendment rights were violated when the trial court admitted Schunk's deposition and the evidence of Schunk's 911 calls because the statements were testimonial and he did not have an adequate opportunity for cross-examination. Second, Niebrugge contends that the evidence is insufficient to support his convictions. Third, he contends that the trial court erred in refusing his tendered Final Instruction No. 4, which addressed the use of force to protect a third person. Finally, Niebrugge contends that the trial court erred in finding an aggravator and in refusing to find mitigators and that his seven-year sentence with three years suspended is inappropriate.

I. Sixth Amendment

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." "The essential purpose of the Sixth Amendment right of confrontation

[2] Ind. Code § 35-42-2-2.

[3] Ind. Code § 35-43-2-1.5.

is to ensure that the defendant has the opportunity to cross-examine the witnesses against him." *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006) (citing *State v. Owings*, 622 N.E.2d 948, 950 (Ind. 1993)). "[T]he right to adequate and effective cross-examination is fundamental and essential to a fair trial." *Id.* It includes the right to ask pointed and relevant questions in an attempt to undermine the opposition's case as well as the opportunity to test a witness's memory, perception, and truthfulness. *Id.*

The standard for determining whether the admission of a hearsay statement against a defendant violates the Sixth Amendment right of confrontation was modified in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the United States Supreme Court held that "the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." *Howard*, 853 N.E.2d at 465 (citing *Crawford*, 541 U.S. at 68).

A. Deposition

Niebrugge first argues that the trial court erred by admitting Schunk's deposition into evidence because Schunk's statements were testimonial and he did not have an adequate opportunity for cross-examination. First, we point out that no question exists that the statements in Schunk's deposition are testimonial pursuant to *Crawford*. That is, witness statements made during depositions are generally understood and widely recognized as testimonial. *Id.* (citing *Davis v. Washington*, 547 U.S. 813 (2006)). Second, Niebrugge concedes that Schunk was unavailable at the time as trial, as he was

on active military duty in Iraq. The question then becomes whether Niebrugge lacked a prior opportunity for cross-examination of Schunk.

In *Howard*, our Supreme Court acknowledged that *Crawford* provides no guidance concerning what "opportunity" is sufficient to satisfy the demands of the Sixth Amendment. *Id.* at 468. However, the Court noted that *Crawford* speaks only in terms of the "opportunity" for adequate cross-examination. *Id.* at 470. The right of confrontation under the Sixth Amendment is honored where "the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Id.* (quotations omitted). "Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant." *Id.*

Our Supreme Court also drew a distinction between discovery and trial/testimonial depositions, highlighting that counsels' motivations are often different in each one. *Id.* at 468-69. Although the purpose of the deposition in *Howard* was discovery, our Supreme Court disagreed that the defendant was denied his right of confrontation because Howard's counsel conducted a vigorous and lengthy examination of the witness. *Id.* at 469. The deposition lasted approximately two hours and resulted in ninety-two typewritten pages, nearly all of which constituted counsel's examination of the witness. *Id.*

More recently, in *Morgan v. State*, 903 N.E.2d 1010 (Ind. Ct. App. 2009), *trans. pending*, this Court, relying on *Howard*, held that the defendant did not lack a prior

opportunity for cross-examination of a witness, Belcher. Although Morgan conducted a discovery, and not a trial, deposition of Belcher, he extensively questioned her and thus "had the opportunity to examine Belcher, and his confrontation rights were not violated." *Id.* at 1017.

Here, Schunk's deposition was taken on December 5, 2007 (the jury trial was held in late April 2008). Before the deposition started, Niebrugge's attorney objected on grounds that it was a testimonial deposition, and not a discovery deposition, because he apparently did not have proper notice. *See* Appellant's App. p. 96-97. Schunk, who was no longer dating Pritchard, testified at the beginning of the deposition that he was being called to active military duty in a mere five days and would be serving overseas. *Id.* at 98. Thus, Schunk would not be able to testify at trial. The deposition of Schunk consists of fifty pages, and Niebrugge's attorney extensively cross-examined Schunk for more than half of those pages. *See id.* at 113-137, 143-148. Pursuant to *Howard* and *Morgan*, Niebrugge had a prior opportunity for cross-examination.

Nevertheless, Niebrugge argues that after the State, shortly before trial, dropped five charges and amended two other charges to delete references to his act of pointing a firearm, *see id.* at 67-68, 73, he was entitled to further cross-examination of Schunk because "[a] review of the dismissed counts and the substance of the amendments establishes the State . . . moved away from a theory that Niebrugge pointed a weapon and possessed a weapon within the home. Yet, Schunk specifically testified [in his deposition] that Niebrugge pointed a gun at him in the home." Appellant's Reply Br. p. 4. However, Niebrugge does not adequately explain why it would make a difference if

he was able to examine Schunk after the State amended and dismissed the charges. As we see it, Niebrugge is the one who benefitted from the dismissals and the amendments. To the extent that Niebrugge argues that the State moved away from the theory that he pointed a weapon and possessed a weapon within the home and, therefore, Schunk's deposition testimony was irrelevant and unduly prejudicial, he is wrong. Two of the counts submitted to the jury still alleged that Niebrugge used a deadly weapon against Schunk. *See* Appellant's App. p. 298-99, 301 (jury instructions for intimidation, pointing a firearm). Therefore, the State needed Schunk's testimony to prove its case on these charges. In any event, the jury acquitted Niebrugge of both charges involving the handgun and Schunk.

B. 911 Calls

Niebrugge next argues that the trial court erred by admitting the 911 tapes into evidence because they are testimonial. While the Supreme Court did not define the terms "testimonial" and "nontestimonial" in *Crawford*, it later explained the distinction in *Davis*:

> Statements are nontestimonal when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822. A 911 call, and at least the initial interrogation conducted in connection with it, is ordinarily not designed primarily to establish or prove some past fact but to describe current circumstances requiring police assistance. *Id.* at 827. In concluding that

the statements at issue in *Davis* were not testimonial, the Supreme Court considered several factors: (1) whether the declarant was describing past events or current events, (2) whether the declarant was facing an ongoing emergency, (3) whether the questions asked by law enforcement were such that they elicited responses necessary to resolve the present emergency rather than learn about past events, and (4) the level of formality of the interrogation.[4] *Id.* at 827.

Here, the record shows that Schunk called 911 twice, and a transcript was made of each call (State's Exhibits 12 and 13). The first call (Exhibit 12) occurred as Niebrugge was gaining entry to Pritchard's home. Niebrugge told the 911 dispatcher that "somebody" was "banging" on the door. Ex. 12. The transcript then reflects the sound of a shot being fired. *Id.* (line 15). After that, Schunk said, "there's gun fire right now." *Id.* The call then ended.

The second call (Exhibit 13) occurred as Schunk was leaving Pritchard's home, after Niebrugge ordered him to do so. It appears that someone from the Greene County Sheriff's Department answered the call and asked, "You say they were shooting at you?" Ex. 13. Schunk then responded, "Yeah, there's a gun in the house (inaudible)." *Id.* The call was then transferred to the Linton Police Department, at which point Schunk said, "Uh, I need a car at 150 West Vincennes Street a man with a gun shooting . . . live rounds." *Id.* The 911 dispatcher then responded that three officers were headed that way right then. *Id.* Schunk then gave his name, and the call ended. *Id.*

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[4] In *Collins v. State*, this Court stated, "We do not mean to suggest that the four factors relied upon by the *Davis* court represent an exhaustive list, that all four will be relevant in all cases, or that they represent 'elements' that must all be satisfied before testimony can be determined to be nontestimonial." 873 N.E.2d 149, 154 n.2 (Ind. Ct. App. 2007), *trans. denied*.

We conclude that both 911 calls are nontestimonial, and therefore *Crawford* does not apply. Both calls occurred while Niebrugge, who had just shot a gun through the back door, was still in the house with two women. Both calls described current events, and they enabled police to meet an ongoing emergency. Importantly, the police had not yet arrived at Pritchard's home at the time of Schunk's second call. As such, the 911 calls are nontestimonial, and their admission did not violate Niebrugge's Sixth Amendment rights.

II. Sufficiency of the Evidence

Niebrugge contends that the evidence is insufficient to support his convictions for residential entry and criminal recklessness. When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146-47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Id.* (quotation omitted).

In order to convict Niebrugge of Class D felony residential entry, the State had to prove that he knowingly or intentionally broke and entered the dwelling of another person, to wit, Pritchard. I.C. § 35-43-2-1.5. Niebrugge argues that the State failed to prove that the Vincennes Street house was the dwelling of another person and failed to disprove his defense of consent.

It was established at trial that at the time of the incident, Niebrugge had not lived in Pritchard's home for over six months and he was living elsewhere. The following exchange then occurred regarding whether Niebrugge had consent to enter Pritchard's home on this particular night:

> Q: Okay. Alright so you hear he's, he's banging at the door, asking to come in. So what do you tell him?
> A: Go home Tony or something.
> Q: Okay. And how does he react?
> A: He said where's [Z.] and I said not here, go home.
> Q: Okay. And so what does he do?
> A: He got mad. He had some more language for me. He said that he needed to be here or he could be here. And he got mad because I kind of laughed at him.
> Q: Okay.
> A: I thought that that was silly that he would say that.
>
> * * * * *
>
> Q: And did he have permission to be at your house and come inside your house that evening?
> A: Typically he would have. But, fighting like that, that's why I thought it was humorous, you know. He, I didn't invite him over. I didn't even know he knew I was home at that point.
> *Q: Okay. But, on that evening, at that point in time, did he have permission to come inside your home?*
> *A: No. I was telling him to leave at that point, yeah.*

Tr. p. 192-93 (emphasis added); *see also id.* at 236-37 (substantially same answer on redirect). Despite Pritchard's unequivocal testimony that Niebrugge did not have permission on *this* particular night, Niebrugge points out that he had a key to the house,

some of his belongings were still there, he paid some of the utilities, and he typically came and went as he pleased because of their son. This, however, does not equate to a possessory interest in Pritchard's house. In addition, a defendant's belief that he has permission to enter must be reasonable in order for the defendant to avail himself of the defense of consent. *McKinney v. State*, 653 N.E.2d 115, 118 (Ind. Ct. App. 1995). On this particular night, the door was locked. Niebrugge did not have a key, and Pritchard told him to leave several times. When Niebrugge was not satisfied with Pritchard's answer, he shot through the door. And when the door would not open, he threw a flower pot and then a chair through the window pane of the door. Finally, he was able to put his hand through the broken window pane and unlock the door. Because Niebrugge had to go to such great lengths to enter Pritchard's house in the face of Pritchard telling him to leave, his belief that he had consent to enter the house was not reasonable. The evidence is sufficient to support his conviction for residential entry.

In order to convict Niebrugge of criminal recklessness as a Class C felony, the State had to prove that he recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person, to wit, he shot a firearm through the door of Pritchard's residence, an inhabited dwelling. I.C. § 35-42-2-2 (b)(1), (c)(3)(A). Niebrugge argues that the State failed to prove that his single shot through the back door created a substantial risk of bodily injury to another person because he "specifically ensured Pritchard was around the corner behind the refrigerator before he attempted to fire into the lock." Appellant's Br. p. 32 (citing Tr. p. 522).

The record reflects that Niebrugge fired his gun into a metal door. The bullet hole was located below the lock on the door, and the angle of Niebrugge's shot was down and to the right. The bullet became lodged several inches into the trim in the basement staircase, which was located to the right of the kitchen staircase. Although Pritchard testified that she ran back up into the kitchen upon seeing Niebrugge reach for his gun, the bullet became lodged approximately two feet over from where she had just been standing. Niebrugge testified that he aimed down and to the right toward the basement because he knew that nothing was in the basement except old furniture. However, when asked if the shot went where he intended, he replied: "I did it so fast. I missed the lock, but I guess it went in the direction that I was meaning yes." Tr. p. 503. And when asked if he knew with "100% certainty" where the bullet would go, Niebrugge conceded "no" because the door was metal. *Id.* at 521. As such, it is apparent that when Niebrugge fired the shot through the door, he did not know where the bullet would land. We therefore conclude that the evidence is sufficient to prove that Niebrugge performed an act that created a substantial risk of bodily injury to Pritchard. The evidence is sufficient to support his conviction for Class C felony criminal recklessness.

III. Defense of Third Person

Niebrugge contends that the trial court erred by refusing his tendered Final Instruction No. 4, which addressed the use of force to protect a third person:

> 10.26 Use of Force to Protect Person
>
> It is an issue whether the accused acted in defense of another person.

> A person may use reasonable force against another person to protect someone else from what the accused reasonably believes *from his perspective* to be the imminent use of unlawful force.
>
> A person is justified in using deadly force only if he/she reasonably believes that deadly force is necessary [to prevent serious bodily injury to himself/herself or a third person] [or] [to prevent the commission of a felony].
>
> *No person in this State shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary*.
>
> However, a person may not use force if:
> [he/she is committing a crime that *directly and immediately produced* the (confrontation) (use a descriptive term based on evidence) *where the force was used*.]
> [he/she is escaping after the commission of a crime that is directly and immediately connected to the (confrontation) (use a descriptive term based on evidence).]
> [he/she provokes a fight with another person with intent to cause bodily injury to that person.]
> [he/she has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.]
>
> The State has the burden of proving beyond a reasonable doubt that the accused did not act in self-defense.

Appellant's App. p. 331 (formatting altered). The manner of instructing a jury is left to the sound discretion of the trial court, and we review its decision only for an abuse of discretion. *Jackson v. State*, 890 N.E.2d 11, 20 (Ind. Ct. App. 2008). When a trial court refuses to give a tendered instruction, we must consider the following: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id.*

Here, even assuming that the instruction correctly states the law, we find that it is not supported by the evidence. Niebrugge argues that he entered Pritchard's house because he feared for the safety of Sapp, his current girlfriend. However, Niebrugge did not witness any violence, much less an argument, between his former and current girlfriends, Pritchard and Sapp. When Niebrugge was banging on the back door, he was demanding to see his son, not Sapp. And according to Niebrugge's trial testimony, once he was able to unlock the back door, he put down his gun and proceeded inside. Moreover, Niebrugge's actions inside Pritchard's house reveal that his intent for entering the house was not to defend Sapp, but to express his jealousy. That is, once inside the house, Niebrugge went straight to Sapp[5] and asked her "if th[is] was funny fu**ing with his head[?]" Tr. at 201. He then told her, "[T]his [was] his family. [Pritchard] was the woman that he loved and . . . this was his home." *Id.* There is simply no evidence that Sapp was in danger on this particular night or that Niebrugge reasonably thought she was.[6] As such, the trial court did not abuse its discretion in refusing to instruct the jury on the use of force to protect a third person.[7]

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[5] In fact, Sapp testified at trial that she and Pritchard were getting along "just fine" that night and that she did not feel threatened by Pritchard. Tr. p. 580, 581.

[6] In fact, at sentencing, the trial court summarized the facts of the crimes, finding in relevant part: "[t]here is no evidence that anyone was in danger or needed help prior to the defendant's arrival." Sent. Tr. p. 105.

[7] In a related argument, Niebrugge argues that the State failed to rebut the elements of his self-defense claim beyond a reasonable doubt. "A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2(a). When the defendant has raised a self-defense claim, the State must disprove at least one of the following elements beyond a reasonable doubt: (1) the defendant was in a place where he or she had a right to be; (2) the defendant was without fault; and (3) the defendant had a reasonable fear or apprehension of bodily harm. *Boyer v. State*, 883 N.E.2d 158, 162 (Ind. Ct. App. 2008). The State may disprove one of these elements by affirmatively showing the defendant did not act in defense or by relying on evidence elicited in its case-in-chief. *Id.* As explained

IV. Sentencing

Niebrugge contends that the trial court erred in finding as an aggravator that he violated a no contact order and erred in refusing to find as mitigators that Pritchard induced or facilitated the offenses and that there are substantial grounds tending to excuse or justify the crimes though failing to establish a defense. Niebrugge also contends that his seven-year sentence with three years suspended is inappropriate.

A. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

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above, the State disproved the element that Niebrugge had a reasonable fear or apprehension of bodily harm to Sapp. In addition, we implicitly determined in Issue II that Niebrugge was not in a place he had a right to be on this particular night.

At sentencing, the trial court identified the following aggravating circumstances: (1) Niebrugge's criminal history; (2) Niebrugge violated probation twice; and (3) Niebrugge violated the No Contact Order entered on July 16, 2007, after the jury trial and while still on bond. The trial court identified as a mitigator that imprisonment would result in undue hardship to Niebrugge's son.

Niebrugge first argues that the trial court abused its discretion in finding that he violated the No Contact Order with respect to Pritchard. The July 16, 2007, No Contact Order provided, in part:

> 1. The Defendant is ordered to have no contact with: Susan Pritchard in person, by telephone or letter, through an intermediary, or in any other way, directly or indirectly, except through an attorney of record, while released from custody pending trial. This includes, but is not limited to, acts of harassment, stalking, intimidation, threats, and physical force of any kind.
>
> * * * * *
>
> 3. The Defendant shall not visit the following locations during the period of his/her release:
> (a) wherever the Defendant knows him/her/them to be located;

Appellant's App. p. 381 (capitalization omitted).

Niebrugge testified at his sentencing hearing that he received information that Pritchard was seen driving north of town, and he determined from this information that she had to be going to one of two places, either a transmission business or her grandmother's house. He wanted to see his son, whom he had not seen in about a month. Niebrugge turned around, drove to Pritchard's grandmother's house, and saw Pritchard taking their son into the grandmother's house. He then parked his car near Pritchard's grandmother's house and watched Pritchard for awhile. He called his mother and told her what he was doing. Niebrugge's mother told him to leave. He then called a friend

who worked for Child Protective Services, who said that nothing could be done because his son was not in danger. Niebrugge then left but drove by the house later. When he drove back by, he passed Pritchard on the road. Niebrugge then called Pritchard's mother to make arrangements to see his son. Niebrugge later received a phone call from Pritchard's father setting up parenting time arrangements. At the sentencing hearing, the trial court stated:

> now I understand what you are telling me in regard to what occurred immediately prior to the revocation of bond, but that if I accept what you are saying, that is still a violation of the No Contact Order. The fact that you went to the home, parked across the street and watched what Susan Pritchard did, that is a violation of the No Contact Order. I am finding that is an aggravating circumstance.

Sent. Tr. p. 108-09. We agree with the trial court. Niebrugge's actions violated both paragraphs 1 and 3 of the No Contact Order. Under paragraph 1, Niebrugge's conduct had the effect of harassment, stalking, and intimidation. He also contacted Pritchard's mother and not an attorney of record. Additionally, Niebrugge drove to a place he knew Pritchard to be in direct violation of Paragraph 3(a). The trial court did not abuse its discretion in identifying Niebrugge's violation of the No Contact Order as an aggravator.

Niebrugge next argues that the trial court failed to identify as mitigators that Pritchard induced or facilitated the offenses and that there are substantial grounds tending to excuse or justify the crimes, though failing to establish a defense. *See* Ind. Code § 35-38-1-7.1(b)(3), (4). Specifically, Niebrugge argues that Pritchard taunted him by threatening to end contact with his son, laughing at him, and refusing to provide information regarding Sapp's location. However, Niebrugge did not proffer this mitigator below and, therefore, he may not raise it for the first time on appeal. *See*

Rogers v. State, 878 N.E.2d 269 (Ind. Ct. App. 2007), *trans. denied*. Specifically, the trial court asked Niebrugge's attorney at the sentencing hearing if he "want[ed] [the court] to consider any other specific item in mitigation [other than the undue hardship to dependent mitigator]?" Sent. Tr. p. 102. Niebrugge's attorney responded:

> Not any other specific, your Honor, and I know one of the statutory and I believe one is allowed is military service, but I don't think that would apply due to his [dishonorable] discharge, your Honor, but I am not sure, I could be mistaken, but it could be taken, he has a general dishonorable discharge, but I am not sure, dishonorable does not count as a mitigating, but I am not sure if that classification would be considered as a mitigating factor, if it is, we would ask the Court to take that into consideration, that he did enlist and try to serve his country.

Id.

Waiver notwithstanding, though Pritchard's behavior on the night in question by sending Niebrugge a threatening text message about their son and laughing at him behind a locked door while his current girlfriend was inside (by choice) is not laudable, Pritchard did not induce or facilitate the offenses that unfolded, and Pritchard's conduct does not provide Niebrugge with *substantial* grounds tending to excuse or justify his crimes. The trial court did not abuse its discretion in failing to identify these as mitigators.

B. Inappropriate Sentence

Niebrugge also argues that his sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

The nature of the offenses is that Niebrugge, after a night of exchanging text messages with his ex-girlfriend and mother of his child (who also happened to be dating another man), went to Pritchard's home around 3 a.m. and banged on the locked back door. Pritchard told him that their son was not there and to go home. When Niebrugge indicated that he was entitled to be there, Pritchard laughed at him. Niebrugge then reached for a gun in his back pocket, which caused Pritchard to run back into the kitchen for safety. Niebrugge aimed for the lock on the door but missed. At the time of the shot, Schunk, Pritchard's current boyfriend, was on the phone with a 911 dispatcher. The bullet became lodged several inches into the basement stairway trim, which was a few feet over from the kitchen stairway where Pritchard had just been. Niebrugge then threw a flower pot and chair through the window of the door to gain entry to the house. Although Niebrugge claimed he gained entry to the house because he feared for Sapp's safety, there is simply no evidence that Sapp was in danger or that Niebrugge reasonably believed she was. Rather, Niebrugge, who was fueled by jealously, introduced a gun into a volatile situation and should be thankful that no one was injured.

As for the character of the offender, Niebrugge has convictions for Class A misdemeanor operating while intoxicated (1991); Class D felony operating with a BAC of .10% or higher (1991); misdemeanor driving under the influence (Florida 2000);

misdemeanor reckless driving (Florida 2000); misdemeanor driving while suspended (Florida 2001); and misdemeanor resisting officer without violence (Florida 2002). In addition, Niebrugge has violated his probation in two different cases. Despite his contacts with the criminal justice system, Niebrugge's criminal activity remains undeterred. Niebrugge has failed to persuade us that his seven-year sentence with three years suspended to probation is inappropriate.

Affirmed.

RILEY, J., and DARDEN, J., concur.