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IN THE COURT OF APPEALS OF INDIANA

ANGEL ABARCA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0910-CR-1018
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0809-FB-198418

June 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Angel Abarca appeals his sentence following a plea of guilty to aggravated battery, a class B felony.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Abarca.

FACTS

On or about the night of August 6, 2008, Abarca got into an argument with his then-girlfriend, Tammy Savage. Savage left their home that same night and went to stay with her mother. The next day, Savage telephoned Abarca to arrange a time when she could pick up her belongings. Abarca agreed to pick her up and take her back to their house. Savage then left her mother's home and waited for Abarca at the curb.

As Savage stood on the sidewalk, she observed Abarca driving a Dodge Durango toward her at a high rate of speed. Abarca then drove up on the sidewalk and struck Savage. Savage suffered multiple injuries, including a laceration to her liver and spinal fractures.

On September 11, 2008, the State charged Abarca with aggravated battery, a class B felony. On March 3, 2009, the trial court set a jury trial for May 18, 2009. The trial court rescheduled the jury trial to July 13, 2009, following a joint motion for continuance. The trial court rescheduled the jury trial to August 10, 2009, and again to September 8,

[1] Ind. Code § 35-42-2-1.5.

2009, following motions for continuance filed by Abarca. On September 8, 2009, Abarca withdrew his plea of not guilty, and the trial court held a guilty plea hearing. Abarca pleaded guilty as charged without the benefit of a plea agreement.

The trial court held a sentencing hearing on September 23, 2009. According to the pre-sentence investigation report (the "PSI"), Abarca was convicted of class D felony theft in New Jersey on November 11, 2006, for which the trial court sentenced him to 316 days of confinement and two years of probation. The State of New Jersey revoked his probation on January 23, 2009. The PSI also showed that on November 1, 2007, the State charged Abarca with criminal confinement, battery, and domestic battery. The State, however, dismissed the charges when Savage, the purported victim, failed to appear at trial.

The PSI reports that Abarca made the following statements regarding his offense:

> I feel I should go to probation so that I can [sic] steady work and provide for my kids. Never [sic] been in trouble before. I apologize for my action [sic] hope the Court [sic] be lening [sic].
>
> . . . I have never had a problem and I am sorry about my actions, and I hope the Court understands that I am very remorseful. Forgive me. Thanks.

(PSI 4).

Abarca offered the following mitigating circumstances: his minimal criminal history, which he asserted did not constitute a felony; his acceptance of responsibility; the hardship that his imprisonment would impose on his three minor children; and his abstention from drugs and alcohol. Regarding Abarca's children, the PSI revealed that

they reside in New Jersey; are in the custody of their paternal grandmother; and that Abarca is delinquent in his child support payments.

Abarca did not make a statement during the sentencing hearing. Regarding Abarca's statement made for the PSI, the trial court did not find it to be a significant statement of remorse "[b]ecause [Abarca] wants probation." (Tr. 47).

The trial court then found as follows:

> [W]ith regard to the hardship on the dependents, I considered that as a mitigator, and I . . . can find that as a mitigator, but I'm . . . not going to give it a great amount of weight, because he made the decision to come out here and leave his kids in New Jersey. And, [there is] no indication that he's paying any type of support for that. I will find that he accepted responsibility for his own actions. And the theft appears to me to be a felony conviction. He did 360 days of confinement and then faced two years of probation. So I see that as a felony conviction. I believe that's a wash. . . . I struggled on this case because we've got some very severe injuries and a very deliberate act on . . . the part of the defendant in this case. So I believe that this case is worth the standard sentence.

(Tr. 48-49). Accordingly, the trial court sentenced Abarca to ten years in the Department of Correction.

DECISION

Abarca asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider, or give adequate consideration to, mitigating circumstances and that his sentence is inappropriate.

1. Mitigating Circumstances[2]

Abarca asserts that the trial court failed to give sufficient weight to the hardship that his imprisonment will impose on his children. He also asserts that the trial court failed to consider his guilty plea as a mitigating circumstance.

A sentence that is within the statutory range is subject to review 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). A trial court may abuse its discretion if the sentencing statement

> explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Id. at 490-91.

a. *Hardship*

Abarca concedes that the trial court recognized the hardship his imprisonment will impose on his children as a mitigating circumstance. He, however, maintains that the trial court failed to assign it adequate weight.

[2] We note that Abarca fails to identify the consideration of mitigating circumstances as an issue separate from his argument that his sentence is inappropriate and fails to cite applicable supporting authority. Abarca therefore has waived his arguments regarding the trial court's finding and weighing of mitigating circumstances. *See* Ind. Appellate Rule 46(A)(8)(a) ("Each contention must be supported by citations to the authorities . . . ."); *see also Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), *trans. denied*.. Waiver notwithstanding, we shall address these issues on the merits.

The relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.* at 491. We therefore will not review the weight assigned to this mitigating circumstance.

b. *Guilty plea*

Abarca also asserts that the trial court abused its discretion in not finding his guilty plea to be a mitigating circumstance. We disagree.

> The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

The record shows that the trial court considered Abarca's guilty plea as a mitigating circumstance, finding "that he accepted responsibility for his own actions." (Tr. 48). Accordingly, we find no abuse of discretion regarding the finding of Abarca's guilty plea to be a mitigating circumstance.[3] As to the weight afforded to his guilty plea, it is not subject to review. *Anglemyer*, 868 N.E.2d at 491.

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[3] Even if we were to find that the trial court did not consider Abarca's guilty plea to be a mitigating circumstance, it would not constitute an abuse of discretion. The record shows that Abarca pleaded guilty the day of his trial, which had been continued three times. Thus, we cannot say that his guilty plea is a significant mitigating circumstance. *See Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) ("The significance of a guilty plea is lessened if it is made on the eve of trial and after the State has already expended significant resources."), *trans. denied*.

2. Inappropriate Sentence

Abarca also argues that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. App. R. 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. Indiana Code section 35-50-2-5 provides that a person who commits a class B felony "shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Thus, Abarca received the advisory sentence.

As to the nature of Abarca's offense, he deliberately struck his girlfriend with a sports utility vehicle as she stood on a sidewalk, waiting for him. Abarca's actions caused multiple serious injuries to Savage, including spinal fractures and a laceration to her liver. At the sentencing hearing, Savage testified that her memory is permanently impaired due to her other injuries. Given the extent of Savage's injuries, we find Abarca's offense to be particularly egregious.

As to Abarca's character, the record reflects that he has one prior conviction for theft. While he has a minimal history of convictions, the record also reflects that he has been arrested for criminal confinement, battery, and domestic battery. A defendant's

record of arrests "may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). Furthermore, Savage testified during the sentencing hearing that the night before Abarca struck her with a vehicle, he had threatened her with a gun.

While Abarca did plead guilty, we cannot say that this is a significant reflection of his character, where he waited until the day of the trial to accept responsibility. As to Abarca's expression of remorse, we accept the trial court's determination that it was not significant or sincere. *See Hape v. State*, 903 N.E.2d 977, 1002-03 (Ind. Ct. App. 2009) (stating that without evidence of some impermissible consideration by the trial court, we accept its determination of a defendant's remorse), *trans. denied*. Given the nature of Abarca's offense and character, we are not persuaded that his sentence is inappropriate.

Affirmed.

BAKER, C.J., and CRONE, J., concur.