

Without benefit of a plea agreement, Sheldon Fogleman pleaded guilty to Theft,¹ a class D felony. The trial court sentenced Fogleman to two years in prison. Fogleman appeals his sentence, presenting the following restated issues for review:

1. Did the trial court abuse its discretion in failing to find as mitigating factors Fogleman's remorse and assistance to law enforcement?
2. Was Fogleman's sentence inappropriate in light of the nature of the offense and his character?

We affirm.

On August 4, 2009, Fogleman was arrested at the Walmart in Greenfield, Indiana, for exerting unauthorized control over store merchandise. Fogleman was subsequently charged with one count of theft as a class D felony. He pleaded guilty without the benefit of a plea agreement. Thereafter, under oath, Fogleman acknowledged the following prior convictions: (1) "a conviction for Misdemeanor Resisting Law Enforcement and Felony Theft under 49G20-9505-CF-58133", *Transcript* at 11; (2) "a conviction under 49G01-9604-CF-45059, ... a B Felony Burglary", *id.* at 11-12; (3) "a conviction under 49G20-9605-CF-67538 involving C Felony Burglary and then four Counts of Auto Theft, [and] four Counts of Receiving Stolen Property", *id.* at 12; (4) a felony theft conviction under 49F08-0808-FD-192636; (5) "a conviction under 49F09-0712-FD-273268 for Theft", *id.* at 13; (6) a misdemeanor conviction for check deception under 49F13-9602-CM-17615; and (7) "a conviction for Burglary, under 49G01-9604-CF-45059". *Id.*

Following Fogleman's admissions, the parties waived a presentence investigation and the matter proceeded to sentencing. Both sides presented argument as to the appropriate

¹ Ind. Code Ann. § 35-43-4-2 (West, Westlaw through 2009 1st Special Sess.).

sentence, after which the trial court sentenced Fogleman to two years in the Indiana Department of Correction. Fogleman appeals the sentence.

1.

Fogleman contends the trial court abused its discretion in failing to find as mitigating factors his remorse and assistance to law enforcement.

When imposing a sentence for a felony offense, trial courts are required to enter a sentencing statement. This statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. If the court finds aggravating or mitigating circumstances, it "must identify all *significant* mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). An abuse of discretion in identifying or failing to identify aggravators and mitigators occurs if it 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.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). Also, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, 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. *Anglemyer v. State*, 868 N.E.2d 482.

Determining mitigating circumstances is within the discretion of the trial court. *Corbett v. State*, 764 N.E.2d 622 (Ind. 2002). A trial court does not err in failing to find mitigation when a mitigation claim is "highly disputable in nature, weight, or significance."

Smith v. State, 670 N.E.2d 7 (Ind. 1996). We further observe that the trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. *Corbett v. State*, 764 N.E.2d 622. Nor is the trial court required to give the same weight to proffered mitigating factors as the defendant does. *Id.* Additionally, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Id.* The failure to find mitigating circumstances that are clearly supported by the record, however, may imply that they were overlooked and not properly considered. *Id.* An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

We begin with the claim that the trial court abused its discretion in failing to find Fogleman's expression of remorse as a mitigating circumstance. Fogleman's expression of remorse was as follows: "I made bad choices but I didn't realize how many people that I was hurting – I thought maybe I was only hurting myself but I was hurting my family, friends, and people that are innocent you know – I really regret what I've done. *Transcript* at 16. Notwithstanding the foregoing statement, the trial court failed to specifically find remorse as a mitigator. Even assuming for the sake of argument that such can be interpreted as discounting the sincerity of Fogleman's expression (see discussion in the following paragraph), it does not constitute reversible error. The trial court did not explain its decision in this regard, but we note that the above sentiments were expressed during Fogleman's response to the question, "in terms of illegal drug use, ... could you give us a little, really just the last 4 or 5 years involving, I believe it was Crack Cocaine." *Id.* Thus, it appears that Fogleman's statement was not so much an expression of remorse with respect to this

particular crime against Walmart, but rather a general expression of regret that was directed more toward his drug use and the problems it had caused him and other people over a period of time. As such, his comments of remorse with respect to *this* incident were not of such a compelling nature as to convince us that the trial court's failure to find remorse as an aggravator would constitute an abuse of discretion. In any event, from our remote vantage point, we are reluctant to substitute our judgment for the trial court's on this issue. *See Gibson v. State*, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) (“[r]emorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant’s apology and demeanor first hand and determines the defendant’s credibility”); *see also Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002) (“[w]ithout evidence of some impermissible consideration by the court, we accept its determination of credibility”).

As we indicated above, the foregoing analysis is based upon the assumption that the trial court rejected Fogleman’s claim of remorse. The court’s comments when pronouncing sentence indicate, however, that it may well have found Fogleman’s remorse as a mitigator. The same can be said of the other claim of error Fogleman presents, i.e., that the trial court erred in failing to find as a mitigator Fogleman’s willingness to cooperate with law enforcement authorities.

When pronouncing sentence, the court stated:

I have to make an order ... [when imposing] a sentence in excess of the advisory sentence ... [explaining] why I am doing so and for the record I am doing so because of the Defendant’s, in this court’s view, extensive criminal history outweighing mitigators such as family issues, willingness to admit and avoid the expense of trial, drug use and addiction, mental health issues *and the other things that have been brought up here to the court*[.]

Transcript at 24 (emphasis supplied). We have reviewed the brief comments of Fogleman and argument of defense counsel that were offered at the hearing in arguing for leniency. The only mitigators mentioned were: (1) the fact that he pleaded guilty, (2) the hardship to his family, which includes two teenage daughters dealing with mental health issues such as bipolar disorder and autism; (3) Fogleman's history of drug addiction; (4) Fogleman's mental health issues, including bipolar disorder; (5) Fogleman's expression of remorse; and (6) the fact that he was willing to cooperate with law enforcement authorities in busting a theft ring operating in a four-county area. The court specifically cited (1) through (4) as mitigators and then alluded to additional mitigators as "other things that have been brought up here to the court[.]" *Id.* The only "other things" proffered as mitigators by Fogleman were (5) and (6) above – the two that he claims here the trial court erred in neglecting to find. Thus, we believe the best interpretation of the court's comments is that the court did, in fact, find them as mitigating factors. Otherwise, the comment emphasized above was meaningless. Granted, it would have been preferable to cite each factor specifically, but the failure to do so does not necessarily render this court powerless to draw a reasonable inference that the factors in question were deemed mitigating, especially when the inference is so clearly apparent.

Regardless, the factors in question were not of such obvious significance that the failure to cite them would have amounted to an abuse of discretion. *See Smith v. State*, 670 N.E.2d 7 (a trial court does not err in failing to find a mitigator that is highly disputable in nature, weight, or significance). We have already explained this conclusion with respect to Fogleman's remorse. With respect to the other claim of error, Fogleman admitted at the hearing that, as of the time of the sentencing hearing, he had spoken only with his attorney

about the theft ring – he had not at that point divulged any information to authorities about those activities. This appears to have been the basis for the statements in summation by defense counsel upon which the instant claim of error is based, i.e.:

I think Mr. Fogleman has got a chance – by pleading open, by admitting to every possible crime he’s ever committed – to do some good over – uh, maybe not in Hancock County because it was just the shoplift, the Theft here in Hancock County but in Marion County – to put a stop to – to what’s going on - - you know I think he’s willing to help the authorities over there, he’s gone on the record here in Hancock County about this uh – this ring and uh I think will be perfectly willing to do that in Marion County[.]

Transcript at 22-23. In light of the speculative and prospective nature of the Fogleman’s claim of assistance to authorities, the failure to find it as a significant mitigating factor would not constitute an abuse of discretion.

2.

Fogleman contends his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after considering the trial court’s decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). “We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences.” *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Fogleman bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

With respect to the nature of the offense, we share the view of Fogleman and the State that this offense was a single case of shoplifting that was “not the worst of all thieveries.”

Appellant's Brief at 8. In fact, it appears to have been a run-of-the-mill shoplifting incident.

Turning to Fogleman's character, we agree with the trial court that the factors cited in mitigation, even including his remorse and offer to help authorities, were outweighed by Fogleman's extensive criminal history. From 1995 until September 2009, Fogleman accumulated seven felony convictions and at least two misdemeanor convictions. All of those convictions were for acts similar to those involved either directly or indirectly in this case, i.e., drugs and theft. This extensive criminal history, by itself, justified the enhanced sentence. Fogleman has not demonstrated that his sentence is inappropriate.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.