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ATTORNEY FOR APPELLANT:

THOMAS G. GODFREY
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

ROY L. KELLEY, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1011-CR-1197
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plantiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0912-FA-247

August 4, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Roy L. Kelley, Jr. ("Kelley") appeals his conviction after a bench trial of aggravated battery[1] as a Class B felony. He raises one issue for our review: whether the sentence imposed by the trial court was inappropriate in light of the nature of Kelley's offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 22, 2009, Timothy Nails ("Nails") drove his motorcycle to a gas station in Anderson, Indiana, went inside to prepay, came back outside, and began pumping gas. Kelley drove his van into the gas station's parking lot and pulled up behind Nails. Kelley exited his vehicle and approached Nails in an aggressive manner, as if to provoke a fight. Kelley and Nails had engaged in altercations several times before, and Kelley had pulled a firearm on Nails a few months prior to this incident. Despite being unarmed and knowing that Kelley usually carried a gun, Nails said, "well, come on."

Kelley then pulled a box cutter out of his pocket with the four-to-five inch blade already extended. *Tr*. at 256-58. Kelley stabbed Nails with the box cutter underneath his left arm and across his lower back. Because Nails's injuries were thought to be life threatening, Nails was carried by helicopter to a hospital in Indianapolis where he remained for over a week and had to be attached to an oxygen machine. Nails was in pain for about a month and did not breathe normally at the time of trial.

[1] *See* Ind. Code § 35-42-2-1.5.

Kelley, who fled from the scene, was apprehended, charged and convicted of Aggravated Battery as a Class B felony. The trial court considered Kelley's prior criminal history as an aggravator, while his remorse and the prior provocation by Nails were considered to be mitigating factors. *Tr.* at 303-04. Kelley was sentenced to fifteen years with ten executed in the Department of Correction and five years suspended to probation. Kelley now appeals.

DECISION AND DISCUSSION

Kelley's only issue on appeal is that the fifteen-year sentence for his Class B felony conviction is inappropriate. Although Kelley states the issue as whether the executed portion of his sentence "was inappropriate in light [of] Kelley's employment, family needs and his remorse concerning his actions," to the extent that Kelley is asking this court to find that the trial court should have given more weight to these factors as mitigators, we are proscribed from doing so. *See Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) ("Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-Blakely statutory regime, a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors.") To the extent Kelley is arguing that the trial court failed to identify such factors as mitigators, his argument fails.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under

this rule, the burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Upton v. State*, 904 N.E.2d 700, 704 (Ind. Ct. App. 2009) *trans. denied*. However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

The sentencing range for a Class B felony conviction is a fixed term of between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. Furthermore, a court may impose any sentence authorized by statute "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d).

At sentencing, Kelley presented no evidence that his ten-year executed sentence in the Department of Correction and additional five-year suspended sentence would create any undue burden on himself or his dependants. The hardship to dependants of the defendant is not necessarily a significant mitigating factor. *McElroy v. State*, 865 N.E.2d 584, 592 (Ind. 2007). Many persons convicted of crimes have dependants and in the absence of special circumstances showing an excessive undue hardship, a trial court does not abuse its discretion by failing to consider it to be a mitigating factor. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009). Incarceration will always be a hardship on dependents. *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005). Both of the mothers of Kelley's children have some steady form of income, and the children are older, ranging in

age from twelve to fifteen. As demonstrated, this is not a unique situation where the hardship is so extreme that it warrants a reversal of his sentence.

Finally, Kelley has failed to show that his sentence is inappropriate in light of the nature of his offense and character. Kelley instituted the confrontation that led to this crime, attacked an unarmed victim with a box cutter, seriously injured him and fled the scene. Kelley's lengthy criminal history, specifically his four prior battery and/or intimidation convictions, and violations of probation and community corrections reflect negatively on his character.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.