

STATEMENT OF THE CASE

Appellant-Defendant, Lymann Lamarr Spurlock (Spurlock), appeals his sentence following a guilty plea for two Counts of attempted battery, Class C felonies, Ind. Code §§ 35-42-2-1; 35-41-5-1, and one Count of assisting a criminal, a Class C felony, I.C. § 35-44-3-2.

We affirm.

ISSUES

Spurlock raises two issues on appeal which we restate as follows:

- (1) Whether the trial court abused its discretion by considering an improper aggravator and not affording weight to mitigators; and
- (2) Whether his sentence is appropriate in light of his character and the nature of his offense.

FACTS AND PROCEDURAL HISTORY

On May 23, 2006, Spurlock and Donte Gildon (Gildon), his passenger, were driving down Fifth Avenue in Gary, Indiana, to a local restaurant. At some point, Spurlock stopped the car in front of three individuals—Marlon Joshua (Joshua), Tameka Foster (Foster) and Anthony Johnson (Johnson) and Gildon began shooting at them. Gildon fatally wounded Joshua. Spurlock immediately reversed the car and drove straight to his aunt's house.

The day after the shooting, Spurlock took the same car he drove during the shooting to have it buffed and also to “get away from the car” because he was scared about the shooting from the previous day. (Sentencing Transcript pp. 67-68). Aware that the police were looking for him and Gildon, Spurlock called the Gary Police Department and spoke with Detective Michael Jackson (Detective Jackson) about the incident. Spurlock told Detective Jackson that he heard that he was implicated in the shooting and wanted to turn himself in, but that he needed reassurance that he would not get arrested. Detective Jackson started “talking crazy to me and I was nervous.” (Sent. Tr. p. 53). Later that day, Spurlock drove to Indianapolis, Indiana, and Gildon went with him. Spurlock was in Indianapolis for two weeks.

On May 23, 2006, the State filed an Information charging Spurlock with Count I, murder, a Class A felony, I.C. § 35-42-1-1; Counts II and III, attempted murder, Class A felonies, I.C. §§ 35-42-1-1; 35-41-5-1; Counts IV and V, attempted battery, Class C felonies, I.C. §§ 35-42-2-1; 35-41-5-1. On October 29, 2008, Spurlock pleaded guilty to Counts IV and V, attempted battery, and Count VI, an amended charge of assisting a criminal, a Class C felony, I.C. § 35-44-3-2, in exchange for the State dismissing all remaining charges. The plea agreement provided that the parties would argue their respective position as to the sentences on the three counts but would have a cap of sixteen years on the aggregate sentence.

On December 12, 2008, during the sentencing hearing, the trial court noted one aggravating factor: “the nature and the circumstance of the crime [is] a significant aggravating factor in that the defendant essentially participated in a ‘drive-by ambush’ of the victim which resulted in the death of [Joshua].” (Sent. Tr. p. 104). The trial court found as mitigating factors: 1) Spurlock’s guilty plea; 2) his lack of a criminal history; and 3) Spurlock’s depression and diabetes. However, because Spurlock refused to take insulin injections and other medications in the past, the trial court did not consider his depression and diabetes to be a significant mitigating factor. The trial court sentenced Spurlock to concurrent terms of six years on Counts IV and V, with a four year term on Count VI to be served consecutively to the six years, for a total sentence of ten years in the Department of Correction.

Spurlock now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Mitigators and Aggravators

Spurlock was convicted of three Class C felonies. A person who commits a Class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. I.C. § 35-50-2-6.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (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.*

Because the trial court no longer has any obligation to “weigh” aggravating and mitigating factors against each other when imposing a sentence, [] a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id.* at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the [Indiana Constitution].” *Id.*

A. *Improper Aggravator*

Spurlock contends that the trial court abused its discretion in considering factors that were dismissed as aggravating circumstances. Specifically, Spurlock argues that it was improper for the trial court to consider any facts from dismissed charges as part of the guilty plea, such as facts pertaining to the death of Joshua.

Spurlock cites *Farmer v. State*, 772 N.E. 2d 1025, 1027 (Ind. Ct. App. 2002), for the proposition that when a trial court accepts a guilty plea agreement under which the State agrees to drop or not file charges and then uses those facts that would have supported the dismissed charges to enhance a sentence, it “essentially circumvents the plea agreement” because the defendant does not “get the full benefit of his plea

agreement.” However, we also note that the “nature and circumstances” of a crime is a proper aggravating circumstance. *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001).

Spurlock pled guilty to attempted battery, which is that he “knowingly or intentionally and in a rude, insolent, or angry manner, attempt[ed] to touch [Foster and Johnson] by means of a handgun . . .” I.C. § 35-42-2-1. While sentencing Spurlock, the trial court commented on the nature of the shooting, stating that Spurlock was involved in a “‘drive-by ambush’ of the victim which resulted in his death and could have easily resulted in the death of others. Not only the other intended victims, but passerbys [sic] as well.” (Sent. Tr. p. 104). Thus, the trial court was simply relying on the facts supporting the definition of an attempted battery charge. Though Joshua’s murder was mentioned, the thrust of the trial court’s findings was centered on pointing out the surprise nature of the attack that exposed Foster and Anthony to the risk of injury as well as other innocent bystanders.

A consecutive sentence may be properly based on “multiple and separate and distinct criminal acts.” *Sanquenetti v. State*, 727 N.E.2d 437, 443 (Ind. 2000). Spurlock committed another, independent crime when he knew the police were looking for Gildon and then drove him to Indianapolis the day after the shooting. Spurlock chose not to call the police at any point during his two weeks in Indianapolis to inform them of Gildon’s whereabouts. Thus, relying on the nature and circumstances of the crime as an aggravator

and the sentencing Spurlock to a consecutive sentence for his separate and independent crime of assisting a criminal was not improper.

B. *Mitigators*

Spurlock asserts that his sentence should be reduced because not only are the acts he committed outside the scope of criminal acts justifying the advisory sentence, but also because he “has no criminal history, accepted responsibility by virtue of the plea agreement, [and] suffers from severe diabetes” (Appellant’s Br. pp. 13-14). Although his lack of criminal history has value, it does not necessarily render his sentence inappropriate. *Laux v. State*, 821 N.E.2d 816, 823 (Ind. 2007). Additionally, a defendant who pleads guilty generally deserves “some” mitigating weight to be afforded to the plea. *Anglemyer*, 875 N.E.2d at 220. However, our supreme court has recognized that a trial court does not necessarily abuse its discretion by failing to recognize a defendant’s guilty plea as a significant mitigating circumstance. *Id.* at 221. Instead, a trial court is only required to identify mitigating circumstances that are both significant and supported by the record, and “a guilty plea may not be significantly mitigating when . . . the *defendant receives a substantial benefit in return for the plea.*” (*emphasis added*) (*citing Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, the State charged Spurlock with murder and attempted murder, both Class A felonies, but dismissed the charges in exchange for a guilty plea to two Counts of attempted battery and one Count of assisting a criminal, both Class C felonies. Therefore,

by entering into this plea agreement, Spurlock avoided the twenty to fifty-year sentence that goes along with a Class A felony and thus received a substantial benefit. I.C. § 35-50-2-4.

II. *Nature and Character*

Spurlock finally argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Specifically, he argues that he “has a history of being a loving family man, and acted under some duress caused by the intimidating Gildon.” (Appellant’s Br. p. 14).

Although a trial court may have acted within its lawful discretion, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemeyer*, 868 N.E.2d at 491. It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id.* The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the character of the offender, Spurlock has not persuaded us that his sentence is inappropriate. First, Spurlock got rid of his car the day after the shooting to

separate himself from any incriminating evidence. Second, while Spurlock did call the police after the shooting, he only called because he knew the police had implicated him in the crime. Additionally, Spurlock told Detective Jackson that he would cooperate with the police only if Detective Jackson could promise him he would not go to jail. Finally, aware that the police were searching for Gildon, Spurlock willingly drove Gildon to Indianapolis and did not call the police to inform them of Gildon's whereabouts.

With regard to the nature of the offense, we note that the offense was one of an ambush-style shooting, not only resulting in the possibility of injury or death of Foster and Johnson, but also the fact that it could have harmed innocent bystanders, warrants the sentence.

Ultimately, Spurlock has not persuaded us that his sentence is inappropriate based on the character of the offender or the nature of the offense.

CONCLUSION

Based on the foregoing, we conclude that the trial court (1) did not abuse its discretion in considering the aggravators and mitigators and (2) the sentence was appropriate considering the nature of the offender and offense.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.