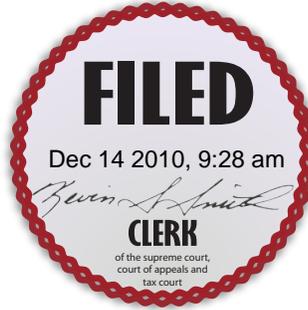


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHIJOIKE BOMANI BEN-YISRAYL)
f/k/a GREAGREE DAVIS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1003-CR-332

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-8404-CF-5165

December 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Chijoike Bomani Ben-Yisrayl, formerly known as Greagree Davis, appeals his sentence for murder. Ben-Yisrayl raises three issues, which we revise and restate as:

- I. Whether the trial court sentenced Ben-Yisrayl in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied;
- II. Whether the trial court abused its discretion in sentencing Ben-Yisrayl; and
- III. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts as discussed in Ben-Yisrayl's direct appeal follow:

[Ben-Yisrayl] was acquainted with [Debra Weaver's] former roommate and had visited [Weaver's] residence on many occasions during the summer of 1983. [Ben-Yisrayl] told the roommate several times of his sexual interest in [Weaver]. About 7:00 p.m. on April 2, 1984, [Ben-Yisrayl] knocked on the door of [Weaver's] neighbors, asking them whether [Weaver] lived there, and was told that . . . she did not. [Ben-Yisrayl] then left. Sometime after 9:00 p.m., [Weaver] arrived home and telephoned her brother. She told him that someone had broken into her residence through a back window and had removed all the light bulbs. [Weaver] believed that the intruder might still be present. Her brother told her to leave immediately, and assumed that she would come to his residence. When she failed to arrive as he expected, he reported the incident to the police. The responding officer did not find [Weaver] at her residence, but found a broken window. Later investigations discovered the keys to her new car on the porch and the missing light bulbs in a waste paper basket.

On April 4, a police officer found the gagged and substantially disrobed body of [Weaver] at the top of a ramp under a bridge near her residence. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. The stab wounds were caused by two different knives. [Weaver's] neck evidenced manual strangulation. Seminal fluid was found in her vaginal cavity. The cause of her death was determined to be multiple stab wounds to the chest and abdomen.

[Ben-Yisrayl] told police investigators that he broke the back window of [Weaver's] home, entered it, unscrewed the light bulbs, waited, and hid behind a door when she returned home and made a phone call. When she walked towards the door, he got behind her. With [Weaver's] hands tied in front of her, he took her to nearby railroad tracks, under a bridge, and up a slope. At some point he gagged her. [Ben-Yisrayl] told police that he stabbed her. He described the disposal of the knife, and took police to the creek where he had dropped it while trying to wash it off. Two knives were discovered at this location. One was [Weaver's] pastry knife and the other was a chef's knife from [Weaver's] kitchen knife set. [Ben-Yisrayl] also admitted taking [Weaver's] watch and later selling it.

Serological analysis of blood and seminal fluid obtained from [Weaver] indicated characteristics representing less than one percent of the general population. [Ben-Yisrayl's] blood test results placed him within this category.

Davis v. State, 598 N.E.2d 1041, 1044-1045 (Ind. 1992), reh'g denied, cert. denied, 510 U.S. 948, 114 S. Ct. 392 (1993).

The State charged Ben-Yisrayl with burglary as a class B felony, criminal confinement as a class B felony, rape as a class A felony, criminal deviate conduct as a class A felony, and murder. Id. at 1044. The State sought imposition of the death penalty. Id. The jury found Ben-Yisrayl not guilty of criminal deviate conduct, but guilty on all other counts. Id. The jurors were unable to agree upon a recommendation regarding the death penalty. Id. The trial court, following a further sentencing hearing, ordered the death penalty on the murder conviction, with an alternate sixty-year sentence should the death penalty not be upheld on appeal, and a ninety-year aggregate sentence on the remaining convictions. Id. On direct appeal, the Indiana Supreme Court affirmed Ben-Yisrayl's convictions and sentence. Id.

On February 16, 1994, Ben-Yisrayl filed a petition for post-conviction relief. The post-conviction court partially granted Ben-Yisrayl's petition, vacating the death sentence and remanding to the trial court for a new penalty phase trial and sentencing proceeding, but otherwise denying his petition. Ben-Yisrayl v. State, 738 N.E.2d 253, 257 (Ind. 2000), reh'g denied, cert. denied, 534 U.S. 1164, 122 S. Ct. 1178 (2002). On appeal, the Indiana Supreme Court affirmed the judgment of the post-conviction court. Id.

On remand for sentencing, the trial court granted Ben-Yisrayl's motion to dismiss the death penalty request, concluding that the Indiana death penalty statute was unconstitutional because it permitted a sentence of death without requiring the jury to find beyond a reasonable doubt that the aggravating circumstance or circumstances outweighed any mitigating circumstances. State v. Ben-Yisrayl, 809 N.E.2d 309, 310 (Ind. 2004), reh'g denied, cert. denied, 546 U.S. 1020, 126 S. Ct. 659 (2005). On appeal, the Indiana Supreme Court reversed the trial court's order and remanded for reinstatement of the State's death penalty request and for penalty phase proceedings as previously ordered by the Court. Id. at 311.

On January 16, 2008, the State moved to dismiss its request for imposition of the death penalty based upon the inadvertent destruction of physical evidence, which the trial court granted. Ben-Yisrayl v. State, 908 N.E.2d 1223, 1226 (Ind. Ct. App. 2009), trans. denied. On January 22, 2008, the trial court issued an amended abstract of judgment reflecting the dismissal of the death penalty but otherwise adopting the 150-year sentence originally imposed by the trial court. Id. On February 12, 2008, Ben-Yisrayl filed a motion to correct error, which the trial court denied. Id.

On appeal, this court held that the original trial court exceeded its statutory authority in imposing Ben-Yisrayl's alternative sixty-year consecutive sentence for murder. Id. at 1230. This court remanded to the trial court with instructions to conduct a sentencing hearing and resentence Ben-Yisrayl for his murder conviction. Id. The court also held that Ben-Yisrayl was subject to the "presumptive" statutory scheme in effect at the time of his crimes. Id. at 1231. The court held: "Accordingly, under the rule in Blakely, the trial court upon remand cannot enhance his sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant had waived Apprendi rights and consented to judicial factfinding." Id. The court also ordered the trial court to conduct a full sentencing hearing for Ben-Yisrayl's murder conviction. Id.

On remand, the trial court held a sentencing hearing on February 16, 2010, and Ben-Yisrayl presented multiple character witnesses. At the end of the hearing, the court and the parties agreed to have the parties submit arguments in writing. Ben-Yisrayl submitted a two-page Sentencing Memorandum, which argued that he had made progress, had responded positively to rehabilitation, had a minimal criminal history, and had family members and members of the community that spoke on his behalf. On February 26, 2010, the court continued the sentencing hearing. The court asked the parties if they had additional argument or evidence, and Ben-Yisrayl's counsel stated: "No thank you, Your Honor. I said what I came to say in my written memorandum." Transcript at 108.

The court recognized that it was constrained by Blakely. The court then identified Ben-Yisrayl's criminal history and the fact that he was on probation at the time of the offense as significant aggravating circumstances. Regarding Ben-Yisrayl's criminal history, the court stated:

[O]n November 1, [19]74, as a juvenile, you were found to have drawn a deadly weapon on another person. Specifically, that you drew a knife on another individual at school. You were 12 years old by my calculation at that time.

Also as part of this aggravating circumstance of a prior criminal history, on October 3, 1978, again as a juvenile, unlawful deviate conduct. You and another individual forced an 11 year-old female to commit sodomy and then placed your penis in her vagina. My calculation was that you were 16 years old at that time.

And then on July 16th of 1983, you committed the burglary class B felony that you've already alluded to. You broke and entered the dwelling at 3801 North Ridgeview Drive, and you did so with intent to exert unauthorized control over property.

* * * * *

So at age 22 you had these three prior convictions that comprise the aggravating circumstance of a prior criminal history. The Court, in reviewing those and considering those, especially in light of the charge that you're being sentenced on, finds that these prior convictions served as your foundation for your preparation for the conviction in this case.

And I say that because at age 12 you pulled a knife on someone, and when you committed this murder you used a knife on [Weaver]. At age 16 you chased and then forced intercourse on a young female, and the day you committed this murder you also raped [Weaver]. And then at age 21, just months before you committed this murder, you broke into another person's home, specifically the neighbor of [Weaver].

So it looks to the Court that your prior criminal history is rather significant in light of it being a training ground for you to commit the most heinous crime of murder; that murder of [Weaver]. You had already used a

knife, you had already committed a violent act against another female and you had already broken into another person's home.

So I find that this prior criminal history is deserving of significant weight as an aggravating circumstance.

Id. at 114-116.

The court noted the statements of Ben-Yisrayl's character witnesses and identified Ben-Yisrayl's network of support of family and friends as a mitigating circumstance of minimal weight. The court also identified Ben-Yisrayl's record of good conduct in prison since the early 1990s as a mitigator of medium weight. The court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Ben-Yisrayl to an executed sentence of sixty years. In determining whether to impose a consecutive sentence, the court found that the offense was premeditated, that Ben-Yisrayl "did lie in wait," and noted the fact that he knocked on the neighbors' door "to see if there's anyone next door that might possibly be able to hear or see what you're about to do." Id. at 122-123. The court ordered that the sixty-year sentence be served consecutive to the aggregate ninety-year sentence Ben-Yisrayl was serving for his other convictions.

I.

The first issue is whether the trial court sentenced Ben-Yisrayl in violation of Blakely. As expressed in this court's earlier opinion, Ben-Yisrayl committed his crimes in 1983, long before the April 2005 statutory amendments creating an "advisory" sentencing scheme took effect. 908 N.E.2d at 1231. Accordingly, Ben-Yisrayl is subject to the "presumptive" statutory scheme in effect at the time of his crimes and Blakely. Id. The Indiana Supreme Court has explained:

We recently held that Blakely was applicable to Indiana's sentencing scheme because our presumptive term constituted the statutory maximum as defined in Blakely. Smylie v. State, 823 N.E.2d 679, 683 (Ind. 2005)[, cert. denied, 546 U.S. 976, 126 S. Ct. 545 (2005)]. Consequently, we held that to enhance a sentence under Indiana's then existing system "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury" Id. at 686.

Blakely is not concerned, primarily, with what facts a judge uses to enhance a sentence, but with how those facts are found. Under Blakely, a trial court in a determinate sentencing system such as Indiana's may enhance a sentence based only on those facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi [v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000),] rights and stipulated to certain facts or consented to judicial factfinding.

Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005). Juvenile adjudications may be considered as "prior convictions" for purposes of sentencing under Blakely. Mitchell v. State, 844 N.E.2d 88, 92 (Ind. 2006). "In a case where a trial court has relied on some Blakely-permissible aggravators and others that are not Blakely-permissible, the 'sentence may still be upheld if there are other valid aggravating factors from which we can discern that the trial court would have imposed the same sentence.'" Sullivan v. State, 836 N.E.2d 1031, 1037 (Ind. Ct. App. 2005) (quoting Edwards v. State, 822 N.E.2d 1106, 1110 (Ind. Ct. App. 2005)).

Ben-Yisrayl argues that whether the aggravators outweigh the mitigators is a finding of fact that must be made by a jury. The trial court may enhance a sentence based upon properly found aggravators and mitigators. See Trusley, 829 N.E.2d at 925; see also Kubsch v. State, 866 N.E.2d 726, 738 (Ind. 2007) (holding that the weighing of the aggravators and mitigators does not have to be proven beyond a reasonable doubt) (citing

Ritchie v. State, 809 N.E.2d 258 (Ind. 2004), reh’g denied, cert. denied, 546 U.S. 828, 126 S. Ct. 42 (2005)), reh’g denied, cert. denied, 553 U.S. 1067, 128 S. Ct. 2501 (2008); Strong v. State, 817 N.E.2d 256, 262 (Ind. Ct. App. 2004) (holding that “we do not discern from the Blakely decision that the trial courts [sic] sentencing authority of balancing and weighing mitigating and aggravating circumstances has been usurped”), clarified on reh’g, 820 N.E.2d 688, trans. denied.

Ben-Yisrayl also argues that the trial court “went beyond the statutory elements and cited additional ‘facts’ which were not established by the prior convictions,” including the fact that Ben-Yisrayl “at age 12, drew a knife on another child at school; that at age 16, he and another individual forced an 11 year old girl to commit sodomy and submit to sexual intercourse; that he burglarized [the victim’s] neighbor; and that his prior offenses served as a ‘training ground’ for the instant offense.” Appellant’s Brief at 23. Ben-Yisrayl argues that the court also cited the use of a knife in the instant offense as an aggravating circumstance but the use of a knife was not a statutory element of murder.

Initially, we observe that the Order of Judgment of Conviction listed two aggravators: (1) Ben-Yisrayl’s prior criminal history; and (2) the fact that Ben-Yisrayl was on probation at the time of the crime. We also observe that the trial court recognized at the sentencing hearing that it was bound by the constraints of Blakely. Specifically, the court stated:

[T]his court understands that this [sentencing hearing must comply with the dictates of *Blakely v. Washington*, which was a United States Supreme Court case in 2004, 542 U.S. 296.

As there was no request for a trial by a jury on the aggravating factors, any aggravators that the Court would find in this hearing must be

either a prior conviction, facts found by jury beyond a reasonable doubt, facts admitted by the defendant or facts found by the judge after a waiver of operandi [sic] rights. Since that didn't occur and since there was no jury, any facts for purposes of aggravating circumstances that would cause a sentence to be above the presumptive[] sentence must be either a prior conviction or facts admitted by the defendant.

Transcript at 111.

To the extent that Ben-Yisrayl argues that the court's recognition that a knife was used in the instant offense violated Blakely, we observe that the charging information for the present offense stated that Ben-Yisrayl "did knowingly and intentionally kill another human being, to-wit: DEBRA A. WEAVER by stabbing at and against the person of DEBRA A. WEAVER by means of a deadly weapon, to-wit: A KNIFE, thereby inflicting mortal wounds upon the person of DEBRA A. WEAVER, causing her to die" Appellant's Appendix at 118. Moreover, at trial, Ben-Yisrayl's trial counsel admitted "[t]here's going to be no argument that Debra Weaver was murdered in a heinous fashion. It was a gruesome murder. And that's going to be brought out. There's going to be gory photo's [sic]. I'm not contending that. What I'm contending is do we have the right man on trial here today." Trial Transcript at 860. Ben-Yisrayl's trial counsel also discussed the knife or knives, referred to "a hundred and thirteen (113) stab wounds," stated "there are some large stab wounds in the chest that killed Debra Weaver, basically eleven (11)," and argued that "[t]here were obviously two (2) knives involved." Id. at 908-909.

To the extent that Ben-Yisrayl argues that the court improperly considered the fact that he burglarized Weaver's neighbor, we observe that Ben-Yisrayl admitted at the

sentencing hearing that he burglarized the house next door to Weaver. Specifically, the following exchange occurred:

THE COURT: And [Debra Weaver] lived next door to the residence that you burglarized?

THE DEFENDANT: Yes.

Transcript at 105.

We cannot say that the court sentenced Ben-Yisrayl in violation of Blakely by its reliance on these factors. See Trusley, 829 N.E.2d at 925 (holding that facts of prior convictions are appropriate for the trial court to consider in enhancing a sentence); Kincaid v. State, 839 N.E.2d 1201, 1205 (Ind. Ct. App. 2005) (holding that the trial court properly considered the defendant's position of trust because he admitted during his trial testimony that the victim was his son).

To the extent that Ben-Yisrayl argues that the court improperly relied upon the specific facts from his juvenile adjudications, we observe that the presentence investigation report ("PSI") reveals that Ben-Yisrayl was adjudicated a delinquent for drawing a deadly weapon and unlawful deviate conduct. The PSI describes the offense of drawing a deadly weapon as follows: "[Ben-Yisrayl] was arrested after he drew a knife on another individual while attending Public School #73." The PSI describes the offense of unlawful deviate conduct as follows: "[Ben-Yisrayl] and another individual chased and forced an eleven year old female to commit sodomy and then place [sic] their penis' [sic] in her vagina." Even assuming, without deciding, that the court improperly relied upon the statements in the PSI that Ben-Yisrayl drew a knife or that he forced a female to

commit sodomy and then placed his penis in her vagina, we conclude that the remaining aggravators of Ben-Yisrayl's criminal history, including his juvenile adjudications, and the fact that he was on probation at the time of the offense adequately support Ben-Yisrayl's sentence. See infra Part II.B.

II.

The next issue is whether the trial court abused its discretion in sentencing Ben-Yisrayl.¹ Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found those to be aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

Ben-Yisrayl argues that the trial court failed to consider mitigating circumstances and improperly relied on aggravating circumstances. We address each argument separately.

A. Mitigators

“The finding of mitigating factors is not mandatory and rests within the discretion of the trial court.” O’Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is

¹ We observe that this court previously held that Ben-Yisrayl was subject to the “presumptive” statutory scheme in effect at the time of his crimes. Ben-Yisrayl, 908 N.E.2d at 1231.

not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." 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. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

1. Residual Doubt & Mental Status

Ben-Yisrayl argues that the trial court failed to consider "residual doubt" as a mitigating circumstance. Appellant's Brief at 26. Ben-Yisrayl argues that the "post-conviction evidence revealed numerous holes in the State's case and showed that much of the State's evidence was not nearly as incriminating as it appeared to be." Id. at 28. Ben-Yisrayl then discusses serology, the watch that he sold to a co-worker a few days after the murder, his confession to police, the knives, and other evidence. Ben-Yisrayl also points to the post-conviction record to suggest that he is "borderline retarded," has an IQ of 76, suffers from "PTSD and NPD," and suffered from "chronic substance abuse." Id. at 43. Ben-Yisrayl argues that the sentencing court "abused its discretion by failing to assign any mitigating weight to Ben-Yisrayl's mental impairments and chronic substance

abuse.” Id. at 44. Ben-Yisrayl has waived these claims because he failed to ask the sentencing court to consider these facts as mitigators.² See Carter, 711 N.E.2d at 838-839 (holding that the trial court did not abuse its discretion in failing to consider evidence of defendant’s low I.Q. where the issue was not raised at sentencing); Creekmore v. State, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006) (“[I]f the defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal.”), clarified on reh’g, 858 N.E.2d 230.

2. Ben-Yisrayl’s Childhood

Ben-Yisrayl argues that he suffered considerable trauma as a child. The State concedes that Ben-Yisrayl “never had much of a relationship with his father, and his mother, with whom he did have an excellent relationship, died when he was only

² In his reply brief, Ben-Yisrayl argues that “the post-conviction court explicitly found that residual doubt and Ben-Yisrayl’s mental status were significant mitigating circumstances in this case.” Appellant’s Reply Brief at 2. Ben-Yisrayl points to the Findings of Fact, Conclusions of Law and Order on Petition for Post-Conviction Relief dated May 31, 1996. The statements in the post-conviction court’s May 31, 1996 order were made in the context of ineffective assistance of counsel at the penalty phase or sentencing, and we cannot say that the post-conviction court’s mention of residual doubt or Ben-Yisrayl’s mental health at that time and in that context constitute a proposed mitigating circumstance by Ben-Yisrayl at the 2010 sentencing hearing. We also observe that the May 31, 1996 order does not clearly support Ben-Yisrayl’s arguments. The 1996 order concluded in part that “the evidence at the guilt phase of the trial was substantial that the watch was in fact the victim’s watch,” that Ben-Yisrayl’s trial counsel was not ineffective for failing to investigate the serology evidence, and that “[t]he evidence at trial was substantial and credible regarding the large knife being used in the commission of the murder by [Ben-Yisrayl] and the evidence regarding the pastry knife was also persuasive.” Post-Conviction Record at 739-740.

Ben-Yisrayl also appears to argue that the court abused its discretion in finding that the circumstances warranted consecutive sentences because the court “relied on many ‘facts’ that were refuted by the post-conviction evidence.” Appellant’s Brief at 48-49. Ben-Yisrayl points to evidence presented at the post-conviction hearing and argues that there was considerable evidence suggesting that he “was not the black man who knocked on the neighbors’ door,” his fingerprints were not found on the light bulbs or anywhere inside the apartment, and that a demonstration with a virtually identical knife to the one allegedly used revealed that it was too dull and flimsy to penetrate human skin. Id. at 49. Again, Ben-Yisrayl has waived this claim because he failed to ask the court to consider these facts as mitigators.

thirteen,” but argues that “[n]evertheless, many people have equally sad experiences yet do not therefore become brutal rapists and murderers.” Appellee’s Brief at 19.

The record reveals that Ben-Yisrayl’s mother died in 1974, and Ben-Yisrayl lived with his aunt who worked in the mental health field. Ben-Yisrayl’s cousin became like a sister to him. Ben-Yisrayl connected with his family, his family’s friends, and his community. Ben-Yisrayl was also active in a church choir. We cannot say that Ben-Yisrayl has shown that the mitigating evidence is both significant and clearly supported by the record. Accordingly, we cannot say that the trial court abused its discretion by not finding Ben-Yisrayl’s childhood as a mitigator.³ See Rose v. State, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004) (holding that the trial court did not abuse its discretion when it declined to find that a troubled childhood was a mitigator); see also Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000) (noting “this court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight”), reh’g denied, cert. denied 534 U.S. 1057, 122 S. Ct. 649 (2001), reh’g denied.

3. Character

Ben-Yisrayl states that the sentencing court “correctly found that [his] character was a mitigating circumstance.” Appellant’s Brief at 45. Ben-Yisrayl points to the post-conviction record, the trial transcript, and the sentencing transcript and exhibits, and argues that his “[p]astors, friends, family members, and co-workers described him as

³ As part of Ben-Yisrayl’s discussion of his background, he discusses his childhood and his work history. Ben-Yisrayl cites to portions of the trial record and the post-conviction record and states that he maintained regular employment until his arrest in 1984 and was “liked and respected by his co-workers and supervisors.” Appellant’s Brief at 42. To the extent that Ben-Yisrayl suggests that his work history constituted a mitigator, Ben-Yisrayl has waived this claim because he failed to ask the trial court to consider these facts as mitigators. See Carter, 711 N.E.2d at 838-839; Creekmore, 853 N.E.2d at 530.

kindhearted, well-mannered, hard working, helpful, respectful, dependable, considerate, responsible, and caring.” Id. To the extent that Ben-Yisrayl attempts to argue that the sentencing court abused its discretion by failing to award this mitigator more weight, we disagree.

At the sentencing hearing, the court stated:

Your lawyers presented several witnesses, both in person and through exhibits. Those individuals either testified or wrote to the Court about you, the man as you sit here today. Some of those people also knew you either when this crime was committed or prior to this crime being committed. And I recognize that they must not have known all there was to know about Greagree Davis or they would have known about your prior criminal history, which they didn’t seem to be aware of. But despite that, they continued, even after you were convicted of this offense, they continued to maintain contact with you, to have a relationship with you and to deem you worthy of their support some 25-plus years later here in this courtroom. I find that as a mitigating circumstance because it speaks to you as you sit here now

Transcript at 117-118.

The record reveals that Richard E. Willoughby, a pastor, testified that Ben-Yisrayl attended church and sang in the church choir in 1983 and 1984 and was a “very friendly guy” and “well-liked.” Id. at 31. Willoughby also testified that he was not aware that Ben-Yisrayl was convicted of burglary in 1983 until the time of the sentencing hearing. Raymond Triggs, Jr., a social minister at a church and a retired teacher, testified that Ben-Yisrayl was a talented singer and made people at the church “feel good.” Id. at 59. Triggs testified that he did not believe Ben-Yisrayl was “capable of [committing the current offenses], you know, with the way he sang and the way he carried himself around the church,” and that it was “not in his character.” Id. at 60. Triggs also testified that he

had regular contact with Ben-Yisrayl beginning when Ben-Yisrayl was twelve or thirteen years old through the time of the current offenses but that he first heard that Ben-Yisrayl was convicted of burglary at the sentencing hearing. Based upon our review of the record, we cannot say that the trial court abused its discretion by failing to give this mitigator additional weight.

4. Potential for Rehabilitation

Ben-Yisrayl appears to argue that the sentencing court abused its discretion by failing to consider his potential for rehabilitation. Ben-Yisrayl argues that he has the potential to rehabilitate and points to his progress in prison and his network of family and friends. Initially, we observe that the court found that Ben-Yisrayl had a supportive network of family and friends as a mitigator of minimal weight. The court also found that Ben-Yisrayl had maintained good conduct in prison since 1992 as a mitigating factor of medium weight. At the sentencing hearing, the court stated:

The second mitigating circumstance that I found in reviewing all of the information I've reviewed about you is that, at least since the early [19]90s, you have maintained a very good record at the prison of good conduct. You've spent approximately 25 years in the Department of Correction. . . . And while I recognize that Indiana's law is structured so that inmates in prison maintain good conduct because we give them the privilege of having a day of credit time for every day of good conduct that they have, in essence meaning that someone with a 100-year sentence can reduce their sentence to 50 years with good time credit. So by the way we've set that up in this state, we encourage prisoners to maintain good conduct. However, I'm well aware of the fact that many of them don't.

* * * * *

In addition, though, to your conduct, I note that they indicated that you've never had a positive drug test, that you've received above average job evaluations while incarcerated and that you most recently are involved

in the Plus Program at the prison and you've been taking advantage of many of the programs that they offer and some of those aren't programs that will do anything to reduce your time in prison, those are just programs to make you a better person. So for all of them [sic] reasons, I'm assigning medium weight to this mitigating circumstance.

Transcript at 118-120.

Based upon the record, we cannot say that the trial court abused its discretion regarding this mitigator.

5. Age

Ben-Yisrayl points out that he was twenty-two years old at the time of the offense and that a young age has been recognized as a mitigating circumstance. A defendant's youth may be a mitigating factor in some circumstances. Gross v. State, 769 N.E.2d 1136, 1141 n.4 (Ind. 2002). However, age is not a *per se* mitigating factor. Id. The trial court recognized Ben-Yisrayl's age at the time of the offense and stated "at age 22 you had these three prior convictions that comprise the aggravating circumstance of a prior criminal history." Transcript at 115. In light of Ben-Yisrayl's criminal history and the present offenses, we cannot say that Ben-Yisrayl has demonstrated that this proposed mitigator was significant or that the trial court abused its discretion. See, e.g., Green v. State, 850 N.E.2d 977, 992 (Ind. Ct. App. 2006) (holding that the trial court did not abuse its discretion when it concluded that the defendant's age of twenty years was not a mitigating factor), summarily affirmed in relevant part by 856 N.E.2d 703 (Ind. 2006).

B. Aggravators

1. Criminal History

Ben-Yisrayl appears to argue that the trial court abused its discretion in considering his criminal history. Specifically, he argues that “there are several circumstances which reduce the aggravating nature of [his] criminal history.” Appellant’s Brief at 47. Ben-Yisrayl points to the finding of the post-conviction court that he made substantial progress while on juvenile probation.⁴ Ben-Yisrayl also argues that the burglary was not an act of violence.

The significance of a criminal history “varies based on the gravity, nature and number of prior offenses as they relate to the current offense.” Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999), reh’g denied. For example, a “non-violent misdemeanor ten years in the past . . . would hardly warrant adding ten or twenty years to the standard sentence” in a murder case. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001). Ben-Yisrayl has juvenile adjudications for drawing a deadly weapon and unlawful deviate conduct.⁵ Ben-Yisrayl was convicted of burglary in 1983 and received six years suspended with two years probation. These convictions relate to the present case as it involved the use of a deadly weapon, a sexual act, and burglary. We cannot say that the trial court abused its discretion in considering Ben-Yisrayl’s criminal history as a significant aggravating factor. See Corbett v. State, 764 N.E.2d 622, 631-632 (Ind. 2002)

⁴ Ben-Yisrayl also argues that “[w]hen the police found him at the scene of the 1983 burglary, he was severely intoxicated and did not remember entering the house.” Appellant’s Brief at 48. Ben-Yisrayl cites page 1567 of the post-conviction record, but our review of this page does not support Ben-Yisrayl’s argument.

⁵ For the first time in his reply brief, Ben-Yisrayl argues that the trial court abused its discretion by considering his juvenile record as a part of his criminal history. Ben-Yisrayl did not raise the issue of the trial court’s reliance on his juvenile record in his appellant’s brief. Therefore, we do not address this argument. See Carden v. State, 873 N.E.2d 160, 162 n.1 (Ind. Ct. App. 2007) (holding that an issue not raised in an appellant’s brief may not be raised for the first time in a reply brief).

(holding that the trial court did not abuse its discretion by using the defendant's criminal history, which consisted of convictions for burglary and theft, as an aggravating factor in his sentence for murder and robbery); Johnson v. State, 837 N.E.2d 209, 215 (Ind. Ct. App. 2005) (holding that the trial court did not abuse its discretion by giving defendant's criminal history, which included three prior felony convictions, significant aggravating weight), trans. denied.

2. Probation

Ben-Yisrayl concedes that the sentencing court correctly found the fact that he was on probation at the time of the current offenses as an aggravating circumstance. Ben-Yisrayl points out that “up until the time of his arrest in the instant case, he did very well on probation” and “was in the process of completing a substance abuse evaluation.” Appellant's Brief at 48. To the extent that Ben-Yisrayl argues that the court abused its discretion in relying upon the fact that he was on probation at the time of the current offense, we disagree.

The Indiana Supreme Court has held that “[p]robation stands on its own as an aggravator.” Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005), cert. denied, 549 U.S. 836, 127 S. Ct. 90 (2006). “While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence.” Id. The record reveals that Ben-Yisrayl committed the present offenses less than nine months after his previous burglary for which he was on probation and less than five months after he was sentenced to probation for his previous burglary. We cannot say that the sentencing court abused its

discretion by considering the fact that Ben-Yisrayl was on probation at the time of the current offense as a significant aggravator.

III.

The third issue is whether Ben-Yisrayl's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. 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 or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Ben-Yisrayl argues that the maximum sentence is inappropriate and requests a sentence of forty years served concurrent with his other sentences. Ben-Yisrayl also argues that his sentence is inappropriate because he is "borderline retarded," suffers from "mental illness," and suffered from a "serious substance abuse problem which was the result of his PTSD." Appellant's Brief at 50.

The Indiana Supreme Court has noted that "the maximum possible sentences are generally most appropriate for the worst offenders." Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id. (internal citations omitted).

Our review of the nature of the offense reveals that Ben-Yisrayl was acquainted with Weaver's former roommate and had visited her residence on many occasions. 598 N.E.2d at 1045. He knocked on the door of Weaver's neighbors, and left after speaking with the neighbors. Id. He broke the back window of Weaver's home, entered it, unscrewed the light bulbs, waited, and hid behind a door when Weaver returned home. Id. Weaver telephoned her brother who told her to leave immediately. Id. The police later discovered the gagged and substantially disrobed body of Weaver at the top of a ramp under a bridge near her residence. Id. An autopsy revealed chipped teeth; broken fingernails; abrasions on the hands, chin, and knees; multiple bruises to the lips and gums; and 113 stab or puncture wounds. Id. Weaver's neck evidenced manual strangulation, and seminal fluid was found in her vaginal cavity. Id. The cause of her death was determined to be multiple stab wounds to the chest and abdomen. Id. Ben-Yisrayl concedes that the circumstances of the offense were "unquestionably brutal." Appellant's Brief at 48, 50.

Our review of the character of the offender reveals that a prison progress report states that Ben-Yisrayl had one minor infraction in 1992 within the past twenty-five years and never received a positive drug urinalysis or violence charge within the past twenty-five years. Ben-Yisrayl has juvenile adjudications for drawing a deadly weapon and unlawful deviate conduct and an adult conviction for burglary. Ben-Yisrayl was on probation at the time of the present offenses. To the extent that Ben-Yisrayl suggests that

he suffers from mental illness, we observe that Ben-Yisrayl does not argue that there was any nexus between his alleged mental illness and the commission of the crime. We also observe that the PSI states that he “appeared to be a physically and mentally stable individual who stated he has no emotional problems,” and that his progress report dated December 7, 2009 states that “[a]ccording to this facility’s medical staff, [Ben-Yisrayl] has no mental health diagnosis.” Appellant’s Appendix at 168.

Given the facts of the case and Ben-Yisrayl’s criminal history and after due consideration of the sentencing court’s decision, we cannot say that the sentence imposed by the court is inappropriate in light of the nature of the offense and the character of the offender. See Roney v. State, 872 N.E.2d 192, 206-207 (Ind. Ct. App. 2007) (noting the brutal nature of the offense in concluding a maximum sentence for murder was not inappropriate), trans. denied; Williams v. State, 782 N.E.2d 1039, 1052 (Ind. Ct. App. 2003) (holding that the defendant’s sixty-five-year sentence for murder was not inappropriate in light of the nature of the offense and the character of the offender), trans. denied.

For the foregoing reasons, we affirm Ben-Yisrayl’s sentence for murder.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.