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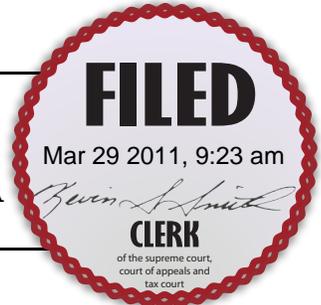
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**IN THE  
COURT OF APPEALS OF INDIANA**

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FRANCISCO PONCE,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 49A05-1008-CR-492

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Carol J. Orbison, Judge  
Cause No. 49G22-0907-FB-67353

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**March 29, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Defendant Francisco Ponce appeals from the sentence imposed following his convictions of two counts of Class B felony Aggravated Battery,<sup>1</sup> Class C felony Battery,<sup>2</sup> Class A misdemeanor Resisting Law Enforcement,<sup>3</sup> and Class C felony Carrying a Handgun Without a License.<sup>4</sup> Ponce contends that the trial court improperly found aggravating circumstances and improperly failed to find mitigating circumstances when sentencing him and that his forty-eight-year aggregate sentence is inappropriately harsh. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On July 25, 2009, Juan Carlos Sosa Lopez was married at the Lawrence Park Community Center, which also hosted the wedding reception. At approximately 8:00 p.m., Ponce and his brother Jose Luis Ponce arrived at the reception. At approximately 10:00 p.m., Jose Luis threw a plate of food onto the floor, tipped over a table, approached Prescilliano Nazario, and struck him in the head.

As other guests attempted to calm Jose Luis, Ponce fired a handgun three times from a hallway into the room where the guests were located. Two-year-old Y.S.R., her mother Mariela Rodriguez, and Miriam Leal Vazquez were struck by bullets. Y.S.R. was struck in the head and was “full of blood.” Tr. p. 72. The left lobe of Y.S.R.’s brain was “extensively injured [and] there was brain coming out everywhere.” Tr. p. 97. A “large volume of [Y.S.R.’s] brain tissue” was destroyed by the gunshot, and a doctor had to

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<sup>1</sup> Ind. Code § 35-42-2-1.5 (2009).

<sup>2</sup> Ind. Code § 35-42-2-1 (2009).

<sup>3</sup> Ind. Code § 35-44-3-3 (2009).

<sup>4</sup> Ind. Code § 35-47-2-23 (2009).

remove a “fair amount of brain [and] even further portions of dead and necrotic brain[.]” Tr. p. 98-99. Although Y.S.R. survived, “she was at extremely high risk of death.” Tr. p. 100. Y.S.R. spent a week in the hospital, has endured two surgeries, has undergone one month of speech therapy, and lost a large section of her hair due to scarring. Vazquez was shot in the leg, resulting in a wound that required surgery and the installation of a metal plate and screws. Vazquez suffered “[u]nbearable pain that [she] would not wish on anybody[.]” missed eight months of work following her injury, and has been told by doctors that her leg will never fully heal. Tr. p. 154. Rodriguez was “graze[d]” on the leg. Tr. p. 73.

When Lawrence Police Officer Ryan Romeril arrived, he saw Ponce in the parking lot being chased by a group of individuals. Officer Romeril told Ponce to drop his weapon, which prompted Ponce to place his handgun on the ground. Ponce, however, did not stop running, and Officer Romeril gave chase. Officer Romeril eventually caught Ponce and managed to “take him to the ground[.]” but Ponce kept his hands underneath his body and did not comply with Officer Romeril’s instructions to put his hands behind his back. Tr. p. 14. Ponce eventually put his hands behind his back after Officer Romeril stunned him five times in the back with a taser.

On July 29, 2009, the State charged Ponce with two counts of Class B felony aggravated battery, Class C felony battery, Class A misdemeanor resisting law enforcement, and Class A misdemeanor carrying a handgun without a license. In a separate charging information filed the same day, the State charged Ponce with Class C felony carrying a handgun without a license by virtue of a prior conviction under the

same section. On July 21, 2010, the trial court found Ponce guilty of two counts of aggravated battery, battery, resisting law enforcement, and Class A misdemeanor carrying a handgun without a license, and Ponce then pled guilty to Class C felony carrying a handgun without a license. The trial court sentenced Ponce to twenty years of incarceration for each aggravated battery conviction, eight years for battery, one year for resisting law enforcement, and eight years for carrying a handgun without a license. The twenty-year sentences for both aggravated battery convictions and the eight-year sentence for the battery conviction were ordered to be served consecutive to one another, with the sentences for resisting law enforcement and carrying a handgun without a license to be served concurrent to one another and the other sentences, for an aggregate sentence of forty-eight years. The trial court found Ponce's criminal history, the fact that the instant crimes were committed when he was on probation, and the circumstances of his crimes to be aggravating and found no mitigating circumstances.

## **DISCUSSION AND DECISION**

### **A. Whether the Trial Court Abused its Discretion in Sentencing Ponce**

Under our current sentencing scheme, “the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.” *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2008). We review the sentence for an abuse of discretion. *Id.* An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” *Id.*

A trial court abuses its discretion if it (1) fails “to enter a sentencing statement at all[,]” (2) enters “a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons,” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration,” or (4) considers reasons that “are improper as a matter of law.” *Id.* at 490-91. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Id.* at 491. However, under the new statutory scheme, 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.* We may review both oral and written statements in order to identify the findings of the trial court. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

### **1. Aggravating Circumstances**

Ponce contends that the trial court abused its discretion in identifying material elements of his crimes as aggravating circumstances. While it is well-settled that a trial court may not use elements of a crime to enhance a sentence, *see Johnson v. State*, 687 N.E.2d 345, 347 (Ind. 1997), the trial court may find that the particularized circumstances of a crime were aggravating. *Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002).

Ponce contends that the trial court improperly used his prior conviction for carrying a handgun without a license as an aggravating circumstance when it had been used to enhance his current conviction for the same thing from a Class A misdemeanor to

a Class C felony. We conclude that any error the trial court may have committed in this regard was harmless. *See Rios v. State*, 930 N.E.2d 664, 669 (Ind. Ct. App. 2010) (“When we find an irregularity in the trial court’s sentencing decision, we may remand to the trial court for a clarification or a new sentencing determination, or affirm the sentence if the error is harmless, or impose a proper sentence.”). Ponce’s prior conviction was used to enhance only his carrying a handgun without a license conviction, so the improper finding that it was an aggravating circumstance is limited to that conviction. Because the sentence for carrying a handgun without a license was ordered to be served concurrently with a longer sentence, it had no effect on Ponce’s aggregate sentence, and it would therefore not help him in any way to reduce it. As such, we need not address Ponce’s claim in this regard further.

Ponce also contends that some of the facts and circumstances identified by the trial court as aggravating were material elements of various crimes of which he was convicted. Ponce challenges the trial court’s reliance on the fact that one of his aggravated batteries very nearly resulted in Y.S.R.’s death, that his other aggravated battery caused Vazquez and her family prolonged suffering, and that his battery injured Y.S.R.’s mother Rodriguez. The trial identified the following facts and circumstances as aggravating at sentencing:

The circumstances of this crime involving the near death of a two-year old baby, the fact that friends and family of the wedding couple were there to celebrate a joyful event that ended up, due to Mr. Ponce’s actions, to end up in total absolute tragedy, with two parents wondering for days whether or not their baby was going to live; the mother of this child having been injured by the bullets shot by Mr. Ponce from his weapon; and the young

woman whose profession and family suffered through what she had to endure.

Tr. p. 327.

As Ponce was charged, the State had to prove that he committed aggravated battery against the two-year-old Y.S.R. by creating a substantial risk of death. Even though Y.S.R. was struck in the head, Ponce placed her at substantial risk of death by firing into the crowd in the first place, and evidence of her head injuries was far beyond what the State was required to prove. In any event, the trial court specifically focused on the fact that Y.S.R. was a “two-year old baby” when she was shot, and the victim’s youth is a valid aggravating circumstance pursuant to Indiana Code section 35-38-1-7.1(a)(3) (2009). Tr. p. 327.

As for Vazquez, the trial court noted the “young woman whose profession and family suffered through what she had to endure.” Tr. p. 327. As Ponce was charged, the State was required to prove that Vazquez “suffered a protracted loss or impairment of the function of a bodily member[.]” Appellant’s App. p. 27. The State’s proof, however, went far beyond this. The State introduced evidence that Vazquez missed eight months of work due to her injury and suffered unbearable pain, neither of which is an inevitable result of a protracted loss or impairment of the function of a bodily member. Moreover, the State produced evidence that Vazquez’s impairment would be *permanent*, when the statute only requires proof that it be protracted.

Finally, Ponce contends that the trial court abused its discretion in noting among the facts and circumstances of his crimes that Rodriguez was shot, in that the shooting

was the touching element of his battery of her. As we read the record, however, it is clear that the trial court was considering this, along with the fact that Y.S.L. was another victim, as compounding the overall effect on Rodriguez's immediate family. The trial court noted that Rodriguez and her husband did not know at first whether Y.S.L. would survive, and immediately noted that Rodriguez also had to contend with having been shot as well. The trial court did not abuse its discretion in finding aggravating circumstances.

## 2. Mitigating Circumstances

Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. *Id.* However, if the record clearly supports a significant mitigating circumstance not found by the trial court, we are left with the reasonable belief that the trial court improperly overlooked the circumstance. *Moyer v. State*, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003).

Ponce contends that the trial court abused its discretion in failing to find, as mitigating circumstances, his remorse, his troubled childhood, his employment history, and his lack of significant criminal history. As for Ponce's claim of remorse, "substantial deference must be given to a trial court's evaluation of remorse." *Corrales v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). "The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best

position to determine whether the remorse is genuine.” *Id.* The trial court was under no obligation to credit Ponce’s declarations of remorse, and did not.

Moreover, “[e]vidence of a troubled childhood does not require the trial court to find it to be a mitigating circumstance.” *Page v. State*, 615 N.E.2d 894, 896 (Ind. 1993). In any event, evidence that Ponce’s childhood was especially troubled is scant; indeed, the record indicates that Ponce was raised by both parents and even described his childhood as “excellent.” PSI p. 5. As for Ponce’s work history, he points to nothing other than his claim that he had been employed for the previous five years. Without more, Ponce has failed to produce a record that convinces us that the trial court abused its discretion in this regard. *See, e.g., Bennett v. State*, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (concluding that trial court did not abuse its discretion in failing to find work history mitigating where defendant “did not present a specific work history, performance reviews, or attendance records”), *trans. denied*.

Finally, regarding Ponce’s criminal history, we cannot say the trial court abused its discretion in not finding it to be mitigating. Although a lack of criminal history may be considered a mitigating circumstance, *see* Ind. Code § 35-38-1-7.1(b)(6) (2009), “[t]rial courts are not required to give significant weight to a defendant’s lack of criminal history,” especially “when a defendant’s record, while felony-free, is blemished.” *Stout v. State*, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005), *trans. denied*. The record indicates that although Ponce had only one prior conviction, it was for carrying a handgun without a license, and almost all of his instant convictions involved the use of a firearm. Moreover, Ponce committed the instant crimes while on probation for the previous

conviction. Under the circumstances, we do not believe that the trial court was required to give Ponce's minimal criminal history mitigating weight.

### **B. Whether Ponce's Sentence is Appropriate**

We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006) (citations and quotation marks omitted), *trans. denied*.

The nature of Ponce's offenses was egregious, to say the least. Ponce, apparently as a result of his brother's minor altercation with Nazario, fired three shots into the crowd during a wedding reception, striking three and gravely injuring Y.S.R. We see nothing in the record that even begins to justify or explain Ponce's wanton act of violence. Moreover, the effect on Ponce's victims has been devastating. Y.S.R. is lucky to be alive after suffering a head wound that resulted in the immediate removal of a large portion of her brain and has already endured two surgeries and undergone therapy. Vazquez had a metal plate installed in her leg and missed eight months of work. For a while following the shooting, Vazquez could not bathe herself, use the bathroom, or play with, take care of, or cook for her three children, and her leg will never be the same. Even Rodriguez, whose only physical injury was a graze wound, had to suffer the anguish of not knowing

whether Y.S.R. would survive and still suffers what may be lesser, but no less real, heartbreaks, such as not being able to braid Y.S.R.'s hair for her due to her hair loss. The egregious nature of Ponce's offenses fully justifies his enhanced sentence.

As for Ponce's character, we acknowledge his minimal prior criminal history, with only one conviction for carrying a handgun without a license in 2006. In light of other considerations, however, we cannot say that this renders Ponce's sentence inappropriately harsh. First, Ponce was only twenty-one when he committed the instant crimes, so it is not altogether surprising that he would not have had an extensive criminal record. Second, we note the alarmingly fast progression Ponce made from carrying a handgun without a license to firing into a crowd of unarmed persons, an act that easily could have resulted in multiple deaths. That Ponce's reaction would be so disproportionately violent to the provocation involved certainly does not speak well of his character and justifies a lengthy incarceration. Ponce has failed to establish that his forty-eight-year sentence is inappropriate.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.