ATTORNEY FOR APPELLANT:

ANN M. SUTTON
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

MARA MCCABE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANDREW ROWE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-900
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark Rogers, Judge
Cause No. 49G16-0607-FD-118744

JULY 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Andrew Rowe ("Rowe") is appealing his convictions after a bench trial of the Class A misdemeanor of battery, and a second count of the Class A misdemeanor of battery which was enhanced to a Class D felony. Rowe was sentenced to 730 days, with 168 days executed, and the remainder on probation.

We affirm.

ISSUE

Rowe states the issue as:

The trial court sentenced the defendant to two years for his D felony conviction where the defendant had not been convicted of a crime for the first 46 years of his life. Did the trial court fail to find and properly credit this mitigating circumstances before pronouncing sentence?

FACTS

Rowe had a relationship with Darlene Mosley. In September of 2005 Rowe was convicted of a battery on Darlene Mosley, placed on probation for a year, and was ordered to have no contact with Mosley. In June of 2006 Rowe again struck Mosley as she was sleeping.

At sentencing, Rowe made a brief statement that had nothing to do with his sentence. His attorney, by way of argument, discussed the fact that Rowe, for the first 46 years of his life, was a law-abiding citizen.[1]

---

[1] It is axiomatic that arguments of counsel are not evidence. *Wilkerson v. State*, 728 N.E.2d 239, 244 (Ind. Ct. App. 2000).

The trial court found that there were no mitigating circumstances and as an aggravating circumstance that Rowe was on probation at the time of his second attack on Mosley.

DISCUSSION AND DECISION

Rowe argues that the trial court ignored Ind. Code §35-38-7.1(b)(6) as a mitigating factor. That provision says that if the person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before the commission of the crime the trial court may consider that as a mitigating circumstance. The trial court may consider as an aggravating circumstance the fact that a person has recently violated the conditions of any probation. Ind. Code §35-38-1-7.1 (a)(6).

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Burgess v. State*, 854 N.E.2d 35, 39 (Ind. Ct. App. 2006). The trial court is not required to give the same weight as the defendant does to mitigating evidence. *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.* Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. *Id.*

We believe that the record is clear the trial court did not ignore Rowe's contention that his prior non-existent criminal record was a mitigating circumstance, but determined that it was not significant.

CONCLUSION

The trial court did not fail to find mitigating circumstances in sentencing Rowe. Judgment affirmed.

KIRSCH, J., concurs.

SULLIVAN, J., concurs in result.