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.

ATTORNEY FOR APPELLANT:

LORINDA MEIER YOUNGCOURT
Huron, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL LEE GREEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0703-CR-137
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0208-FA-4

November 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this appeal following remand by this court for resentencing, Appellant-Defendant Michael Green, who was convicted of Class A felony Attempted Robbery (Count I),[1] Class A felony Burglary (Count III),[2] and Class A felony Conspiracy to Commit Burglary (Count IV),[3] challenges the trial court's aggregate sentence of seventy-eight years. Green's sole claim on appeal is that the trial court erred in considering his lack of remorse as an aggravator and that, given this claimed error, we should reduce his sentence pursuant to our authority under Indiana Appellate Rule 7(B). We affirm.

FACTS AND PROCEDURAL HISTORY

This court's opinion in Green's first appeal is instructive as to the underlying facts and procedural history in this case:

> In *Fields v. State*, 825 N.E.2d 841, 843 (Ind. Ct. App. 2005), *trans. denied*, a case involving Green's co-defendant, we dealt with the facts surrounding the case at hand as follows:
>
> > Prior to August 2, 2002, Fields, Michael Green, Nathan Haas, and Brian Allen agreed to steal money they believed they would find in the home of Larry and Judy Pohlgeers. Green and Haas had allegedly burglarized the same house in 2000. On the evening of August 5, 2002, Fields and Green broke into the house while the other two stood watch outside. Fields beat Mr. Pohlgeers with a bicycle seat post and Green beat Mrs. Pohlgeers with a pipe.
>
> The specific factual bases which were entered during Green's plea agreement hearing indicated that, with respect to Count I, attempted robbery, on August 5, 2002, Green aided David Fields, who knowingly attempted to take property from one Larry Pohlgeers by searching his dresser drawer and striking him with a pipe resulting in serious bodily injury to Pohlgeers including pain, lacerations, and contusions. With

[1] Ind. Code §§ 35-42-5-1; 35-41-5-1; 35-41-2-4 (2002).
[2] Ind. Code §§35-43-2-1(2) (2002); 35-41-2-4.
[3] Ind. Code §§35-43-2-1(2); 35-41-5-2 (2002).

respect to Count II, conspiracy to commit robbery, the factual basis indicated that on August 5, 2002, Green agreed with Fields and others to commit a robbery and that Fields committed the overt act of searching a dresser drawer and striking Mr. Pohlgeers, resulting in serious bodily injury to Pohlgeers in furtherance of the agreement. With respect to Count III, burglary, on August 5, 2002, the factual basis stated that Green broke and entered the residence of Judith Pohlgeers with the intent to commit the felony of theft which resulted in the bodily injury of pain, multiple contusions and lacerations to Mrs. Pohlgeers. With respect to Count IV, conspiracy to commit burglary, the factual basis indicated that between August 2 and August 5, 2002, Green agreed with Fields and others to commit the felony of burglary, which resulted in bodily injury, and performed the overt act of "scop[ing]" out the Pohlgeerses' residence on August 2 and August 4, and on August 5, by Fields's bringing a pipe and/or hatchet to the Pohlgeerses' residence and by Green's and Fields's breaking and entering the Pohlgeerses' residence with the intent to commit a theft there which resulted in bodily injury to Mrs. Pohlgeers. Tr. at 12.

***

At a September 25, 2003 guilty plea hearing, Green pleaded guilty to attempted robbery, conspiracy to commit robbery, burglary, and conspiracy to commit burglary, all as Class A felonies.

During a December 19, 2003 sentencing hearing, the trial court found the following as aggravators: the age of the victims; the permanent injuries and disfigurement suffered by the victims; Green's prior criminal record; the risk of Green committing further criminal conduct; Green's lack of remorse; and the facts surrounding the commission of the crime itself, which involved "[p]lanning and scheming, lying in wait," aborting preliminary attempts, using disguises and latex gloves, and preparing weapons. Tr. at 165.

***

The court then sentenced Green to a fifty-year sentence on Count I, attempted robbery, another fifty-year sentence on Count III, burglary, and a third fifty-year sentence on Count IV, conspiracy to commit burglary. The court suspended fifteen years of each fifty-year sentence. It further ordered that the sentences run consecutively, for an aggregate sentence of 150 years with forty-five years suspended.

***

> On July 15, 2005, Green filed a belated notice of appeal under Indiana Post-Conviction Rule 2(1).

Green v. State, 850 N.E.2d 977, 980-82 (Ind. Ct. App. 2006), *affirmed in part and vacated in part by Green v. State*, 856 N.E.2d 703 (Ind. 2006).[4]

In considering the issues raised in Green's first appeal, one of which was a challenge to the various aggravators considered by the trial court, this court determined that the trial court's consideration of Green's lack of remorse as a separate aggravator violated *Blakely v. Washington*, 542 U.S. 296 (2004). For this and other reasons, we remanded to the trial court for resentencing.

In resentencing Green, the trial court stated the following with respect to Green's lack of remorse:

> The other thing that the Court has a vivid recollection of at that sentencing was the instance of the lack of remorse. The observations made by the Court at sentencing and also the defendant's claim of being sorry but then also almost in the same breath still trying to shirk responsibility for the crime and claiming intimidation by Mr. Fields as what caused this to happen but not taking responsibility for the fact that Mr. Green was the source of information as to the money that the Pohlgeers kept in their household, where they kept the money in their household and that Mr. Green was an active participant in this particular crime.

Sentencing Tr. p. 23. The court subsequently made an additional reference to its original observations regarding Green's lack of remorse. The court then re-sentenced Green to two concurrent forty-year terms, with seven years suspended on each, for his burglary and conspiracy-to-commit-burglary convictions in Counts III and IV, to be served consecutively with a thirty-eight-year sentence for his attempted robbery conviction in

[4] That part of *Green* which was vacated by the Indiana Supreme Court in *Green v. State*, 856 N.E.2d 703 (Ind. 2006) is not relevant to this appeal.

Count I, also with seven years suspended, for an aggregate sentence of seventy-eight years. Green filed his notice of appeal on February 26, 2007.

DISCUSSION AND DECISION

Green claims upon appeal that the trial court erred in resentencing him by considering his lack of remorse, which Green claims, pursuant to this court's opinion in his first appeal, violated *Blakely*. Green acknowledges there were other permissible aggravators but requests this court, in light of such alleged error, to revise his sentence pursuant to our authority under Indiana Appellate Rule 7(B).

Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court 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."

As Green's claim of error in his belated appeal rests upon the holding in *Blakely*, we find it unnecessary to consider his claim on the merits. Green was initially sentenced on December 19, 2003. *Blakely* was decided on June 24, 2004. Green initiated his belated appeal on July 15, 2005. In *Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007), the Indiana Supreme Court held that belated appeals of sentences entered prior to *Blakely* were not subject to the *Blakely* holding. While this court held to the contrary in Green's

first appeal, the Supreme Court has since held otherwise. *See Gutermuth*, 868 N.E.2d at 428. Accordingly, we decline to entertain Green's claim of error in his belated appeal based upon the holding of *Blakely*.

Having found that Green may not claim the benefit of the *Blakely* holding in his belated appeal, we conclude his challenge on appeal is without merit.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.