ATTORNEY FOR APPELLANT:

STAN G. WYRICK
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GEORGE V. HARKER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0705-CR-287
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Judge
Cause No. 18C03-0701-FB-1

December 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

George V. Harker, Jr. challenges his sentence, after a guilty plea, of two counts of class C felony battery resulting in bodily injury.

We affirm.

ISSUES

1. Whether the trial court overlooked mitigating circumstances.
2. Whether Harker's sentence is inappropriate.

FACTS

Harker and his wife, Regina, married on September 21, 2006, and resided in Muncie, Indiana. On December 11, 2006, Harker and Regina went to a local bar and consumed alcohol. Subsequently, they returned to their home and engaged in sexual activity. The act was initially consensual in nature; however, Regina protested when Harker inserted his fist in her vagina, causing her great pain. Regina "told [Harker] he was hurting [her] and . . . asked him to stop[.]" (Tr. 23). Harker ignored Regina's protests. A short time later, Harker inserted a cucumber into Regina's rectum, causing her further pain. Regina sought medical attention at the emergency room of Ball Memorial Hospital, where physicians determined that she had sustained "rips and tears" to her vaginal and rectal tissue. (Tr. 22).

On January 3, 2007, the State charged Harker with rape and criminal deviate conduct as class B felonies. The parties entered into a plea agreement, under which the State agreed dismiss the initial charges provided that Harker agreed to plead guilty to two counts of class C felony battery resulting in serious bodily injury. On April 19, 2007, the

parties tendered their plea agreement to the trial court and Harker pled guilty. The trial court took Harker's guilty plea under advisement. On May 14, 2007, the trial court conducted a sentencing hearing. In imposing its sentence, the trial court found the following mitigating and aggravating circumstances:

> Mitigating Circumstances:
> 1. [Harker] did enter guilty pleas in this matter and accepted responsibility for his actions.
> 2. [Harker] still has support from family and friends which should aid in rehabilitation.
> 3. [Harker] did complete his G.E.D.
>
> Aggravating Circumstances:
> 1. [Harker] has a long history of contact with the [criminal justice] system, both as a juvenile and as an adult: Three (3) Felony convictions consisting of Receiving Stolen Property, Criminal Recklessness, and Burglary; and four (4) Misdemeanor convictions.
> 2. Prior attempts at correctional treatment have failed.
> 3. Facts of the attack are particularly disturbing.
> 4. [Harker] was in a position of trust with [Regina] which was violated.

Order 3-4. The trial court then imposed two concurrent six-year sentences to be served in the Department of Correction. Harker now appeals.

Additional facts will be provided below.

DECISION

Harker argues that "the trial court did not identify all mitigating factors in imposing his sentence."[1] Harker's Br. 7. He argues further that his sentence is

[1] Harker also argues that the trial court failed to properly weigh the aggravating and mitigating circumstances; however, this claim is not available for appellate review. In support, we note our Supreme Court's holding that

> [b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely*

inappropriate in light of the nature of the offense and his character. Sentencing decisions are within the sound discretion of the trial court. *Edwards v. State,* 842 N.E.2d 849, 854 (Ind. Ct. App. 2006). These decisions are afforded great deference on appeal and will only be reversed for an abuse of discretion. *Id*.

We first address Harker's claim that in imposing its sentence, the trial court overlooked his expression of remorse and plans to pursue higher education as mitigating circumstances. The finding of mitigating circumstances is not mandatory and rests within the discretion of the trial court. *Niemeyer v. State,* 865 N.E.2d 674, 676 (Ind. Ct. App. 2007). The trial court is not required to find the mitigating circumstances that a defendant offers; nor is the trial court required to explain why it has chosen not to make such a finding. *Id*. However, the failure of a trial court to find a significant mitigating circumstance clearly supported by the record may imply that the sentencing court overlooked or did not properly consider the circumstance. *Rawson v. State,* 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007).

At sentencing, the defense advanced a single mitigating circumstance -- Regina's alleged "facilitat[ion]" of Harker's sexual battery. (Tr. 30). Defense counsel stated,

> As a mitigator, Judge, we believe that the alleged victim here did somewhat facilitate the offense. * * * The offense did occur during the marital relationship, it did occur involving a sexual practice, it did occur using foreign objects in their sexual activity. The victim . . . did admit that they had done such practices in the past, and that the victim and [Harker] had consumed alcohol on the night in question.

> statutory regime, a trial court cannot now be said to have abused is discretion in failing to 'properly weigh' [aggravating and mitigating] factors.

Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). Thus, to the extent that Harker challenges the trial court's weighing of the mitigating and aggravating circumstances, he is not entitled to relief.

(Tr. 30-31). If a 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." *Creekmore v. State*, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006). Therefore, inasmuch as Harker failed to advance as mitigating his expression of remorse and his plans to pursue higher education, those claims are now precluded from review.

Next, Baker argues that his sentence is inappropriate in light of the nature of the offense and his character. Pursuant to Indiana Appellate Rule 7(B), 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. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007).

With regard to the nature of the offense, it is undisputed that over Regina's protests, Harker inserted his fist into her vagina and a cucumber into her rectum. His actions caused Regina to suffer extreme pain and to require emergency treatment for lacerations to her vaginal and rectal tissue.[2] Harker committed these acts of sexual battery on his wife, thereby violating his position of trust.

---

[2] For approximately a month and a half after Harker's crimes, Regina "had problems with [her] stomach, and [her] lower organs hurt." (Tr. 23). At the time of the sentencing hearing, which occurred five months after the underlying crimes, Regina still required pain and anxiety medication for her injuries and mental trauma.

As regards Harker's character, we find the arguments contained in his brief to be instructive. At sentencing, Harker's counsel argued that Regina "did somewhat facilitate the offense." (Tr. 30). In his brief, Harker argues in the same vein, asserting that his sentence is inappropriate for the following reasons:

> [T]his offense occurred in the marital bedroom. It did not threaten harm to multiple victims . . . .
>
> The sexual activity which precipitated the offense was originally consensual. Harker's delay in terminating the objectionable activity could well be caused by the moment of ardor and by the alcohol which had earlier been consumed.
>
> Harker does not assess responsibility of the offense on his wife. It should be noted, however, that she also had been consuming alcohol . . . and, according to Harker, the parties engaged in similar unusual sexual activities in the past.
>
> Unlike the Defendant in the case of *Fuller v. State*, 852 N.E.2d 22 (Ind. Ct. App. 2006), Harker did not laugh and boast of this wrongdoing. Rather, as noted, [he] expressed remorse for his behavior.
>
> Harker did not commit the offense while armed with a knife, gun or similar weapon. Harker did not commit the offense in a public place.

Harker's Br. 10-11. The foregoing arguments evince a disturbing tendency to shift blame for Harker's actions to Regina and to attempt to excuse his crimes of sexual battery. Moreover, we are appalled by Harker's argument that he is entitled to a reduction in his sentence simply because he did not threaten harm to multiple people, did not commit the crime while armed, and somehow refrained from mocking Regina. Like the trial court before us, we find the facts surrounding Harker's attack on Regina to be "particularly disturbing," especially given Harker's position of trust with regard to Regina. Order 4.

In addition, as the trial court noted at the sentencing hearing, Harker has an extensive criminal history,[3] and "[p]rior attempts at correctional treatment have failed." Order 4. His juvenile record includes adjudications for two counts of class A misdemeanor criminal conversion; class B misdemeanor intimidation; class C felony burglary; class D felony theft; class C felony forgery, and class D felony receiving stolen property. As an adult, Harker has been convicted of four misdemeanor and three felonies, including class C misdemeanor failure to return to the scene after an accident; two counts of class B misdemeanor criminal mischief; class D felony receiving stolen property; class D felony criminal recklessness; and class C felony burglary. Worse yet, Harker was on parole from the Department of Correction when he committed the underlying crimes.

The evidence firmly established that Harker committed two acts of sexual battery on Regina, disregarding her protests and causing her extreme pain and lasting physical and mental trauma. Harker's considerable criminal history -- a dubious feat for someone so young -- further demonstrates his wanton disregard of state laws and his disinclination toward rejecting criminal behavior. In light of the foregoing and after due consideration of the trial court's decision, we conclude that Harker's enhanced sentence of six years is not inappropriate in light of the nature of his offense and his character.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.

---

[3] Harker was thirty years-old at the time of the sentencing hearing.