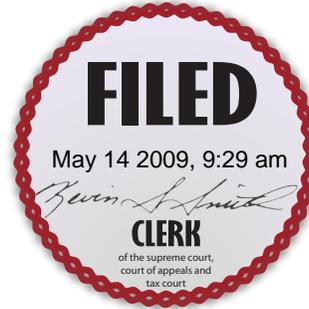


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**IN THE
COURT OF APPEALS OF INDIANA**

DAMON B. CATT,)

Appellant-Defendant,)

vs.)

No. 42A01-0810-CR-491

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-0711-MR-078

May 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Damon Catt was convicted of murder and sentenced to sixty-three years in prison. On appeal, Catt raises three issues for our review, which we expand and restate as: 1) whether the trial court abused its discretion when it admitted an autopsy photograph into evidence; 2) whether the trial court abused its discretion when it refused to give Catt's tendered instructions on voluntary manslaughter and sudden heat; 3) whether the trial court properly sentenced Catt; and 4) whether the sentence is inappropriate in light of the nature of his offense and his character. Concluding the admission of the autopsy photograph was harmless error, there is no appreciable evidence of sudden heat to support a voluntary manslaughter instruction, the trial court properly sentenced Catt and his sentence is not inappropriate, we affirm.

Facts and Procedural History

Catt and Allison Rinsch lived together and were involved romantically. On November 16, 2007, after having a fight with Rinsch, Catt packed his belongings and moved out of the apartment. Catt went to stay temporarily with his estranged wife, Monique Catt, and her boyfriend, Shaye Frye.¹ Later that night, Catt called Heather Jackson and told her that Rinsch and Jackson's boyfriend, Andrew Ricketts, were having sex. Catt then picked up Jackson and they went to Rinsch's apartment to confront her. Catt initially waited outside while Jackson and Rinsch talked but later came into the apartment. At that time, Chris Lockhart, who had been in the apartment with Rinsch, left the apartment and Catt and Rinsch began arguing. Next, Catt left the apartment and

¹ Although Catt and Monique have been physically separated for many years, they have never actually obtained a divorce. However, Catt apparently has an amicable relationship with both Monique and her boyfriend.

began banging on the door of another apartment downstairs apparently looking for Lockhart. After he was informed that Lockhart was not in the apartment, Catt went back to Rinsch's apartment and they continued arguing.

Subsequently, Catt left Rinsch's apartment, went and purchased a 12-pack of beer, and continued drinking until morning. Catt returned to Monique's home around 7:00 a.m. on November 17, 2007 and went to bed. Around 1:30 p.m. Catt received a call from Ricketts, who told Catt that he had seen Rinsch and Lockhart engaging in oral sex in Rinsch's truck. Catt yelled at and threatened Ricketts and, after hanging up the phone, began pacing around the house and told Frye he was "pissed." Transcript at 1131. About twenty to thirty minutes later, Catt and Frye went looking for Lockhart and then went back to Rinsch's apartment. Catt went into Rinsch's apartment. Around 2:30, a neighbor heard an argument and looked outside to see Rinsch standing next to her vehicle crying and Catt walking away saying, "I didn't touch you, Allison." *Id.* at 881. Catt had taken Rinsch's truck keys and cell phone. Rinsch called the police, who responded to her apartment and gave Rinsch some tips about securing her front door.

Catt returned to Monique's home again but parked his car at a nearby house in case the police were looking for him. Catt again began pacing around the house and the front porch and told Monique, "I'm going to kill her." *Id.* at 1048. After asking if Frye had a knife, Catt took a utility knife from Frye's tools. Catt and Frye then went to a CVS pharmacy and purchased cigarettes, lighter fluid, and Sudafed. Around 3:18 p.m., Catt called Amber VanVleet, a neighbor in the apartment complex, to ask if Rinsch was home. Afterwards, Catt returned to Rinsch's apartment and Catt told Frye to drive his car back

to Monique's house. VanVleet, and other tenants, saw Catt walking towards Rinsch's apartment.

Shortly thereafter, VanVleet heard Rinsch scream and ran up to her apartment. VanVleet saw Rinsch lying in the hallway with her hands around her throat gasping for air. VanVleet went to check on Rinsch and then saw Catt standing in the bathroom. VanVleet told Catt that the police were coming and he should leave, but Catt told VanVleet to "get out of here." Id. at 854. As VanVleet left the apartment to be sure the police had been called, she turned around to see Catt pick Rinsch up off the floor by her neck and carry her into the bedroom. When VanVleet returned to the apartment a short time later, she saw Catt coming out of the bedroom. "He had blood all over his hands and all over his sleeves and he goes, he said, call the cops, I killed the bitch. She's dead and just walked out." Id. at 856. VanVleet ran to Rinsch, who was still breathing, but was "gurgling" and "choking on her blood." Id. at 856. A bloody knife² was on the floor above Rinsch's head.

Catt walked out of Rinsch's apartment, stood on the landing, and smoked a cigarette. When asked by neighbors what he had done, Catt responded, "I killed her." Id. at 883, 928. The police arrived, and as an officer approached Catt, he put his hands in the air and said, "It's me." Id. at 987. When the ambulance arrived, Rinsch was no longer breathing and did not have a pulse. She was pronounced dead at the emergency room. The emergency room doctor concluded that Rinsch had bled to death as a result of the

² The knife Catt used to kill Rinsch was not the utility knife he got from Frye's tools; rather, the evidence indicates that at some point during the attack, Catt went into the kitchen and retrieved a large kitchen knife, which he used for the murder.

massive wounds to her neck. A couple of days later, Catt confessed to the killing in a statement to police.

The State charged Catt with murder on November 27, 2007. A jury trial was held from May 5-12, 2008, after which the jury found Catt guilty. During the trial, Catt's counsel objected to the admission of an autopsy photo depicting an internal blunt-force injury to Rinsch's head. The photo showed Rinsch's skull with the skin pulled away to reveal the bruising underneath the skin. Catt argued that the photo was prejudicial because it was unduly gruesome and because the injury was not the cause of death. The trial court admitted the photo over Catt's objection.

Prior to the trial, Catt submitted proposed instructions regarding voluntary manslaughter and the definition of sudden heat. At the close of the State's evidence and at the close of his defense, Catt argued for the inclusion of the instructions. However, the trial court refused to give the instructions finding a "lack of a serious evidentiary dispute" regarding the presence of sudden heat. *Id.* at 1677.

After the trial, the trial court held a sentencing hearing. Following the hearing, the trial court found Catt's criminal history and that Catt violated the conditions of his pre-trial release for another pending felony charge as aggravating circumstances. The trial court did not find any mitigating circumstances. The trial court then sentenced Catt to "the presumptive sentence of 55 years plus an additional sentence of eight years for aggravating circumstances, for a total of 63 years of incarceration." *Id.* at 1794. Catt now appeals.

Discussion and Decision

I. Admission of Autopsy Photograph

Catt argues that the trial court improperly admitted an autopsy photo, which showed the victim's skull with the skin and hair peeled back to display an internal bruise. "The admission of photographic evidence is within the sound discretion of the trial court." Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004). Therefore, we will review the admission of photographs only for an abuse of discretion. Id. Generally, autopsy photos are inadmissible if they show the body in an altered condition. Allen v. State, 686 N.E.2d 760, 776 (Ind. 1997), cert. denied, 525 U.S. 1073 (1999). The reason is that such photos "may impute the handiwork of the physician to the accused assailant and thereby render the defendant responsible in the minds of the jurors for the cuts, incisions, and indignity of an autopsy." Loy v. State, 436 N.E.2d 1125, 1128 (Ind. 1982). However, autopsy photos may be admissible, even when they display the body in an altered condition, if the alteration of the body is necessary to demonstrate the testimony being given. Prewitt v. State, 819 N.E.2d 393, 415 (Ind. Ct. App. 2004).

The physician who conducted the autopsy testified in relation to the photo that the bruise was caused by some blunt force trauma such as being punched or hitting a solid object. The physician further testified that it is a usual practice in performing an autopsy to look beneath the skin to determine the extent of injuries from blunt force trauma.

In Fentress v. State, 702 N.E.2d 721 (Ind. 1998), our supreme court affirmed the admission of similar photographs showing a victim's shattered skull with the skin and hair pulled away from it. The court noted that the pathologist described the procedure

and its outcome to the jury and the State also presented other photos showing the injury prior to the procedure. Id. at 722. The court also noted that the damage to the shattered skull was visible only if the victim's skin was pulled back. Id. Similarly, here the physician testified about the procedure and its necessity in determining the full extent of the blunt force injury and the State presented other photos of the injury prior to the procedure. However, unlike Fentress, the blunt force injury here was not the cause of death. Catt argues that this fact reduces the photo's relevance to the State's case such that its probative value is outweighed by the danger of unfair prejudice.

We agree that these photos have minimal probative value and, therefore, were inadmissible; however, we think their admission was harmless error. See Allen v. State, 686 N.E.2d 760, 776 (Ind. 1997) (slide showing victim's scalp peeled back to display a potentially mortal wound was erroneously admitted, but error was harmless in light of the overwhelming evidence properly admitted to prove the cause of death). In Carrico v. State, 775 N.E.2d 312 (Ind. 2002), our supreme court similarly found minimal probative value in the admission of autopsy photos but found their admission to be harmless error in light of the overwhelming evidence of the defendant's guilt. Three witnesses testified that Carrico admitted killing the victim, Carrico showed witnesses the murder weapon and the bloody money he had taken from the victim, and an eyewitness testified that he watched Carrico kill the victim. Id. at 315. In addition, Carrico revealed his involvement in the killing in a videotaped statement to police, which was played at trial. Id.

Similarly here, Catt admitted to several witnesses that he killed the victim and these witnesses also testified to seeing Catt covered in blood walking out of Rinsch's

apartment. VanVleet saw Rinsch lying on the floor of the hallway gasping for air and clutching her neck. After Catt told VanVleet to get out of the apartment, she saw Catt lift Rinsch up off of the ground by her neck and carry her to the bedroom. Upon her return to the apartment, VanVleet saw Catt walk out of the bedroom covered in blood and heard him say, “call the cops, I killed the bitch.” Tr. at 856. Catt also confessed to killing Rinsch in a videotaped statement to police, which was played at the trial. Therefore, in light of the overwhelming evidence of Catt’s guilt, we hold the admission of the autopsy photo was harmless error.

II. Voluntary Manslaughter Instructions

Catt next argues that the trial court abused its discretion when it refused to give his tendered instructions on voluntary manslaughter and sudden heat. We review a trial court’s refusal to give a tendered voluntary manslaughter instruction based on a lack of evidence of sudden heat for an abuse of discretion. Washington v. State, 808 N.E.2d 617, 626 (Ind. 2004). Voluntary manslaughter is a lesser-included offense to murder. Watts v. State, 885 N.E.2d 1228, 1232 (Ind. 2008). The only distinguishing element is that voluntary manslaughter includes the mitigating factor of sudden heat. Wilson v. State, 697 N.E.2d 466, 474 (Ind. 1998). “An instruction on voluntary manslaughter is supported if there exists evidence of sufficient provocation to induce passion that renders a reasonable person incapable of cool reflection.” Dearman v. State, 743 N.E.2d 757, 760 (Ind. 2001). If “[a]ny appreciable evidence” of sudden heat exists in the record, a trial court should instruct the jury on voluntary manslaughter. Id. However, “if there is no serious evidentiary dispute over sudden heat, it is error for a trial court to instruct a

jury on voluntary manslaughter in addition to murder.” Watts v. State, 885 N.E.2d 1228, 1232 (Ind. 2008).

Catt argues that Ricketts’s phone call informing him that Ricketts had seen Rinsch engaging in oral sex with Lockhart sent Catt into a jealous rage which culminated in him killing Rinsch. The phone call occurred at approximately 1:30 p.m. Catt spent thirty minutes pacing around Monique’s house, and then went looking for Lockhart. After failing to find Lockhart, Catt went to confront Rinsch. However, Catt did not attack Rinsch on this occasion. Instead, he stole her truck keys and cell phone and went back to Monique’s house. There, Catt continued pacing around the house and porch, eventually telling Monique that he was going to kill Rinsch. Catt then asked Frye if he had a knife and took a utility knife from Frye’s tools. Next, Catt went to a CVS drugstore to buy cigarettes, lighter fluid, and Sudafed. Catt phoned one of Rinsch’s neighbors to see if Rinsch was at her apartment. Then, Catt returned a final time to Rinsch’s apartment nearly two hours after he first received the phone call.

After arriving at the apartment complex, Catt told Frye to take his car back to Monique’s house. Catt then broke into Rinsch’s apartment and attacked her. However, Catt did not kill Rinsch in this first attack. When VanVleet entered the apartment, she saw Rinsch lying on the hallway floor holding her neck and gasping for breath. Catt was standing in the bathroom near Rinsch and told VanVleet to leave. As VanVleet left, she saw Catt pick up Rinsch and carry her to the bedroom, where he killed Rinsch. At some point between entering the apartment and killing Rinsch, Catt also went into the kitchen to find the knife he used to kill her.

Under these circumstances, a reasonable person would have had several opportunities to cool down and reflect upon his actions: the two periods spent pacing Monique's house; the period spent looking for Lockhart; the period between the initial trip to Rinsch's apartment and the second trip to Rinsch's apartment; the trip to the drugstore; the period spent walking to the kitchen to find the knife; and the period between the two attacks on Rinsch in the apartment when VanVleet entered the apartment and told Catt the police were on their way. If a sufficient cooling-off period elapsed between the provocation and the homicide, the defendant's claim of sudden heat is negated. Morrison v. State, 588 N.E.2d 527, 531-32 (Ind. Ct. App. 1992). Although Catt points to evidence that he remained angry throughout the entire period between the phone call and the killing, the question is not whether the defendant actually cooled off, but whether an ordinary person would have cooled off under the circumstances. See Harrington v. State, 584 N.E.2d 558, 563 (Ind. 1992) (affirming trial court's instruction to determine whether sufficient time existed for an ordinary person's passions to cool based on court's prior approval of the ordinary person standard) (citing Johnson v. State, 518 N.E.2d 1073 (Ind. 1988)).

In Santana v. State, 688 N.E.2d 1275, 1279 (Ind. Ct. App. 1997), this court held there was no evidence of sudden heat where the defendant, after being provoked to anger, got in his car, travelled to his house, retrieved the gun with which he intended to hurt the victim, and returned and killed the victim approximately thirty minutes later. Similarly here, we find no evidence of sudden heat when nearly two hours elapsed between the provocation and the killing during which Catt made two separate trips to confront Rinsch,

a trip to find Lockhart, and a trip to the drugstore and spent considerable time pacing Monique's house. Therefore, the trial court did not abuse its discretion in refusing to give Catt's proposed instructions on voluntary manslaughter and sudden heat.

III. Propriety of the Sentence

Third, Catt argues that the trial court abused its discretion in sentencing him because it failed to find several mitigating circumstances. We review a trial court's sentencing decision for an abuse of discretion, which occurs only when the trial court's decision is clearly against the logic and effect of the circumstances before the court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. A trial court court may impose "any sentence that is ... authorized by statute ... regardless of the presence or absence of aggravating or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, when imposing a sentence for a felony, a trial court must enter a sentencing statement including reasonably detailed reasons or circumstances for imposing a particular sentence. Anglemyer, 868 N.E.2d at 490. Further, a trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support the reasons; 3) enters a sentencing statement that omits reasons 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.

After the sentencing hearing, the trial court found as aggravating circumstances Catt's criminal history, his repeated violation of work release and probation, and his "succession of battery cases" and "escalating level of aggressive and violent behavior"

culminating in murder. Tr. at 1791-92. The court also found as an aggravating circumstance that Catt was on pre-trial release for other criminal charges when he committed the murder. The trial court stated: “I’ve considered all of the various possible mitigators and I’m finding no basis for mitigation.” Id. at 1793. Catt argues that the trial court erred when it failed to find the following mitigating circumstances: Catt’s remorse; Catt’s immediate surrender to police and subsequent cooperation with the investigation; and that Catt was provoked into committing the murder.

The finding of mitigating factors is discretionary with the trial court. The trial court is not required to find the presence of a mitigating factor. ... Further, the trial court is not required to weigh or credit the mitigating evidence the way the appellant suggests it should be weighed or credited.

Manns v. State, 637 N.E.2d 842, 846 (Ind. Ct. App. 1994) (citations omitted).

A. Remorse

We first note that Catt did not testify or make a statement at his sentencing hearing and, thus, did not personally express any remorse. The trial court heard testimony from family members expressing their belief that Catt feels remorse. Catt also argues that he expressed remorse in his taped statements to police. However, in his audiotaped statement, Catt tries to shift some of the blame for the killing onto Frye because he put the knife into Catt’s hand and dropped him off at Rinsch’s apartment. In light of these facts, we cannot say that the trial court abused its discretion when it refused to find Catt’s remorse as a mitigating circumstance.

B. Cooperation with Police

Police arrived on the scene shortly after Catt had killed Rinsch. When he was arrested, Catt was covered in blood and VanVleet had seen him carry Rinsch into the

bedroom and walk out of the bedroom covered in blood. In addition, Catt told VanVleet that he had killed Rinsch. Had Catt not surrendered to police, he would no doubt have been apprehended in short order and arrested for the murder. Further, although Catt made two separate taped statements to police, in neither statement did he actually confess to the murder or provide significant details of the crime.

Our supreme court has refused to find an abuse of discretion under similar circumstances. See Warlick v. State, 722 N.E.2d 809, 813 (Ind. 2000) (defendant shot victim in plain view of an eyewitness); Battles v. State, 688 N.E.2d 1230, 1237 (Ind. 1997) (“defendant’s eventual capture and arrest were nigh unavoidable, and we cannot say that the trial court abused its discretion in failing to find that his voluntary statement to the police was a mitigating factor entitled to any significant weight”). Similarly here, we cannot say that the trial court abused its discretion in refusing to assign significant weight to Catt’s surrender and statements to police.

C. Provocation

Finally, Catt argues that even if the provocation did not rise to the level of sudden heat sufficient to warrant a voluntary manslaughter instruction, it was at least enough to merit consideration as a mitigating factor. The only provocation that Catt points to is the phone call from Ricketts telling Catt he had seen Rinsch and Lockhart engaging in oral sex. Indiana Code section 35-38-1-7.1(b)(5) allows the trial court to consider that the person acted under “strong provocation” as a mitigating circumstance. The evidence does not support a finding that Catt acted under strong provocation.

There is no direct evidence that Rinsch actually did anything to provoke Catt. Catt had broken up with Rinsch the previous night and moved out. Although the two had argued, there is no evidence that Rinsch threatened to harm or tried to harm Catt. There is no evidence that Rinsch took any action to provoke Catt at the time of the murder. There also is no evidence that Catt saw Rinsch with another man. Rather, Catt argues he was provoked by a telephone call from Ricketts, whom Catt had previously alleged was having sex with Rinsch. Therefore, we cannot say that the trial court abused its discretion in failing to find provocation as a mitigating circumstance. See Ousley v. State, 807 N.E.2d 758, 673 (Ind. Ct. App. 2004) (evidence that victim may have fallen in love with another man and may have hit defendant as they fought over defendant reading victim's diary was not so significant that the trial court was required to believe defendant's crime of cutting victim's throat and shooting her with a shotgun was due mitigating weight as a crime caused by provocation).

Based on the above analysis, we hold that the trial court did not abuse its discretion when it refused to find mitigating circumstances in sentencing Catt.

IV. Appropriateness of the Sentence

Catt's sixty-three year sentence for his murder conviction is eight years above the advisory sentence. See Ind. Code § 35-50-2-3(a). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence 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." Id. When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans.

denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited ... to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). However, the defendant bears the burden to “persuade the appellate court that his ... sentence has met this inappropriate standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A. Nature of the Offense

With respect to the nature of Catt’s crime, we note that the killing was extremely brutal. Catt attacked Rinsch at least twice after he entered her apartment. Initially, Catt choked Rinsch and left her lying on the floor gasping for breath. Catt then went into the kitchen, returned with a butcher knife, picked Rinsch up by her throat, and carried her into the bedroom before killing her. The autopsy revealed that Catt forced the knife completely through Rinsch’s neck severing her carotid artery, jugular vein, esophagus, and wind pipe. In addition, the autopsy revealed saw marks on Rinsch’s vertebrae indicating that Catt had repeatedly thrust into or moved the knife around in the wound. After the attack, Catt left Rinsch still alive, choking on her own blood, and bleeding to death. Although Catt argues that he acted under provocation or sudden heat, as we explained above, we do not find those arguments persuasive. Therefore, Catt’s sentence is not inappropriate in light of the nature of his offense.

B. Character of the Offender

With respect to Catt's character, we note that he has a violent criminal history, including: battery; attempted battery, a Class C felony,³ and resisting/interfering with law enforcement. Catt has been arrested while on probation five times and committed this crime while on pre-trial release after being charged with possession of methamphetamine, a Class D felony, and possession of paraphernalia. Catt has twice been dissatisfactorily discharged from probation and has had parole and a community corrections sentence revoked.

We also point out that, although Catt was enraged by the telephone call from Ricketts, he had multiple opportunities to cool off and could easily have stayed away from Rinsch altogether. Instead, Catt developed an "if I can't have her, then no one can" attitude. See Tr. at 924 ("he said that he was going to be the only one that was with her [Rinsch]"), 925 ("he said, if I can't have her, then I don't ... been nice knowing you."). The fact that Catt took Rinsch's life because of his own jealousy and selfish motives reflects negatively on his character. Therefore, Catt's sentence is not inappropriate in light of his character.

Conclusion

The admission of the autopsy photo at trial was harmless error in light of the overwhelming evidence of Catt's guilt. In addition, the trial court did not abuse its discretion when it refused to give Catt's tendered instructions on voluntary manslaughter and sudden heat or when it sentenced Catt to sixty-three years in prison. Finally, Catt's sentence is not inappropriate in light of the nature of his offense or his character.

³ Catt was charged with attempted murder, but pled guilty to the lesser charge.

Affirmed.

DARDEN, J., and BAILEY, J. concur.