

STATEMENT OF THE CASE

Appellant-Defendant, Malcolm K. Ellis (Ellis), appeals his sentence for Count I, burglary, a Class A felony, Ind. Code § 35-43-2-1(2); Counts II, V-VI, X, robbery, Class B felonies, I.C. §35-42-5-1; Counts III, VII-IX, XI, criminal confinement, Class B felonies, I.C. § 35-42-3-3(b)(3); and Count IV, burglary, a Class B felony, I.C. § 35-4-2-1(1).

We vacate the sentence and remand with instructions.

ISSUES

Ellis raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion by failing to enter a written sentencing statement; and
- (2) Whether his sentence is appropriate in light of his character and the nature of his offenses.

FACTS AND PROCEDURAL HISTORY

At approximately 2:40 a.m. on February 19, 2007, Ellis, then sixteen years old, along with Johnnie Walker (Walker), Austin Knight (Knight), and Antonio Wright (Wright), broke into the apartment of Beatriz Main-Ward (Main-Ward) while armed with firearms, BB guns, and pellet guns. Main-Ward was asleep when the four men entered. The men bound Main-Ward in her bed and gagged her with a rag. Then, they ransacked her apartment, stealing cash and personal property, and shot her goldfish. Before leaving the apartment, one of the men suggested to “shoot her in the pee pee,” so Main-Ward rolled to her side to protect herself as she was shot ten times in the thigh. (Sentencing Transcript p. 20).

Immediately thereafter and while still armed with the weapons, Ellis and the three other men broke into Jose Perfecto-Pasquel's (Jose) apartment where Alejandro Perfecto-Pasquel (Alejandro), Claudia Coronel (Coronel), and Megan Witte (Witte) were visiting. Wright forced Witte to take him to an ATM in order to withdraw cash. While Witte and Wright exited the apartment, they were approached by a police officer. Because Ellis' partner threatened to kill Witte if she said anything to the police officer, she kept quiet. Meanwhile, in the apartment, Coronel was forced to take her clothes off and kneel on the bed. However, the three men fled the apartment when they heard the police sirens approach.

On February 22, 2007, the State filed an Information charging Ellis with one Count of class A felony burglary, one Count of class B felony burglary, four Counts of Class B felony robbery, and five Counts of Class B felony criminal confinement. On July 5, 2007, Ellis entered into a plea agreement with the State in which he agreed to plead guilty to Count I, burglary, a Class A felony, and Count IV, burglary, a Class B felony. In exchange, the State agreed to request the following sentence: forty years with twenty years suspended on Count I and ten years executed with four years probation on Count IV. The parties agreed to run the sentences consecutive. As a condition of the plea agreement, Ellis was required to testify truthfully in any proceedings brought by the State against Walker, Knight, and Wright. However, on March 3, 2008, the plea agreement was rescinded at the State's request because Ellis refused to testify against Wright.

On May 28, 2008, Ellis pled guilty to all Counts without the benefit of a plea agreement. On August 8, 2008, the trial court conducted a sentencing hearing wherein the

trial court imposed Ellis' sentence as follows: thirty years for Count I, burglary, a Class A felony; ten years for Count II, robbery, a Class B felony; Count III, criminal confinement, a Class B felony, merged into Count I; six years on Count IV, robbery, a Class B felony; six years on Count V, robbery, a Class B felony; six years on Count VI, robbery, a Class B felony; Count VII, criminal confinement, a Class B felony, merged into Count V; Count VIII, criminal confinement, a Class B felony, merged into Count VI; six years on Count IX, criminal confinement, a Class B felony; six years on Count X, robbery, a Class B felony; and six years on Count XI, criminal confinement, a Class B felony. Counts I and II were ordered served concurrently with each other, but consecutively to Counts IV, V, VI, IX, X, and XI. Counts IV, V, VI, IX, X, and XI were ordered to be served consecutively to each other and consecutively to Count I. Ellis' aggregate sentence was seventy years.

Ellis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Ellis contends that the trial court abused its discretion by sentencing him to an aggregate sentence of seventy years for his Class A and Class B felonies. A person who commits a class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years. I.C. §35-50-2-4. A person who commits a Class B felony shall be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years. I.C. § 35-50-2-5. Accordingly, on each Count Ellis was either given the advisory sentence or the lowest sentence possible.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *aff'd on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* One way in which a trial court may abuse its discretion is by failing to enter a sentencing statement at all. Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id.* at 490-91.

Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id.* at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then impose any sentence that is authorized by statute and permitted under the Indiana Constitution. *Id.*

This does not mean that criminal defendants have no recourse in challenging sentences they believe are excessive. *Id.* Although a trial court may have acted within its lawful discretion in determining a sentence, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id.* It is on this basis alone that a criminal defendant may now challenge his sentence where the

trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id.*

II. *Abuse of Discretion*

Ellis first argues that the trial court abused its discretion by failing to enter a written sentencing statement, setting forth in detail the reasons for imposing Ellis' sentence. In *Anglemeyer*, our supreme court analyzed the role of the trial court's sentencing statement under the new sentencing statute and "discern[ed] no legislative intent [] to alter fundamentally the trial procedure for sentencing criminal defendants." *Anglemeyer*, 868 N.E.2d at 490. The court concluded that

[U]nder the new statutory regime Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. In order to facilitate its underlying goals, the statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence.

Id. Its primary purpose is to guard against arbitrary and capricious sentencing, and provide a basis for appellate review. *Id.* at 489.

Our review of the sentencing transcript reveals that the trial court provided an oral sentencing statement, elaborating on its reasons for imposing an aggregate sentence of seventy years. In its statement, the trial court clearly identified Ellis' guilty plea, his remorse, his young age, and the undue hardship on his family as mitigating factors, while Ellis' criminal history was regarded as an aggravating factor. During its recitation, the trial court

carefully explained its reasoning for accepting each factor as either a mitigator or aggravator. As such, we find that the trial court issued a proper sentencing statement.

With regard to mitigators, Ellis now claims that the trial court should have added his mental illness. Ellis' presentence investigation report includes a forensic mental health assessment which recommended that because of Ellis' history of head injuries and concussions, further evaluation would be beneficial to determine whether he has an undiagnosed brain injury which could have impacted his level of responsibility at the time of the crimes. The trial court acknowledged the forensic mental health assessment but found "nothing significant in it." (Sent. Tr. p. 36). Ellis' counsel expressly agreed with the trial court. Because Ellis invited the error he now complains of, his argument is not subject to appellate review. *See, e.g., Pinkton v. State*, 786 N.E.2d 796, 798 (Ind. Ct. App. 2003), *trans. denied*.

Additionally, Ellis claims that the trial court, in formulating its mitigators and aggravators, improperly relied upon its sentencing statement made in the trial of Walker, Ellis' co-participant. However, Ellis never objected to the trial court's reference to Walker's sentencing hearing. Therefore, Ellis waived the issue for our review. *See, e.g., Brewer v. State*, 816 N.E.2d 514, 516 (Ind. Ct. App. 2004). Waiver notwithstanding, we find that the trial court did not abuse its discretion. During Ellis' sentencing hearing, the trial court merely mentioned the sentencing statement in Walker's trial to indicate its prior familiarity with the crimes. The trial court then tailored Ellis' sentencing statement to Ellis' particular circumstances.

III. *Appropriateness of the Sentence*

Next, Ellis contends that his sentence is inappropriate in light of his character and nature of the crime. With respect to the nature of the crime, we note that Ellis and his partners not only burglarized two apartments but also terrorized its occupants. They confined Main-Ward to her bed, stole her possessions, and for no apparent reason, shot her repeatedly. Immediately thereafter, they entered Jose's apartment where they subjected Coronel to the extreme indignity of disrobing in front of her friends and strangers. Witte was forced, at gunpoint, to accompany Wright to an ATM and was threatened with death when approached by a police officer.

Turning to Ellis' character, we note his drug use and his criminal history. Ellis began drinking alcohol and smoking marijuana at the age of ten. By the age of sixteen, Ellis had already two juvenile delinquency adjudications. He was found delinquent for molesting a five year old girl when he was thirteen years old, a Class B felony if committed by an adult, and placed on probation. After violating his probation, he was committed to the Indiana Boys School. In addition, he was found delinquent for criminal mischief, a Class A misdemeanor if committed by an adult.

Nevertheless, we are concerned about the effect that a lengthy seventy-year prison sentence may have on a sixteen year old. His imprisonment will house him with older, hardened criminals and without a 'light at the end of the tunnel,' Ellis might be less susceptible to redemption. The State apparently recognized that a lower sentence might be more appropriate in this case by offering Ellis an aggregate sentence of thirty years. We

agree. In order for the prison sentence to retain a somewhat rehabilitative character for Ellis, we decrease his sentence. We conclude that the appropriate sentence for Ellis is as follows: thirty-four years with four years suspended to probation for Count I, burglary, a Class A felony; ten years for Count II, robbery, a Class B felony; Count III, criminal confinement, a Class B felony, merged into Count I; six years on Count IV, robbery, a Class B felony; six years on Count V, robbery, a Class B felony; six years on Count VI, robbery, a Class B felony; Count VII, criminal confinement, a Class B felony, merged into Count V; Count VIII, criminal confinement, a Class B felony, merged into Count VI; six years on Count IX, criminal confinement, a Class B felony; six years on Count X, robbery, a Class B felony; and six years on Count XI, criminal confinement, a Class B felony. Counts I and II are to be served concurrently with each other. Counts IV, V, VI, IX, X, and XI are ordered to be served concurrently to each other and consecutively to Count I. Thus Ellis' aggregate executed sentence becomes thirty-six years with four years probation.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it failed to enter a written sentencing statement. However, we find Ellis' sentence inappropriate pursuant to Appellate Rule 7(B) and therefore vacate the trial court's sentence and remand with instructions to enter sentence as provided herein.

Vacated and remanded with instructions.

KIRSCH, J., concurs.

MATHIAS, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

MALCOLM K. ELLIS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 02A03-0811-CR-557
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

MATHIAS, Judge, concurring in part and dissenting in part.

I concur with the majority that the trial court did not abuse its discretion when it failed to enter a written sentencing statement. However, I must dissent from the majority’s decision to revise Ellis’s sentence from an aggregate term of seventy years to an aggregate term of thirty-six years. Appellate Rule 7(B)’s revision authority is based on the nature of the offense and the character of the offender. Ellis is a miserable failure regarding both of these elements.

As noted by the majority, Ellis and his partners burglarized two apartments and terrorized their occupants. During this rampage they bound and gagged Main-Ward, stole cash and personal property, shot her goldfish, and shot her repeatedly as they left on their

way to rob another apartment. Main-Ward was left lying in her apartment bound, gagged, and injured.

Then, Ellis and his partners entered Jose's apartment where Witte was forced to accompany Wright to an ATM and was threatened with death when approached by a police officer. Meanwhile, in Jose's apartment, Coronel was forced to strip naked and kneel on the bed in front of her friends and armed robbers. Only upon hearing police sirens did Ellis and his partners in crime decide to leave the scene.

Ellis's character is similarly unredeeming. Ellis began drinking alcohol and smoking marijuana at the age of ten. By the age of sixteen, Ellis had two juvenile delinquency adjudications, his first adjudication was for molesting a five year old girl when he was thirteen years old, a Class B felony if committed by an adult, and an offense for which he received probation. He quickly violated that probation and was committed to the Indiana Boys School. His second adjudication was for criminal mischief, a Class A misdemeanor if committed by an adult.

While the majority worries that the length of the prison term will make Ellis less susceptible to redemption, Ellis has shown little propensity or desire for redemption or rehabilitation to date. The State offered Ellis a plea agreement that required him to testify against his co-defendants and offered him an aggregate term of twenty-six years executed, and Ellis chose not to testify. Later, Ellis chose to plead guilty without the benefit of a plea agreement. Additionally, I doubt very much that a prison term of thirty-six years will provide a 'light at the end of the tunnel' for Ellis. His actions against the victims in this case are

those of a much older and more hardened criminal than his years would lead us to believe and his sentence should reflect that.

For all of these reasons, I concur in the majority's decision regarding the trial court's sentencing statement but dissent as to the majority's decision to reduce Ellis's sentence pursuant to Appellate Rule 7(B).