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ATTORNEY FOR APPELLANT:

DAVID A. HAPPE
Lockwood Williams & Happe
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



DENNIS BARNETT,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-0711-CR-623

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0602-FA-23993

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Dennis Barnett appeals his convictions and sentences for Attempted Murder, a Class A felony,¹ Criminal Confinement, as a Class B felony,² and Carrying a Handgun Without a License, as a Class C felony.³ We affirm.

Issues

- I. Whether the record supports the trial court's finding that Barnett was guilty but mentally ill rather than not guilty by reason of insanity; and
- II. Whether the trial court abused its discretion in imposing the sentences.⁴

Facts and Procedural History

Barnett, now thirty-years old, has a long-standing diagnosis of paranoid schizophrenia, exhibiting symptoms in his teenage years. He has been hospitalized repeatedly due to his mental illness and has been treated with various antipsychotic medications. In February of 2006, Barnett lived in Indianapolis with his uncle, Lonnie Stone, and Stone's girlfriend of eleven years, Diane Sims. Barnett was not taking his medications when he lived with Stone and Sims.

On February 8, 2006, Barnett asked Stone if he believed a twenty-two-caliber handgun would kill a person. Stone responded, "If it ain't God's will, no." Trial transcript at 90. Barnett replied, "I'm not talking about that, Uncle Lonnie. I'm talking about if I take

¹ Ind. Code §§ 35-41-5-1 and 35-42-1-1.

² Ind. Code § 35-42-3-3(b)(2).

³ Ind. Code § 35-47-2-1.

⁴ Barnett titles his argument as a request for review under Appellate Rule 7(B), but the case law cited and structure of the argument is essentially seeking a determination of an abuse of discretion in sentencing because the trial court did not allocate enough mitigating weight to Barnett's mental illness.

and put it right up to somebody's head, will it kill them?" Id. Stone repeated his previous answer. At the time, Stone noticed that Barnett was wearing plastic latex gloves, which Barnett would normally wear when he bought or had a gun. Barnett informed Stone that he was going to shoot some woman on Stone's street that day. Stone described Barnett as "acting pretty nuts" that day and the day prior in that he was "walking around like he's in space" and mumbling stuff under his breath, and displaying odd facial expressions. Tr. at 102, 107.

Later that day Barnett was at Sims's house. Barnett asked Sims if he could use the phone. After receiving Sims's permission, Barnett picked up the phone and started "raving," saying, "I'm going to kill that b----, pimp. I'm going to kill your b----." Tr. at 115. Sims told Barnett to get off the phone. Barnett repeated the statements a couple more times before hanging up the phone. Sims looked over at Barnett and noticed that he had his hands in his pants with the top of latex gloves sticking out. Then the doorbell rang, and as Sims stood and turned to answer the door, Barnett shot her in the head with a twenty-two-caliber handgun.

Sims darted down the hallway to her bedroom and tried to close the door behind her. Before she could close it, Barnett started pushing against the door from the other side. Barnett finally overpowered the injured Sims and threw her down on the bed. He then shot her twice more. One bullet hit her ear and the other struck her in the neck.

After hearing the first set of gunshots, Stone, who had been in the kitchen and was holding a knife he had been using, looked down the hallway and saw Barnett run into the bedroom. As Stone walked down the hallway, Barnett ran out of the room and out the back

door. Sims came to the bedroom door, holding her head, and said, “Lonnie, he just shot me in my head.” Tr. at 95. Stone then chased Barnett out of the house and into the street, continuing for a block and a half.

On February 13, 2006, the State charged Barnett with Attempted Murder, a Class A felony, Criminal Confinement, as a Class B felony, and Carrying a Handgun Without a License, as a Class C felony. On March 20, 2006, Barnett filed a notice of intent to interpose a defense of insanity and a petition for examination. The trial court issued an order, appointing Dr. George Parker and Dr. Shelvy Keglur to examine Barnett and make determinations as to whether Barnett was competent to stand trial and whether, as a result of a mental disease or defect, Barnett was unable to appreciate the wrongfulness of his conduct at the time of the alleged offense. Based on the reports submitted, the trial court found Barnett incompetent to stand trial and committed him to the Department of Mental Health. On February 1, 2007, the Department of Mental Health certified in a letter to the trial court that Barnett had attained the ability to stand trial.

On July 20, 2007, Barnett waived his right to a jury trial. At trial, the two appointed medical experts testified about their conclusions on Barnett’s mental health. While they both agreed that Barnett was mentally ill, Dr. Parker and Dr. Keglur evaluated Barnett and came to different conclusions as to whether Barnett, due to mental disease, could appreciate the wrongfulness of his of conduct at the time of the incident. Dr. Parker, a forensic psychiatrist, testified that Barnett was insane at the time of the offense due to Barnett’s long history of mental treatment, failure to take his medication for months prior to the offense, and the

description of his behavior in the police report being consistent with his observations that Barnett was delusional and responding to auditory hallucinations. Dr. Parker also testified that he had not received any indication from Barnett that he experienced any amnesia regarding the shooting incident and that complete amnesia of an event would be unusual. Dr. Kegljar testified that his conclusion was that Barnett could appreciate the wrongfulness of his conduct at the time of the offense. Dr. Kegljar said that Barnett would avoid eye contact at times in the interviews and claimed total amnesia of the events. Based on Barnett's demeanor during the interviews, Dr. Kegljar concluded that Barnett was malingering and that there was no indication that Barnett was of unsound mind prior to the shooting.

After the bench trial, Barnett was found guilty but mentally ill on all counts. The trial court sentenced Barnett to forty years for Attempted Murder, fifteen years for Criminal Confinement, and eight years for Carrying a Handgun without a License, all to be served concurrently. The trial court specified that twenty years are to be executed at the Department of Correction with the remainder to be served at the Community Corrections Mental Health Component.

Barnett now appeals.

Discussion and Decision

I. Insanity Defense

Because Barnett admits to committing the alleged offenses, the only issue before us is whether the record supports the trial court's finding that Barnett was guilty but mentally ill rather than not guilty by reason of insanity.

“A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.” Ind. Code § 35-41-3-6. “Mental disease or defect” is defined in the section as “a severely abnormal mental condition that grossly and demonstrably impairs a person’s perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.” I.C. § 35-41-3-6(b).

The defendant bears the burden of proof when asserting the “insanity defense.” Thompson v. State, 804 N.E.2d 1146, 1148 (Ind. 2004). The State must prove the offense, including *mens rea*, beyond a reasonable doubt but need not disprove insanity. Ind. Code § 35-41-4-1. To avoid responsibility for the crime proven by the State, the defendant must establish the defense by a preponderance of the evidence. Id.

The determination of whether a defendant can appreciate the wrongfulness of his conduct is a question for the trier of fact. Thompson, 804 N.E.2d at 1149. “A convicted defendant who claims his insanity defense should have prevailed at trial is in the position of one appealing from a negative judgment, and we will reverse only when the evidence is without conflict and leads only to the conclusion that the defendant was insane when the crime was committed.” Id. We only consider the evidence most favorable to the judgment and the reasonable and logical inferences drawn therefrom and will not reweigh the evidence or assess the credibility of witnesses. Id.

Barnett argues that the only evidence supporting a finding of sanity, the trial testimony of Dr. Keglär, is not credible because Dr. Keglär’s conclusion at trial differs from that in his

report and his opinion is based on the subjective disbelief in Barnett's claim of memory loss. This argument is essentially a request that we reassess the credibility of this witness, which we will not do.

The evidence most favorable to the judgment is that Dr. Kegl, a psychologist, testified that in his opinion Barnett could appreciate the wrongfulness of his conduct at the time of the offense. Dr. Kegl based his opinion on Barnett's demeanor and responses during his interviews. According to Dr. Kegl, Barnett would avoid looking at him when Barnett was making an untrue statement, told Dr. Kegl of his plans to "perform for the Court," and was very lucid and communicative yet became forgetful when questioned about the shooting incident. Although of the opinion that Barnett is mentally ill, Dr. Kegl concluded that Barnett was malingering by his claim of total amnesia and that there was no indication immediately prior to the shooting that Barnett was of unsound mind.

Moreover, there was other testimony from which a reasonable inference could be drawn that Barnett could appreciate the wrongfulness of his conduct. Testimony regarding the behavior of the defendant before, during, and after a crime may be more indicative of actual mental health at the time of the crime than mental exams conducted weeks or months later. Thompson, 804 N.E.2d at 1149. Earlier on the day of the crime, Barnett asked Stone if shooting someone in the head with a twenty-two-caliber gun would kill the person. During that same conversation, Barnett told Stone that he would shoot some woman on Stone's street that day. Barnett was wearing latex gloves, which he did when he had a gun. Prior to shooting Sims, Barnett spoke on the telephone saying, "I'm going to kill that b---, pimp. I'm

going to kill your b----.” After shooting Sims with a twenty-two-caliber gun, Barnett ran from the house.

“The evidence on the issue of insanity clearly was in conflict and did not lead inexorably to a single conclusion.” Rogers v. State, 514 N.E.2d 1259, 1261 (Ind. 1987). We conclude that based on the evidence presented, the trier of fact could have found that Barnett was mentally ill but able to appreciate the wrongfulness of his conduct.

II. Sentence

Although labeled as a request for review under Indiana Appellate Rule 7(B), the content of Barnett’s final argument is that the trial court abused its discretion by not allocating sufficient weight to the mitigator of Barnett’s mental illness. Sentencing decisions rest within the discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (Ind. 2007). As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. An abuse of discretion occurs when 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. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). In Anglemyer, our Supreme Court noted examples of ways in which a trial court abuses its discretion:

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are

improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. However, under the new advisory statutory scheme, the relative weight or value assignable to reasons properly found, or to those that should have been found, is not subject to review for abuse of discretion. Id. at 491.

Here, Barnett contends that the trial court assigned an improper weight to his mental illness as a mitigating factor. However, this is not available for appellate review.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.