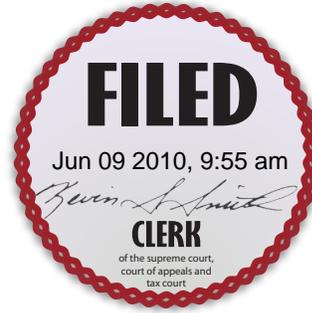


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRUCE W. GUESS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 64A03-0910-CR-497

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0812-MR-12434

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bruce W. Guess appeals his sentence following a plea of guilty to murder¹ and robbery as a class B felony.²

We affirm.

ISSUES

Guess raises the following issue:

Whether the trial court erred in sentencing Guess.

The State also raises the following issue:

Whether the trial court improperly entered a judgment of conviction for robbery as a class B felony on double jeopardy grounds.

FACTS

Guess and Steve Jordan conspired to rob Luke's One-Stop, a convenience store located in Valparaiso. Guess was familiar with the store as he had helped the owners' son close the store several times. In order to facilitate the robbery, Guess planned to distract the clerk, whereupon Jordan would strike her with a hammer.

Barbara Heckman was working alone at the store the night of December 19, 2008, when Guess and Jordan decided to implement their plan. Just prior to closing, Guess created a ruse by clogging the toilet in the men's restroom. As Heckman attempted to unclog the toilet, Jordan came into the bathroom with a mini-sledgehammer. When

¹ Ind. Code § 35-42-1-1.

² I.C. § 35-42-5-1.

Jorden hesitated, Guess took the hammer from him and repeatedly struck Heckman's head with it, killing her. Guess and Jorden then took cash and cigarettes from the store.

Jorden turned himself in to law enforcement the next day. Shortly thereafter, officers apprehended Guess. After waiving his *Miranda* rights, Guess admitted that he had hit Heckman in the head with a hammer during the course of the robbery.

On December 22, 2008, the State charged Guess with Count I, murder, a felony; and Count II, robbery as a class A felony. On June 29, 2009, Guess withdrew his plea of not guilty and pleaded guilty to both counts without the benefit of a written plea agreement.

During the guilty plea hearing, Guess's counsel indicated that "there was an issue as to whether or not life without parole might be filed in this case" and that "certainly there was the possibility that if he had not pled guilty, there would have been a life without parole filed" by the State. (Guilty Plea Hr'g Tr. 9). Accordingly, Guess pleaded guilty to avoid a life imprisonment without parole count. As such, he understood that "there is a benefit to him in pleading guilty." *Id.* The trial court took the guilty plea under advisement and ordered a pre-sentence investigation report ("PSI").

The trial court held a sentencing hearing on September 28, 2009. According to the PSI, Guess was eighteen years old when he committed the present offenses. The PSI further showed that between 2003 and 2008, Guess had been adjudicated a juvenile delinquent for committing acts which, if committed by an adult, would have constituted the following: two counts of class A misdemeanor resisting law enforcement; class A

misdemeanor criminal mischief; class A misdemeanor consumption of alcohol; class A misdemeanor carrying a handgun without a license; class B misdemeanor criminal mischief; class B misdemeanor battery; class D felony escape; class D felony theft; class D felony possession of a controlled substance; class D felony possession of a legend drug; class D felony dealing in a controlled substance; class C felony robbery; and class C felony burglary. He also violated house arrest on one occasion. The PSI further showed that in 2007, Guess was arrested for acts which, if committed by an adult, would have constituted class C felony intimidation with a deadly weapon; class D felony theft; and class B misdemeanor criminal mischief.

The trial court entered a judgment of conviction for murder and class B felony robbery. Guess proffered his acceptance of responsibility without a plea agreement and “history of psychological issues” as mitigating circumstances. (Sent. Tr. 17).

The trial court then found as follows:

In looking first at the aggravating circumstance, the most obvious, and the one that jumps off of the multiple pages listing it in the [PSI], the defendant’s history of delinquent and criminal activity. He’s amassed quite a record for someone only 19 years old. So that will be found as an aggravating circumstance.

As to the robbery, I find as an aggravating circumstance the care taken in planning the robbery. It wasn’t a spur of the moment thing. It was planned. According to the defendant’s own version in the [PSI], there was planning that went into the robbery.

As to the murder, I’m going to find as an aggravating circumstance the brutal manner in which this killing was done. I’ve unfortunately presided over several murder cases and this, there’s no good way to say

this, but some are more brutal than others and this was definitely one of the more brutal than [sic] I've seen. I find that as an aggravating circumstance.

I'm also going to find as an aggravating circumstance that this defendant, who actually did the killing, had the opportunity to not follow through with the plan. According to his own version, it wasn't the plan to kill the clerk nor was it the plan that he was going to disable her. That was his co-defendant's plan. But he took over when the co-defendant didn't. And the life wouldn't have been taken if things would have just fallen apart then. But, Mr. Guess, you had to pick up the hammer and follow through with that, and I find that aggravating as well.

As to mitigating circumstances, I will find the defendant's young age as a mitigating circumstance, for whatever value that has. Given his criminal history, that's hardly much of a mitigator, but it is one of the statutory ones.

Id. at 19-20. Finding that the aggravating circumstances outweighed the mitigating circumstance, the trial court sentenced Guess to consecutive sentences of sixty-five years for the murder conviction and twenty years for the robbery conviction, for a total sentence of eighty-five years.

DECISION

Guess asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider mitigating circumstances; found improper aggravating circumstances; and that his sentence is inappropriate.

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may abuse its discretion if the sentencing statement

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.

Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

1. Mitigating Circumstances

Guess first argues that the trial court failed to find his acceptance of responsibility by pleading guilty and cooperating with law enforcement to be a mitigating circumstance.

The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. The trial court, however, is not obligated to consider “alleged mitigating factors that are highly disputable in nature, weight, or significance.” The trial court need enumerate only those mitigating circumstances it finds to be significant. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record.

Rawson v. State, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007) (internal citations omitted), *trans. denied*.

Regarding the acceptance of responsibility, “the record shows that the plea agreement was ‘more likely the result of pragmatism than acceptance of responsibility and remorse.’” *Anglemyer*, 875 N.E.2d at 221 (quoting *Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002) (citations omitted)). This is so because the evidence against Guess was overwhelming, particularly given that, according to the probable cause affidavit, witnesses identified Guess exiting the store; Jorden turned himself in to law enforcement;

and Guess made incriminating statements to law enforcement. *See Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (“The plea may also be considered less significant if there was substantial admissible evidence of the defendant’s guilt.”), *trans. denied*. Furthermore, according to statements made during the guilty plea hearing, Guess pleaded guilty in order to avoid a count of life without parole being filed against him.

Guess has failed to show that his acceptance of responsibility is both a significant mitigating circumstance and clearly supported by the record. Accordingly, we find no abuse of discretion in failing to consider it as a mitigating circumstance.

2. Aggravating Circumstances

Guess asserts that the trial court abused its discretion in finding his criminal history and decision to follow through with the planned assault and robbery to be aggravating circumstances. We disagree.

a. *Criminal history*

Guess contends that the trial court abused its discretion in finding his criminal history to be an aggravator, where his “offenses are predominately substance abuse related and theft related”; and his “only adjudications for violence were two (2) B misdemeanor battery offenses that were committed when he was fourteen (14) and fifteen (15) years of age[.]”³ Guess’s Br. at 7.

³ Our review of the PSI reveals that Guess has one adjudication for an offense that would constitute battery if committed by an adult. The State did, however, file an additional petition, alleging him to be a delinquent child for committing what would constitute battery if committed by an adult. The disposition of this petition is unknown.

“A trial court, when evaluating a defendant’s criminal history, can look to the number of juvenile true findings and enhance the defendant’s sentence based upon this history.” *H.M. v. State*, 892 N.E.2d 679, 682 (Ind. Ct. App. 2008), *trans. denied*. The significance of a defendant’s criminal history, however, “varies based on the gravity, nature and number of prior offenses as they relate to the current offense.” *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied*, 855 N.E.2d 1003 (Ind. 2006), *cert. denied*, 549 U.S. 994 (2006).

Here, Guess had fourteen juvenile adjudications, seven of which were for acts that would constitute felony offenses if committed by an adult. Moreover, several of those acts were related in nature to the present offense; namely, he committed acts which would constitute theft, robbery, and burglary if committed by an adult; he also committed an act which would constitute battery if committed by an adult. Given Guess’s lengthy criminal history, we cannot say that the trial court abused its discretion in finding it to be a significant aggravating circumstance.

b. *Nature and circumstances*

Guess further asserts that the trial court abused its discretion “when it found as an aggravating circumstance that [he] continued with the crime when the opportunity arose to change the outcome.” Guess’s Br. at 8. Guess maintains that this aggravator was a material element of his offense.

It is proper for trial courts to consider the particularized individual circumstances of the crime as an aggravating factor. *Robinson v. State*, 894 N.E.2d 1038, 1043 (Ind. Ct.

App. 2008). In this case, the trial court found as an aggravating circumstance Guess's decision to continue and escalate the offense against Heckman despite the opportunity to terminate the original plan. We find no abuse of discretion in finding the nature and circumstances of the offense as an aggravating circumstance.

Even if this court were to find that the trial court improperly considered this to be an aggravating circumstance, this court would have at least three courses of actions:

1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level."

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005)), *trans. denied*.

Here, the record clearly supports the finding of Guess's criminal history as an aggravating circumstance. A single circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). We find that such is the case here, and the error, if any, was harmless.

3. Inappropriate Sentence

Guess also asserts that his sentence is inappropriate because he has "no significant history of violence that was similar to the instant offense"; "demonstrated a clear acceptance of responsibility"; and suffers from "psychological issues."⁴ Guess's Br. at 9, 10. Again, we disagree.

⁴ According to the PSI, Guess reported that he "has been diagnosed with chronic depression, anxiety, bipolar, ADD, ADHD, and Social-Emotional disorder." (App. 98).

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for murder is fifty-five years. I.C. § 35-50-2-3. The potential maximum sentence is sixty-five years. *Id.* Pursuant to Indiana Code section 35-50-2-5, the advisory sentence for a class B felony is ten years, with a potential maximum sentence of twenty years. The trial court sentenced Guess to the maximum sentence on both counts.

Guess argues that his conduct and character do not support the maximum sentences as he "is neither the worst offender nor was the commission of this offense particularly egregious." Guess's Br. at 10. Generally, "[m]aximum sentences are reserved for the worst offenders and offenses." *Johnson v. State*, 830 N.E.2d 895, 898 (Ind. 2005).

With regard to the worst offense and worst offender principle, however, we have previously explained as follows:

There is a danger in applying [this principle because] [i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense

fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided,--or more problematically--with hypothetical facts calculated to provide a “worst-case scenario” template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical and not real, and the maximum sentence would never be justified.

This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*.

As to the nature of the offense, Guess and Jordan decided to rob a store and attack its employee in the process. They chose a store with which they were familiar; Guess was friends with the owners’ son and had helped him to close the store on several occasions.

The night of the robbery, Guess lured Heckman into the men’s restroom by clogging a toilet. As Heckman attempted to fix the toilet, Guess took a hammer from Jordan and brutally struck Heckman in the head several times. He then left her to die on the bathroom floor as he pillaged the store for cash and cigarettes.

As to Guess’s character, he has a lengthy criminal history, amassing numerous juvenile adjudications over a short period of time. Clearly, prior attempts to rehabilitate Guess and deter him from future unlawful conduct have failed.

While acknowledging Guess's mental issues, we find nothing in the record to indicate that 1) he was unable to control his behavior due to his mental disorders; 2) his mental disorders limited his ability to function; or 3) that there was a nexus between the disorders and the crime. *See Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998) (finding that in determining the weight to be given to a mental illness in sentencing, the trial court should consider several factors, including "the extent of the defendant's inability to control his or her behavior due to the disorder or impairment"; the "overall limitations on functions"; the duration of the disorder or impairment; and "the extent of any nexus between the disorder of impairment and the commission of the crime"). Given Guess's offense and his character, we find his sentence to be appropriate.

4. Conviction for Class B Robbery

The State asserts that the trial court improperly entered a judgment of conviction for robbery as a class B felony rather than robbery as a class A felony. The State argues that double jeopardy concerns do not apply as Guess pleaded guilty to robbery as a class A felony. The State therefore seeks remand of "this cause to the trial court for the trial court to revise [Guess's] [r]obbery conviction to a class a felony and for the trial court to re-sentence [Guess] accordingly." State's Br. at 12 n.5.

[I]n Indiana, "we have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy . . ." One of those rules prohibits "[c]onviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished."

Owens v. State, 897 N.E.2d 537, 538-39 (Ind. Ct. App. 2008) (internal citations omitted).

Indiana Code section 35-42-5-1 provides as follows:

A person who knowingly or intentionally takes property from another person or from the presence of another person:

- (1) by using or threatening the use of force on any person; or
- (2) by putting any person in fear;

commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant.

The State charged Guess with robbery as a class A felony, alleging that he

knowingly or intentionally t[ook] property from another person or from the presence of another person by using or threatening the use of force on any person while armed with a deadly weapon, to-wit: took United States Currency and cigarettes from the presence of Barbara Jean Heckman, resulting in serious bodily injury

(App. 8-9). The State also charged Guess with “knowingly or intentionally kill[ing] another human being, to-wit: Barbara Jean Heckman” *Id.* at 8.

It is clear that the State used the harm to Heckman to enhance Guess’s robbery charge to a class A felony; this is the same harm used to charge him with murder. “Where a robbery conviction is elevated to a Class A felony based on the same serious bodily injury that forms the basis of a murder conviction, the two cannot stand.” *Owens*, 897 N.E.2d at 539 (quoting *Spears v. State*, 735 N.E.2d 1161, 1164-64 (Ind. 2000), *reh’g denied*). Therefore, the trial court’s reduction of the conviction from class A felony robbery to class B felony robbery was proper. *See* 897 N.E.2d at 540 (finding the

enhancement to class B felony robbery proper as the State charged the defendant with being armed with a deadly weapon).

In so holding, we recognize that “a defendant who pleads guilty is not allowed to raise a double jeopardy challenge to his convictions.” *McElroy v. State*, 864 N.E.2d 392, 396 (Ind. Ct. App. 2007), *trans. denied*. “[D]efendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy.” *Id.* (quoting *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004)).

In this case, however, Guess pleaded guilty as charged without the benefit of a written plea agreement. Thus, we cannot say that the trial court was bound to enter the convictions as charged or pleaded. *Cf. St. Clair v. State*, 901 N.E.2d 4901, 492 (Ind. 2009) (“A plea agreement is contractual in nature, binding the defendant, the state, and the trial court, once the judge accepts it.”). Also, as there was no plea agreement, we cannot say that Guess entered into a bargain for which he was required to waive the double jeopardy violation. *See Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001) (“[A] defendant with adequate counsel who enters a plea agreement to achieve an advantageous position must keep the bargain. Once the defendant bargains for a reduced charge, he cannot then challenge the sentence on double jeopardy grounds.”).

Furthermore, the State made no objection when the trial court advised the parties that it would enter a judgment of conviction for class B felony robbery. Thus, we cannot

say that the trial court improperly entered a judgment of conviction for robbery as a class B felony, rather than as a class A felony.

Affirmed.

BAKER, C.J., and CRONE, J., concur.