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.

FILED
Jun 10 2009, 8:44 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

CHARLES E. STEWART, JR.
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

VICTOR ALFONSO HERNANDEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0809-CR-441
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0712-MR-00009

June 10, 2009

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Victor Hernandez appeals following his convictions for Murder,[1] a felony; Burglary,[2] a class B felony; two counts of Attempted Carjacking,[3] both as class B felonies; and two counts of Attempted Confinement,[4] one as a class D felony and the other as a class B felony. Specifically, Hernandez argues that the trial court erred by failing to vacate his convictions for attempted confinement on double jeopardy grounds. In addition, Hernandez appeals his ninety-five-year sentence, contending that the trial court abused its discretion in finding and weighing aggravating and mitigating factors. Finally, Hernandez maintains that his sentence is inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On November 29, 2007, sixteen-year-old Hernandez and Kenneth Zamarron were in a vehicle accident. Afterward, Hernandez noticed that one of the tires needed air, so he stopped at a residence belonging to Marianne Bobella. To gain entry, Hernandez threw a brick into the front door window and reached inside to unlock the door. Hernandez and Zamarron went inside to look for an air pump, but instead found a pistol, CD player, jewelry, and liquor, which they took from the house. After placing the items into the vehicle, Hernandez realized that he had lost the key to the vehicle. They went back inside the house

---

[1] Ind. Code § 35-42-1-1.

[2] Ind. Code § 35-43-2-1.

[3] I.C. § 35-42-5-2, Ind. Code § 35-41-5-1.

[4] I.C. § 35-42-3-3, I.C. § 35-41-5-1.

to find it, but were unsuccessful.

Around 8:30 p.m., Gregory Grudzien, Bobella's business partner, stopped by her house to care for her dog. Grudzien called Bobella and told her to come home immediately because her house had been ransacked. When Grudzien entered the house, he was confronted by Hernandez and Zamarron, who stabbed, kicked, and beat him to death. When Bobella arrived, she saw that the storm door was shut, but the main door was open and the window panes in the door had been broken. Bobella looked inside and saw debris and broken dishes. She yelled for Grudzien, but heard no response. Bobella walked out and found Grudzien's body in the street.

Hammond Police Officers Tom Dillner and Michael Noworyta responded to Bobella's call and found Grudzien lying in the street. Officer Dillner observed that Grudzien was not breathing and was unresponsive. There were stab wounds to Grudzien's upper torso and severe trauma to his face. There were several bloody shoe prints on Grudzien's pants. Officer Dillner requested an ambulance and found a cell phone lying in the grass about ten feet from Grudzien. Officer Dillner also noticed a vehicle with a flat tire about thirty feet from the victim with a handgun lying on the driver's seat and a stereo and bottles of alcoholic beverages on the backseat. Officer Dillner entered Bobella's house and saw that it had been vandalized and ransacked. A dead dog was lying in a pool of blood underneath the kitchen table.

Jack and Loretta Simmons lived a short distance from Bobella. When the Simmonses arrived home on the evening of November 29, 2007, they saw Hernandez and Zamarron,

walking down the middle of the road toward them. As the men approached the Simmonses' vehicle, Loretta, sensing that they were in trouble, began to back out of the driveway. Zamarron began pounding on the windshield and doors of the Simmonses' vehicle. As Hernandez reached the passenger side of the vehicle, Zamarron attempted to open the driver's side door, but the doors were locked. Loretta drove away, and Jack called the police.

Hernandez and Zamarron ran to a gasoline station where Ana Almaraz and her daughter, Doris, were purchasing gasoline. Ana went inside and paid, and Hernandez and Zamarron approached her as she returned to her vehicle. Zamarron demanded Ana's keys and Hernandez ordered Doris to get out of the vehicle. As Doris complied, Hernandez showed her a bloody knife. When Ana did not give Zamarron her keys, he grabbed the gas pump and began spraying her face with gasoline. Doris screamed and ran towards her mother. Hernandez and Zamarron ran away, while Ana and Doris ran inside for help.

Shortly thereafter, Hammond Police Officer Kelly Mickey saw Hernandez running and followed him. Hernandez ran between two houses and Officer Mickey drove her vehicle into the yard between the two houses before stopping and exiting her vehicle. Officer Mickey yelled for Hernandez to stop and pursued him on foot. Officer Mickey found Hernandez hiding in the back of a pick-up truck, where Officer Michael Schmidt removed him. Zamarron was also apprehended.

When Officers Mickey and Schmidt arrested Hernandez, he was violent, angry, and appeared to be covered in blood. Even after being handcuffed, Hernandez continued to kick Officer Schmidt, who was attempting to check him for weapons, and threatened to kill both

officers. Because Hernandez continued to resist, Officer Mickey shot him with her taser gun. While Hernandez was being transported to jail, he asked why he was going to jail and then responded, "I don't give a f[***]." Tr. p. 537. Hernandez also asked how much prison time he was facing, before again stating, "I don't give a f[***]." Id. at 538.

Dr. Kim Young performed the autopsy on Grudzien and found many cuts and stab wounds on his face and neck. Grudzien had also been stabbed in the back and stomach area. As a result, Grudzien had suffered a lacerated abdominal aorta. In addition, Grudzien had several broken ribs, extensive skull fractures, and a subarachnoid hemorrhage. Dr. Young concluded that Grudzien died as a result of extensive head injuries, blunt force trauma, and stab wounds.

On December 20, 2007, the State filed an amended information,[5] charging Hernandez with Count I, murder; Count II, murder in the perpetration of robbery; Count III, murder in the perpetration of burglary; Count IV, robbery, a class A felony; Count V, attempted carjacking, a class B felony; Count VI, attempted confinement, a class D felony; Count VII, attempted carjacking, a class B felony; Count VIII, attempted confinement, a class B felony; Count IX, burglary, a class B felony; and Count X, cruelty to animals, a class A misdemeanor.

Hernandez's four-day jury trial commenced on June 23, 2008, and on June 26, 2008,

---

[5] The State filed its original charging information on December 1, 2007.

he was found guilty of count I, murder; count III, murder in the perpetration of burglary; count V, attempted carjacking; count VI, attempted confinement; count VII, attempted carjacking; count VIII, attempted confinement; and count IX, burglary. Hernandez was acquitted of counts II, IV, and X.

At Hernandez's August 4, 2008, sentencing hearing, the trial court vacated Hernandez's conviction for count III, murder in the perpetration of burglary. Hernandez was sentenced to sixty years imprisonment on count I, thirteen years imprisonment on count V, two years imprisonment on count VI, and eleven years imprisonment on each of counts VII, VIII, and IX. The trial court ordered that counts V and VI be served concurrently with each other, but consecutively to counts I, VII, VIII, and IX. Likewise, the trial court ordered that counts VII and VIII run concurrently with each other, but consecutively to counts I, V, VI, and IX. Finally, the trial court ordered counts I and IX run consecutively to all other counts and to each other, for an aggregate term of ninety-five years imprisonment. Hernandez now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Hernandez argues that the trial court erred by not vacating his two convictions for attempted confinement. Specifically, Hernandez contends that "[t]he acts allegedly constituting the attempted confinement of the victims were the same acts that constituted the attempted carjacking of the victims' vehicles." Appellant's Br. p. 9. Thus, Hernandez asserts that his convictions for attempted carjacking and attempted confinement violate

constitutional provisions prohibiting double jeopardy.

As an initial matter, the State maintains that Hernandez has waived the issue because he "fails to indicate whether he is relying upon the double jeopardy clause of either the federal or state constitutions or any other authority." Appellee's Br. p. 9. The State also points out that Hernandez failed to cite portions of the record to support his double jeopardy claim.

Our Supreme Court has recognized that the failure to cite to the appropriate authority constitutes waiver of the alleged error. Johnson v. State, 693 N.E.2d 941, 954 (Ind. 1998); see also Ind. Appellate Rule 46(A)(8)(a) (stating that "[t]he argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and Appendix or parts of the Record on Appeal relied on. . . ."). Here, Hernandez failed to cite to any authority to support his argument and failed to indicate whether the alleged error implicates the federal or state constitution. However, because a double jeopardy violation implicates fundamental rights, we will address the issue. See Smith v. State, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008) (stating that "[w]e raise this issue sua sponte because a double jeopardy violation, if shown, implicates fundamental rights").

Under the United States Constitution, convictions for multiple offenses are not barred by double jeopardy principles if each offense "requires proof an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Two or more

offenses are the same offense under the Indiana Constitution[6] "if with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphases in original). In addition, the Indiana Double Jeopardy Clause "is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002) (emphasis added).

Here, to convict Hernandez of the attempted carjacking of the Simmonses' vehicle, the State was required to show beyond a reasonable doubt that Hernandez "knowingly or intentionally attempt[ed] to take a motor vehicle from the person or presence of Loretta Simmons by using or threatening the use of force on Loretta Simmons." Appellant's App. p. 30. To convict Hernandez of attempted confinement, the State had to prove that Hernandez "knowingly or intentionally attempt[ed] to remove Jack Simmons, by threat of force, from inside a motor vehicle to the outside of a motor vehicle." Id.

To prove attempted carjacking, the State had to show that Hernandez attempted to take a motor vehicle from Loretta, which was not required to prove attempted confinement. On the other hand, for criminal confinement, the State had to prove that Hernandez attempted to remove Jack from inside a motor vehicle to the outside of the motor vehicle, which was

---

[6] Ind. Const. art. I, § 14.

not required to prove attempted carjacking. Therefore, the two counts do not share the same elements.

As for the actual evidence used to convict Hernandez of both offenses, Indiana courts have held that convictions arising out of certain situations involving multiple victims do not constitute double jeopardy. See Bald v. State, 766 N.E.2d 1170, 1172 n.4 (Ind. 2002) (observing that the defendant's "convictions arise from a situation 'where separate victims are involved,' which has been a scenario that does not constitute double jeopardy" (quoting Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring))); Vanzandt v. State, 731 N.E.2d 450, 455 (Ind. Ct. App. 2000) (affirming convictions for robbery and confinement where the defendant ordered a restaurant employee to empty the cash register while forcing the manager to stay on the ground). In these situations, multiple convictions did not violate the actual evidence test because the jury was required to find proof of at least one unique evidentiary fact, namely, the identity of the victim of each crime. Bald 766 N.E.2d at 1172.

Here, the charging information identified Loretta as the victim of the attempted carjacking and Jack as the victim of the attempted confinement. Thus, the jury was required to find proof of at least one unique evidentiary fact to convict Hernandez of both offenses. Consequently, Hernandez has failed to show a double jeopardy violation for these two convictions.

Similarly, to convict Hernandez of attempted carjacking of the Almarazes' vehicle, the State had to show that Hernandez "knowingly or intentionally attempt[ed] to take a motor vehicle from the person or presence of Ana Almaraz by using or threatening the use of force

on Ana Almaraz." Id. And to convict Hernandez of attempted confinement, the State had to prove that Hernandez "knowingly or intentionally attempt[ed] to remove Doris Almaraz, by threat of force, from inside a motor vehicle to the outside of a motor vehicle, while armed with a knife, a deadly weapon." Id. As stated before, attempting to take the vehicle from Ana and attempting to remove Doris from the vehicle were separate offenses with separate elements and victims. Therefore, Hernandez has failed to show that his convictions for these two convictions resulted in a double jeopardy violation. Thus, we conclude that no double jeopardy violation occurred.

II. Sentencing

A. Abuse of Discretion

Hernandez maintains that the trial court abused its discretion when it sentenced him to terms of imprisonment in excess of the advisory sentences and ordered him to serve consecutive terms of imprisonment. Specifically, Hernandez asserts that the trial court improperly found his past history of juvenile adjudications as an aggravating factor and failed to give sufficient mitigating weight to his youth. Moreover, Hernandez contends that because the murder victim was the only one who was physically harmed, the imposition of consecutive sentences was improper

We initially observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony

offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating factors and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

In the instant case, the trial court concluded that Hernandez's prior juvenile adjudications for what would have been residential entry and disorderly conduct if committed by an adult, were aggravating circumstances. Indiana Code section 35-38-1-7.1(a) provides that "[i]n determining what sentence to impose for a crime, the court may consider the following aggravating circumstances . . . [t]he person has a history of criminal or delinquent behavior." See also McCray v. State, 823 N.E.2d 740, 745 (Ind. Ct. App. 2005) (recognizing that Indiana's sentencing statute gives trial courts discretion to consider prior juvenile adjudications as aggravating factors). In light of this well-established rule, we cannot conclude that the trial court abused its discretion by considering Hernandez's prior juvenile adjudications.

Hernandez also contends that the trial court failed to give sufficient mitigating weight to the fact that he was only sixteen years old. However, our Supreme Court has held that the weight assigned to aggravating or mitigating factors is not subject to appellate review. See

Anglemyer, 868 N.E.2d at 491 (concluding that "[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors"). Thus, this argument fails.

Finally, Hernandez argues that the trial court abused its discretion by ordering him to serve consecutive sentences because "[t]he only victim that was injured was the murder victim. None of the other victims were physically hurt in any manner." Appellant's Br. p. 8. In its sentencing order, the trial court concluded that "[t]he Court believes the significant aggravating factor of six victims requires consecutive sentences." Appellant's App. p. 150. Our Supreme Court has recognized that "[i]t is a well established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstances that a trial court may consider in imposing consecutive or enhanced sentences." O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001). Therefore, this argument is also unavailing.

B. Inappropriate Sentencing

Hernandez also contends that his ninety-five-year sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). The State counters that Hernandez has waived this argument because he failed to develop a separate argument explaining how his sentence is inappropriate.

In Ford v. State, the defendant alleged that the trial court had abused its discretion by relying on his criminal history and his need for correctional treatment as aggravating circumstances. 718 N.E.2d 1104, 1107 (Ind. 1999). In addition, the defendant stated that his

sentence was inappropriate in light of the nature of the offense and his character. Id. at 1107 n.1. Our Supreme Court held that the defendant had waived this argument for failure to state a cogent argument and reasoned that the defendant had made no argument as to why his sentence was manifestly unreasonable in light of the nature of the offense and his character, but instead focused only on the propriety of the trial court's use of his criminal history and need for correctional treatment as aggravating factors. Id.

Likewise, Hernandez has failed to present a cogent argument as to why his sentence is inappropriate in light of the nature of his offenses and his character. Indeed, his argument consists of one sentence stating that his ninety-five-year sentence was inappropriate in light of the nature of the offenses and his character. The remainder of Hernandez's argument focuses on the propriety of the trial court's use of and weight given to certain aggravating and mitigating circumstances. Whether a trial court abused its discretion in sentencing a defendant and whether the sentence is inappropriate in light of the nature of the offense and the defendant's character under Appellate Rule 7(B) are separate questions which require separate analyses. Therefore, Hernandez has waived this argument for failure to develop a separate and cogent argument.

Waiver notwithstanding, we cannot agree that Hernandez's ninety-five-year sentence is inappropriate in light of the nature of the offenses and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court

has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

> Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . . .
>
> The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived "correct" result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

As for the nature of the offenses, the trial court noted that Hernandez had been "involved in a particularly heinous murder where the victim was beaten and stabbed beyond recognition." Appellant's App. p. 149. The trial judge observed that in his experience as a prosecutor, defense attorney, and judge, he had never seen "such a horrendous display of brutality as what [Hernandez] did to this victim." Tr. p. 1180-81. In addition, Hernandez destroyed the interior of Bobella's home and terrorized the Simmonses and the Almarazes.

As for Hernandez's character, the record indicates that he has prior juvenile adjudications, for which he was given the benefit of probation and house arrest, but failed at both. In addition, Hernandez ran from the police, threatened them, and forcefully resisted

arrest to the point that he had to be tasered. Moreover, after asking the police why he was going to jail and how much prison time he was facing, he responded to his own questions with, "I don't give a f[***]." Id. at 537-38. Therefore, in light of the nature of the offenses and his character, Hernandez has failed to convince us that his sentence is inappropriate.

The judgment of the trial court is affirmed.

MAY, J., and BARNES, J., concur.