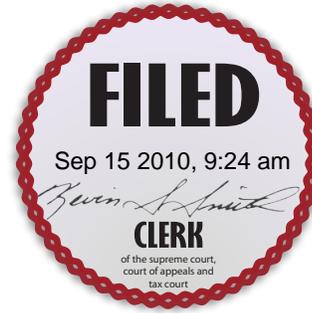


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KYLE KIPLINGER,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 62A01-1004-CR-195

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable M. Lucy Goffinet, Judge
Cause No. 62C01-0608-MR-789

September 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kyle Kiplinger appeals his sixty-five year sentence for murder imposed during a resentencing hearing.

We affirm.

ISSUES

Whether the trial court erred in resentencing Kiplinger.

FACTS

This case comes to our Court following a direct appeal to our Indiana Supreme Court where the Supreme Court vacated Kiplinger's sentence of life without parole and remanded for resentencing. The facts of the crime as set forth in Kiplinger's direct appeal follow:

The evidence supporting the verdicts in this case indicates that Defendant Kyle Kiplinger attended a party where he and others engaged in drinking and smoking marijuana. Darrick O'Brien and Bobbi Jo Braunecker were also in attendance. At the end of the night, Defendant and O'Brien were asked to take Braunecker home because she appeared intoxicated. The three left the apartment together at about 2:00 a.m. on August 17, 2006.

After leaving the apartment, O'Brien and Defendant drove Braunecker around and eventually drove her behind a flood wall in Tell City. O'Brien said he wanted to have sex with Braunecker and told Defendant to knock her unconscious. Defendant punched Braunecker in the head and started choking her; the two men then dragged her out of the vehicle and carried her down by the river. O'Brien pulled Braunecker's pants down and kicked her in the head several times. Defendant stated that O'Brien then had sex with Braunecker. O'Brien then struck her in the head several times with a 75 to 80 pound rock. The two left Braunecker's body in the river.

On August 18, a conservation officer recovered Braunecker's badly decomposed body from the Ohio River. Her pants were pulled down and she was not wearing a shirt. A medical examiner determined that Braunecker was murdered and that the cause of death was from multiple

injuries sustained in a physical assault. Her body was too decomposed for a rape evaluation or to obtain DNA.

Kiplinger v. State, 922 N.E.2d 1261, 1262-63 (Ind. 2010) (footnotes omitted).

Also on August 18, 2006, Kiplinger told his friend, Scott Board, that he and O'Brien had killed a woman named Bobbi Jo. Kiplinger described how he had punched and choked Braunecker and had helped drag her from his car and dump her body in the river. Kiplinger told Board that he went back to the crime scene the following day to look for evidence and that he found a headband that he took and threw in the trash. Kiplinger also showed Board the clothing that O'Brien wore on the night of the crime and told Board that he was going to get rid of the clothes.

On August 20, 2006, after learning that the body of a woman named Bobbi Jo was found in the river, Board went to the police and told them that he knew who killed Braunecker. On August 21, 2006, the police arrested Kiplinger and O'Brien. Kiplinger initially denied knowing Braunecker or about a body being found in the river. After Kiplinger admitted to knowing Braunecker and being with her at a party, he told police that he and O'Brien dropped her off at a house after the party. He finally revealed to police that Braunecker was killed and dumped in the river, but he claimed that O'Brien did it while he watched. Kiplinger also showed police officers the crime scene.

The State charged Kiplinger with murder and felony murder and filed a request for a sentence of life without parole based on the qualifying aggravating circumstance that Kiplinger intentionally killed Braunecker while committing or attempting to commit rape. In July 2008, a jury found Kiplinger guilty as charged.

Following the hearing on the State's request for a sentence of life without parole, the jury returned a special verdict form indicating that the State had proved that the charged aggravating circumstance outweighed any mitigating circumstance. The form, however, did not indicate that the aggravating circumstance had been proven beyond a reasonable doubt. The jury was unable to reach a unanimous decision regarding a sentencing recommendation.

The trial court held a sentencing hearing in August 2008. During that hearing, Kiplinger made a statement in which he apologized to the victim's family. The trial court sentenced Kiplinger to life without parole.

Kiplinger appealed his felony murder conviction and his life sentence. In March 2010, the Indiana Supreme Court affirmed his conviction but vacated Kiplinger's sentence of life without parole and remanded for resentencing.¹

The State moved to dismiss its request for a life sentence, and the trial court held a resentencing hearing on April 21, 2010. During the resentencing hearing, the trial court indicated that it would take judicial notice of Kiplinger's statement and other witnesses' statements from the August 2008 sentencing hearing. Kiplinger did not object. Kiplinger's attorney presented argument but did not request that Kiplinger be allowed to make a statement. The trial court found that the aggravating circumstances, which included Kiplinger's criminal history and the nature of the offense, outweighed the nonexistent mitigating circumstances. The trial court found Kiplinger to be one of the

¹ The Supreme Court held that the trial court did not have the authority under the Sixth Amendment to impose a sentence of life without parole when the jury did not make a specific finding that the charged aggravating circumstance had been proven beyond a reasonable doubt. *See Kiplinger*, 922 N.E.2d at 1264-65.

worst offenders and sentenced him to the maximum sentence of sixty-five years. After the trial court had pronounced Kiplinger's sentence, he stated, "I would like to say something, Your Honor[,]" and the trial court informed him, "No, sir, not at this time." (Resentencing Tr. at 36).

DECISION

Kiplinger asserts that the trial court erred in resentencing him. Specifically, he argues that the trial court failed to consider various mitigating circumstances, his sentence is inappropriate, and the trial court denied him the right of allocution during the resentencing hearing.

1. Mitigating Circumstances

Kiplinger argues that the trial court should have considered his cooperation with police and his difficult childhood in conjunction with his low IQ to be mitigating circumstances.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal 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). One way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Id.* at 490-91. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). A claim that the trial court failed to find a mitigating circumstance requires the

defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493.

Turning to Kiplinger's first claimed mitigator, he argues that his cooperation with police and statements incriminating O'Brien should have been assigned some mitigating weight. At the same time, he acknowledges that this factor would not be entitled to much mitigating weight because he did not cooperate with police until after he was arrested and it was determined that he had initially lied to police about his involvement. Kiplinger's two-sided argument highlights the fact that, to the extent his cooperation could be considered mitigating, this factor was clearly not significant. Because he cannot establish that the mitigating evidence was both significant and clearly supported by the record, the trial court did not abuse its discretion by failing to identify his statements to police as a mitigating factor. *See, e.g., 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").

In regard to Kiplinger's difficult childhood, the Indiana Supreme Court has "consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000), *reh'g denied, cert. denied*. Indeed, a trial court is not obligated to consider a defendant's difficult childhood as a mitigator, especially where a defendant fails to show how it is relevant to his level of culpability. *Loveless v. State*, 642 N.E.2d 974, 977 (Ind. 1994). While the record indicates that Kiplinger had some history of abuse in his childhood, he has failed to show

how his troubled childhood was relevant to his culpability or that it somehow led him to participate in Braunecker's murder. Accordingly, the trial court did not err by not identifying Kiplinger's difficult childhood as a mitigator. *See, e.g., Loveless*, 642 N.E.2d at 977 ("the trial court was not obligated to consider Appellant's extremely dysfunctional family background and the impact it wrought upon her as a mitigating circumstance when conducting sentencing").

Kiplinger has also failed to show any error relating to his IQ. First, we fail to see that Kiplinger specifically offered his IQ as a mitigating factor during the resentencing hearing. "If [a] defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal." *Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. 2000), *reh'g denied*. As a result, Kiplinger has waived any argument regarding his IQ.

Waiver notwithstanding, Kiplinger has failed to show that his IQ was a significant mitigating circumstance. The record reveals that Kiplinger had an IQ of 83, which was considered "low normal[.]" (Tr. at 936). The record also indicates that Kiplinger graduated from high school and was employed at the time of the crime. The psychologist who testified during Kiplinger's original sentencing hearing indicated that Kiplinger was able to appreciate the wrongfulness of his conduct at the time of the crime. Because Kiplinger has failed to explain why his IQ should be given mitigating weight with regard to this conviction, the trial court did not err in disregarding it as a mitigator. *See Carter*

v. State, 711 N.E.2d 835, 839 (Ind. 1999) (holding the trial court did not abuse its discretion by failing to find the defendant’s IQ of 89 to be a mitigating circumstance).

2. *Inappropriate Sentence*

Kiplinger argues that the maximum sixty-five year sentence for his murder conviction is inappropriate because he had a “lesser role” in the commission of Braunecker’s murder. Kiplinger’s Br. at 13.

We have the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of Kiplinger’s offense, the evidence reveals that Kiplinger had more than a limited role in Braunecker’s murder and rape. Kiplinger and O’Brien were asked to take Braunecker home because she was intoxicated. As the Indiana Supreme Court stated when affirming Kiplinger’s felony murder conviction, Kiplinger “knew that O’Brien wanted to have sex with Braunecker” and “assisted O’Brien in his effort to overcome Braunecker so that O’Brien could have sex with her.” *Kiplinger*, 922 N.E.2d at 1266. Kiplinger punched Braunecker in the head and choked her. He then helped O’Brien drag Braunecker from the car and to the river, where he watched as O’Brien kicked Braunecker in the head with his steel toed boots and struck her with a 75 to 80 pound rock. The record reveals that the cause of Braunecker’s death was due to the multiple injuries sustained in the physical assault, including asphyxiation injuries from

strangulation. Additionally, Kiplinger and O'Brien dumped Braunecker's body in the river, and Kiplinger attempted to get rid of any evidence relating to the crime. The serious nature of Kiplinger's crime supports the enhanced sentence that the trial court imposed, and his nature of the offense argument does not aid his inappropriateness claim.

Turning to Kiplinger's character, the record reveals that he is no stranger to criminal behavior or aggression against women. Kiplinger, who was twenty-two at the time of the crime, had amassed convictions in Kentucky for crimes relating to drugs, alcohol, and violent behavior. At the time of the crime, Kiplinger was on probation from Kentucky convictions of terroristic threatening, domestic violence assault, and criminal mischief. In 2004, he was convicted in Kentucky of assault, possession of a controlled substance not in an original container, and alcohol intoxication in a public place. In the five months leading up to the murder, Kiplinger had been convicted of terroristic threatening, harassing communications, public intoxication of controlled substances, being mentally ill and a danger to self/others, and the convictions for which he was on probation. Kiplinger also had protective orders filed against him by two women, including the mother of his two children, who had to get a protective order against Kiplinger after he punched her in the eye while she was pregnant.

Additionally, Kiplinger has a history of substance abuse, including alcohol and marijuana. He reported that he started using marijuana at the age of sixteen and that he smoked daily. Kiplinger indicated that, at the time of the offense, he was relatively drug free, which he equated to drinking a six pack of beer and maybe smoking a joint.

Finally, his actions surrounding the crime reveal a further glimpse into his poor character. On the night of the crime, Kiplinger drove under the influence of alcohol and marijuana, and after the crime, he attempted to get rid of any evidence that would connect him or O'Brien. A day or so after the crime, Kiplinger told his friend, in an almost boastful manner, about the murder and showed off O'Brien's clothes to prove to his friend what they had done.

Kiplinger may have had a difficult childhood and a below average IQ, but given his substance abuse, criminal history, and disregard for the law, we conclude that the sixty-five-year sentence imposed by the trial court was not inappropriate in light of the nature of the offense and his character. *See, e.g., White v. State*, 849 N.E.2d 735, 744-745 (Ind. Ct. App. 2006) (holding that the trial court's imposition of a maximum sentence was not inappropriate where the defendant had repeated contact with law enforcement that escalated in seriousness), *trans. denied*.

3. *Allocution at Resentencing*

Lastly, Kiplinger argues that the trial court erred at resentencing because it did not allow him the right of allocution.

Defendants have a right of allocution—or an opportunity to offer a statement on their own behalf—before a trial court imposes a sentence. *See Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007); *see also* Ind. Code § 35-38-1-5(a); Article 1, Section 13 of the Indiana Constitution. “[T]he purpose of the right of allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of

the defendant in the case before it.” *Biddinger*, 868 N.E.2d at 413 (quoting *Ross v. State*, 676 N.E.2d 339, 343 (Ind. 1996)).

Here, Kiplinger made a statement during his original sentencing hearing. During Kiplinger’s resentencing hearing, the trial court indicated that it was going to take judicial notice of Kiplinger’s statement from the original sentencing hearing, and Kiplinger did not object. Kiplinger’s attorney presented argument during the resentencing hearing but did not request that Kiplinger be allowed to make a statement. Only after the trial court had imposed Kiplinger’s sentence did he make any mention of wanting to “say something.” (Resentencing Tr. at 36). When the trial court informed Kiplinger that he could not do so at that time, again, Kiplinger made no sort of objection or offer of proof as to why his statement might be relevant to his sentence.

Because of his failure to object, Kiplinger has waived any argument relating to his right of allocution at the resentencing hearing. “A defendant, especially one under these circumstances, may not sit idly at a sentencing hearing, fail to object to a statutory defect in the proceeding, then seek a new sentencing hearing on that basis on appeal. The failure to object constitutes waiver.” *Angleton v. State*, 714 N.E.2d 156, 159 (Ind. 1999) (holding that the defendant had waived his right to allocution at his resentencing hearing on murder where he failed to object), *reh’g denied, cert. denied*. See also *Robles v. State*, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998) (holding that where the defendant failed to object to the trial court’s failure to grant him or his counsel the opportunity to speak before the pronouncement of the sentence, he had waived the alleged error and was precluded from raising it for the first time on appeal).

Affirmed.

BRADFORD, J., and BROWN, J., concur.