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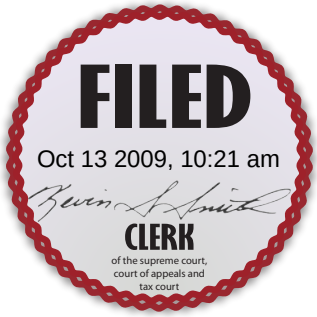

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IN THE
COURT OF APPEALS OF INDIANA

THOMAS D. TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0907-CR-294
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0709-MR-00003

OCTOBER 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Thomas Turner appeals his conviction of murder and the sixty-five-year sentence imposed thereon. We affirm.

Turner raises three issues for our review:

1. Whether the trial court erred in admitting evidence;

2. Whether there is sufficient evidence to support his conviction; and

3. Whether the trial court erred in sentencing him.

The facts most favorable to the verdict reveal that in 2007, forty-three-year-old Turner and seventy-four-year-old Walter Hagen lived together in Elkhart County. The two men were very close, almost like a father and a son. However, their relationship began to change that summer. In July 2007, while he was incarcerated in the Elkhart County Jail, Turner sent Hagen a letter and asked Hagen to go to the library and fill out Turner's unemployment paperwork online so that Turner would have some money when he was released from jail. Specifically, Turner instructed Hagen to "make up 3 places where [he] looked for work" that week and to submit the information online. State's Exhibit 2. Hagen, however, took the letter to the unemployment office and showed it to an employment associate. Turner's unemployment benefits were subsequently placed on hold. Turner told a neighbor that he was going to "kick [Hagen's] ass" for doing that. Tr. at 287.

After he was released from jail, Turner had a job interview. The evening before the interview, Turner asked Hagen if Hagen would drive him to the interview. Hagen

agreed. However, the following morning, Hagen left in his truck without Turner. As he was leaving, Hagen told Turner to ride a bike to the interview. A few days later, Turner grilled some meat on the charcoal grill that the two men shared. Turner refused to share the meat with Hagen because he "was getting even" with Hagen for not driving him to the job interview. Tr. at 753. When Turner returned home a few days later, he found that Hagen had hidden the grill.

When Turner returned home at 11:30 p.m. on August 17, 2007, he discovered that Hagen had locked him out of the house. Turner used a hammer to pop open the lock, and went upstairs where the two men slept. At some point, the two men became involved in a physical altercation, and Turner threw Hagen down the stairs. As Hagen lay on the floor, Turner kicked and stomped on him repeatedly. Turner later said that he may have kicked Hagen "a f***ing million times." Tr. at 725.

Turner called 911 from a neighbor's home. Turner told the 911 dispatcher that Hagen hit him with a chair and he "whipped [Hagen's] ass." Tr. at 359. When paramedics arrived at the scene, they saw Turner calmly sitting on the front porch. He pointed over his shoulder and told the paramedics that Hagen had fallen down the stairs. The paramedics found Hagen lying on the floor with coagulated blood pooled around his head and splattered all over the nearby refrigerator, indicating that Hagen had been stomped on. Both of Hagen's eyes were swollen, and he suffered from numerous facial, rib, and leg fractures. He also suffered from a subdural hematoma, which is blood between the skull and brain. In addition, Hagen had bruises and abrasions on his back,

which were caused by the blunt force of an object with sharply defined edges. Hagen died two weeks later after being taken off of life support. An autopsy revealed that Hagen's death was a homicide caused by blunt force trauma to the head.

The State charged Turner with murder. Testimony at trial revealed that Turner referred to Hagen's beating as the "ass kicking ceremony." Tr. at 727. Turner's defense was based on a claim of sudden heat. According to Turner, Hagen provoked him by hitting him with a chair. Also at trial, the court admitted into evidence over Turner's objection Hagen's autopsy photographs. A jury convicted Turner of murder, and the court sentenced him to sixty-five years. Turner appeals his conviction and sentence.

Turner first argues that the trial court erred in admitting State's Exhibits 61-65, 67, and 68, Hagen's autopsy photographs. It is within the sound discretion of the trial court to admit or exclude evidence. *Hornbostel v. State*, 757 N.E.2d 170, 181 (Ind. Ct. App. 2001), *trans. denied*. This court will not reverse that decision absent an abuse of discretion. *Id.* A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts and circumstances presented. *Id.*

Autopsy photographs are admissible if they provide relevant evidence, and their probative value is not substantially outweighed by their tendency to impassion the jury against the defendant. *Id.* When such photographs are used to illustrate the pathologist's testimony, the initial relevancy requirement has been satisfied. *Id.* The question then becomes one of balancing the probative value against the prejudicial effect. *Id.*

Turner challenges the admission of all of Hagen's autopsy photographs, none of which show Hagen's body in an altered condition. Our review of the transcript, however, reveals that the pathologist used these photographs to illustrate his testimony regarding the extent of Hagen's injuries. Thus, the initial relevancy requirement has been satisfied. *See id.* Turner makes no further argument as to how the probative value of these photographs is substantially outweighed by their prejudicial effect on the jury. The trial court did not err in admitting these photographs into evidence. *See id.*

Turner further argues that there is insufficient evidence to support his conviction. Specifically, his sole contention is that the State failed to establish that he did not act in sudden heat, a factor that mitigates murder to voluntary manslaughter. Voluntary manslaughter is a lesser included offense of murder, distinguishable by the factor of the defendant having killed while acting under sudden heat. *See* Ind. Code § 35-42-1-3. To establish sudden heat, the defendant must show sufficient provocation to engender passion. *Earl v. State*, 715 N.E.2d 1265, 1267 (Ind. 1999). Sufficient provocation is demonstrated by such emotions as anger, rage, sudden resentment, or terror sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection. *Id.*

Because there is no implied element of the absence of sudden heat in the crime of murder, the State is under no obligation to negate the presence of sudden heat to obtain a conviction. *Id.* However, once a defendant places sudden heat into issue, the State bears the burden of negating the presence of sudden heat beyond a reasonable doubt. *Id.* The

State may meet this burden by rebutting the defendant's evidence or affirmatively showing in its case-in-chief that the defendant was not acting in sudden heat when the killing occurred. *Id*.

Here, Turner argues that he acted in sudden heat after Hagen hit him with a chair. However, even assuming that Turner's statement could establish the presence of sudden heat, the jury was under no obligation to credit it. The existence of sudden heat is a classic question of fact to be determined by the jury. *Jackson v. State*, 709 N.E.2d 326, 329 (Ind. 1999). Turner's argument is essentially an invitation to reweigh the evidence, which we will not do. The State produced sufficient evidence to establish that Turner was not acting in sudden heat when he killed Hagen.

Lastly, Turner contends that the trial court erred in sentencing him to an enhanced sentence. Specifically, he argues that the trial court used several improper aggravating factors. Because the offenses in this case were committed after the April 25, 2005, revisions to the sentencing statutes, we review Turner's sentence under the advisory sentencing scheme. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* at 490. If the recitation includes a finding of aggravating or mitigating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.*

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* 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 failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including aggravating and mitigating, 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 in 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 or mitigating factors, it may then impose any sentence that is authorized by statute and permitted under the Indiana Constitution. *Id.*

Here, the trial court found four mitigating circumstances and sixteen aggravating circumstances. In his oral sentencing statement, the trial court explained as follows:

> The aggravators are substantial. Any one of the aggravators taken alone would, in my opinion, be sufficient to warrant the imposition of a substantial enhanced sentence. All of them taken together would likewise be substantial enough to warrant the imposition of a rather substantial enhancement.

Sentencing Hearing Tr. at 25-26.

Turner complains that the trial court erroneously considered twelve of the sixteen aggravating factors. However, Turner concedes that the following aggravating circumstances were not erroneous: 1) Turner was on probation when he committed the murder; 2) Turner's character, including the facts that he took advantage of a seventy-four-year-old man, he had an apparently retaliatory motive for the crime, and he apparently failed to seek immediate medical attention for Hagen as evidenced by the coagulated blood surrounding Hagen's head; 3) Turner owed up to $82,000.00 in back child support; and 4) Turner violated a position of trust with Hagen based upon their relationship.

Even if the trial court improperly applies an aggravating circumstance, a sentence enhancement may be upheld if other valid aggravating circumstances exist. *Garland v. State*, 855 N.E.2d 703, 707 (Ind. Ct. App. 2006), *trans. denied.* Further, a single aggravating circumstance is adequate to justify an enhanced sentence. *Storey v. State*, 875 N.E.2d 243, 250 (Ind. Ct. App. 2007), *trans. denied*. Here, Turner concedes that the trial court properly applied four aggravating circumstances. These circumstances support the trial court's imposition of an enhanced sentence. The trial court did not err in sentencing Turner.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.