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IN THE COURT OF APPEALS OF INDIANA

LINDA L. MILLENDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0610-CR-617
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0505-FA-27

July 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Linda L. Millender appeals her seven-year sentence for reckless homicide, a class C felony. We affirm.

Issue

The issue is whether the trial court properly sentenced Millender.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that sometime after 10:00 p.m. on January 19, 2005, Millender called 911 and told the operator that she had stabbed her boyfriend, Phillip Upshaw, during a fight in their East Chicago apartment. Millender stated that they both had grabbed knives, that Upshaw had thrown a television at her, and that she had "end[ed] up cutting him[.]" Exh. 2. Upshaw was dead by the time the police and paramedics arrived, killed by a single knife stab to the chest that penetrated approximately five inches, fractured two ribs, and lacerated his heart. Based on the odd placement of pots, food, and a lamp on the floor, as well as the lack of blood on a knife lying in a pool of blood near Upshaw's body, one of the responding officers believed that signs of a struggle had been staged. Police found the butcher knife that Millender used to kill Upshaw on top of the refrigerator.

Police took Millender into custody. She gave a statement in which she described having a verbal altercation with Upshaw, which escalated when he lunged at her with a pot lid and picked up two knives. Millender stated that she grabbed a knife, that Upshaw lunged at her with a pot and a knife, and that she fell over an ottoman. Fearing that Upshaw was

going to hit her with the pot, Millender lunged at him with the knife and then "saw blood on his side." Exh. 12.

A grand jury indicted Millender for class A felony voluntary manslaughter.[1] Millender's trial testimony was largely consistent with her statement to police, although she claimed that Upshaw came toward her and impaled himself on her knife. Millender also acknowledged that Upshaw did not throw a television at her, as she had reported to the 911 operator. On August 3, 2006, the jury found Millender guilty of the lesser-included offense of reckless homicide, a class C felony.[2] On September 26, 2006, the trial court sentenced Millender to seven years in the Department of Correction. She now appeals her sentence.

Discussion and Decision

When Millender committed her crime, the presumptive sentence for a class C felony was four years, with not more than four years added for aggravating circumstances and not more than two years subtracted for mitigating circumstances. Ind. Code § 35-50-2-6.[3] Regarding the presumptive sentencing scheme, this Court has stated,

> When enhancing a sentence, the trial court must set forth a statement of its reasons for selecting a particular punishment. Specifically, the court must identify all significant aggravating and mitigating circumstances, explain why each circumstance is considered aggravating and mitigating, and show that it evaluated and balanced the circumstances. A trial court may enhance a

[1] *See* Ind. Code § 35-42-1-3(a) (defining class A felony voluntary manslaughter as a knowing or intentional killing of another human being, with a deadly weapon, while acting under sudden heat).

[2] *See* Ind. Code § 35-42-1-5 ("A person who recklessly kills another human being commits reckless homicide, a Class C felony.").

[3] Effective April 25, 2005, the Indiana General Assembly replaced the presumptive sentencing scheme with the current advisory sentencing scheme. "[C]ourts generally must sentence defendants under the statute in effect at the time the defendant committed the offense." *White v. State*, 849 N.E.2d 735, 741 (Ind. Ct. App. 2006), *trans. denied*. As stated above, Moore committed her crime in January 2005.

> presumptive sentence based upon the finding of only one valid aggravating circumstance.

Leffingwell v. State, 810 N.E.2d 369, 371 (Ind. Ct. App. 2004) (citations omitted).

At sentencing, the trial court found the following aggravating factors:

> [T]he defendant has a history of criminal convictions. The defendant was convicted in Federal Court with possession with intent to distribute cocaine, aiding and abetting, in 1992.
>
> On Count II, possession with intent to distribute cocaine, the defendant received three years of probation. On Count III, aiding and abetting, the defendant received two months in prison and three years of probation. In 1995, there was a violation of probation filed, the defendant was sentenced to Federal prison for a period of nine months.
>
> In further aggravation, the defendant is in need of correctional and rehabilitative treatment that can best be provided by her commitment to a penal facility because of the defendant's past criminal convictions. The defendant was given probation in the past in the Federal system. That probation ended up being revoked and the defendant received an executed sentence. That executed service of sentence did not cause the defendant to lead a law-abiding life in that this offense occurred thereafter.

Tr. at 914-15.

The trial court also found the following mitigating factors:

> [T]he Court finds that the defendant has health considerations that require her to walk with a cane. In further mitigation, the Court finds imprisonment will result in undue hardship to the defendant and her relatives, namely her relatives and grandchildren, in that the defendant provides a loving relationship to her children and grandchildren.

Id. at 914. The trial court found that the aggravating factors "substantially" outweighed the mitigating factors and sentenced Millender to seven years in the Department of Correction. *Id*. at 915.

Millender first contends that the trial court improperly considered and balanced the aggravating and mitigating factors. "Sentencing decisions rest within the discretion of the

trial court and are reviewed on appeal only for an abuse of discretion. It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors." *Leffingwell*, 810 N.E.2d at 371 (citation omitted). "The trial court is solely responsible for determining the appropriate weight to accord aggravating and mitigating factors in sentencing." *Allen v. State*, 719 N.E.2d 815, 817-18 (Ind. Ct. App. 1999), *trans. denied* (2000). "[A] trial court is not required to assign a specific weight to each aggravator and mitigator." *Leffingwell*, 810 N.E.2d at 371.

Millender does not challenge the trial court's finding of her criminal convictions as an aggravator, except to say that her prior convictions are nonviolent and that she remained conviction-free until her current offense. Millender contends that the second aggravator is "entirely derivative" of her criminal record and therefore "does not merit separate consideration as an aggravating factor." Appellant's Br. at 6. Millender cites no authority for this contention, however, and has therefore waived it. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) (finding that defendant waived contention "by failing to make a cogent argument with citations to supporting authority.") (citing Ind. Appellate Rule 46(A)(8)), *trans. denied*.

Millender also claims that the trial court abused its discretion in failing to find her remorse for Upshaw's death as "an additional and significant mitigator[.]" Appellant's Br. at 6. "A trial court's determination of a defendant's remorse is similar to a determination of credibility. Without evidence of some impermissible consideration by the court, we accept its determination of credibility. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements." *Dylak v. State*, 850 N.E.2d 401, 410 (Ind. Ct. App.

2006) (citations omitted), *trans. denied*. Millender does not allege any impermissible considerations.[4] As such, the trial court did not abuse its discretion in failing to consider her remorse as a mitigating factor. In sum, we conclude that Millender has failed to establish that the trial court abused its discretion in considering and balancing the aggravators and mitigators.

Millender further contends that her sentence is inappropriate pursuant to Indiana Appellate Rule 7(B), which provides that this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." As for the nature of the offense, Millender's forceful plunging of a butcher knife into Upshaw's chest is a particularly egregious instance of reckless conduct. *See* Ind. Code § 35-41-2-2(c) (stating that a person engages in conduct "recklessly" when she does so "in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct"). As for Millender's character, she was convicted of two drug-related felonies in 1992 and violated her probation. Millender stabbed her boyfriend in the heart with a butcher knife, staged signs of a struggle, and gave conflicting accounts of the event to the 911 operator, the police, and the jury. After due consideration of the trial court's decision, we cannot say that Millender's seven-year sentence for reckless homicide is inappropriate. We therefore affirm her sentence.

[4] Millender states that "she was the person who summoned police and emergency personnel to the scene, identified herself as the person who stabbed Upshaw (albeit in self-defense), and remained there to let the police into her home." Appellant's Br. at 7. Millender neglects to mention that she lied to the 911 operator about Upshaw throwing a television at her and that the jury obviously disbelieved her self-defense claim.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.