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IN THE COURT OF APPEALS OF INDIANA

JAMES BECK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-922
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Commissioner
Cause No. 49G06-0604-FB-70066

July 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

James Beck appeals his convictions of robbery, a Class B felony, carrying a handgun without a license while having a prior felony conviction within fifteen years, a Class C felony, and of being an habitual offender, and his aggregate sentence of twenty-seven years. On appeal, Beck raises three issues, which we expand and restate as whether sufficient evidence supports his convictions, whether his sentence violates his Sixth Amendment rights under Blakely v. Washington, whether the trial court abused its discretion in sentencing Beck, and whether his sentence is inappropriate in light of the nature of his offenses and his character. Concluding that sufficient evidence exists to support his convictions, Beck's Sixth Amendment rights were not violated, the trial court did not abuse its discretion, and Beck's sentence is not inappropriate, we affirm.

Facts and Procedural History

Around 1:00 a.m. on March 22, 2006, Big Kahuna Pizza received an order for a pizza along with a request that the delivery person bring change for a fifty-dollar bill. Andrea Gillenwater left Big Kahuna around 2:00 a.m. with the order and drove to the given address. Upon reaching the address, Gillenwater exited her vehicle and began walking up to the house. At this point, Gillenwater heard car doors open and turned to see four masked men running at her. One man, who was wearing a plaid jacket, removed his mask and pointed a handgun at Gillenwater, saying "Bitch, give me all your money . . . I know you have money on you." Transcript at 30. Gillenwater handed the man the money in her pocket. One of the other men entered Gillenwater's car and took money that was in the console. One of the men

also took the pizza, 2-liter of soda, and order of breadsticks. The man with the gun told Gillenwater, "Bitch, put your face in the snow," and the men returned to their vehicle and drove away. Gillenwater then called 911 and reported the robbery.

Gillenwater gave a description to officers, and subsequently picked Beck's photo out of a collection of photographs on the police department's database. A few weeks later, Gillenwater picked a different photograph of Beck out of a six-photograph array. A jury trial was held on September 13, 2006, at which Gillenwater also identified Beck. Gillenwater testified that she "remember[ed] his face. He kept calling me a bitch." Id. at 36. She explained that there was an electrical light on about four houses down, a porch light on at the house to which she thought she was delivering a pizza, and that she thought there was a full moon, so "even though it was dark, it was pretty light." Id. at 38.

The only witnesses other than Gillenwater were the police officer who responded to the 911 call and the police officer who assembled the photo arrays and was present when Gillenwater identified Beck. The jury found Beck guilty of robbery, a Class B felony, and carrying a handgun without a license, a Class A misdemeanor. Beck then waived his right to a jury on the handgun charge's second part, which alleged that he had a prior felony conviction within the last fifteen years, thereby elevating the offense to a Class C felony, and the habitual offender enhancement. On September 22, 2006, a bench trial was held at which Beck admitted that he had two prior unrelated felonies: robbery, a Class C felony, and theft, a Class D felony. The trial court entered judgments of conviction for robbery and carrying a handgun without a license as a Class C felony.

The trial court then held a sentencing hearing on September 22, 2006. At this hearing, the trial court stated that it found the following aggravating factors: 1) Beck's criminal history, which consists of true findings for mischief, a Class B misdemeanor if committed by an adult, arson, a Class D felony if committed by an adult, and theft, a Class D felony if committed by an adult, and convictions for possession of marijuana, a Class A misdemeanor, burglary, a Class C felony, and theft, a Class D felony; 2) Beck was on probation when he committed the current offenses; and 3) "this was a robbery that wasn't spur of the moment; it was a planned robbery." Tr. at 172. In regard to this third aggravator, the trial court explained that Beck or his accomplices had "call[ed] that pizza place to set this girl up to get her to this desolate area . . . [in] what I call the middle of the night . . . [where] they knew no one else would be around . . . . It's very different than those folks who are high on crack and happen to have a gun and go in to a Village Pantry and rob somebody." Id. The trial court found Beck's youthful age of twenty to be the sole mitigating factor.

The trial court sentenced Beck to twelve years for robbery, and six years for carrying a handgun without a license. The trial court then enhanced the sentence for robbery by fifteen years because of Beck's status as an habitual offender, and ordered that the robbery and handgun charges run concurrently for an aggregate sentence of twenty-seven years. Beck now appeals.

Discussion and Decision

I. Sufficiency of Evidence

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

Here, Gillenwater identified Beck from the police department's database, from a photographic array, and at trial. It is well-established that "the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal." Toney v. State, 715 N.E.2d 367, 369 (Ind. 1999). Beck points to Gillenwater's failure to indicate whether her assailant had facial hair or any tattoos, and a police officer's testimony that Gillenwater initially stated that her assailant had a gap between his teeth.[1] These arguments boil down to requests that we reassess the weight of Gillenwater's testimony based on her credibility as a witness, a task that this court will not undertake. See Drane, 867 N.E.2d at 146-47;

[1] Beck's attorney claimed in his closing argument that Beck has "James" tattooed on his neck and does not have a gap between his teeth. However, the unsworn statements of counsel are not evidence. See Burk v. State, 716 N.E.2d 39, 43 (Ind. Ct. App. 1999). One of the pictures of Beck introduced by the State

Greenboam v. State, 766 N.E.2d 1247, 1257 (Ind. Ct. App. 2002), trans. denied. Nothing in Gillenwater's testimony was contradictory or equivocal, and no evidence indicates that her testimony was coerced in any way. Therefore, her testimony is not "incredible dubious." See James v. State, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), trans. denied.

We conclude that Gillenwater's testimony constitutes sufficient evidence to support Beck's convictions.

II. Blakely Challenge

Beck argues that his Sixth Amendment rights "were impinged by the trial court's use of certain aggravating factors in enhancing Beck's sentence." Appellant's Br. at 9. Prior to April 25, 2005, trial courts did indeed "enhance" sentences beyond the statutory "presumptive" sentence based on the presence of aggravating circumstances. However, in 2004, the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296 (2004), which called into question the constitutionality of Indiana's sentencing scheme. Our legislature responded to the Court's decision by amending our statutes to replace "presumptive" sentences with "advisory" sentences, a change that became effective April 25, 2005. See Primmer v. State, 857 N.E.2d 11, 15 (Ind. Ct. App. 2006), trans. denied. Now, a trial court may impose any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1. Therefore, "while under the previous presumptive sentencing scheme, a sentence must be supported by Blakely-appropriate aggravators and

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appears to show a tattoo on the side of Beck's neck, but neither picture shows Beck with his mouth open. See

mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators." Primmer, 857 N.E.2d at 15.

Because Beck committed the offense and was sentenced after the new statute took effect, the trial court had no presumptive sentence from which to "enhance" Beck's sentence. Instead, the trial court had a range of permissible sentences, with an "advisory" sentence serving as "a guideline sentence that the court may voluntarily consider." Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied (quoting Ind. Code § 35-50-2-1.3). That is, the new sentencing scheme "permit[s] the imposition of a maximum sentence without any finding of aggravating circumstances by any factfinder – judge or jury." Id. at 1072 (emphasis in original). Therefore, the trial court's finding of an aggravating circumstance did not amount to an impermissible "enhancement," as the trial court was not required to use the advisory sentence, and the finding of this aggravating circumstance did not violate Blakely. See Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007) (noting that Blakely "does not prohibit a trial court from finding aggravating circumstances" (quoting Davidson v. State, 849 N.E.2d 591, 594-95 (Ind. 2006))).

III. Aggravating and Mitigating Circumstances

Beck argues that the trial court improperly failed to find Beck's mental illness and his childhood as mitigating factors. "Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer, 868

State's Ex. 3.

N.E.2d at 490. We will conclude that the trial court abused its discretion if its sentencing statement "omits reasons that are clearly supported by the record and advanced for consideration." Id. at 491

Beck claims he "suffers from depression, nervousness, anxiety, and has been diagnosed with bipolar / manic-depression and psychosis in 2003." Pre-Sentence Report at 14. Our supreme court has identified four factors that are relevant when considering a defendant's mental illness in conjunction with sentencing: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)). We have previously concluded that a defendant "who is suffering from a severe, longstanding mental illness that has some connection with the crime(s) for which he was convicted and sentenced is entitled to receive considerable mitigation of his sentence." Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied (remanding with instructions that trial court impose minimum sentence for voluntary manslaughter where defendant had such an illness and no criminal history). On the other hand, where a defendant is "capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense," mental illness should not be as significant a factor for sentencing. Scott v. State, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006), trans. denied (finding that defendant's

mental illness should have been given little weight).

Here, Beck in no way has attempted to identify a nexus between his illness and his decision to plan and carry out the robbery. The record contains no indication that Beck's mental illness renders him unable to control his behavior or of the extent to which it limits his ability to function. Because the record does not clearly indicate that Beck's mental illness was a significant mitigating factor, the trial court did not abuse its discretion in declining to find it as such.

In regard to Beck's childhood, although Beck indicates that he was moved among various relatives and had a bad relationship with his parents, he denied being mentally, physically, or sexually abused at any point during his childhood. Again, the record does not clearly indicate that Beck's childhood was a significant mitigating factor, and the trial court acted within its discretion in declining to find it as such.

Beck also argues that the trial court improperly balanced the aggravating and mitigating factors. However, our supreme court has explained 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." Anglemyer, 868 N.E.2d at 491.

We conclude that the trial court did not abuse its discretion in finding and balancing the aggravating and mitigating circumstances.

IV. Appropriateness of Sentence

Beck next argues that his sentence is inappropriate. When reviewing a sentence

imposed by the trial court, we "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." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006).

Beck does not frame his argument in terms of the nature of the offense and his character, and instead argues that his sentence is inappropriate based on the trial court's consideration and balancing of the aggravating and mitigating circumstances.[2] Despite the State's argument that we should therefore treat the issue of appropriateness as waived, we will address the issue, reframing Beck's arguments to relate to the nature of the offense and his character. See Collins v. State, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), trans. denied (noting our "strong preference to decide issues on their merits").

Here, the trial court sentenced Beck to twelve years for robbery, a sentence that is two years above the advisory sentence, and eight years below the maximum sentence. See Ind. Code § 35-50-2-5. Under the habitual offender statute, the trial court must sentence the

[2] In a separate section of his brief, Beck also argues that his sentence is "manifestly unreasonable." Appellant's Brief at 13. The rule that authorized appellate revision of a "manifestly unreasonable" sentence was repealed January 1, 2001, and replaced with the current rule allowing for revision when an appellate court finds the sentence inappropriate given the nature of the offense and the defendant's character. Neale, 826 N.E.2d at 639.

defendant "to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." Ind. Code § 35-50-2-8(h). Here the trial court attached the habitual offender enhancement to the robbery count, and thereby could have enhanced the sentence by ten to thirty years. Therefore, the fifteen-year enhancement is five years above the minimum enhancement, and fifteen years below the maximum.

In regard to the nature of the offense, we recognize, as did the trial court, that this robbery appears to have been premeditated. No one was at the house to which the pizza was to be delivered, the caller requested that the delivery person bring change for a fifty-dollar bill, Beck and his accomplices were waiting at the address when Gillenwater arrived, and Beck told Gillenwater that he knew she had money. These circumstances clearly constitute circumstantial evidence that Beck and his accomplices planned this robbery. However, we also recognize that this robbery is not significantly more egregious than the typical robbery committed with a deadly weapon.[3] We need not decide whether the nature of the offense, in itself, justifies the trial court's sentence, as our review under Rule 7(B) entails an examination of both the nature of the offense and the character of the offender.

Beck argues that his sentence should be reduced based upon his mental illness and his childhood. As discussed above, the record does not indicate that either Beck's mental illness or childhood played a significant role in his commission of the crime. Based on the

[3] Robbery is a Class B felony only when committed while armed with a deadly weapon or when it results in bodily injury. Ind. Code § 35-42-5-1. It is a Class A felony if it results in serious bodily injury to anyone other than the defendant. Id. If none of these conditions is present, robbery is a Class C felony. Id.

information before us, we conclude that neither of these circumstances renders Beck's sentence inappropriate.

We recognize, as did the trial court, that Beck was only twenty years old at the time of sentencing. However, Beck had already compiled a juvenile history of three true findings and an adult criminal history of two felonies and a misdemeanor. See Field v. State, 843 N.E.2d 1008, 1012-13 (Ind. Ct. App. 2006), trans. denied (fact that defendant had compiled a substantial criminal history at a young age commented negatively upon defendant's character); Johnson v. State, 837 N.E.2d 209, 216 (Ind. Ct. App. 2005), trans. denied ("Given [the defendant's] lengthy criminal history, we cannot say that the trial court abused its discretion by failing to give mitigating weight to his age."). Beck also has a previous probation violation, and again violated probation by the commission of this crime. Cf. Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) ("Probationary status is a valid aggravating factor, and sufficient to support sentence enhancement."). During a previous period of roughly three months in prison, Beck received four conduct violations, providing further evidence of Beck's lack of respect for the law and authority.

Beck's previous true findings of theft and arson, and his felony convictions for theft and burglary demonstrate Beck's consistent lack of respect for other's property. The instant offense also provides insight into Beck's character. Although, as stated above, the current offense is not significantly more egregious than a typical armed robbery, the offense demonstrates that Beck's lack of respect for property extends to a lack of respect for human life, as his actions demonstrate his willingness to plan and carry out a crime carrying a

substantial risk of death or serious injury to an innocent person.

Based on our examination of the record, we conclude that Beck's aggregate twenty-seven year sentence is not inappropriate given his character and the nature of the offense.

Conclusion

We conclude that sufficient evidence supports Beck's conviction, the trial court's consideration and finding of aggravating circumstances did not violate Beck's Sixth Amendment rights, the trial court did not abuse its discretion in sentencing Beck, and Beck's sentence was not inappropriate.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.