ATTORNEY FOR APPELLANT:

JEFFREY D. STONEBRAKER
Chief Public Defender
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIAM GENE HUGHES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0610-CR-459
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel Donahue, Judge
Cause No. 10C01-0306-FA-74

July 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, William Gene Hughes[1] was convicted of rape[2] as a Class A felony, burglary resulting in bodily injury[3] as a Class A felony, and criminal confinement[4] as a Class B felony. The trial court sentenced him to fifty years for rape and fifty years for burglary to be served concurrently, and also imposed a consecutive sentence of twenty years for criminal confinement. On appeal, Hughes raises the following issues:

I. Whether the trial court abused its discretion by finding Hughes competent to stand trial.

II. Whether the trial court abused its discretion in its sentencing of Hughes by finding aggravating factors contrary to the rule set forth in *Blakely v. Washington*.[5]

We affirm.

FACTS AND PROCEDURAL HISTORY

During the early morning hours of June 13, 2003, Hughes entered the residence of sixty-seven-year-old J.S. by breaking a window in her screened-in patio. J.S. awoke to find Hughes holding a butcher knife to her neck and demanding either money or sex. After J.S. gave Hughes money from her purse, he informed her, "well this ain't enough money . . . I'm going to take sex too." *Tr*. at 120. J.S. pleaded with Hughes and offered her checkbook and credit card in an effort to prevent the rape.

---

[1] Both parties refer to the defendant as William *E*. Hughes, however, we note that the transcript from the trial and the pre-sentence investigation report refer to the defendant as William *Gene* Hughes.

[2] *See* IC 35-42-4-1(b)(2).

[3] *See* IC 35-43-2-1(2)(A).

[4] *See* IC 35-42-3-2(b)(2)(A).

[5] 542 U.S. 296, 124 S. Ct. 2531 (2004).

Hughes ignored J.S.'s pleas, removed his clothes, got into her bed, and raped her. J.S. testified that Hughes remained in her home for almost an hour. Before he left, Hughes told J.S. that he was sorry for his actions but explained that he had been "drinking and doing drugs." *Tr*. at 124. He further stated, "you're the sixth woman that I done this to, but I didn't hurt any of them because they did what I told them to do." *Id*.

Hughes acknowledged that he needed help and asked J.S. to help him. He also told J.S. that he would return the following Tuesday and stated, "maybe we could get a relationship going." *Id*. at 125, 137-38. After Hughes left, J.S. ran to a neighbor's house for help, and when the police arrived, she was taken to the hospital.

Working from a description provided by J.S., police apprehended Hughes and found him in possession of J.S.'s jewelry. During the investigation, police matched DNA found in bodily fluids at the scene with Hughes's DNA. *Id*. at 165. Police also found one of Hughes's fingerprints on an interior piece of glass in J.S.'s kitchen.

The State charged Hughes with rape, burglary resulting in bodily injury, and criminal confinement. After discovering that Hughes was mentally challenged, the trial court appointed two psychiatrists, Dr. Asad Ismail and Dr. Daniel Howerton, to examine Hughes regarding his competency to stand trial.

In July 2003, both psychiatrists evaluated Hughes and found him incompetent to stand trial on the basis that Hughes did not understand the charges against him and was unable to assist his attorney in his defense. *Appellant's App*. at 31-34. In August 2003, the trial court reviewed these evaluations, determined that Hughes lacked the capacity to stand trial, and

committed him to Logansport State Hospital ("Logansport") for further evaluation and treatment. *Id*. at 40-43.

In November 2003, the Superintendent of Logansport ("Superintendent") provided the trial court with a psychiatric evaluation prepared by Dr. Robert Sena. In the report, Dr. Sena noted that Hughes "is able to discuss and examine the events for which he is charged, in a calm and coherent manner," but "appears to be grossly deficient in his comprehension of legal terms. For example, he was unable to correctly define 'rape' and had no idea what the term 'criminal confinement' means." *Id*. at 51. The report further noted that Hughes had an IQ of 61, "and appears to be functioning in the middle or low-middle range of Mild Mental Retardation, which is defined as an IQ of '50 or 55 to 70.'" *Id*. at 49. Based on this evaluation, the Superintendent notified the trial court, "Mr. Hughes has not been found competent to stand trial, but the possibility of his becoming competent does exist." *Id*. at 45.

In March 2004, the Superintendent notified the trial court, "After six months' hospitalization, Mr. Hughes has now been found to have sufficient comprehension to proceed to trial on the charges." *Id*. at 54. The Superintendent's conclusion was based on findings made by Dr. Sena in his second evaluation of Hughes. Dr. Sena observed that Hughes "has improved considerably in the past 3 months in his comprehension of legal terms. . . . He verbalizes a basic but adequate understanding of courtroom procedures and the roles of key courtroom personnel. He understands his charges and how serious they are. . . . I am confident that he has the ability to properly assist his attorney in his own defense." *Id*. at 58-59. Following this report of competency, the trial court ordered Hughes to be returned to the county jail.

On January 25, 2006, Hughes filed a motion for psychiatric evaluation. The next day, he filed notice of his intent to interpose the defense of insanity to the charged offenses. The trial court ordered Dr. Ismail and Dr. Howerton to again examine Hughes in regard to his insanity defense. Both doctors also evaluated Hughes's competency. Dr. Ismail found Hughes was still not competent to stand trial. In contrast, Dr. Howerton found Hughes to be "minimally competent for trial" based on his understanding of the nature of the charges against him, the legal consequences, and his ability to participate in his defense. *Court's Ex.* 1 at 33.

The trial court held an April 2006 competency hearing, during which it heard testimony from Dr. Howerton and Dr. Ismail, reviewed Dr. Sena's report, and found Hughes competent to stand trial. In June 2006, Hughes moved for reconsideration of the trial court's finding, arguing that he was unable to understand the proceedings or assist with his defense. *Appellant's App.* at 141-42. Following brief testimony from Hughes, the trial court incorporated its prior finding that Hughes was competent to stand trial and denied Hughes's motion to reconsider.

The jury found Hughes guilty but mentally ill on each of the three charges, and the trial court sentenced him to concurrent fifty-year sentences for each Class A felony, and imposed a consecutive twenty-year sentence for the Class B felony. Hughes now appeals. Additional facts will be added as needed.

DISCUSSION AND DECISION

I. Competence to Stand Trial

Hughes first contends that the trial court abused its discretion in finding him competent to stand trial. On appeal, we review a trial court's determination of competency for an abuse of discretion. *Brewer v. State*, 646 N.E.2d 1382, 1385 (Ind. 1985). "The standard for deciding such competency is whether or not the defendant currently possesses the ability to consult rationally with counsel and factually comprehend the proceedings against him or her." *Id*. at 1384. To be competent at trial, a defendant must be able to understand the proceedings and assist in the preparation of his own defense. IC 35-36-3-1; *Brewer*, 646 N.E.2d at 1384.

An appellate court will reverse a trial court's determination of competency only "if it was clearly erroneous, unsupported by the facts and circumstances before the court and the reasonable conclusions that can be drawn therefrom." *Brewer*, 646 N.E.2d at 1385. "Where there is a conflict of the evidence submitted by the physicians, this Court generally will not overturn the trial court's determination as long as reasonable grounds exist to support it." *Barnes v. State*, 634 N.E.2d 46, 49 (Ind. 1994).

Here, at the outset, the trial court understood Hughes's mental limitations, assigned Dr. Ismail and Dr. Howerton to evaluate Hughes's competency to stand trial, and ordered him committed to Logansport for psychiatric evaluation with Dr. Sena. Dr. Sena initially determined that Hughes was not competent to stand trial. Hughes remained at Logansport for six months, after which, Dr. Sena reevaluated Hughes and found him competent. The trial court then ordered Hughes to be returned to the county jail.

Upon Hughes's motion, the trial court ordered Dr. Ismail and Dr. Howerton to again examine Hughes in regard to his insanity defense and his competency to stand trial. Dr. Ismail found Hughes was still not competent to stand trial based on "his low functioning and mental retardation and intellectual dysfunction." *Court's Ex.* 2 at 35. In contrast, Dr. Howerton found Hughes to be "minimally competent for trial" based on his understanding of the nature of the charges against him, the legal consequences, and his ability to participate in his defense. *Court's Ex.* 1 at 33.

During the competency hearing prior to trial, the trial court learned that Hughes could not read or write, was unable to feed, clothe, or provide shelter for himself, and had an IQ of 61. *Tr*. at 5-7. Dr. Ismail testified that Hughes was not competent to stand trial based on his mental retardation and intellectual dysfunction. *Id*. at 17. Dr. Howerton, however, disagreed, and under close questioning from the trial court, stated that Hughes could participate in his own defense and knew the charges against him, and concluded that Hughes was at least minimally competent to stand trial. *Id*. at 12.

In making its determination, the trial court had access to four competency evaluations—two each from Dr. Ismail and Dr. Howerton. The trial court also had information that Dr. Sena, who had previously found Hughes incompetent to stand trial, now found him to be competent.

Just prior to trial, Hughes filed a motion asking the trial court to reconsider the competency determination. Hughes briefly testified. On the stand, Hughes could identify the judge but did not know his role, could identify only one of his own attorneys, and was unable to identify the role of the prosecutor, the jury, or the judge. *Id*. at 38-40. Hughes identified

the charges against him as burglary and "[s]ex or something, sex." *Id*. at 40. Hughes understood that he would be sent to jail. The trial court denied Hughes's motion to reconsider and incorporated its prior finding that Hughes was competent to stand trial.

Here, the trial court's final decision of competency was made after numerous hearings, a careful review of psychiatric reports, and close questioning of Dr. Howerton, Dr. Ismail, and Hughes. We cannot say that the decision was clearly erroneous or unsupported by the facts and circumstances before the court. *Brewer*, 646 N.E.2d at 1385. The trial court did not abuse its discretion in finding Hughes competent to stand trial.

We further reject Hughes's contention that the trial court misunderstood the proper standard for determining whether Hughes was competent to stand trial. IC 35-36-3-1, in pertinent part, provides:

> (a) If at any time before the final submission of any criminal case to the court or the jury trying the case, the *court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense*, the court shall immediately fix a time for a hearing to determine whether the defendant has that ability. The court shall appoint two (2) or three (3) competent, disinterested:
>
> (1) psychiatrists; or
>
> (2) psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology.
>
> . . . The individuals who are appointed shall examine the defendant and testify at the hearing *as to whether the defendant can understand the proceedings and assist in the preparation of the defendant's defense*.

(Emphasis added).

When presented with the question of whether Hughes was competent, the trial court ordered a psychiatric evaluation as follows:

IT IS THEREFORE ORDERED that:

(1) Dr. Asad Ismail and Dr. Daniel Howerton, two competent disinterested psychiatrists, should be and they are hereby appointed to examine the Defendant to report to the court the results of their examination in writing, and to testify as Court appointed psychiatrists in this cause at a hearing as to whether the defendant has the present sufficient ability to:

(a) Understand the nature of the criminal action and the proceedings thereon; and

(b) Assist in the preparation of his defense.

Appellant's App. at 28. After determining that Hughes was competent to stand trial, the trial court issued an Order Determining Capacity to Stand Trial and set forth the proper standard by providing, "The Defendant presently does have comprehension sufficient to understand the nature of this criminal action against him, and to assist counsel in making a defense thereto." *Id*. at 128. It is clear that the trial court understood the basis for making a determination of competency.

II. Sentencing

Hughes next appeals his sentence. Sentencing decisions are generally within the sound discretion of the trial court and will only be reversed upon a showing of an abuse of discretion. *Garland v. State*, 855 N.E.2d 703, 706 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. *Id*. at 706-07.

In 2005, the Legislature amended Indiana's sentencing statutes to provide for "advisory sentences" rather than "presumptive sentences." *See* Pub. L. No. 71-2005, Sec. 5 (codified at IC 35-50-2-1.3). Because Hughes committed the instant offenses prior to the

April 5, 2005 effective date, his sentencing issues are not governed by the recent revisions in the sentencing scheme. Under the presumptive scheme, trial court discretion included the ability to determine whether a presumptive sentence should be increased because of aggravating circumstances or decreased because of mitigating circumstances. *O'Connell v. State*, 742 N.E.2d 943, 951 (Ind. 2001).

During the sentencing hearing, the trial judge noted his intention to "direct the Department of Corrections to place Mr. Hughes in a facility where they handle mentally handicap[ped] people" and where [Hughes] could be close to his mother in Chicago. *Tr*. at 432-33. He then stated, "first of all there is a mitigating factor . . . and that's the IQ of the Defendant at a sixty-one . . . ." *Id*. at 433-34. Next the trial judge listed the aggravating circumstances as: (1) history of criminal activity; (2) concern Hughes would commit another crime if he were out on the streets; (3) the need of correctional rehabilitative treatment; (4) imposition of a reduced sentence would depreciate the seriousness of the offenses; and (5) the victim was over sixty-five years of age. *Id*. at 434. Finding that the aggravating circumstances exceedingly outweighed the mitigating circumstances, the trial court imposed two concurrent fifty-year sentences for each of the Class A felonies and a consecutive twenty-year sentence for the Class B felony. *Id*.

On appeal, Hughes contends that the trial court's finding of each of the aggravators with the exception of the criminal history is, under the reasoning in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement. In *Blakely*, the United States Supreme Court applied the rule set forth

in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

Our Supreme Court later noted that, under *Blakely*, an Indiana trial court may enhance a sentence based only on those facts that are established: (1) as a fact of prior convictions; (2) by a jury beyond a reasonable doubt; (3) when admitted by the defendant; and (4) in the course of a guilty plea when defendant has stipulated to certain facts or consented to judicial fact-finding. *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005).

Hughes does not appeal the trial court's use of his criminal history to aggravate his sentence. As noted above, a trial court's use of a defendant's criminal history as an aggravating factor does not violate the Sixth Amendment under *Blakely*. Here, Hughes had two prior felony convictions for possession of a controlled substance. *Appellant's App.* at 278. Hughes also had misdemeanor or unspecified convictions for public intoxication and criminal conversion. *Id*. Additionally, Hughes had charges of possession of cocaine and possession of heroin, which resulted in his being committed to the Illinois Department of Mental Health. *Id*. at 279. This history was particularly relevant because, after committing the crime, Hughes told J.S. that he was sorry for his actions but explained that he had been "drinking and doing drugs." *Tr*. at 124.

Hughes argues that it was a *Blakely* violation for the trial court to aggravate his sentence on the basis "that the imposition of a reduced or suspended sentence would depreciate the seriousness of the offense." *Appellee's Br.* at 31. This factor is used "to support a refusal to reduce the presumptive sentence." *Leffingwell v. State*, 793 N.E.2d 307,

310 (Ind. Ct. App. 2003). Because the trial court found the mitigator that Hughes has an IQ of 61, the trial court may have intended to use this "aggravator" as an explanation of why it was not reducing Hughes's sentence below the presumptive. However, because this "aggravator cannot be a justification for a sentence above the 'statutory maximum,' i.e., the presumptive sentence, its use does not implicate *Blakely* concerns." *McNew v. State*, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005) (citing *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004) (explaining that with a presumptive sentence there is no Blakely issue)).

Hughes also challenges the trial court's findings that there is a likelihood that he will commit another crime and that he was in need of rehabilitative treatment that can best be provided by a penal facility. While a jury did not find these factors beyond a reasonable doubt, comments made by Hughes's mother on his behalf essentially acknowledge these factors. The "Substance Abuse" portion of the Presentence Investigation Report stated:

> The Defendant has a history of alcohol and cocaine abuse. The Defendant reported to the evaluator at [Logansport] that he had used crack cocaine in the past and did so by "smoking it in a pipe." The Defendant's mother confirmed that the Defendant did abuse alcohol and other drugs. The Defendant's mother believed that because of the Defendant's diminished mental capacity he was easily influenced by others and that he was often provided illegal substances by others.

Appellant's App. at 288. Further, in comments read at the sentencing hearing, Hughes's mother begged the court to be lenient and to send Hughes to a facility that could give him the treatment necessary for his mental retardation—a condition that his attorney admitted could not be rectified. *Tr*. at 423-24, 429.

While there has been some tendency to sanction these two aggravators on grounds that they derive from a defendant's prior criminal history, our Supreme Court has held "that such

statements are more properly characterized as 'legitimate observations about the weight to be given to facts'" such as criminal history. *Williams v. State*, 838 N.E.2d 1019, 1021 (Ind. 2005) (quoting *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005)); *see Pinkston v. State*, 836 N.E.2d 453, 465 (Ind. Ct. App. 2005), *trans. denied* (2006); *McNew*, 822 N.E.2d at 1082. Here, the trial court erred to the extent it used these factors as separate aggravating circumstances in sentencing Hughes. However, the trial court's conclusions were legitimate observations about the weight to be given to Hughes's criminal history. The evidence showed that Hughes: (1) has previous convictions for drug-related offenses; (2) appears to have a substance abuse problem; (3) is susceptible to the influence of others; and (4) commits crimes when influenced by alcohol and drugs.[6] As such, significant weight may be added to Hughes's criminal history by the fact that he is likely to commit another crime and is in need of rehabilitative treatment that can best be provided by a penal facility.

Finally, Hughes contends that the trial court erred in aggravating his sentence on the basis that the victim was over sixty-five years old. During sentencing, the trial court acknowledged that the jury had made no finding of the victim's age, but determined this to be an appropriate aggravator based on the clear age of the victim at trial. During her testimony, J.S. stated that she was seventy years old. *Tr*. at 116. Further, the State asked J.S. whether the volume of her hearing aid was properly turned up. *Id*. While it was not appropriate for the court to aggravate Hughes's sentence on the basis of an age not found by the jury, it was

[6] In the probable cause affidavit, Detective Ed McCutcheon related a conversation J.S. had with Hughes after the attack, during which Hughes apologized for his actions and said that "he was high on drugs and he is crazy whenever he is on drugs . . . ." *Appellant's App.* at 295.

clear to the jury that J.S. was over sixty-five, and if given the chance, it could not have found otherwise.

The record before us reveals that this was a very troubling trial for all concerned. During the sentencing hearing, the State commented:

> Judge, I've been a Prosecutor for a number of years. This has probably been one of the hardest trials I've ever had to try because of the victim involved, the circumstances, and the Defendant. . . . [The Defendant's] family loves him. He's supported by them.

Tr. at 420. The State then continued:

> But as a Prosecutor I see a threat to the safety of this community that letting him just go or giving him a minimum sentence is simply not appropriate. The other thing I see in looking at his record, and there's just numerous other people, other agencies, other states who have just passed him on. They know he's . . . mildly mentally retarded. He is never going to get better, yet they keep passing him on. I ask this court not to pass him on. He needs to receive a substantial sentence, and that sentence needs to protect not only himself but needs to protect other potential victims because he simply would do it again.

Id. The trial court heard the State and the defense attorney's regret at having to try this case, but also heard about Hughes's criminal history, his lack of judgment due to mental illness, his propensity to use drugs and alcohol, and his mother's plea that he get the help he needs.

The trial court first considered and accepted the mitigator that Hughes has an IQ of 61. Thereafter, it reviewed his criminal history and added weight to that history by considerations that Hughes needs rehabilitative care and is likely to commit another crime. Further, the court noted the obvious fact that J.S. was over sixty-five. Our courts frequently hold that a single aggravating circumstance may be sufficient to support the imposition of an enhanced sentence. *Comer v. State*, 839 N.E.2d 721, 725 (Ind. App. Ct. 2005), *trans. denied* (citing *Deane v. State*, 759 N.E.2d 201, 205 (Ind. 2001)). Even when a trial court improperly

applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist. *Comer*, 839 N.E.2d at 725 (citing *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002)). "[W]e will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *Pickens*, 767 N.E.2d at 535. While this does not mean that any single aggravator will suffice in all situations, *Deane*, 759 N.E.2d at 205, under the facts of this case, the trial court's imposition of a seventy-year sentence was not a violation of the Sixth Amendment under *Blakely*.

Affirmed.

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