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IN THE
COURT OF APPEALS OF INDIANA

BRIAN W. SAWYER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0610-CR-552
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barber, Magistrate
Cause No. 49G05-0510-FA-184250

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Brian Sawyer appeals his sentence for rape and criminal deviate conduct, both Class A felonies. Sawyer raises the sole issue of whether his aggregate one-hundred-year sentence, with sixty years executed, is inappropriate based on his character and the nature of the offense. We also address the issue of whether the trial court abused its discretion in sentencing Sawyer. Concluding that his sentence is not inappropriate and that the trial court acted within its discretion, we affirm.

Facts and Procedural History

At the guilty plea hearing, the following factual basis was admitted into evidence:

> [I]n the early morning hours of October 4, 2005, at approximately 2 am, [the victim] was asleep in her house, her 2 children were upstairs and she was sleeping downstairs. . . . [The victim] was awakened by a strange man climbing through her bedroom window. That man had a ski mask on his face when she first saw him. He came in the house. [The victim] reached for her cell phone and her knife, the cell phone beside her bed and the knife that was under her mattress. The person who came in the house grabbed the knife and took it away from her and also the cell phone. However, before he grabbed the knife she was able to cut him on his right arm. The suspect then took the knife away from her, began choking her, calling her a stupid bitch and threatened to kill her. He then forced sexual intercourse on her. In the beginning he was unable to get an erection. He was able to get an erection, and then forced vaginal intercourse on her. After that lasted 15 to 20 minutes he then put her on the floor while [the victim] was continually telling him no and trying to struggle away from him. He then covered her face with a sheet and placed his finger in her anus and asked her if she liked it. That went on for several minutes. This carried on for approximately 3 1/2 hours.

Transcript at 15-16.

Police officers recovered fingerprints and DNA samples from the scene, both of which identified Sawyer as the perpetrator. On October 25, 2005, the State charged Sawyer with

rape, three counts of criminal deviate conduct, burglary, a Class B felony, and robbery, a Class B felony. On August 21, 2006, pursuant to a plea agreement, Sawyer pled guilty to rape and one count of criminal deviate conduct. Pursuant to the plea agreement's terms, the State dropped the remaining charges and agreed to recommend that the executed portion of Sawyer's sentence be capped at sixty years.

At the sentencing hearing, both the victim and Sawyer testified. Following this testimony, the following exchange took place:

> Trial Court: . . . I find as aggravating circumstances that you do have a history of criminal or delinquent activity. You have a prior conviction for auto theft as a D felony June 13th of '06; an auto theft as a D felony September 8th of '04; resisting law enforcement, a D felony March 13th of '03; criminal trespass, er, I'm sorry, auto theft as a D felony, is that the same one, March 13th of '03 –
> Sawyer: Yes ma'am. I don't have a long history of criminal activity at all.
> Trial Court: You have a history of criminal – okay, you were doing good there and now you're starting to –
> Sawyer: When I got involved with drugs. I mean, when I got involved with drugs, yes, and I need –
> Trial Court: Let me tell you something, Mr. Sawyer. Maybe she can't judge you,[1] but I can.
> Sawyer: Yes, ma'am.
> Trial Court: I deal with a lot of alcoholics and a lot of drug addicts. Most alcoholics and drug addicts steal cars, steal vcr's, break into sheds. They don't cut open a woman's screen at 2 a.m., break into her bedroom, rape her, do unmentionable things to her, refuse to allow her to go help her six-year-old who wakes up sick so that you can rape her again.
> Sawyer: (inaudible)
> Trial Court: I'm sorry, you didn't do all that?
> Sawyer: No, I'm not saying that. I'm just saying –
> Trial Court: Okay, that's, that's, you know, there's a hole inside of you that can allow you to do something like this to a human being and that's what they're referring to when they call you a monster because it's a monstrous act

[1] In response to the State's argument, in which the prosecutor characterized Sawyer as a "monster," Sawyer stated: "You don't know me and I'm not a monster. Drugs and alcohol messed my mind up and I apologize, I do and I deserve time, that's why I pled guilty. But you don't know me, you cannot judge me." Tr. at 37.

> that you've committed on this woman. I mean, you're the reason that people don't sleep with their bedroom windows open at night. It's people like you that cause other people to fear having fresh night air come into their room because somebody might cut open the screen and break into their house. And you did it to her. I mean, that's the worst nightmare for people. So if you want to sit here and blame drugs and alcohol, you go right ahead. It's not drugs and alcohol that did it. It's you that did it. You have a history of criminal delinquent – and delinquent activity as I've just stated. You also have a conviction for operating while intoxicated May 26th of '93. You committed this act in the dead of night when people were sure to be home, when the two children were home and you were aware that there was a child home at one point during this because the child came to the door asking for her mother. You expressed remorse here today but as you continued talking, I do not consider what you said to be remorseful and I do not consider mitigating circumstances that you were using drugs or alcohol. You used the drugs and you used the alcohol on a voluntary basis and then you victimized this woman. I find aggravating circumstances outweigh mitigating circumstances . . .

Id. at 38-40. The trial court sentenced Sawyer to fifty years on each count, suspended twenty years from each count, and ordered that the sentences run consecutively for an aggregate sentence of one hundred years with sixty years executed. Sawyer now appeals.

Discussion and Decision

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). When conducting our

review, we look at not only the evidence introduced at the guilty plea hearing, but also all other evidence appearing in the record. See Newsome v. State, 654 N.E.2d 11, 13 (Ind. Ct. App. 1995), trans. denied (when determining whether a sentence is appropriate, this court "may consider all the material available to the trial court at the time of sentencing").

Although Sawyer purports to argue that his sentence is inappropriate given the nature of the offense and his character, he does not frame his argument in these terms, and instead argues that the trial court found aggravating circumstances not supported by the record and improperly failed to consider mitigating circumstances. Sawyer committed the crime and was sentenced after the recent amendment to Indiana's sentencing statutes, clearly putting this case under the "advisory" sentencing statutes that became effective on April 25, 2005. See Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006). Under this sentencing scheme, a trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d).

Our supreme court recently interpreted this advisory sentencing scheme in Anglemeyer v. State, 868 N.E.2d 482 (Ind. 2007). The court held that Indiana trial courts are required to issue a sentencing statement whenever sentencing a defendant for a felony. Id. at 490. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. We continue to review a trial court's sentencing decisions for an abuse of discretion. Id. The trial court can abuse its discretion be either failing to issue a sentencing statement or by

issuing a statement that indicates the reasons for a sentence "but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. However, the trial court is under no obligation to weigh the aggravating circumstances against the mitigating circumstances, and therefore "a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." Id.

Here, the trial court found three aggravating circumstances: 1) Sawyer's criminal history; 2) the presence of the victim's children; and 3) the general nature and circumstances of the crime.[2] The trial court did not find any mitigating circumstances, and specifically declined to find Sawyer's remorse or use of drugs and alcohol to be mitigating circumstances.

A. Aggravating Circumstances

Sawyer argues that the trial court improperly found the aggravating circumstances of the children's presence and the nature and circumstances of the crime. We disagree.

The commission of a crime of violence[3] in the presence of an individual who is below the age of eighteen is a valid aggravating circumstance. Cloun v. State, 779 N.E.2d 84, 87 (Ind. Ct. App. 2002); Ind. Code § 35-38-1-7.1(a)(4). The trial court may also consider the

[2] In his appellate brief, Sawyer states that the trial court found six aggravating circumstances: 1) his criminal history; 2) the presence of the victim's children; 3) the offense was committed at night; 4) the offense was "monstrous"; 5) people like Sawyer "cause others 'to fear sleeping with their bedroom windows open because somebody might cut open the screen and break into their house'"; and 6) "Mr. Sawyer refused to allow the victim to go help her sick six-year-old daughter so he could rape her again." Appellant's Brief at 9. Although the trial court did make statements relating to these six circumstances in at the sentencing hearing, we view aggravators 3-6, as identified by Sawyer, to be merely statements by the trial court explaining why the nature of the offense is an aggravating circumstance.

[3] Rape and criminal deviate conduct are both crimes of violence. Ind. Code § 35-50-1-2(a)(8), (9).

nature and circumstances of the crime as an aggravating circumstance. See Ousley v. State, 807 N.E.2d 758, 760, 765 (Ind. Ct. App. 2004); cf. Ind. Code § 35-38-1-7.1(a)(1) (indicating that the trial court may consider as an aggravating circumstance the extent to which the harm caused by the defendant exceeded that necessary to meet the elements of the offense).

Sawyer argues that no evidence exists from which the trial court could have found that the victim's children were present during the commission of the crime, or from which the trial court could have found that the nature of the crime constituted an aggravating circumstance. However, the probable cause affidavit, which was included in the pre-sentence report, indicates that while Sawyer was raping the victim:

> [the victim's] six-year-old daughter knocked on the bedroom door. [Sawyer] told [the victim] to be quiet. Her daughter was telling [the victim] that she was sick. [The victim] told her to go back upstairs and she would be up in a second to check on her. After this, [Sawyer] told her to get dressed and go check on her daughter. She pulled a pair of pants and a shirt on and started to leave the room. The suspect then pulled her pants down and forced her to the bed again. He again forced vaginal intercourse.

Pre-Sentence Report at 18. The aggravating circumstances of the presence of children and the nature and circumstances of the crime had support in the record. We conclude that the trial court did not abuse its discretion in finding these aggravating circumstances.

B. Mitigating Circumstances

Sawyer next argues that the trial court improperly failed to find Sawyer's guilty plea, his expressions of remorse, and his drug and alcohol use to be mitigating circumstances. Although the trial court has an obligation to consider all mitigating circumstances identified

by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Id.

1. Sawyer's Guilty Plea

We have long held that a defendant who pleads guilty deserves some benefit in return. See Williams v. State, 430 N.E.2d 759, 764 (Ind. 1982). When sentencing a defendant, the trial court should consider a guilty plea a mitigating circumstance. Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004). However, a guilty plea is not inherently considered a significant mitigating circumstance. Id. at 238 n.3; Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). The significance of a guilty plea may be reduced for a variety of reasons, one of which is if substantial admissible evidence existed of the defendant's guilt. Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Under these circumstances, the defendant's plea may be viewed as a pragmatic decision, rather than a true desire to accept responsibility for the crimes. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Also, when a defendant has already received a substantial benefit in return for his guilty plea, the significance of the plea in terms of its mitigating weight may be reduced. See Sensbeck, 720 N.E.2d at 1165.

We recognize that the trial court did not specifically mention Sawyer's guilty plea in its discussion of mitigating and aggravating circumstances, and note that the trial court would have acted more properly had it done so. However, we are convinced that the trial court did

not improperly overlook the defendant's guilty plea, as it acknowledged the fact that Sawyer had pled guilty at the beginning of the sentencing hearing. Instead, we conclude that the trial court merely found that Sawyer's guilty plea was not a significant mitigating circumstance, and therefore did not abuse its discretion by not finding it. See Anglemyer, 868 N.E.2d at 491 (holding that a trial court may abuse its discretion by failing to find mitigating circumstances that are "clearly supported by the record and advanced for consideration").

In exchange for Sawyer's guilty plea, the State dropped charges for two counts of criminal deviate conduct, Class A felonies, robbery, a Class B felony, and burglary, a Class B felony, and agreed to recommend that the executed portion of Sawyer's sentence be capped at sixty years. Although Sawyer's sentence is still significant, with good-behavior credit, he has an opportunity to be released in thirty years and rejoin society after his prison sentence, an opportunity that would not exist, for all practical purposes, had his executed sentence been much longer.[4] Also, in addition to the victim's eye-witness testimony, the State possessed fingerprint and DNA evidence placing Sawyer at the scene of the crime. Finally, the trial court's statements at the sentencing hearing indicate that it found Sawyer was not fully taking responsibility for his actions as he continued to blame drugs and alcohol for his conduct.

We reiterate that the trial court would have acted more properly had it specifically mentioned Sawyer's guilty plea as a mitigating factor and then explained why it afforded it no significant weight. However, based on the benefit extended to Sawyer, the substantial evidence of his guilt, and the trial court's statements indicating that Sawyer was not truly taking responsibility, we conclude that the trial court did not find the plea to be a significant

mitigating circumstance, and therefore did not abuse its discretion in failing to identify it as such. See Banks v. State, 841 N.E.2d 654, 658-59 (Ind. Ct. App. 2006), trans. denied (trial court's failure to identify defendant's guilty plea as a mitigating circumstance was harmless error where record indicated that plea was entitled to little or no weight).

2. Remorse

A defendant's remorse can be a valid mitigating circumstance. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). "However, substantial deference must be given to a trial court's evaluation of remorse. The trial court, which has the ability to directly observe the defendant and listen to the tenor of his or her voice, is in the best position to determine whether the remorse is genuine." Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004).

Here, the trial court acknowledged that Sawyer expressed remorse at the sentencing hearing, but determined that it did not consider Sawyer to be truly remorseful. Sawyer did apologize to the victim at the sentencing hearing, but also repeatedly attributed his behavior to his drug and alcohol abuse. We conclude that the trial court did not abuse its discretion in failing to find Sawyer's remorse to be a mitigating circumstance. See Banks, 841 N.E.2d at 659 (trial court did not abuse its discretion in failing to afford mitigating weight to defendant's remorse where defendant's statements were "somewhat ambivalent" and defendant failed to take full responsibility for his actions).

3. Drug and Alcohol Abuse

The trial court declined to find Sawyer's abuse of drugs and alcohol to be a mitigating

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[4] Sawyer was thirty-six years old at the time of sentencing.

circumstance. Determining whether a defendant's intoxication constitutes a mitigating circumstance "may involve the consideration and evaluation of various factors, among them the degree of intoxication and the defendant's culpability in the knowing and voluntary consumption of alcohol." Legue v. State, 688 N.E.2d 408, 411 (Ind. 1997). Trial courts are afforded broad discretion in determining whether intoxication constitutes a mitigating circumstance. Id. Also, we have previously explained that a history of substance abuse is sometimes more appropriately considered an aggravating circumstance than a mitigating circumstance. Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), trans. denied. Here, the trial court noted that Sawyer "used the drugs and you used the alcohol on a voluntary basis and then you victimized this woman." Tr. at 40. The trial court did not abuse its discretion in failing to find Sawyer's use of drugs and alcohol a mitigating circumstance.

C. Appropriateness of Sawyer's Sentence

In relation to the nature of the offense, as the trial court found, Sawyer broke into the victim's house in the middle of the night and raped her for several hours while the victim's children were in the house. At one point, Sawyer told the victim that she could go check on her sick child, only to grab her, throw her on the bed, and rape her again. Sawyer's actions go far beyond those required to convict one of rape and criminal deviate conduct. Clearly, the nature of the crime does not render the sentence inappropriate.

With regard to Sawyer's character, Sawyer has convictions for operating while intoxicated, a Class A misdemeanor, auto theft, a Class D felony, resisting law enforcement, a Class A misdemeanor, resisting law enforcement, a Class D felony, possession of

marijuana, a Class A misdemeanor, resisting law enforcement, a Class A misdemeanor, driving with a suspended license, a Class A misdemeanor, and auto theft, a Class C felony. Although none of Sawyer's previous convictions approach the level of seriousness of the current offense, a criminal history of five misdemeanor and three felony convictions is by no means insignificant. Also, the current offense is certainly relevant to our assessment of Sawyer's character. We also recognize that the trial court found Sawyer to be not remorseful. We conclude that Sawyer's character does not render his sentence inappropriate.

Conclusion

We conclude that the trial court acted within its discretion in sentencing Sawyer, and that his sentence is not inappropriate based on the nature of the offenses and his character.

Affirmed.

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