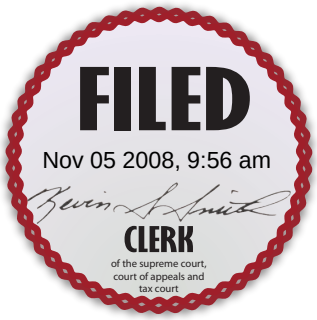

ATTORNEY FOR APPELLANT:

P. STEPHEN MILLER
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTHUR THADDEUS PERRY
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EMILY L. CASTRO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0807-CR-398
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck Jr., Judge
Cause No. 02D04-0704-FA-28

November 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Emily Castro appeals her conviction for the attempted murder of her infant daughter and her sentence of thirty years with five years suspended. Specifically, she contends that the trial court abused its discretion in determining that she was competent to stand trial and that the evidence is insufficient to find that she was sane at the time of her crime. Castro also contends that her sentence is an abuse of discretion and inappropriate. Because we conclude that Castro failed to object at trial to her examining psychiatrist's credentials and examination procedure, that the evidence is sufficient for the trial court to conclude that Castro was sane, and that her sentence is not an abuse of discretion and is appropriate in light of the nature of the heinous offense and her character, we affirm.

Facts and Procedural History

Castro and Deangelo Gonzalez's relationship began in 2005 and produced one child, J.G. When Castro was pregnant with J.G., the couple moved to Fort Wayne. One month before J.G. was born, the couple moved into an apartment together. Castro had been prescribed a number of medications for mental health issues, including manic depression. The couple began having difficulties in their relationship, and Deangelo moved out twice for a short time but then returned. On April 3, 2007, Deangelo moved out for the third time, leaving eleven-month-old J.G. behind with Castro, who was nineteen years old at the time.

The next day, Heather Powell was driving at about 6:30 p.m. and stopped her car when she saw a woman running with a baby in her arms. Powell saw blood coming from

the baby's throat and called 911. The baby had been cut four times in the neck. After police and paramedics arrived on the scene, the woman who had been running with the baby, Grimilda Figeroa, who is Castro's mother, told police that Castro had stabbed the baby.

Officer Reed from the Fort Wayne Police Department went to Castro's home. Castro, covered in mud, water, and blood, approached Officer Reed. Castro was bleeding from self-inflicted knife wounds to her neck and wrists. Officer Reed summoned paramedics, and inside the ambulance Castro said that she had cut her wrists with the same knife she used to cut the baby and then tried to drown herself in a nearby creek.

J.G. survived her injuries, and the State charged Castro with Count I, Class A felony attempted murder,[1] and Count II, Class B felony battery.[2] Castro filed a notice of intent to rely on the insanity defense and alleged that she was incapable of standing trial. The court held a competency hearing and found Castro competent to stand trial. Following a bench trial, the court found Castro guilty but mentally ill with regard to Count I and merged Count II into Count I. When sentencing Castro, the trial court discussed the following aggravating and mitigating factors:

> Following sentencing hearing, the court would find that there are mitigating circumstances, that the Defendant in fact has no prior history and as indicated in my original ruling and is supported very effectively I think by the doctors [sic] reports that there is mental illness in existence. I have considered the issue of hardship, period. And will find that there is no extraordinary hardship in this case by the Defendant's incarceration. . . . There certainly is a history of mental illness, there is a history of treatment, there is a history of refusal of treatment and refusal and failure of meds, which on the one hand is not unusual I suppose, in circumstances like this,

[1] Ind. Code §§ 35-42-1-1; 35-41-5-1.

[2] Ind. Code § 35-42-2-1(a)(4).

> but on the other hand, it's an indication that she's not likely to respond affirmatively in the short run to treatment. . . . I will find as an aggravator the nature of the offense including the circumstances raised by the State, the very young age of the victim, the position of trust, a mother expecting to be able to take care of, and being expected to care for her child. And instead tried and nearly succeeded in injuring her substantially. And while very seldom does this issue of depreciation of seriousness of the offense come truly into play, I think it does here, I think this case requires that the advisory sentence be imposed. That to do less would depreciate the seriousness and severity of this crime.

Sent. Tr. p. 25-26, 28, 30. The trial court sentenced Castro to an advisory term of thirty years, with five years suspended. Castro now appeals.

Discussion and Decision

Castro contends that the State did not comply with the statutory requirements governing competency hearings and sanity evaluations. Castro also argues that her sentence is an abuse of discretion and inappropriate.

I. Competency Hearing

Castro alleges several errors regarding her competency hearing. Specifically, Castro argues that there was no evidence that Dr. Trier was a psychiatrist as required by Indiana statute and that Dr. Trier was required to testify and be subject to cross-examination at the competency hearing.

A trial court's determination of competency is reviewed for an abuse of discretion. *Brewer v. State*, 646 N.E.2d 1382, 1385 (Ind. 1995). "To be competent at trial, a defendant must be able to understand the nature of the proceedings and be able to assist in the preparation of his defense." *Timberlake v. State*, 753 N.E.2d 591, 598 (Ind. 2001) (citing Ind. Code § 35-36-3-1), *reh'g denied*; *see also Brewer*, 646 N.E.2d at 1384 ("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."). When the evidence of competency is in conflict, an appellate court will normally reverse the trial court's decision 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.

Indiana Code § 35-36-3-1(a) governs competency determinations and provides in pertinent part:

> 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.
>
> At least one (1) of the individuals appointed under this subsection must be a psychiatrist. However, none may be an employee or a contractor of a state institution (as defined in IC 12-7-2-184). 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.

A. Dr. Trier's Credentials

Castro argues that "no evidence was presented to establish the psychiatric credentials of Dr. Trier" and that the "failure to comply with [Indiana Code § 35-36-3-1] was a decision clearly against all logic and a denial of due process." Appellant's Br. p. 8-9, 11. Because Castro failed to timely challenge Dr. Trier's qualifications at the

competency hearing, she has waived this issue on appeal. *Collins v. State*, 643 N.E.2d 375, 378 (Ind. Ct. App. 1994).

Waiver notwithstanding, there is sufficient evidence in the record that Dr. Trier was a psychiatrist. First, in the absence of evidence disproving a doctor as a psychiatrist as required by Indiana Code § 35-36-3-1, the trial court is presumed to have had knowledge that one of the doctors was a psychiatrist. *Id.* at 379. Additionally, Dr. Trier testified at Castro's trial:

> **Court:** And what is your profession sir?
> **Dr. Trier:** I'm a psychiatrist.
> **Court:** And are you licensed to practice that profession?
> **Dr. Trier:** Yes I am.
> **Court:** Perhaps if you would just briefly recite your qualifications.
> **Dr. Trier:** I practiced psychiatry in this community for over forty years and have trained at Indiana University Medical School and took my specialty training at the University of Pittsburgh.
> **Court:** With that, do counsel stipulate Dr. Trier's qualifications?
> **State Counsel:** Yes sir.
> **Defense Counsel:** Yes, Your Honor.

Tr. p. 344-45. We cannot say that the court failed to appoint a psychiatrist to examine Castro as required by Indiana law.

B. Dr. Trier's Testimony

Three court-appointed doctors examined Castro and all three found her competent to stand trial. Nevertheless, Castro requested and received a competency hearing. At the hearing, one psychologist testified that Castro was competent to stand trial and sane at the time of her criminal acts. A second psychologist testified that Castro was competent to stand trial but was insane at the time of her criminal acts. The trial court inadvertently failed to send a subpoena to the third doctor, Dr. Trier, to notify him of the hearing. At

the hearing, the trial court gave the parties the option of either stipulating that Dr. Trier's testimony regarding his determination that Castro was competent to stand trial would be the same as the discussion in his report or adjourning and reconvening at a date convenient for Dr. Trier. After the State agreed to stipulate, defense counsel did likewise:

> **Defense Counsel:** I explained to Ms. Castro that we're obviously [of the opinion] that Dr. Trier's opinion coincides with that of the two Doctors we've heard live today. I have no reason to anticipate that he's going to say something different than what's memorialized in his report. So if the Court is comfortable with simply adopting the report and acknowledging the report in addition to what you've heard live today that's acceptable to me and I think it's acceptable to Ms. Castro as well.

Competency Hrg. Tr. p. 28.

Castro argues that Dr. Trier was required to testify and be subject to cross-examination at the competency hearing. Castro acknowledges that the parties stipulated that Dr. Trier's report could be admitted in lieu of live testimony. However, Castro argues that this stipulation constituted an impermissible waiver of her right to a competency hearing.

The United States Supreme Court has held that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384 (1966). Our own Supreme Court has recognized that "waiver is an inapposite concept in a competency situation." *Smith v. State*, 443 N.E.2d 1187, 1818 (Ind. 1983). These cases hold that when competency is at issue, the defendant cannot waive the right to a hearing on the issue.

Here, however, Castro received a competency hearing. What she is really challenging now is her decision to waive her right to cross-examine Dr. Trier. When the examining doctors have all reported that a defendant is competent to stand trial, the defendant does not have a due process or statutory right to a competency hearing for the purpose of pretrial cross-examination. *Clifford v. State*, 457 N.E.2d 536, 540 (Ind. 1984). Even if we assumed there was a right to cross-examine Dr. Trier in this setting, Castro validly waived that right through her counsel. Rather than the impermissible waiver of a competency hearing as Castro claims, this was merely an attorney's tactical decision. *See Pierce v. State*, 677 N.E.2d 39, 48 (Ind. 1997) ("Exercise of cross-examination is primarily the prerogative of the defendant. In general, failure to request the opportunity to cross-examine a witness at trial called by the opposing party waives the right."). The trial court did not err by allowing the parties to stipulate that Dr. Trier's report could come into evidence at the competency hearing in lieu of his live testimony after the court gave the option to continue the hearing until Dr. Trier could attend. We cannot say that the trial court abused its discretion in finding Castro competent to stand trial.

II. Sanity Evaluation

With regard to her sanity evaluation, she again argues that there was no evidence that Dr. Trier was a psychiatrist, that Dr. Trier had a conflict of interest because Castro's family might have contacted his hospital for treatment before Castro hurt her baby, and that Dr. Trier's examination was not sufficient for him to determine that she was sane at the time of the criminal acts.

In reviewing the trial court's determination that the defendant was sane at the time of the crimes in question, we cannot reweigh the evidence or judge the credibility of witnesses. *Johnson v. State*, 265 Ind. 652, 358 N.E.2d 748, 750 (1977). We look at the evidence most favorable to the State and the reasonable inferences to be drawn from that evidence. *Id.* When there is substantial evidence of probative value to support the conclusion of the trier of fact, we will not disturb that conclusion. *Id.* Indiana Code § 35-36-2-2 governs the defense of insanity and provides in pertinent part:

> (b) When notice of an insanity defense is filed, the court shall appoint two (2) or three (3) competent disinterested psychiatrists, psychologists endorsed by the state psychology board as health service providers in psychology, or physicians, at least one (1) of whom must be a psychiatrist, to examine the defendant and to testify at the trial. This testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony of any medical experts employed by the state or by the defense.

Castro argues that the statutory requirements were not met because there was no evidence that Dr. Trier was a psychiatrist. As discussed above, Castro waived this issue for failing to object at trial, but there is nevertheless sufficient evidence to conclude that Dr. Trier was a psychiatrist. Castro also argues that Dr. Trier was not a disinterested psychiatrist and that Dr. Trier's examination was not sufficient.

A. Disinterested Psychiatrist

Castro argues that Dr. Trier was not a disinterested psychiatrist. Specifically, Castro argues that Dr. Trier knew that members of Castro's family had contacted the hospital where he was employed to seek mental health assistance for Castro before her criminal acts. Castro alleges that Dr. Trier "may or may not have had an interest that neither he nor the hospital become involved in litigation." Appellant's Br. p. 14.

A claim that the testimony of an examining doctor is motivated by fear of a potential malpractice suit must be based on evidence in the record. *See Resneck v. State*, 499 N.E.2d 230, 232-33 (Ind. 1986). Also, there is no basis for finding a doctor is disqualified from examining a defendant and testifying about the examination simply because the doctor is on the staff of a hospital where that defendant was at one time treated, even if the examining doctor had taken part in some of the treatment. *Id.* at 233.

At trial, defense counsel asked Dr. Trier if he was aware that members of Castro's family contacted his hospital to ask about mental health assistance for Castro. Dr. Trier testified that Castro had indicated that she had sought help from his hospital before. When counsel asked Dr. Trier when that was in relation to the events of April 4, 2007, Dr. Trier responded that he only knew that it was around the time she felt depressed. The record does not reveal the results of Castro's inquiry or anything in regard to a potential malpractice suit even though Castro was free to delve further while still on cross-examination. Thus, this allegation of interest is mere speculation and the court did not abuse its discretion by appointing Dr. Trier.

B. Sufficiency of Examination

Next, Castro argues that Dr. Trier did not conduct an appropriate examination of Castro. Castro complains because Dr. Trier completed only a half-hour mental examination of Castro and did not review the taped police interviews with Castro, conduct any other standardized interviews, or review the FDA records concerning the prescription medicines prescribed to Castro. Castro also argues that because Dr. Trier

was the only examiner licensed to practice medicine, a general physical examination was required.

The United States Supreme Court has held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Indiana's statutory scheme exceeds the requirements of *Ake*. *Palmer v. State*, 486 N.E.2d 477, 482 (Ind. 1985). Indiana Code § 35-36-2-2 requires that three disinterested professionals, including at least one psychiatrist, examine the defendant. However, the Code does not expressly require any specific examination procedures. At trial, the court first questions the examiners after the prosecution and defense have both finished presenting evidence. I.C. § 35-36-2-2(b). Then the prosecution and defense have the opportunity to cross-examine the doctors and introduce rebuttal evidence. *Id.* at -2(d).

Here, Dr. Trier did examine Castro. Dr. Trier testified that he interviewed Castro in his office and she revealed that she knew why she was there and that she had been previously treated with Effexor and Ambien for depression. Dr. Trier testified while being cross-examined by the State that although Castro was depressed her judgment was not impaired. On cross-examination by the defense, Dr. Trier testified that Castro reported that she had also been prescribed Vicodin. He testified that the combination of Effexor and Vicodin could lead to confusion but not to delusional thinking. Dr. Trier testified that he did not perform the standardized tests that defense counsel asked about

because he usually leaves them to be performed by a psychologist. After asking Castro questions and listening to her responses, Dr. Trier concluded that Castro did not suffer from delusional thoughts. Dr. Trier also testified that he did not review the materials the prosecutor and public defender provided because he had already examined Castro and reached his conclusion that she was sane at the time of the offense.

Castro argues that even if that interview was sufficient to support a finding that Castro was competent to stand trial, it cannot support a finding that Castro was sane at the time of the offense. However, Castro provides no authority for this argument. Castro also fails to demonstrate that the statute requires the psychiatrist to perform a physical examination. Castro argues in her brief that Dr. Trier's testimony "fails to indicate that he reviewed any FDA records involving prescription medications prescribed to the Defendant," Appellant's Br. p. 18, but Castro had the opportunity at trial to cross-examine Dr. Trier on this point and failed to do so. Castro did not present to the trial court any rebuttal evidence suggesting that Dr. Trier's examination was abnormal or deficient or any rebuttal evidence regarding the possible side-effects and interactions from the drugs Castro had been taking. Thus, we cannot say based on these facts that Dr. Trier's examination was insufficient. *See Griffin v. State*, 275 Ind. 107, 415 N.E.2d 60, 63 (Ind. 1981) (noting that defendant must show the psychiatrists' evaluations were improper or inadequate). Further, even if Dr. Trier's examination was insufficient, his testimony is cumulative of Dr. Lombard's testimony that Castro was sane at the time of her acts. The trial court did not abuse its discretion by finding that Castro's mental illness did not rise to the level of legal insanity at the time of her crime.

III. Sentence

Castro contends that her sentence is inappropriate in light of the nature of the offense and her character pursuant to Indiana Appellate Rule 7(B). However, interspersed within Castro's inappropriate sentence discussion are arguments that must be analyzed under an abuse of discretion standard. Inappropriate sentence and abuse of discretion claims are to be analyzed separately. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

A. Abuse of Discretion

In general, sentencing decisions lie within the discretion of the trial court. *Anglemyer*, 868 N.E.2d at 490. As such, we review sentencing decisions only for an abuse of discretion. *Id.*

Castro argues that the trial court abused its discretion in two ways when sentencing her. She first argues that the trial court's finding that a sentence less than the advisory sentence would depreciate the seriousness of the crime "appears to be a 'perfunctory recitation' of this aggravating circumstance and is therefore not adequate to support its use." Appellant's Br. p. 22. (citing *Ingle v. State*, 766 N.E.2d 392, 396 (Ind. Ct. App. 2002), *trans. denied*). Second, Castro argues that the trial court did not afford enough mitigating weight to her mental illness.

Responding to the trial court's finding that to impose less than the advisory sentence would depreciate the seriousness of the crime, it is apparent that Castro misunderstands the trial court's use of this circumstance. Castro argued that she was

entitled to probation and short-term imprisonment and asked the judge to suspend her entire sentence. Sent. Tr. p. at 13-15. The trial court referenced Castro's intent to substantially hurt her baby and her success to explain why a sentence below the advisory sentence was not warranted. *Id.* at 30. The trial court was entitled to recognize this aggravator in light of Castro's argument, *see Kirby v. State*, 746 N.E.2d 440, 444 (Ind. Ct. App. 2001) (observing that the trial court properly used this factor to support its refusal to reduce the presumptive sentence), *trans. denied*, and the court amply explained its rationale for doing so. Castro's claim on this point fails.

Next, while the trial court found that Castro's mental illness was a mitigator, Castro now argues that "[w]hat can be said, however, is that Defendant was mentally ill and mental illness is not always possible to understand. With that lack of understanding, however, should come a sense of a full recognition of such illness as an overriding mitigating factor." Appellant's Br. p. 22. This is an invitation for us to reweigh the aggravators and mitigators. To the extent Castro claims that the court abused its discretion in failing to give this mitigating factor more weight, the claim is not available for appellate review. *Anglemyer*, 868 N.E.2d at 493-94. The court did not abuse its discretion in sentencing Castro.

B. Inappropriate Sentence

Finally, Castro contends that her sentence of thirty years with five years suspended is inappropriate in light of the nature of the offense and her character. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and

revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, Castro admits that "the nature of the crime was heinous" and that "[t]here is no question but that the Defendant was responsible for the care and nurturing of the victim, nor is there any question but that she was in a position of trust." Appellant's Br. p. 22. Castro took her infant daughter to the family garage and cut her four times in the neck with a knife, leaving life-threatening gashes. Nothing about the nature of this offense persuades us that Castro's sentence of thirty years with five years suspended is inappropriate.

As for the character of the offender, we recognize that Castro has no prior criminal history. Castro argues that we should find that the fact that Castro was mentally ill yet had committed no previous criminal acts indicates that Castro has good character. However, the Presentence Investigation Report ("PSI") indicates that since her diagnosis at the age of thirteen of manic depression Castro has a history of both quitting her prescribed medications and refusing to follow through with the prescribed treatments for her mental illness. *See* Appellant's App. p. 95. State's Exhibit 16 provides a list of six medications prescribed to Castro, but the PSI reveals that Castro reported that she was no

longer taking any medications. This history of refusal to deal with her mental illness culminated in a violent episode that left her infant daughter gravely wounded. We cannot say that Castro's character renders her sentence inappropriate. In sum, Castro has not carried her burden of persuading this Court that her sentence of thirty years with five years suspended is inappropriate based upon the nature of the offense she committed and her character.

Affirmed.

KIRSCH, J. and CRONE, J., concur.