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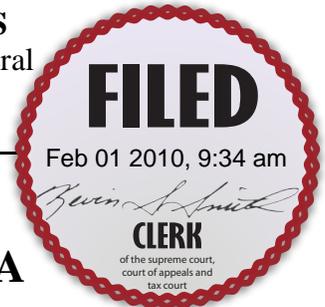
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**IN THE
COURT OF APPEALS OF INDIANA**

JONATHON GRIESHOP,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 38A05-0908-CR-454

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause No. 38C01-0810-FA-13

February 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Jonathon Grieshop was convicted of aggravated battery, a Class B felony, and sentenced to fifteen years at the Indiana Department of Correction (“DOC”). Grieshop appeals his sentence, raising one issue for our review: whether the trial court properly sentenced him. Concluding the trial court did not abuse its discretion in sentencing Grieshop, we affirm.

Facts and Procedural History

Grieshop and Alisha Flowers were involved in an on-again, off-again relationship for several years that began when they were in high school. They share a daughter, C.G., who lives with Flowers, her fiancé, Shad McClur, and Flowers’s and McClur’s infant daughter, A.M. Grieshop regularly exercises visitation with C.G.

Grieshop had C.G. for the Labor Day weekend in 2008. No specific arrangements were made for her return on Monday, but Flowers expected Grieshop to bring her home around 6:00 p.m. as usual. When he did not, Flowers began calling Grieshop and his mother to find out what was going on. Eventually, Flowers learned Grieshop and C.G. were returning from King’s Island in Ohio and C.G. would be home around midnight. Flowers and Grieshop exchanged words over the phone about this since C.G. had school the next morning.

The following morning, after her fiancé left for work and C.G. left for school, Flowers heard someone banging on her front door. Flowers answered the door to find a woman she did not know who was dressed head-to-toe in black. The woman said she had car trouble and asked to use Flowers’s phone. Flowers said she did not have a phone for

her to use and pointed the woman toward her neighbors. The woman then pushed Flowers into the front room of the house and began hitting her about her face and head with a metal bar. Flowers's infant daughter was in her crib in a room that directly connects with the front room, and she was crying during the encounter. Flowers believed the beating lasted approximately fifteen minutes. At one point, the woman put her arm around Flowers neck and tried to choke her. Before she left, the woman cut over a foot from Flowers's braided hair. Flowers testified at the sentencing hearing that every bone in her face was fractured or broken, she will continue to require medical treatment, she suffers nerve damage which may be permanent, and she has scars which will fade but never go away.

Eventually, police discovered the woman who beat Flowers was named Alyssa Heare. Heare's boyfriend was friends with Joe McDowell, who was a friend of Grieshop's. Through that connection, Grieshop asked Heare to beat up Flowers. He told her where Flowers lived, instructed her not to arrive before 7:00 a.m. so Flowers's fiancé and C.G. would be gone, told her to "fuck [Flowers's] face up," transcript at 95, and asked her to cut off Flowers's hair as proof she had committed the beating. When Heare and McDowell, who had driven Heare to Flowers's house, met up with Grieshop after the beating, it was agreed that Grieshop would pay Heare "about two grand." *Id.* at 133. A few days after the beating, Heare accompanied Grieshop to a bank and he gave her \$300.

Grieshop was charged with burglary, a Class A felony, and aggravated battery, a Class B felony. A jury was unable to reach a unanimous verdict as to the burglary

charge, but found him guilty of aggravated battery. The trial court subsequently sentenced him to fifteen years at the DOC. Grieshop now appeals.

Discussion and Decision

I. Standard of Review

A sentencing decision rests within the sound discretion of the trial court and, as long as the sentence is within the statutory range, is reviewed on appeal only for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court or the reasonable, probable, and actual deductions to be drawn therefrom. Id. We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we do not review the relative weight given to these reasons. Id. at 491.

The trial court must enter a sentencing statement that includes reasonably detailed reasons for imposing a particular sentence. Id. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion. Id. The trial court may abuse its discretion if the record fails to support the reasons given for imposing a sentence, if the statement omits reasons that are clearly supported by the record and advanced for consideration, or if the reasons are improper as a matter of law. Id. at 490-91.

II. Aggravating and Mitigating Circumstances

Grieshop was convicted of aggravated battery, a Class B felony, which is subject to a sentencing range of six to twenty years, with an advisory sentence of ten years. Ind.

Code § 35-50-2-5. The trial court's sentencing statement recited the following circumstances it considered in sentencing Grieshop to fifteen years:

1. Aggravating circumstances:
 - a. [Grieshop] has a history of domestic violence against the victim;
 - b. the act was committed again[st] his own child's mother;
 - c. the offense was committed in the presence of an infant child who was not the victim of the offense;
 - d. [Grieshop] continuously demonstrated open contempt and hostility toward the victim throughout the trial;
 - e. [Grieshop] has demonstrated callous disregard for the emotional well being of the parties['] child in arranging the attack of her mother;
 - f. the beating suffered by the victim was extremely brutal and designed to inflict lasting facial wounds and scarring;
 - g. the offense was planned in advance and [Grieshop] hired the act done;
2. Mitigating circumstances:
 - a. [Grieshop] has avoided criminal conviction until now.

Appendix of Defendant-Appellant at 115. Grieshop contends the trial court abused its discretion both in its finding of aggravating circumstances and its omission of significant mitigating circumstances.

A. Aggravating Circumstances

Grieshop contends several of the aggravating circumstances found by the trial court are unsupported by the record: that he has a history of domestic violence against the victim, that the offense was committed in the presence of an infant, and that he demonstrated open contempt for the victim in court. In addition, he contends the aggravating circumstance that the beating was extremely brutal and was designed to inflict lasting facial injuries is improper as a matter of law because the injury is an element of the offense.

Grieshop first argues there is no evidence in the record to support the trial court's finding of a history of domestic violence. Flowers testified at trial that she and Grieshop "had a [sic] on going disturbed relationship for several years." Tr. at 17. She testified at the sentencing hearing that

whether it be boyfriend girlfriend or whether it was just visitation between parents[, i]t's never been a healthy normal relationship. It's always been abusive to some degree. At times there were [sic] extreme abuse on both our parts. I really really feel like it just continued to escalate. From verbal abuse in high school to physical abuse after high school to it just escalated up to everything that happened on September 2nd. . . . I had made police reports. They were just pretty much ignored and I just feel like that if something had possibly been done prior to this it might not have come to this.

Sentencing Tr. at 8. Flowers acknowledged that she had been abusive also: "I do not stand to take it without giving it back." Id. at 9.¹ Contrary to Grieshop's assertion that "[t]here was no evidence that either party engaged in violent physical abuse," brief of defendant-appellant at 9, Flowers testified the abusive nature of their relationship escalated from verbal to physical abuse. Although she acknowledged she, too, engaged in abusive behavior, her testimony at the sentencing hearing and her reference to making police reports clearly relates to Grieshop's treatment of her. Based on Flowers's testimony, we cannot say the record is devoid of evidence of domestic abuse and the trial court did not abuse its discretion in finding this aggravating circumstance.

Grieshop also argues there is no evidence in the record to support the trial court's finding that the offense was committed in the presence of an infant. Indiana Code section 35-38-1-7.1(a)(4) provides the fact the person knowingly committed a crime of violence

¹ Flowers also wrote a victim impact statement that was made part of the pre-sentence investigation report. See Sent. Tr. at 5. The pre-sentence investigation report was not included as part of the appendix and is therefore not available for our review on appeal.

“in the presence or within the hearing of” an individual under the age of eighteen who was not the victim of the offense may be considered an aggravating circumstance. Aggravated battery is a “crime of violence.” Ind. Code § 35-50-1-2(a)(6). Grieshop claims the evidence shows Flowers’s infant daughter was asleep in another room and unaware of the beating. However, the statute does not require proof that a child under eighteen actually saw or heard the offense taking place. Firestone v. State, 838 N.E.2d 468, 474 (Ind. Ct. App. 2005). Although there is no specific testimony that Grieshop knew Flowers had an infant daughter, it is reasonable to infer that he did. He told Heare to wait until both Flowers’s fiancé and C.G. were gone from the house before going in to beat up Flowers, and it is also reasonable to infer he knew A.M. would be home with Flowers under those circumstances. Flowers testified A.M.’s bedroom directly connects with the front room and is approximately fourteen feet from where the beating took place. Both Flowers and Heare testified A.M. was crying during the beating. When A.M. began crying, Flowers told Heare to take whatever she wanted but to leave the baby alone. Heare “laughed a little bit and then . . . hit [Flowers] with the bar across the face [and] said that she wasn’t going to do anything to [the] baby.” Tr. at 38. Given this evidence, the trial court did not abuse its discretion in considering as an aggravating circumstance that the crime was knowingly committed in the presence of a child under the age of eighteen.

Grieshop also argues there is no evidence in the record to support the trial court’s finding that he demonstrated open contempt for Flowers during the trial. We agree the record does not directly reflect Grieshop’s demeanor during the trial. However, we

would not expect it to. Observing the demeanor of the participants in a trial, much like judging the credibility of witnesses or determining the genuineness of a defendant's expression of remorse, is a matter we leave to the trial court. The trial court stated at the sentencing hearing: "I watched you keenly throughout the course of the trial. I watched you glare and scowl at Alisha Flowers. You hate that woman. That's pretty apparent." Sent. Tr. at 36. We cannot say the trial court abused its discretion in finding this aggravating circumstance.

Finally, Grieshop argues the trial court's finding that the beating Flowers suffered was extremely brutal is improper as a matter of law because the injury she suffered is an element of the offense. In order to find the nature and circumstances of the crime to be an aggravating circumstance, the trial court must point to facts not necessary to establish the elements of the offense. McCoy v. State, 856 N.E.2d 1259, 1263 (Ind. Ct. App. 2006). Grieshop was charged with aggravated battery, which requires proof of serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. See Ind. Code § 35-42-2-1.5(1), (2). Indiana Code section 35-38-1-7.1(a)(1) provides that a trial court may assign aggravating weight to the harm, injury, loss, or damage suffered by the victim of the offense if such harm was significant and greater than the elements necessary to prove the commission of the offense. When evaluating the nature of the offense, the trial court may consider the particularized circumstances of the factual elements as aggravating factors but must detail why the defendant deserves a sentence greater than the advisory under the particular circumstances. McElroy v. State, 865 N.E.2d 584, 589-90 (Ind. 2007). Generally, this

aggravator is “associated with particularly heinous facts or situations.” Id. (quotation omitted). Here, the transcript of the sentencing hearing shows the trial court examined the circumstances of Grieshop’s offense and deemed them “brutal” and “heinous.” Sent. Tr. at 36. The trial court stated, “to be quite honest, this is the most brutal beating I have ever observed where the victim didn’t die. . . . The victim suffered extensively. . . . [Y]ou sat back and paid for it to be done and helped in the planning. . . . And the taking of the hair is . . . despicable” Id. at 36-37. The trial court detailed the specific circumstances beyond the injuries themselves that merited a sentence in excess of the advisory. See McElroy, 865 N.E.2d at 590 (holding trial court did not abuse its discretion in finding nature and circumstances of crime to be an aggravating circumstance when it described defendant’s behavior as “horrific” and “heinous,” and detailed victims’ debilitating injuries in sentencing defendant for reckless homicide and criminal recklessness). Thus, the trial court did not abuse its discretion in recognizing this aggravating circumstance.

B. Mitigating Circumstances

Grieshop also contends the trial court abused its discretion in failing to find certain mitigating circumstances that were advanced for consideration and are clearly supported by the record:

1. Had maintained employment throughout his life starting at around the age of 16 years.
2. Had lived an otherwise law abiding life.
3. Had good family support.
4. Was employed at a full-time job.
5. He got along with people and was generally peaceful toward others.

Brief of Defendant-Appellant at 11.

The trial court found one mitigating circumstance: that Grieshop “has avoided criminal conviction until now.” App. at 115. Because the trial court’s sentencing statement included a finding of mitigating circumstances, the trial court was required to identify all significant mitigating circumstances. Anglemyer, 868 N.E.2d at 492-93. When the appellant alleges the trial court failed to find a mitigating factor, the appellant must establish the mitigating evidence is both significant and supported by the record. Id. at 493. “If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.” Id. (quotation omitted).

The mitigating circumstances alleged above were proffered to the trial court at the sentencing hearing. We do not have the pre-sentence investigation report in the record before us, so we cannot fully evaluate Grieshop’s alleged “law abiding life” prior to this offense. We do note, however, there was testimony regarding long-standing domestic abuse and the trial court noted Grieshop had avoided conviction but not arrest. Grieshop’s treatment of Flowers belies his assertion that he got along with people and was “peaceful toward others.” Grieshop’s mother testified at the sentencing hearing that Grieshop had been living with her and that she feels he could respond well to probation, but her testimony does not demonstrate an extensive support system or show how family support and concern for Grieshop would have substantial, positive effects on his character and rehabilitation. As to Grieshop’s employment, “[m]any people are gainfully employed such that this would not require the trial court to note it as a mitigating factor” Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. The trial

court apparently did not, and was not required to, find Grieshop's proffered mitigating circumstances to be significant factors influencing its sentencing decision. To the extent Grieshop argues the trial court should have given greater weight to his proffered mitigating circumstances, this claim is not available for our review. See Anglemyer, 868 N.E.2d at 493-94. We cannot say the trial court abused its discretion in its finding of mitigating circumstances.²

Conclusion

The trial court did not abuse its discretion in sentencing Grieshop. Accordingly, his fifteen-year sentence is affirmed.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.

² As we have found the trial court did not abuse its discretion in sentencing Grieshop, see Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (holding where trial court abuses its sentencing discretion, we may remand or may exercise our authority to review and revise the sentence), and as Grieshop does not advance an Appellate Rule 7(B) claim for independent review of his sentence, see King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) (“[I]nappropriate sentence and abuse of discretion claims are to be analyzed separately.”), we need not consider whether the sentence is inappropriate.