



**FILED**  
Feb 03 2010, 8:53 am  
*Kevin Smith*  
**CLERK**  
of the supreme court,  
court of appeals and  
tax court

**FRIEDLANDER, Judge**

Keayon K. Scott appeals the sentence he received following his conviction of attempted robbery resulting in serious bodily injury, a class A felony, criminal recklessness as a class C felony, and carrying a handgun without a license with a previous conviction of carrying a handgun without a license, as a class C felony. Scott presents the following restated issues for review:

1. Did the trial court cite invalid aggravating circumstances?
2. Did the trial court impose an inappropriate sentence?

We affirm.

The underlying facts are that late at night on January 5, 2009, Scott and several others were present at the Greenbriar Apartments. Two of those present persuaded the others, including Scott, that they should go to Jackie Chapman's apartment and rob him. They went to Chapman's apartment, where a woman in the group convinced Chapman to open his apartment door. When he did so, however, Chapman saw Scott approach the door carrying a handgun and quickly closed the door. Scott fired seven to nine shots into the door. One shot struck Chapman in the leg, narrowly missing his femoral artery. Scott was arrested the next morning. When he was searched while awaiting booking, police found sixty-one Xanax pills on Scott's person.

Scott was charged with attempted robbery resulting in serious bodily injury as a class A felony, burglary resulting in serious bodily injury as a class A felony, criminal recklessness and criminal recklessness causing serious bodily injury, both as class C felonies, carrying a handgun without a license with a previous felony conviction within the prior fifteen years as

a class C felony, carrying a handgun without a license with a previous conviction of carrying a handgun without a license as a class C felony, possession of a controlled substance as a class D felony, and carrying a handgun without a license as a class A misdemeanor. On June 15, 2009, the parties entered into a plea agreement whereby Scott would plead guilty to attempted robbery resulting in serious bodily injury as a class A felony, criminal recklessness as a class C felony, and carrying a handgun without a license with a previous conviction of carrying a handgun without a license as a class C felony. Although the sentence imposed upon each count was left to the trial court's discretion, in exchange for Scott's guilty plea, the State agreed to concurrent sentences on those three counts and agreed to dismiss the remaining counts.

Following a sentencing hearing and after considering the presentence investigation report, the court found the following aggravating circumstances: (1) The circumstances of the crime – the violence was senseless, (2) Scott was on probation when he committed these offenses, (3) Scott was in possession of a large amount of illegal drugs when he was arrested, (4) Scott has a “troubling” juvenile and criminal history, *Transcript* at 51, and (5) while acknowledging that the court “[did not] know if it’s an aggravator or not, ... it means something that ... [Scott] was waived to adult court.” *Id.* at 51-52. In mitigation, the court noted Scott's young age – eighteen at the time these offenses were committed, and that Scott pleaded guilty. Finding that the aggravating circumstances outweighed the mitigating circumstances, the court imposed forty-five years for the attempted robbery conviction with five years suspended, eight years for the handgun offense, three years for the drug offense,

with all sentences to run concurrent with one another, and the court ordered Scott to pay \$4000 in restitution to the victim for medical bills.

1.

Scott contends the trial court erred in finding certain aggravating circumstances. Specifically, Scott contends, “[t]he only valid aggravating factor in this case is the fact that the defendant was on probation.” *Appellant’s Brief* at 4.

When imposing a sentence for a felony offense, trial courts are required to enter a sentencing statement. This statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. If the court finds aggravating or mitigating circumstances, it “must identify all *significant* mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating.” *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). An abuse of discretion in identifying or failing to identify aggravators and mitigators occurs if it is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

Scott contends the court erred in finding as an aggravating circumstance that the violent act of firing seven to nine shots into the door of Clark’s apartment was senseless. He offers the novel contention that senselessness is an element of the offense of robbery causing serious bodily injury because “[t]here could never be an offense of robbery with serious

bodily injury that is not senseless.” *Id.* Although we appreciate the sentiment, we can find no case establishing senselessness as an element of the offense of robbery causing serious bodily injury. The statute defining this offense certainly does not do so. *See* Ind. Code Ann. § 35-42-5-1 (West, PREMISE through 2009 1st Regular Sess.). In point of fact, senselessness is not an element of the offense.

We interpret this aggravator as referring to the nature or circumstances of Scott’s offenses. It is well-settled that the nature and circumstances of a crime is generally a proper aggravating factor. *See McCann v. State*, 749 N.E.2d 1116 (Ind. 2001). Moreover, our courts have not infrequently affirmed that the senselessness of a particular criminal act is a valid aggravating circumstance. *See, e.g., Simmons v. State*, 814 N.E.2d 670 (Ind. Ct. App. 2004), *trans. denied*. In this case, in view of the fact that, unprovoked, Scott wantonly fired multiple shots through the door of an occupied apartment, the trial court’s determination that the act was senseless to the point of constituting an aggravating circumstance was not an abuse of discretion.

Scott contends the trial court erred in citing his juvenile and criminal record as significantly aggravating. The extent that a sentence should be enhanced based upon an individual’s criminal history turns upon factors such as the number of prior convictions and their gravity, their temporal proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability. *Duncan v. State*, 857 N.E.2d 955 (Ind. 2006). While not extensive, Scott’s juvenile history included three true findings, one of which was a drug offense. Moreover,

when he was not yet eighteen years of age, Scott was convicted as an adult of another drug offense (class-D felony possession of marijuana) and a weapons offense, i.e., possession of an unlicensed firearm. In view of the instant offenses, this criminal history is not insignificant.

We note also Scott's argument that the trial court erred in finding as an aggravator that he committed the instant offenses while on probation. He claims this was error because the probation violation was a part of his criminal history, and thus cannot stand independent of that aggravator. We have recently held that under the current advisory sentencing scheme, the fact that the defendant has a criminal history and the fact that he committed the present offense while on probation are distinct sentencing considerations. *See Ramon v. State*, 888 N.E.2d 244 (Ind. Ct. App. 2008).

Finally, Scott contends that the trial court erred in citing the seriousness of Chapman's injury as an aggravator. He contends this was erroneous because serious injury is an element of this robbery offense. Clearly, an element of an offense may not also constitute an aggravating factor for sentencing purposes. *See Lavoie v. State*, 903 N.E.2d 135 (Ind. Ct. App. 2009). We do not agree, however, that the trial court cited Chapman's injury as an aggravating factor. Rather, the court merely stated to Scott that he was fortunate that he was not facing a murder charge. Thus, Scott's claim that the trial court cited serious injury as an aggravating circumstance is factually incorrect.

The trial court did not err in identifying aggravating factors.

Scott contends his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Scott bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

We begin with the nature of the offense. Late one evening, Scott and six other individuals decided, seemingly on a whim, to rob Chapman. Scott was armed with a deadly weapon when he travelled to the scene. When Chapman saw what was happening and closed his door in an attempt to thwart their attack, Scott indiscriminately fired at least seven shots into the door; one shot came within one-eighth of an inch of inflicting what could very well have been a fatal wound. As it was, Chapman was wounded in the leg. When he was arrested the next morning, Scott had a large quantity of drugs on him. These events are particularly serious because Scott displayed absolutely no regard for the life or safety of anyone present at the scene when, unprovoked, he shot blindly into the door of an occupied apartment and could easily have killed the victim. The serious and senseless nature of the offense, alone, justifies the sentence imposed.

Turning now to the “character of the offender” component, Scott was eighteen years old at the time of this offense and had already been convicted of a criminal offense. In fact, he was on probation from that conviction at the time, having already been involved in several juvenile delinquency cases before with true findings entered against him. In this case, he willingly participated in a scheme conceived almost casually late one night. Armed with a handgun, he travelled to the victim’s apartment and, unprovoked, brandished the gun at the earliest opportunity, escalating the violence exponentially by shooting many times into a door while aware that a person was standing on the other side. In view of what this reveals of Scott’s character and considering the nature of his offenses, the imposition of a forty-five-year sentence with five suspended to probation, which in terms of executed time is effectively ten years greater than the advisory sentence for a class A felony, but ten years less than the maximum, was not inappropriate.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.