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IN THE
COURT OF APPEALS OF INDIANA

JAMES BRACKIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0906-CR-558
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0805-MR-107909

March 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

James P. Brackin appeals his sentence, following a guilty plea, for voluntary manslaughter, as a class B felony.

We affirm.

ISSUE

Whether the trial court abused its sentencing discretion.

FACTS

In the early evening, on May 3, 2008, sixty-three year old Davy Evans and several other members of the Newman-Hass Racing Team[1] went to Kazablanca Bar and Grill (the "bar") in Indianapolis for dinner and drinks. Several local bar regulars were also at the bar. At approximately midnight, Brackin[2] arrived at the bar with his girlfriend, Sabrina Scott ("Sabrina"), and several friends. Brackin and Sabrina were intoxicated when they entered the bar, having already consumed alcohol at other locations.

Evans and his team members were seated at the bar, as was bar regular Jeff Cordray, who was seated directly next to Evans. Sabrina and Cordray were long-time friends, and Sabrina went to the bar and stood between Evans and Cordray, as she chatted with Cordray. Brackin reportedly observed Evans and another older man trying to tuck dollar bills into Sabrina's brassiere. He walked over to the bar and told Evans and the

[1] They were in Indianapolis to participate in the 2008 Indianapolis 500.

[2] Brackin was thirty-one years old at sentencing.

other older man to stop harassing his girlfriend. Sabrina and Brackin then left the bar area and returned to their table.

There are differing accounts as to what happened next. Several witnesses later testified that Brackin returned to the bar area and got into Evans' face. Others testified that Evans took off from the bar towards Brackin's table, shouting at him. In any event, amid a great deal of shouting and cursing, a shoving match ensued between the race team group and some local patrons. Later, at the sentencing hearing, several witnesses testified that Evans and Brackin never actually fought one another. Several individuals restrained Brackin and Evans, who were shouting and lunging at one another. On at least one occasion, Evans broke free and got into a shoving match with Brackin. Eventually, Brackin and Evans, and the two groups were separated. With assistance from several local patrons, the bar owner pushed Evans and the race team group out the side door to the patio area, which was enclosed by a railing. Tempers flared, and pushing and shoving began anew as the race team group tried to keep some aggressive local patrons from entering the patio area.

Brackin bypassed the apparent bottleneck at the side door, ran out of the front door of the bar, and crossed the parking lot to the patio area. He jumped onto the patio railing and then on top of a table, and kicked Evans in the head. Evans was rendered unconscious and dropped to the floor. Despite efforts to revive him, Evans subsequently died of a brain hemorrhage.

On May 30, 2008, the State charged Brackin with murder. On April 28, 2009, by amended information, the State also charged him with voluntary manslaughter, as a class B felony. On April 28, 2009, Brackin pleaded guilty to class B felony voluntary manslaughter. The trial court conducted a sentencing hearing on May 21, 2009. In imposing the enhanced fourteen-year sentence, the trial court identified the nature and circumstances of the offense; and Brackin's criminal history as aggravating circumstances. It also found, as mitigating circumstances, Brackin's acceptance of responsibility, entry of a guilty plea, and expression of remorse; and that Evans had facilitated the offense. Brackin now appeals.

Additional facts will be provided as necessary.

DECISION

Brackin argues that in imposing his enhanced sentence, the court improperly (1) used material elements of the offense as an aggravating circumstance; and (2) failed to recognize, as mitigating, the hardship that would result to his children from his imprisonment. We cannot agree.

> Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. An abuse of discretion occurs if the decision 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. We can review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons.

Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007) (internal citations omitted).

1. Nature and Circumstances of the Crime

Our Supreme Court has held that one way in which a trial court may abuse its discretion is by considering reasons that "are improper as a matter of law." *Anglemyer*, 868 N.E.2d at 490-91. Brackin argues that the trial court improperly found, as aggravating, the fact that in the absence of any threat to his personal safety, he had followed Evans outside, jumped onto a table, and kicked the side of Evans' head with sufficient force to kill him. He argues that the trial court's consideration of these details constituted improper use of material elements of the offense as an aggravating circumstance.

Brackin correctly asserts that a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance; however, the particularized circumstances of the factual elements may be a valid aggravating circumstance. *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). In its sentencing colloquy, the trial court detailed its reasons for finding that the nature and circumstances of Brackin's offense were particularly egregious as follows:

> I see individuals that said words and did things and it should have ended when everyone went outside. When [Brackin] got up, stood upon on a table and struck another individual in the head with his foot with sufficient force to be able to kill, the Court again refers to Dr. Kinney's autopsy and his testimony that this was not the equivalent of a slip and fall. This was the equivalent of a substantial impact. In looking at Mr. Brackin's behavior, I can't under any circumstance understand why in the world you

> feel that it was acceptable to kick another human being. Yet this is the second times [sic], in terms of a criminal conviction, in which you have done that. It would not be acceptable to kick an animal, let alone an animal in the head. Yet you kicked a human being with sufficient force to take away his life. There was nothing in the record that indicated that Mr. Evans, while he may have been mouthy, while he may have been upset, there was nothing to indicate that your life was in danger in any way to justify what you did. The fact that you had done this previously, in terms of your other conviction, the Court finds is a substantial aggravating circumstance.

(Tr. 232). Thus, the trial court identified the following particularized circumstances of the factual elements of Brackin's offense: (1) his decision to direct the kick to Evans' head; (2) the disrespect inherent in such an action; (3) the brute force of his kick; (4) that after being separated from Evans such that he was in no danger of physical harm from him, Brackin had re-injected himself into the fight and escalated it to the point of dealing a fatal injury; and (5) the fact that Brackin had previously been convicted of battery for attacking an individual by kicking him.

Because the trial court adequately explained its reasons for finding as such, we conclude that it did not abuse its discretion in finding the nature and circumstances of the offense to be an aggravating circumstance. *See McElroy v. State*, 865 N.E.2d 584, 590 (Ind. 2007) (no abuse of discretion where trial court detailed reasons for finding particularized circumstances of factual elements to be aggravating circumstance). *See also Vasquez v. State*, 762 N.E.2d 92, 98 (Ind. 2001) (no abuse of discretion where trial court examined "unique," "horrific," and "heinous" circumstances of defendant's brutal

behavior in recognizing nature and circumstances of the offense to be aggravating circumstance).

2. Hardship to Dependent Children

Brackin argues that the trial court erred in "rejecting the hardship to [his] two children as a mitigating circumstance." Brackin's Br. at 13. We disagree.

Our Supreme Court has held that one way in which a court may abuse its discretion is by entering a sentencing statement that omits mitigating circumstances that are clearly supported by the record and advanced for consideration. *Anglemyer,* 868 N.E.2d at 490-91. 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). A trial court is not, however, obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State,* 736 N.E.2d 246, 249 (Ind. 2000).

Undue hardship upon a dependent caused by a defendant's imprisonment is a valid mitigating circumstance. Ind. Code § 35-38-1-7.1(b)(10). However, a trial court is not required to find that a defendant's incarceration will result in undue hardship upon his dependents. *See Davis v. State,* 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), *trans. denied*. Many persons convicted of crimes have children and, absent special circumstances showing that the hardship to the children is "undue," a trial court does not

abuse its discretion by not finding this to be a mitigating circumstance. *Roney v. State*, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007).

Brackin and members of his extended family testified as to his active involvement in the lives of his children, who were nine and ten years old at the time of the sentencing hearing. Brackin's Br. at 14. In its sentencing remarks, the trial court stated,

> [Brackin] has argued that this would be a hardship to his children. The Court acknowledges it's always a hardship to children when their parents are taken away from them . . . . The statute talks however in terms of what's undue hardship. It's always a tragedy when someone loses their parent to [sic] supervision and there's been lots of evidence in the record that you're a good father. I have no reason to disbelieve that or the testimony of those people who know you and love you. It's ironic that you recognize what it is to be without a parent and how it affected you. It's ironic that you would place yourself in a position, where by your actions, you're taking yourself from them. That is a tragedy. It is ironic but the Court does not find that it's an undue hardship under the statute.

(Tr. 225).

Here, the trial court acknowledged that Brackin's incarceration will certainly be difficult on his young children, but found that he had not demonstrated that the hardship to his children would be any worse than that normally suffered by a family with an incarcerated relative. Although the record indicates that at the time of his offense, Brackin had physical custody of his children, it does not indicate that the children will be without family or care due to his imprisonment. To the contrary, the record reveals that until January 2007, when Brackin's ex-wife agreed to give Brackin physical custody of the children, they had lived with her, and presumably, will again. *See Benefield v. State*, 901 N.E.2d 602, 609 (Ind. Ct. App. 2009) (no abuse of discretion from trial court's

conclusion that no undue hardship would ensue to defendant's mother from defendant's imprisonment even though defendant had been her mother's primary caregiver, because defendant's sister could assist their mother as needed).

Based upon the foregoing, we conclude that the trial court did not abuse its discretion in finding that the hardship to Brackin's children was not undue.

Affirmed.

MAY, J., and KIRSCH, J., concur.