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IN THE
COURT OF APPEALS OF INDIANA

DAVID E. WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0908-CR-746
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0809-FB-44

April 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

David E. Wilson appeals his conviction for being an habitual offender and his sentence following a jury trial on the State's criminal allegations. Wilson raises three issues for our review:

1. Whether he waived his right to a jury trial for a determination of his habitual offender status.

2. Whether the trial court abused its discretion in its finding of aggravating circumstances.

3. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the evening of September 9, 2008, Wilson, his brother Steven, and several friends were drinking at Wilson's Lafayette apartment. Steven, a veteran of the U.S. Navy, was fifty-five years old at the time. In the mid-1990s, Steven developed, among other disabilities, a chronic back condition where his spine "crushes the nerve system," which causes him severe pain. Transcript at 20. This condition forces Steven to walk with a cane "[b]ecause sometimes [his] legs give out and [he] fall[s]." Id. at 21.

After about a half an hour, Wilson inexplicably became angry and yelled four or five times for everyone to leave his apartment. Wilson then went into his kitchen and grabbed a knife. Everyone but Steven left quickly. While Steven was standing to leave, Wilson grabbed him and cut his neck. The cut started in the center of Steven's throat and extended about 3.5 inches outward. Although the knife "didn't penetrate that deep," it

did come within two millimeters of Steven's carotid artery, which "is one of the major vessels that supply your brain with blood." Id. at 123, 125.

As Steven retreated, Wilson shouted "die motherfucker, die" at him and kicked him. Id. at 34. Steven then tripped over a table, and Wilson stepped on Steven's ankle and broke it. Steven made it to an elevator and called 9-1-1. Wilson pursued him through a different elevator and, while Steven was on the phone, said, "motherfucker, I told you to die. Why ain't you dead? Who you talking to?" Id. Wilson then began beating Steven, breaking his jaw and nose and fracturing his orbital socket. The police arrived and restrained and arrested Wilson. Steven lapsed into unconsciousness as the police arrived.

On September 15, 2008, the State charged Wilson with three counts of battery, one as a Class B felony and two as Class C felonies. The State also charged Wilson with criminal recklessness, as a Class C felony. On November 14, the State added an allegation that Wilson was an habitual offender.

The court held Wilson's jury trial on June 2 and June 3, 2009. Among other witnesses, Steven testified at the trial and recounted the battery. Steven also described his relationship with Wilson:

> Well, me and Dave was real close, we was closer than any of the other family members. We was like yin[] and yang. We went to places all together and we were just tight as a person could be and so he was my best friend . . . . And I love him dearly, you know. Well, so we slept together in the same bed, I mean, we grew up in a religious home, because my father's a minister. So we knew right from wrong. I helped David for awhile to get out on his own, you know. . . . I brought him from Arkansas to stay with me and to give him his own place. Bring him from the misery that he was already in back there. He came and he was good for awhile . . .

> and then he started drinkin, so he's a different person when he's been drinkin.

Id. at 22-23.

After the jury retired to deliberate, Wilson's trial counsel informed the court that if the jury found Wilson guilty then Wilson would waive his right to a jury trial on the habitual offender allegation. The court then engaged Wilson directly: "For the record, I just want to make sure. Mr. O'Connor [Wilson's trial counsel] you have stated that your client is going to waive jury on phase two, if necessary. Mr. Wilson, is that correct?" Id. at 332. Wilson personally responded: "Yes, sir." Id. The jury then returned its verdict in which it acquitted Wilson of the Class B felony battery allegation but found him guilty on the remaining charges. The court then heard evidence on the State's habitual offender allegation, namely, that Wilson, while living in Arkansas, had committed rape in 1980 and arson in 2002. The court found Wilson to be an habitual offender.

On July 28, the court held Wilson's sentencing hearing. On August 19, the court entered its corrected sentencing order, in which the court entered its judgment of conviction for one count of Class C felony battery. The court found Wilson's criminal history and the seriousness of his crime against Steven as aggravating factors. The court found no mitigating factors. The court then sentenced Wilson to eight years on the battery conviction, enhanced by twelve additional years for being an habitual offender. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Waiver of Jury Trial

Wilson first contends that he did not knowingly, voluntarily, and intelligently waive his right to have a jury determine his status as an habitual offender. Specifically, Wilson asserts that there "was no explicit colloquy between the judge and Wilson regarding waiver of jury on the habitual phase." Appellant's Br. at 8 (quotations omitted). We cannot agree.

"[T]he statute governing waiver of trial by jury, Indiana Code Section 35-37-1-2, requires that a defendant's waiver of the right to a jury trial be 'personal,' either in a writing signed by the defendant or in the form of a colloquy in open court between the defendant and judge." Kellems v. State, 849 N.E.2d 1110, 1112-13 (Ind. 2006). Further:

> a knowing, voluntary, and intelligent waiver of the right to a jury trial requires assent to a bench trial "by defendant personally, reflected in the record before the trial begins either in writing or in open court. The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right."

Id. at 1113 (citations omitted). "Contrary to Appellant's assertion, however, there is no requirement that a trial court orally advise a defendant of his right to a jury trial and the consequences of waiving that right." Coleman v. State, 694 N.E.2d 269, 278 (Ind. 1998).

In Kellems, the case on which Wilson substantially relies in this appeal, the defendant personally "neither signed a written waiver nor engaged in any colloquy" with the trial court, although his attorney indicated his client's desire to proceed without a jury. 849 N.E.2d at 1113. As such, our supreme court reversed the defendant's conviction and remanded for a new trial.

Wilson's case, however, is factually distinct from Kellems. Here, the trial court personally engaged Wilson in a colloquy about Wilson's desire to waive his right to a jury trial for the habitual offender phase of his trial. In response to the court's direct question of whether he wanted to waive that right, Wilson personally answered "Yes, sir." Transcript at 331-32. Accordingly, Wilson's personal assent to the waiver in open court is apparent in the record, and his assertion on appeal that "[t]here was no dialogue whatsoever" is without merit. See Appellant's Br. at 9. And insofar as Wilson is suggesting that the court was required to orally advise him of his right to a jury trial and the consequences of waiving that right, our supreme court held otherwise in Coleman. 694 N.E.2d at 278. Thus, we hold that Wilson knowingly, voluntarily, and intelligently waived his right to have a jury determine his status as an habitual offender.

Issue Two: Sentencing Abuse of Discretion

Wilson next contends that the trial court abused its discretion in its finding of aggravating circumstances. "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). "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." Id. (quotation omitted).

As our supreme court has explained:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—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. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.
>
> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence . . . a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors. . . .

Id. at 490-91.

Here, Wilson received the maximum aggregate sentence of twenty years. See Ind. Code § 35-50-2-6(a) (maximum sentence for a Class C felony conviction is eight years); see also I.C. § 35-50-2-8(h) (maximum habitual offender enhancement to a Class C felony conviction is twelve years). As noted above, the trial court identified the seriousness of this crime and Wilson's criminal history as aggravating circumstances. The court did not find any mitigators.

On appeal, Wilson first argues that the trial court abused its discretion in considering the seriousness of Wilson's crime as an aggravator. Wilson suggests that the trial court's use of this aggravator was really an attempt by the court to punish him for the Class B felony battery allegation, for which he was acquitted, or to punish him for the second Class C felony verdict on which the court did not enter a judgment of conviction. We have reviewed the record and cannot agree with Wilson's interpretation of the trial court's finding. The court unambiguously stated during Wilson's sentencing that the jury properly acquitted him of the Class B felony allegation. See Transcript at 360 ("the jury found that the injury didn't create a substantial risk of death because . . . the knife didn't

penetrate far enough to require life saving efforts . . . . Fortunately, but . . . no credit to you for that."). Likewise, the court expressly stated that it was not enhancing Wilson's sentence in light of the other Class C felony verdict. See id. ("I can only impose sentence on one of them [the Class C felonies].").

Wilson also asserts that "the 'seriousness of the crime' aggravator is improper." Appellant's Br. at 14. In support, Wilson cites Walsman v. State, 855 N.E.2d 645, 653 (Ind. Ct. App. 2006), which in turn quoted from Taylor v. State, 840 N.E.2d 324, 340 (Ind. 2006). In Taylor, our supreme court held:

> The court incorrectly identified as an aggravating factor the fact that the "imposition of [a] reduce[d] sentence would depreciate the seriousness of the crime." By the time of Taylor's sentencing, this Court had held on multiple occasions that that aggravator "may only be used when a trial court is considering imposition of a sentence which was shorter than the presumptive sentence."

Id. (alterations original; citations omitted). And, more recently, our supreme court reiterated that "the seriousness of the offense . . . , which implicitly includes the nature and circumstances of the crime as well as the manner in which the crime is committed, has long been held a valid aggravating factor." Anglemyer, 868 N.E.2d at 492.

Here, it is clear from the record that the trial court's reliance on the seriousness of Wilson's offense as an aggravator was based on the nature and the circumstances of the crime as well as the manner in which the crime was committed. The trial court did not consider whether imposition of a reduced sentence would depreciate the seriousness of Wilson's crime. Thus, this aggravator is not an improper aggravator as a matter of law, and the court did not abuse its discretion in relying on it.

Wilson next contends that the court abused its discretion in finding his criminal history to be an aggravating circumstance. As Wilson states:

> Although Wilson's criminal history is a legitimate aggravator, the total of three prior convictions, two of which [occurred] more than 25 years ago, together with minimal sentences handed out, reflect that these crimes are remote and factually mitigated, not deserving of the maximum sentence Wilson received for the instant offense.

Appellant's Br. at 14-15. As Wilson acknowledges, criminal history is a legitimate aggravator. As such, Wilson's further contentions are merely requests for this court to reweigh that aggravator, which we cannot do. See Anglemyer, 868 N.E.2d at 491.

Issue Three: Inappropriateness of Sentence

Finally, Wilson argues that his twenty-year aggregate sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met

th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration original).

Wilson's twenty-year sentence is not inappropriate in light of the nature of the offense. Wilson brutally and repeatedly attacked his disabled, fifty-five-year-old brother Steven, who had helped Wilson move to Indiana from Arkansas and with whom Wilson had had a close childhood. As a result of Wilson's unprovoked attacks, Steven testified that he suffered a broken ankle, a broken jaw, and a broken nose. The treating emergency physician also testified that Steven suffered a broken orbital bone. And Wilson's slicing of Steven's throat with a kitchen knife came within two millimeters of piercing Steven's carotid artery.

Neither is Wilson's sentence inappropriate in light of his character. Wilson has three felony convictions since 1980. Those convictions were for rape, aggravated battery, and arson. Further, Wilson has spent fourteen of the last twenty-eight years either in prison or under court supervision, and the instant offense occurred within one year of Wilson having completed his most recent sentence. Wilson's criminal history reflects poorly both on Wilson's judgment and his attempts to rehabilitate himself throughout his life. Thus, we cannot say that his sentence is inappropriate in light of the nature of the offense or Wilson's character.

Conclusion

In sum, we hold that Wilson knowingly, voluntarily, and intelligently waived his right to have a jury determine his status as an habitual offender. We also hold that the trial court did not abuse its discretion when it imposed its sentence on Wilson and that

that sentence is not inappropriate in light of the nature of the offense or Wilson's character. Thus, we affirm Wilson's conviction and sentence.

Affirmed.

VAIDIK, J., and BROWN, J., concur.