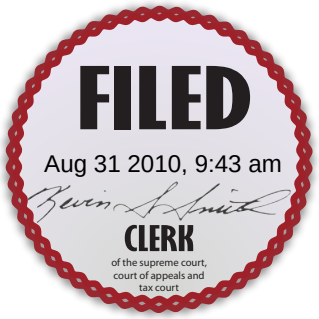

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IN THE COURT OF APPEALS OF INDIANA

CHARLES E. HUBBARD,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 89A01-1002-CR-151
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause No. 89D02-0809-FA-8

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Charles Hubbard was convicted of kidnapping and attempted rape, Class A felonies, and criminal confinement, robbery, and carjacking, Class B felonies, and was adjudicated an habitual offender. Upon Hubbard's initial appeal of his 135-year sentence, this court remanded for the trial court to consider what, if any, mitigating weight to afford Hubbard's mental illness. On remand, the trial court found Hubbard's mental illness was longstanding, limited his overall functioning, and diminished his ability to control his behavior, yet imposed the same 135-year sentence. Hubbard again appeals his sentence, raising a single issue that we restate as two: whether the trial court abused its discretion in sentencing him, and whether Hubbard's sentence is inappropriate in light of the nature of his offenses and his character. Concluding the trial court did not abuse its discretion in sentencing Hubbard, and his sentence is not inappropriate, we affirm.

Facts and Procedural History

The following facts were recited in Hubbard's previous appeal:

> On June 22, 2008, sixty-three-year-old M.T. was doing her laundry in a Richmond laundromat when Hubbard walked in. Hubbard asked M.T. if the car parked outside was hers and whether she "t[ook] passengers[,]" claiming that he needed to return to Ohio. When M.T. told Hubbard that she would not give him a ride, he struck her in the face with his open hand, knocking her to the floor, causing pain. Hubbard, who was holding a knife in his hand, told M.T. that if she did not do everything he told her to do that he would kill her and that he would "slash" her throat. Hubbard and M.T. drove in M.T.'s car to a cornfield, where he had her undress. Hubbard attempted to have vaginal intercourse with M.T., but was unable to achieve an erection. Hubbard tied M.T.'s arms and legs with her clothing and left in her car.
>
> On September 4, 2008, the State charged Hubbard with a total of ten crimes stemming from the attack on M.T. and alleged that he was a habitual

> offender. As part of an investigation into Hubbard's competence to stand trial, he was examined by Dr. Glenn S. Davidson, Jr., Ph.D. Dr. Davidson concluded that "the defendant is of reduced intellectual ability[,] has had problems with acting out and aggressive behaviors in the past, but it is unclear whether he would have fully met the diagnosis for schizophrenia at the time of the offense." Dr. George Parker, M.D., also examined Hubbard and concluded, *inter alia*, that "the defendant did have a mental disease and a mental defect at the time of the alleged offenses." On November 14, 2008, the trial court found Hubbard competent to stand trial.
>
> On November 21, 2008, a jury found Hubbard guilty but mentally ill ("GBMI") as charged, and Hubbard admitted his habitual offender status. On December 19, 2008, the trial court sentenced Hubbard to forty-five years of incarceration for attempted rape, forty-five years for kidnapping, fifteen years for criminal confinement, fifteen years for robbery, and fifteen years for carjacking. The trial court ordered that Hubbard's attempted rape, kidnapping, and robbery sentences be served consecutively, that the criminal confinement and carjacking sentences would run concurrently with the attempted rape sentence, and that the sentence be enhanced by thirty years by virtue of Hubbard's habitual offender status, for an aggregate sentence of 135 years. The trial court found Hubbard's criminal record to be an aggravating circumstance, found no mitigating circumstances, and made no mention of Hubbard's mental illness or the fact that he had been found GBMI at either the sentencing hearing or in the sentencing statement.

Hubbard v. State, No. 89A01-0901-CR-25, slip op. at 2-4 (Ind. Ct. App., Sept. 21, 2009) (record citations omitted).

Hubbard appealed his sentence, and this court reversed and remanded. We concluded that because the record did not show the trial court properly considered Hubbard's mental illness in sentencing him, remand was required for a new sentencing order showing the trial court had applied the criteria set forth in Archer v. State, 689 N.E.2d 678 (Ind. 1997). We "emphasize[d] that the sentence imposed by the trial court was not necessarily improper," slip op. at 6, and accordingly expressed no opinion regarding what weight, if any, the trial court should attribute to Hubbard's mental illness.

On remand, the trial court held a resentencing hearing. Following argument by counsel, the trial court found Hubbard's mental illness was a mitigating circumstance but declined Hubbard's request to attribute to it significant weight. The trial court's resentencing order provides in relevant part:

> The Court finds that on November 21, 2008, a jury returned verdicts finding [Hubbard] Guilty But Mentally Ill (GBMI) . . . .
>
> Argument is heard and the Court now specifically considers the following factors that bear on the weight, if any, that should be given to mental illness in sentencing: . . . . .[citation to Archer v. State, 689 N.E.2d 678 (Ind. 1997)]
>
> The Court finds that [Hubbard] is less able to control his behavior due to his impairment than one who is not mentally retarded. At the same time, both Dr. Davidson and Dr. Parker found that [Hubbard] was able to distinguish between right and wrong.
>
> The Court further finds that [Hubbard]'s mental retardation do [sic] affect [his] overall functioning in a negative manner and the Court finds that [Hubbard]'s mental illness is of a long-standing nature.
>
> The Court is unable to conclude that there is a substantial nexus between [Hubbard]'s impairment and the commission of the several crimes committed by [Hubbard]. Again, it is worth noting that despite [Hubbard]'s impairment, both Dr. Davidson and Dr. Parker determined that [Hubbard] was able to differentiate right from wrong.
>
> The Court finds no other mitigating circumstances.

Appellant's Appendix at 31-32. As in its original sentencing order, the trial court found Hubbard's criminal history and the recent revocation of his probation to be aggravating circumstances. The trial court then explained:

> In weighing and balancing the aggravating circumstances against the mitigating circumstances in re-sentencing, the Court finds that the aggravating circumstances clearly and vastly outweigh the mitigating circumstances even considering the Archer factors set forth above, and an aggravated sentence is warranted and appropriate and reasonable in this

> cause. Indeed, the criminal history of [Hubbard] in and of itself outweighs the mitigating circumstances and warrants an aggravated sentence.

Id. at 33. The trial court imposed the same sentence as before: forty-five years for attempted rape, forty-five years for kidnapping, fifteen years for criminal confinement, fifteen years for robbery, and fifteen years for carjacking. The trial court ordered that Hubbard's attempted rape, kidnapping, and robbery sentences be served consecutively, that the criminal confinement and carjacking sentences run concurrently with the attempted rape sentence, and that the sentence be enhanced by thirty years for Hubbard's habitual offender status, for a total sentence of 135 years. Hubbard now appeals.

Discussion and Decision

Initially we note that Hubbard's brief is less clear than it should be about the nature of the issues raised on appeal. Hubbard frames the issue as "[w]hether or not the trial court erred when it sentenced [Hubbard] to one hundred and thirty-five (135) years?" Appellant's Brief at 1. This broad statement of the issue fails to distinguish between an inappropriateness claim and an abuse of discretion claim, claims which this court has emphasized counsel should address and analyze separately. King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). Although Hubbard clearly challenges the merits of his 135-year sentence, he also refers to the abuse of discretion standard and makes arguments regarding the trial court's alleged failure to find and attribute weight to mitigating circumstances, a comingling of inappropriateness and abuse of discretion claims that we have found "troubl[ing]." Id.

The State argues Hubbard has waived his inappropriateness claim by failing to argue it separately from his abuse of discretion claim and by failing to cite Appellate

Rule 7(B). We have previously held that "failure to offer more than a mere conclusory statement" that a sentence should be reduced waives review of an inappropriateness claim, Gentry v. State, 835 N.E.2d 569, 576 (Ind. Ct. App. 2005), disapproved on other grounds, Freshwater v. State, 853 N.E.2d 941, 944 (Ind. 2006), as does failure to argue an inappropriateness claim independently from an abuse of discretion claim if the result is lack of a cogent argument, see Allen v. State, 875 N.E.2d 783, 788 n.8 (Ind. Ct. App. 2007). While we are troubled by Hubbard's failure to separately analyze the inappropriateness claim and to cite clearly applicable authority, see Appellate Rule 46(A)(8)(A), Hubbard has provided us with citations to the record and case authority bearing upon his mental illness and the weight properly attributable to it on review for inappropriateness. Hubbard has made a cogent, if barely cogent, argument that the trial court's decision not to reduce his sentence on remand from his first appeal resulted in an inappropriate sentence, and we therefore review both of Hubbard's claims on their merits.

I. Abuse of Discretion

Hubbard argues the trial court abused its discretion in sentencing him. Under our current sentencing scheme, the trial court "must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). "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 abuses its discretion if it (1) fails to enter a sentencing statement at all, (2) enters "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," (3) enters a statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that "are improper as a matter of law." Id. at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. Id. at 491.

Hubbard makes two arguments regarding the trial court's exercise of its discretion: first, that the trial court failed to consider the guilty but mentally ill verdicts as a mitigating circumstance, and second, that the trial court failed to attribute sufficient mitigating weight to Hubbard's mental illness. Regarding the first, the trial court's resentencing order clearly notes the guilty but mentally ill verdicts and indicates the trial court considered them in reaching its sentencing decision. Regarding the second, it is well established that appellate courts no longer review for an abuse of discretion the weight or lack thereof a trial court attributes to particular mitigating circumstances. See id. The trial court in assessing Hubbard's mental illness considered on the record the factors outlined in Archer v. State, 689 N.E.2d 678 (Ind. 1997), in the manner this court directed upon remand, and we cannot say the trial court abused its discretion.

II. Inappropriate Sentence

Even when the trial court has acted within its discretion in sentencing a defendant, the Indiana Constitution, in Article 7, sections 4 and 6, authorizes independent appellate review of the appropriateness of a sentence. Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This authority is implemented through Appellate Rule 7(B), which

provides this 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." In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). Nevertheless, the defendant bears the burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress, 848 N.E.2d at 1080. "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

A. Nature of the Offenses

The crimes Hubbard committed in this case were deplorable. Hubbard kidnapped a random sixty-three-year-old woman at knifepoint while threatening deadly force. He then took M.T.'s car and drove her to a cornfield, forced her to undress, and attempted to rape her. Thus, Hubbard's crimes amount to distinct episodes of violent conduct and justify the enhanced and consecutive sentences imposed. See Cardwell, 895 N.E.2d at 1225 (noting with respect to appropriateness of consecutive sentences, "additional criminal activity directed to the same victim should not be free of consequences").

B. Hubbard's Character

Hubbard's criminal history is lengthy and troublesome. The trial court noted his record of prior convictions, including theft as a Class D felony, with an habitual offender enhancement, in 2008; disorderly conduct as a Class B misdemeanor in 2006; robbery as a Class C felony in 2003; misdemeanor criminal mischief in Ohio in 2002; burglary as a third-degree felony, two violations of a civil protective order, disorderly conduct, misdemeanor criminal mischief, criminal damaging, and criminal trespassing, all in Ohio in 1999; misdemeanor criminal trespassing in Ohio in 1998; criminal mischief, a Class A misdemeanor, in 1998; battery by bodily waste, a Class D felony, in 1997; four counts of battery and two counts of intimidation, all Class A misdemeanors, in 1996; burglary, a Class B felony, in 1982; and disorderly conduct, a Class B misdemeanor, in 1981.[1] The trial court also noted Hubbard's probation was revoked in July 2006. Thus, while some of Hubbard's prior convictions have already been taken into account by virtue of the habitual offender enhancement in this case, we note his prior unrelated felonies are five in number and include robbery, burglary, and battery – crimes that physically harm or endanger others.

We acknowledge Hubbard's mental illness and the guilty but mentally ill verdicts in this case, which the trial court specifically considered in resentencing. The trial court found Hubbard's mental illness was longstanding, diminished his ability to control his behavior, and limited his overall functioning. However, the trial court was unable to find any particularized nexus between Hubbard's mental illness and his present offenses, and

[1] The trial court noted, but disregarded, two other convictions listed in the pre-sentence investigation report but disputed by Hubbard.

Hubbard does not point to any evidence establishing as much. The record does show Hubbard's history of reduced intellectual ability, seizure disorder, childhood traumatic brain injury, hospitalizations, and prescribed medications. Hubbard has also reported hearing voices since childhood. However, there is no evidence that the voices told him to commit the present offenses or that he was otherwise acting under a delusion.

Hubbard's mental illness deserves some mitigating weight. See Weeks v. State, 697 N.E.2d 28, 30-31 (Ind. 1998); Archer, 689 N.E.2d at 686. However, even attributing somewhat more weight to his mental illness than did the trial court, we find it is more than offset by the extent and seriousness of Hubbard's criminal history coupled with the egregiousness of his present offenses. Cf. Salyers v. State, 862 N.E.2d 650, 654 (Ind. 2007) (concluding life-without-parole sentence was not inappropriate when, notwithstanding defendant's mental illness, murder of a police officer was planned and deliberate and defendant "was able to appreciate the consequences of his actions"). For these reasons, Hubbard's 135-year sentence is not inappropriate.

Conclusion

The trial court did not abuse its discretion in sentencing Hubbard, as the record shows the court properly considered his mental illness. Further, Hubbard's 135-year sentence is not inappropriate in light of the nature of his offenses and his character.

Affirmed.

MAY, J., and VAIDIK, J., concur.