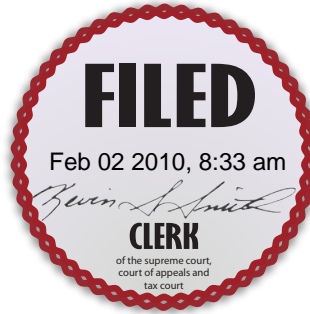


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EDWARD A. FAIR,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 20A03-0906-CR-265

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0710-MR-4

February 2, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Edward A. Fair (Fair), appeals his sentence following a guilty plea for murder, Ind. Code § 35-42-1-1(1).

We affirm.

ISSUES

Fair raises two issues for our review, which we restate as the following three:

- (1) Whether fundamental error occurred when exhibits were offered into evidence;
- (2) Whether the trial court abused its discretion by considering certain aggravators; and
- (3) Whether his sentence is appropriate in light of his character and the nature of his offense.

FACTS AND PROCEDURAL HISTORY

On October 22, 2007, the State filed an Information charging Fair with the murder of Raul Martinez (Martinez), I.C. § 35-42-1-1(1). On March 30, 2009, during *voir dire* of the jury, Fair withdrew his not guilty plea and entered into a guilty plea without a written plea agreement. A sentencing hearing was set for May 14, 2009. During the sentencing hearing, the State offered into evidence, without any objection from Fair, State's Exhibits 1-10, consisting of photos of the site where Martinez's body was found, pictures of his injuries, an autopsy diagram, a picture of the 13 pounds of marijuana found when Fair was arrested, and the homemade sword Fair made to kill Martinez.

When sentencing Fair, the trial court found as aggravating factors: (1) Fair's juvenile criminal history; (2) Fair has used marijuana since the age of 22, sells it, and was under the influence at the time of the offense; (3) the entire murder was related to a drug debt that Fair owed Martinez; (4) 13 pounds of marijuana was found with Fair when he was arrested; (5) disfigurement of Martinez's head and the fact that pieces of his skull were found in multiple places; (6) that Fair never sought medical help and attention for Martinez; (7) Fair made a homemade sword to kill Martinez; and (8) Fair intentionally misled the police by scattering pieces of Martinez's skull in different parts of Elkhart County and dumping the body in a separate location.

The trial court found as mitigating factors: (1) Fair's age of 28; (2) his acceptance of responsibility by pleading guilty; (3) his apology; (4) the fact that he has mental health issues as evidenced by psychiatric exams; however, the trial court noted that the mitigating weight of his mental health issues was diminished by his "apparent illegal use of marijuana to self-medicate." (Sentencing Transcript p. 17). When weighing the aggravating factors against the mitigating factors, the trial court stated, "I think that any one of them taken alone, or in conjunction with the others, would be sufficient to warrant the imposition of a substantial[ly] enhanced sentence." (Sent. Tr. p. 18). As a result, the trial court sentenced him to 64 years to be served in the Department of Correction.

Fair now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Fundamental Error

Fair claims that the trial court's erroneous admission of the State's Exhibits 1-10 amounted to fundamental error because his due process rights and confrontation right as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Sections 12, 13 of the Indiana Constitution were violated. Specifically, Fair argues that he was not provided the opportunity to meet face-to-face or confront the witnesses who took the photos or prepared the diagrams and, therefore they should not have been used to aid the trial court in determining the aggravating factors.

A trial court has broad discretion in ruling on the admissibility of evidence, including photographs, and we will only reverse a trial court's ruling on admissibility of evidence when the trial court has abused its discretion. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003); *Jackson v. State*, 426 N.E.2d 685, 686 (Ind. 1981). However, failure to object to the admission of evidence results in waiver of the issue of admissibility on appeal. *Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003). Here, Fair concedes that he did not object to the admission of the exhibits at the sentencing hearing.

In an attempt to evade waiver, Fair requests that we perform a fundamental error analysis. The fundamental error exception to the waiver rule is an extremely narrow one. *Glotzbach v. State*, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.* at 1226. Specifically, the error "must constitute a blatant violation

of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.” *Id.* (citing *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987)).

The Sixth Amendment Confrontation Clause provides that, “[i]n all criminal prosecutions . . . the accused shall enjoy the right to be confronted with the witnesses against him.” U.S. CONST. AMEND., VI. Article 1, Section 13 of the Indiana Constitution provides an additional measure of protection, providing that “In all criminal prosecutions, the accused shall have the right to meet the witnesses face to face.”

The right of confrontation is largely dependent on the precise nature of the proceedings. With respect to the federal constitution, the Seventh Circuit has determined that the Confrontation Clause does not apply to sentencing proceedings. *Debro v. State*, 821 N.E.2d 367, 373-74 (Ind. 2005); *see also United States v. Francis*, 39 F.3d 803, 810 (7th Cir. 1994). A sentencing hearing is not a “criminal prosecution” within the meaning of the Sixth Amendment, because its sole purpose is to determine only the appropriate punishment for the offense, not the accused’s guilt. *Francis*, 39 F.3d at 810 (7th Cir. 1994).

Turning to the Indiana Constitution, our supreme court in *Debro* declined to determine “whether our state constitution affords a defendant a right of confrontation in a sentencing hearing.” 821 N.E.2d at 374.¹ In *White v. State*, 756 N.E.2d 1057, 1061 (Ind. Ct. App. 2001), we agreed with the proposition stated by the 7th Circuit that “[t]he purpose of a

¹ In *Debro*, our supreme court did not make this determination because it found that the evidentiary hearings in that case, which were held to determine whether the defendant had violated the terms and conditions of his plea agreement, were more analogous to a probation revocation hearing rather than a sentencing hearing. *Id.*

sentencing hearing ‘is to determine the type and extent of punishment[,]’ not whether the defendant is guilty.” (quoting *Thomas v. State*, 562 N.E.2d 43, 47 (Ind. Ct. App. 1990)). Additionally, we note that the rules of evidence, other than those regarding privilege, do not apply to sentencing hearings. Ind. Evidence Rule 101(c)(2). The rationale for the relaxation of the evidentiary rules at sentencing is that unlike at trial, the evidence is not confined to the narrow issue of guilt. *Kellett v. State*, 716 N.E.2d 975, 983 n.5 (Ind. Ct. App. 1999). Instead, the task is to determine the type and extent of punishment. *Id.* This individualized sentencing process requires possession of the fullest information possible about the defendant. *Thomas v. State*, 562 N.E.2d 43, 47 (Ind. Ct. App. 1990). Given that the rules of evidence are relaxed during sentencing hearings, and the evidence at a sentencing hearing is not confined to the narrow issue of guilt, we cannot say that face-to-face confrontation is required. *Kellett*, 716 N.E.2d at 983 n.5.

During the sentencing hearing, the State entered into evidence photos depicting the area where Martinez’s body was found, photos of Martinez’s disfigured head to illustrate the severity of the wounds, autopsy diagrams, the homemade sword, and a photo of marijuana found with Fair when he was arrested. Because the rules of evidence do not apply to sentencing hearings, the State was not required to lay an adequate foundation, and thus, we do not find that error, let alone fundamental error, has occurred. Evi.R. 101(c)(1).

II. Aggravators

Fair was convicted of a murder. A person who commits murder shall be imprisoned for a fixed term of between 45 to 65 years, with the advisory sentence being 55 years. I.C. §

35-50-2-3. Here, the trial court sentenced Fair to nine years over the advisory sentence for a total of 64 years due to the aggravating factors relating to the crime.

As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified 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.*

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 cannot now be said to have abused its discretion by failing to properly weigh such factors. *Id.* at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then “impose any sentence that is . . . authorized by statute; and . . . permissible under the [Indiana Constitution].” *Id.*

Fair contends that the trial court abused its discretion in considering the evidence presented by the State without objection. However, during the factual basis phase of the guilty plea, Fair admitted to “striking Mr. Martinez with a home fashioned sword,” and that Martinez’s death occurred as a “result of [Fair] striking him [] at least four times on the top of the crown of his head” (Appellant’s App. pp. 119-120). Additionally, it was noted that this murder occurred because of a \$20,000 drug debt owed to the victim. This information, taken alone and without consideration of the exhibits presented by the State, was sufficient to find several of the aggravators. Considering that the trial court stated that each

aggravator taken alone could enhance Fair's sentence, we cannot find an abuse of discretion by the trial court.

III. *Nature and Character*

Finally, Fair argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. Specifically, he argues that he only had one juvenile case and did not have a lengthy criminal history.

Although a trial court may have acted within its lawful discretion, Appellate Rule 7(B) provides that the appellate court may revise a sentence authorized by statute if the appellate court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer*, 868 N.E.2d at 491. It is on this basis alone that a criminal defendant may now challenge his sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing the particular sentence that is supported by the record, and the reasons are not improper as a matter of law. *Id.* The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offense, Fair has not persuaded us that his sentence is inappropriate. During the sentencing hearing, the trial court noted that this murder was the result of a \$20,000 drug debt owed to Martinez, and that thirteen pounds of marijuana was found at Fair's home when he was arrested. Additionally, the trial court noted that the nature of the crime was very brutal. Fair fashioned a homemade sword to kill Martinez, striking him in the head four times. Then, in an effort to elude and mislead police, Fair purposely

attempted to avoid getting caught by scattering pieces of Martinez’s skull throughout the county.

With regard to the character of the offender, Fair admitted that he has been using marijuana for the past six years. Taken together with the fact that the motive of the crime stems from drug related activity, the trial court duly noted that “the drug trade got you where you are today.” (Sent. Tr. p. 14). While acknowledging that Fair had some mental health issues, the trial court could not allocate it a lot of weight because Fair choose to self-medicate with the very thing that put him in the situation he currently is in—illicit drugs.

Ultimately, Fair has not persuaded us that his sentence is inappropriate based on the character of the offender or the nature of the offense.

CONCLUSION

Based on the foregoing, we find that: (1) no error, let alone fundamental error, occurred when the State entered Exhibits 1-10 into evidence; (2) the trial court did not abuse its discretion in considering the State’s Exhibits when determining the aggravating factors; and (3) the sentence was appropriate considering the nature of the offender and offense.

Affirmed.

VAIDIK, J., and CRONE, J., concur.