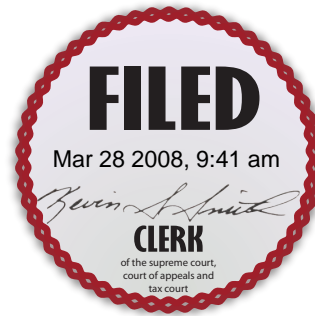


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DWAYNE KELLY, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 27A05-0610-CR-590  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE GRANT CIRCUIT COURT  
The Honorable Thomas R. Hunt, Judge  
Cause No.27C01-0503-MR-28

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**March 28, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issues

Following a jury trial, Dwayne Kelly was convicted of murder, a felony, and sentenced to sixty-five years at the Indiana Department of Correction. Kelly now appeals his conviction and sentence, raising for our review the following issues: 1) whether his conviction of murder is supported by sufficient evidence; and 2) whether the trial court abused its discretion in sentencing him to the maximum term of sixty-five years. Concluding that there was sufficient evidence to support Kelly's conviction of murder and that any error made by the trial court in sentencing Kelly was harmless, we affirm.

### Facts and Procedural History

On March 4, 2005, Kelly went to Heather Jones's house in Marion, Indiana, looking for Alonzo Coleman. Steffan Bobson and several friends were already at Jones's house. When Kelly entered the house, Bobson was sleeping on the couch with a gun in his lap. Kelly took the gun from Bobson's lap and asked who owned the gun. One of Bobson's friends testified that Kelly cocked the gun and pointed it at his legs. Despite being urged by several of the people present to return the gun to Bobson, Kelly left with the gun. Kelly testified that he unloaded the gun and hid it after he left Jones's house.

The following day, Kelly went to Antoinette Sanders's house looking for Coleman. While Kelly was at Sanders's house, Bobson arrived. Bobson yelled at Kelly to return his gun and acted as if he was going to hit Kelly. Kelly jumped, causing onlookers to laugh. Kelly then left and retrieved Bobson's gun from its hiding place. Kelly told his friends that he was going back to the house to "deal with him," tr. at 243, or to "settle the problem," *id.* at

262.

Not long after he first left Sanders's house, Kelly returned and knocked on the door. When Bobson answered, Kelly said, "Let me holler at you." Id. at 665. Bobson partially shut the door and walked away, but Kelly entered the house while holding the gun in his hand. Kelly raised the gun and pointed it at Bobson. Kelly and Bobson struggled over the gun. During the struggle, Bobson was shot and eventually died from a "loose contact gun shot wound" to the chest. Id. at 553. Kelly testified that it was a "surprise" to him when the gun went off because he thought it was unloaded. Id. at 667.

After the shooting, Kelly took the gun and walked away from the scene. He gave the coat he was wearing to a friend's nephew and told him to wash it. He borrowed a change of clothes and arranged a ride to Chicago with friends. He told one of his friends that "he didn't mean[ ] for it to happen like that, he meant . . . to put him in the wheelchair." Id. at 536.

Kelly was eventually arrested and charged with murder. Kelly testified on his own behalf at his jury trial, admitting to much of the State's evidence, but claiming that he believed the gun was unloaded, that he did not have the gun in his hand when he entered Sanders's house, and that he does not know who pulled the trigger during the struggle for the gun. The jury was instructed on the elements of murder as well as the elements of the lesser-included offenses of voluntary manslaughter, involuntary manslaughter, and reckless homicide. The jury found Kelly guilty of murder. At Kelly's sentencing hearing, the trial court found as aggravating circumstances Kelly's extensive criminal history and the fact that he was on probation at the time of the crime. The trial court acknowledged Kelly's proffered

mitigating circumstances of his remorse and the fact that the victim was involved in the violence, but assigned those circumstances “slight weight.” Appellant’s Appendix at 7. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Kelly to an enhanced sentence of sixty-five years. Kelly now appeals his conviction and sentence.

### Discussion and Decision<sup>1</sup>

#### I. Sufficiency of the Evidence

Our supreme court recently reiterated our standard for reviewing a challenge to the sufficiency of the evidence:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

To convict Kelly of murder, the State was required to prove beyond a reasonable doubt that (1) the defendant (2) with knowledge or intent (3) killed (4) another human being.

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<sup>1</sup> This case was fully briefed as of June 2007, but was not assigned to this office until March 2008.

Ind. Code § 35-42-1-1. Kelly contends that the State “failed to prove that at the time of the struggle, Kelly had any intention to kill Bobson, or even that he knew his actions would cause Bobson’s death.” Appellant’s Brief at 11. Kelly essentially asks us to reweigh the evidence in his favor. “[T]he use of a deadly weapon in a manner likely to cause death or serious bodily injury is sufficient evidence of intent to support a conviction for murder.” Chapman v. State, 719 N.E.2d 1232, 1234 (Ind. 1999).

The evidence supporting the verdict is that Kelly stole Bobson’s gun and after encountering Bobson the following day at Sanders’s house, told his friends he was going to “settle the problem.” Tr. at 262. He returned to Sanders’s house with the gun in his hand and pointed it at Bobson. A struggle ensued during which Bobson was fatally shot. After the shooting, Kelly tried to dispose of evidence by having his bloody jacket washed and then left the state. See Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) (“Flight and related conduct may be considered by a jury in determining a defendant’s guilt.”). Kelly told one of his traveling companions that he “didn’t mean to kill [Bobson], he just meant to put him in a wheelchair.” Tr. at 536.

Kelly’s self-serving testimony that he thought he had unloaded the gun and went back to Sanders’s house to return the gun to Bobson is the only evidence that casts any doubt whatsoever on the fact that returning to a volatile situation with a gun after announcing an intention to “settle the matter” and then wielding that gun in close quarters evidences an intent to kill or at the very least the knowledge that death or seriously bodily injury could occur. As for Kelly’s testimony, the jury weighed the conflicting testimony and the

witnesses' credibility and returned a verdict of guilty. We hold there was sufficient probative evidence from which a reasonable jury could have found that Kelly had the intent to commit murder, or at the very least knowingly shot Bobson. See Francis v. State, 758 N.E.2d 528, 535 (Ind. 2001) (rejecting appellant's claim that because he did not know that he had shot anyone, the evidence was insufficient to convict him of "knowingly" killing another person; "[e]vidence is sufficient to uphold a murder conviction when the evidence indicates that a weapon was fired in the direction of the victim").

## II. Sentencing

Kelly also contends that the trial court abused its discretion in imposing a sixty-five year sentence. Because this crime was committed in March of 2005 – approximately six weeks prior to April 25, 2005, the date the advisory sentencing scheme became effective – the presumptive sentencing scheme applies to this case. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

Sentencing decisions, including whether to enhance a sentence, are within the trial court's discretion and will be reversed only for an abuse of discretion. Edmonds v. State, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S.Ct. 497 (Oct. 30, 2006). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). It is within the trial court's discretion to decide both the existence and weight of aggravating and mitigating circumstances. Ross v. State, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005), trans. denied. However, modification of a presumptive

sentence based upon aggravating or mitigating circumstances requires the trial court to identify all significant mitigating and aggravating circumstances, state the specific reason why each circumstance is determined to be mitigating or aggravating, and articulate its evaluation and balancing of the circumstances. White v. State, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006).

The Supreme Court's holding in Blakely v. Washington, 542 U.S. 296 (2004), applies to Kelly's sentence under the presumptive sentencing scheme. Smylie v. State, 823 N.E.2d 679, 683 (Ind. 2005), cert. denied, 546 U.S. 976 (2005). Under Blakely, any aggravating circumstance used to enhance a defendant's sentence beyond the presumptive, excepting prior convictions, must be either found by a jury or admitted by the defendant. 542 U.S. at 310. The trial court found the following aggravating circumstances in this case:

1. The Defendant has an extensive prior record dating back to the time that he was 17 years of age. Included in this extensive prior record are convictions of 6 felonies, 3 misdemeanors and 2 probation violations.
2. Defendant was on probation at the time he committed this offense.

Appellant's App. at 6. Although prior convictions do not implicate Blakely,<sup>2</sup> Kelly contends that the trial court misrepresented his criminal record. The trial court stated that Kelly's criminal record began when he was seventeen years old. Kelly notes that his juvenile history consists of an allegation that he committed conversion when he was seventeen years old, but that case was dismissed. See Appellant's App. at 15. Thus, Kelly contends that "at least a

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<sup>2</sup> Kelly does not raise an issue regarding the trial court finding the fact he was on probation when he committed this crime to be an aggravating circumstance. We note that probationary status need not be proven

portion of the trial court's reliance upon the extent of his prior record was misplaced." Appellant's Brief at 12.<sup>3</sup>

Kelly correctly notes that prior dismissed charges are not properly considered an aggravating circumstance pursuant to Blakely. Hunter v. State, 854 N.E.2d 342, 344 (Ind. 2006). In Hunter, however, the defendant had just one prior felony conviction when he was sentenced to a maximum term of eight years for escape, a Class C felony. The trial court's sentencing statement suggested that the trial court may have considered three dismissed felony charges and two dismissed misdemeanor charges as part of the defendant's criminal history justifying the enhanced sentence. Id. at 343. Noting that the trial court could have found the defendant's prior conviction was an aggravating circumstance but that prior dismissed charges were not permissible considerations, our supreme court revised the defendant's sentence pursuant to Appellate Rule 7(B) to the presumptive sentence of four years. Id. at 344.

Kelly's criminal history, unlike the defendant's in Hunter, begins when he was twenty years old and shows two convictions of battery, battery resulting in injury, possession of cocaine, delivery of a controlled substance, false reporting, two convictions of possession of a controlled substance, driving while suspended, and theft. To the extent the trial court relied on the dismissed juvenile charge, the trial court erred. However, we will affirm a sentence

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to a jury beyond a reasonable doubt before it can be considered an aggravating circumstance. Ryle v. State, 842 N.E.2d 320, 325 (Ind. 2005), cert. denied, 127 S.Ct. 90 (Oct. 2, 2006).

<sup>3</sup> Kelly also notes that the dispositions of the first three charges he faced as an adult are unknown. See Appellant's App. at 15. There is no indication that the trial court relied on these charges in sentencing him, however.



when we can say with confidence that the trial court would have imposed the same sentence if it had considered the proper aggravating circumstances. Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007). Given Kelly's young age at the start of his criminal history and the number of convictions on his record, including several for offenses against other persons, we conclude the trial court would have imposed the same sentence based solely on the permissible criminal history.

Kelly proffered as mitigating circumstances that he was remorseful and acknowledged that he "does bear partial responsibility for" Bobson's death, appellant's app. at 11, and also that there was evidence that Bobson played a part in "provoking the events that resulted in his own death," appellant's brief at 3. Kelly points to the trial court's sentencing order in which the trial court states that "[a]s to defendant's mitigator that [the victim] provoked or was involved in the incident, the Court finds the Jury heard defendant's evidence on that issue and chose to disbelieve in it," appellant's app. at 7, and contends the trial court impermissibly "relied upon the jury verdict to justify diminishing Kelly's expression of remorse and/or the actions of the victim in provoking or contributing to the circumstances of his own death," appellant's brief at 13.

The finding of mitigating circumstances is not mandatory and rests within the discretion of the trial court. Cotto v. State, 829 N.E.2d 520, 524 (Ind. 2005). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating circumstance or how much weight should be assigned to it. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). The trial court's statements at the sentencing hearing make it clear that the

trial court independently evaluated Kelly's proffered mitigating circumstances and determined they were entitled to minimal weight:

[H]e has acknowledged his wrong doing, he has apologized and seemed to accept responsibility for what he did. However, that only went so far. I was troubled by his comments that it could [have] been [Bobson] sitting here and this has been rough on me. Those sorts of things tend to lessen the impact of an assumption of responsibility and lessen certainly the impact of an apology. . . . The second mitigator that he raises . . . was somehow that the victim . . . was somewhat responsible for what happened because he had a gun and because he was involved in an altercation. . . . The fact is there was evidence to the contrary that the victim was bumrushed . . . by the defendant and the jury chose to believe that because they found the defendant guilty of murder, not guilty of some lesser offense. And so I'm not sure we can give much weight to any mitigation that arises from the victim having a gun or being involved in the altercation.

Tr. at 791-92. The trial court considered Kelly's proffered mitigating circumstances and decided that they were entitled to only minimal weight because Kelly's remorse was qualified and because the evidence did not necessarily support his version of events in which Bobson was partially responsible for the incident. We cannot say the trial court abused its discretion in assigning minimal weight to Kelly's proffered mitigators and in determining that the aggravating circumstance of Kelly's extensive criminal history outweighed the mitigating circumstances.

### Conclusion

There was sufficient evidence of Kelly's intent to support his conviction of murder, and to the extent that the trial court abused its discretion in considering a dismissed juvenile charge as part of Kelly's criminal history, such error was harmless. Kelly's conviction and his sixty-five year sentence are therefore affirmed.

Affirmed.

BAKER, C.J., and RILEY, J., concur.