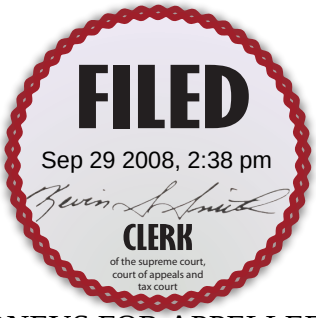

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IN THE
COURT OF APPEALS OF INDIANA

LINDEN CORNEWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0801-CR-00020
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0402-MR-017465

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Linden Cornewell appeals his convictions and sentence for two counts of Murder,[1] a felony, two counts of Robbery,[2] a class C felony, two counts of Criminal Confinement,[3] a class B felony, and one count of Burglary,[4] a class B felony. Specifically, Cornewell argues that the trial court abused its discretion by admitting hearsay testimony and that the admission of that evidence was not harmless error. In addition, Cornewell asserts that the trial court improperly considered an aggravating factor not found by the jury in violation of Blakely v. Washington, 542 U.S. 296 (2004). Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On January 29, 2004, Manuel and Mayra Gonzales (the "Gonzaleses") were robbed and stabbed to death in their son's duplex, where they had been residing since moving from Cuba in 2003. Police identified Lonnie Hall as a suspect and located him on January 31, 2004. Thereafter, Hall directed the police to the location of a knife that his accomplice, Cornewell, had disassembled in the area.

A subsequent search of Cornewell and Amy Ball's residence revealed that the freezer contained bottles of Cuban liquor, which were later found to belong to the Gonzaleses, who had obtained them from a family member in Cuba. In addition, a phone that was missing from the Gonzaleses' home was also found at the residence. Red

[1] Ind. Code § 35-42-1-1.

[2] I.C. § 35-42-5-1.

[3] I.C. § 35-42-3-3.

[4] Ind. Code § 35-43-2-1.

braided rope, duct tape, and knives were also discovered inside the house. Laboratory testing of the rope showed no differences between it and the rope that was used to bind Manuel and Mayra. Additional tests revealed the presence of blood on Hall and Cornewell's clothes and the presence of human proteins on Cornewell's boots. In May 2006, Hall, who was fifteen years old at the time of the murders, was convicted of two counts of murder, two counts of robbery, two counts of criminal confinement, three counts of burglary, and one count of theft.

On January 31, 2004, Hall gave a statement to police implicating Cornewell in the crimes. At Cornewell's jury trial, which commenced on December 3, 2007, Hall testified that he had been living with his cousin, Amy Ball, and Cornewell. Hall informed Cornewell that he had previously burglarized the Gonzaleses' duplex, and they discussed burglarizing it again. Hall told Cornewell that there were televisions and computer equipment in the residence, and Cornewell suggested that they use the vehicle at the duplex to transport the items.

Hall and Cornewell also discussed how to handle the duplex residents at the time of the burglary. The men obtained rope, which they cut into six-foot sections and cauterized to prevent it from unraveling. Hall and Ball tied up Cornewell to ascertain how much rope would be needed. Ball was to sit on the front porch while Hall searched upstairs and Cornewell watched the victims and searched downstairs.

On January 28, 2004, Hall and Cornewell burglarized Hall's uncle's home and stole a handgun. The next day, the men equipped themselves with ropes, tape, and knives. When Hall, Cornewell, and Ball arrived at the duplex, Ball stood off to the side

of the porch while Hall knocked on the door and pulled the pistol from his pants. Mayra opened the door and "she kind of started freaking out and crying." Tr. p. 266.

Hall and Cornewell subdued the Gonzaleses by striking both in the face numerous times. Once subdued, Cornewell "hog tied" them with red rope and taped their mouths shut with duct tape. Id. at 270. Hall and Cornewell then began to hit and kick the Gonzaleses. Cornewell "stomped on Manuel's head" and kicked Mayra in the face. Id. at 272-73. Hall then proceeded upstairs to look for valuables.

While upstairs, Hall took jewelry and change. When Hall came back downstairs, Cornewell stated, "we gotta kill 'em, 'cause they seen my face." Id. at 279. Hall walked off to search the dining room and kitchen. When Hall returned to the living room, Cornewell had a large butcher knife and again stated, "we gotta kill 'em. They seen my face." Id. at 280.

Cornewell gave the knife to Hall, who then cut Manuel's throat and gave the knife back to Cornewell. Cornewell then cut Manuel's throat several more times before commenting that the knife was dull. After pulling a different knife from his pants pocket, Cornewell stabbed Manuel in the neck multiple times. Cornewell then grabbed Mayra by the hair and stabbed her in the throat. Hall took Manuel's wallet but was unable to find the keys to the vehicle. Cornewell then placed the Gonzaleses' phone in Hall's backback and took several bottles of liquor from the residence.

As Hall, Cornewell, and Ball walked back to their house, they divided the money among the three of them. Cornewell disassembled one of the knives and threw pieces of it in different locations. Hall tossed Manuel's wallet into a sewage drain, and Cornewell

and Ball decided to burn their clothes in a charcoal grill behind their house. All three then proceeded to smoke marijuana and drink some of the liquor that they had just stolen.

On February 2, 2004, the State charged Cornewell with two counts of murder, two counts of felony murder, two counts of class A felony robbery, two counts of class B felony criminal confinement, and one count of class B felony burglary. The jury found Cornewell guilty as charged. Following the presentation of evidence at his jury trial that commenced on December 3, 2007, Cornewell was convicted of two counts of murder, two counts of robbery, a class C felony, two counts of criminal confinement, a class B felony, and one count of burglary, a class B felony. On December 14, 2007, the trial court sentenced Cornewell to fifty-five years on each of the two murders and ten years on the burglary, all to be served consecutively. Cornewell was also sentenced to four years on each count of robbery and ten years on each count of criminal confinement, to run concurrently with the murder and burglary convictions, for a total executed sentence of 120 years.[5] The trial court concluded that the lack of prior criminal history was the sole mitigating factor, but offset this mitigating factor with one aggravating factor—the heinous nature and circumstances of the case. Because the aggravating and mitigating factors were in equipoise, the trial court imposed the presumptive sentence for each count. Cornewell now appeals.

[5] The trial court vacated Cornewell's convictions for felony murder and reduced the robbery convictions to class C felonies.

DISCUSSION AND DECISION

I. Admission of Prior Statement

Cornewell argues that his convictions must be reversed because the trial court erred in admitting Hall's prior statement to police into evidence. Specifically, Cornewell maintains that the prior statement is inadmissible hearsay and that the admission of the statement was not harmless error.

In resolving this issue, we note that hearsay evidence is generally not admissible; however, the admission of hearsay constitutes harmless error unless the substantial rights of a party are affected. Robinson v. State, 693 N.E.2d 548, 553 (Ind. 1998). To determine if substantial rights are affected, the court must look to the impact of the evidence on the jury. Id. Our Supreme Court has stated that the "[a]dmission of hearsay is not grounds for reversal where it is merely cumulative of other evidence admitted." Id.

Here, the admission of Hall's prior statement to police was merely cumulative of his testimony at Cornewell's trial. As our Supreme Court observed in Robinson, the trial court's admission of alleged hearsay was "merely cumulative" and "not grounds for reversal" because the declarants had testified to the statements in court. Id. For these same reasons, the admission of Hall's alleged hearsay statements is not grounds for reversal.

Nonetheless, Cornewell maintains that the admission of Hall's prior statements necessarily requires reversal because they created a "drumbeat effect" on the jury. Appellant's Br. p. 18. In McGrew v. State, this court held that the admission of alleged hearsay testimony did not create a drumbeat repetition of inadmissible evidence because

the testimony was brief and consistent with the victim's testimony. 673 N.E.2d 787, 796 (Ind. Ct. App. 1996), affirmed in relevant part by 682 N.E.2d 1289, 1292 (Ind. 1997). Similarly, Hall's prior statement to police was brief and consistent with his in-court testimony. Hall testified in depth and was cross-examined about his version of events. His testimony consists of more than one hundred pages of transcript. By contrast, his statement to police admitted into evidence consists of only twelve pages. Therefore, because the alleged hearsay was brief and consistent with Hall's in-court testimony, Cornewell's contention that the statement created a "drumbeat effect" of inadmissible evidence on the jury fails.

II. Sentence—Aggravating Factor

Cornewell contends that the trial court erred when it offset a mitigating factor with an aggravating factor that violated the rule announced in Blakely, ultimately imposing the presumptive sentence on each count. Thus, Cornewell argues that he must be resentenced.

We initially observe that because Cornewell committed his crimes in 2004, the "presumptive" version of the sentencing statutes applies to him. See Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). Under the "presumptive" version of the statutes, a sentence could be enhanced or reduced from the presumptive sentence based on

aggravating or mitigating circumstances found by the trial judge. See Ind. Code § 35-38-1-7.1.[6]

In Blakely, the United States Supreme Court held that the Sixth Amendment right to trial by jury is violated when a criminal defendant is sentenced above the statutory maximum based on aggravating factors, except for a prior conviction, that are not found by the jury beyond a reasonable doubt. 542 U.S. at 301. The Court defined "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303 (emphasis in original).

In response to Blakely, our Supreme Court struck down Indiana's "presumptive" statutes because a trial court could enhance a sentence above the presumptive term by finding aggravating factors that had not been found beyond a reasonable doubt by a jury. Smylie v. State, 823 N.E.2d 679, 683 (Ind. 2005). The Court reasoned that the presumptive sentence was the relevant "statutory maximum" referred to in Blakely "[b]ecause the judge has to find additional facts to impose a sentence higher than the presumptive sentence." Id. at 684. Therefore, "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws" before a sentence above the presumptive sentence can be imposed. Id. at 686.

Here, Cornewell was not sentenced above the presumptive term and therefore his sentence does not violate Blakely. Indeed, in Davidson v. State, our Supreme Court held

[6] In 2005, the General Assembly amended this section to conform with the Sixth Amendment as interpreted in Blakely v. Washington. The amendment entitles a sentencing court to sentence a defendant to any sentence within the statutory range, without regard to aggravating or mitigating factors.

that "Blakely does not prohibit a trial court from finding aggravating circumstances. What it does prohibit is a trial court finding an aggravating circumstance and enhancing a sentence beyond the statutory maximum." 849 N.E.2d 591, 594-95 (Ind. 2006) (emphasis in original). Thus, the trial court committed no error by offsetting a mitigating factor with an aggravating factor and sentencing Cornewell to the presumptive term on the offenses.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.