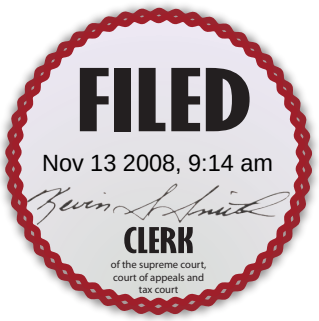

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IN THE
COURT OF APPEALS OF INDIANA

ASHLEY RAY LAWRENCE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0804-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0703-FC-37

November 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Ashley Ray Lawrence appeals her sentence for voluntary manslaughter as a class A felony[1] and assisting a criminal as a class C felony.[2] Lawrence raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing her; and

II. Whether Lawrence's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We reverse and remand.

The relevant facts from the stipulated factual basis follow. During the early morning hours of March 27, 2007, Deshun Bennett was invited over to the apartment of Lawrence and her boyfriend, Jason Gaboian. Bennett and Lawrence were involved in a sexual encounter, and Lawrence told Gaboian that the encounter was "non consensual." Appellant's Appendix at 60. Gaboian shot Bennett in the forehead with Bennett's handgun in the living room. Gaboian asked Lawrence to give him a knife, and Lawrence handed Gaboian a knife "while she was under sudden heat from the above described sexual encounter." Id. When Lawrence handed Gaboian the knife, she "knew that [Gaboian] intended to kill [Bennett] with the knife and she observed [Bennett] being stabbed by [Gaboian] with said knife." Id. Bennett died as a result of the shooting and stabbing. That same day, Lawrence aided and assisted Gaboian in attempting to conceal

[1] Ind. Code § 35-42-1-3 (2004).

[2] Ind. Code § 35-44-3-2 (2004).

the crime. Specifically, she moved Gaboian's truck from the front of the apartment building to the rear sliding glass doors to be able to remove Bennett's body from the apartment. Lawrence accompanied Gaboian in his truck to the location where they dumped Bennett's body. Lawrence then drove Bennett's automobile from the scene of the crime to a location in Lake Station, Indiana in order to dispose of the victim's vehicle. Lawrence purchased two cans of carpet cleaner and a mop in order to clean up the victim's blood in the apartment.

On March 29, 2007, the State charged Lawrence with assisting a criminal as a class C felony. On May 15, 2007, the State amended the charging information to include charges of murder and murder in the perpetration of a robbery. On January 30, 2008, the State amended the charging information to include voluntary manslaughter as a class A felony. That same day, Lawrence pled guilty to voluntary manslaughter as a class A felony and assisting a criminal as a class C felony. The State dismissed the remaining charges. The plea agreement stated that the sentences would be served concurrently and the sentence would have a maximum cap of thirty-five years.

The trial court found the following mitigating circumstances: (1) Lawrence pled guilty and admitted responsibility, to which the trial court gave "minimal weight because [Lawrence] pled to a reduced offense from the principle charge of Murder;" and (2) Lawrence's age of nineteen years. Appellant's Appendix at 65. The trial court found the following aggravating circumstances: (1) Lawrence's criminal history; (2) her character

is "dishonest and manipulative;" (3) her "actions started the chain of events that eventually led to the victim's death;" (4) "[i]n regards to [the voluntary manslaughter as a class A felony charge] only: [Lawrence] assisted in disposing of the victim's body in an attempt to conceal the crime;" and (5) "[a]ny further reduction or suspension of the sentence would depreciate the seriousness of the crime committed in light of the defendant's involvement." Id. at 66. The trial court stated that "[n]otwithstanding the aggravating factors, [Lawrence]'s sentence to the advisory sentence is appropriate under the circumstances." Id. The trial court sentenced Lawrence to thirty years in the Department of Correction for voluntary manslaughter as a class A felony and four years for assisting a criminal as a class C felony. The trial court ordered the sentences to be served concurrently.

I.

The first issue is whether the trial court abused its discretion in sentencing Lawrence. We note that Lawrence's offenses were committed after the April 25, 2005, revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "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, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id.

A 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 sentencing 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 490-491. If the trial court has abused its discretion, we will remand for resentencing "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." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

A. Mitigators

Lawrence argues that the trial court overlooked her remorse, abuse, depression, and efforts at rehabilitation. "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001),

reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

1. Remorse

Lawrence argues that the trial court overlooked her remorse as a mitigating factor. A trial court's determination of a defendant's remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied.

Lawrence does not allege any impermissible considerations. Rather, Lawrence points to her testimony and the testimony of her mother and sister. The trial court stated, "I do believe – and I think that what [the prosecutor] is trying to get it [sic] – that to some extent you are a very manipulative person. I do believe that. I truly believe that." Transcript at 154. In light of the trial court's comments, we cannot say that Lawrence's remorse is both significant and clearly supported by the record. Thus, the trial court did not abuse its discretion by not finding Lawrence's alleged remorse to be a mitigating

circumstance. See, e.g., Stout, 834 N.E.2d at 711 (addressing the defendant's argument that the trial court had overlooked his remorse as a mitigating factor and holding that the trial court did not err by refusing to find the defendant's alleged remorse to be a mitigating factor).

2. Abuse & Mental Illness

Lawrence argues that the trial court overlooked her condition as a "battered woman" and the mental illness caused by the abuse. Appellant's Brief at 9. Specifically, Lawrence argues that she has shown "how her years of being victimized by a family friend and her male companions coupled with her depression, has led her to where she is today." Id. at 10.

Lawrence testified that she was raped when she was fourteen years old and her first boyfriend hurt her physically, mentally, and emotionally. Lawrence points to her mother's testimony that Lawrence was pregnant but lost the child as a result of a beating by Gaboian. Lawrence also points out that Gaboian isolated her from her family. Lawrence testified that she tried to call the police after Gaboian shot and stabbed Bennett but Gaboian kneed her on both sides of her face and cracked two of her molars. In a probation officer hearing report, the probation officer stated that Lawrence's mother "fears that [Lawrence] is suffering from 'battered wife's syndrome.'" Appellant's Appendix at 283. A medical progress notation from the jail reveals that Lawrence stated

that "she is bi-polar, manic depressive," and has "post traumatic stress syndrome, [and] battered wife syndrome." Id. at 221.

"A trial court is not required to consider as mitigating circumstances allegations of appellant's . . . mental illness." James v. State, 643 N.E.2d 321, 323 (Ind. 1994). The Indiana Supreme Court has outlined several considerations that bear on the weight, if any, that should be given to mental illness in sentencing. These factors include: (1) the extent of the defendant's inability to control her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. Weeks v. State, 697 N.E.2d 28, 31 (Ind. 1998). Where a defendant's mental illness is less severe and the defendant appears to have more control over her thoughts and actions, or where the nexus between defendant's mental illness and the commission of the crime is less clear, the trial court may determine on the facts of a particular case that the mental illness warrants relatively little or no weight as a mitigating factor. Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997), reh'g denied.

The State argues that Lawrence did not establish a nexus between the abuse or depression and her crimes. Lawrence argues that this is "not a situation where although abused, she has failed to establish how that victimization led her to where she is today." Appellant's Brief at 9. Lawrence argues that "this is a situation where the appellant was subjected to abuse, day in and day out, by men who [sic] she looked to for protection . . .

[a]nd this abuse contributed to the events of that fateful night." Id. at 9-10. Lawrence testified that "I know I had plenty opportunities [sic] to flee, I know, but I was so scared. I just wanted to make it out alive. I just saw a man get murdered. I wasn't doing anything unless [Gaboian] told me to." Transcript at 147.

To the extent that Lawrence argues that her depression contributed to the offense, we cannot say that Lawrence established a nexus between her depression and the commission of the crime. See, e.g., Corralez v. State, 815 N.E.2d 1023, 1026 (Ind. Ct. App. 2004) (holding that the trial court did not err in rejecting the defendant's mental history as a mitigator where the defendant offered no indication that his mental health was responsible for his decision-making process on the day of the crime).

To the extent that Lawrence argues that the commission of the crime was the result of the abuse she suffered, we note that the trial court stated, "I don't know where the truth is. I don't know who manipulated who. I – I truly don't know," and later stated that it believed that Lawrence was a "very manipulative person." Transcript at 152. The trial court also stated:

> Bottom line is that it would seem that drugs played a part of this, sexual encounter played a part of this and someone had a gun and someone died. You know, and you were certainly a part of that process. There's no question about it. You were part of a process that – that started a chain of events that eventually led to someone's death and there's no excuse for that, none whatsoever.

Id. at 154. Based on the record, we cannot say that the trial court omitted reasons that were clearly supported by the record.

3. Efforts at Rehabilitation

Lawrence argues that the trial court overlooked her behavior while incarcerated. Specifically, Lawrence points to the "certification showing that [she] completed the courses available to her and tried to improve her condition and wean herself from dependency on drugs." Appellant's Brief at 11. The record reveals that Lawrence graduated from a thirty-six hour chemical dependency and addictions program while in jail. Although Lawrence is to be commended for her behavior and efforts to better herself through drug dependency programs, we do not find this behavior to be a significant mitigating circumstance, and we conclude that the trial court did not abuse its discretion by failing to find it as such. See Carter v. State, 711 N.E.2d 835, 839 (Ind. 1999) ("Although [the defendant's] academic achievement [while in jail awaiting trial] in the face of a pending murder charge is laudable, the trial court did not abuse its discretion by failing to find it as a mitigating circumstance.").

B. Aggravator

Lawrence argues that the trial court "erred in using the elements of assisting a criminal, for which she pled guilty, was convicted, and sentenced to four (4) years in prison, as an aggravating circumstance considered by the trial court in imposing her sentence on her conviction for voluntary manslaughter." Appellant's Brief at 12.

A trial court may not use a material element of the offense as an aggravating circumstance. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, the trial court may find the nature and circumstances of the offense to be an aggravating circumstance. Id. The offense of assisting a criminal is governed by Ind. Code § 35-44-3-2, which provides that "[a] person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor. However, the offense is . . . a Class C felony if the person assisted has committed murder or a Class A felony, or if the assistance was providing a deadly weapon."[3]

The State argues that "the trial court was presented with myriad examples of Defendant's subsequent assistance of Gaboian after the killing which fulfilled the elements of the crime of assisting a criminal." Appellee's Brief at 11. The State also argues that the trial court properly considered the nature and circumstances of the offense as an aggravator. We agree with the State.

Based on the record, Lawrence aided and assisted Gaboian in attempting to conceal the crime by moving Gaboian's truck, accompanying Gaboian in his truck to the location where they dumped Bennett's body, driving Bennett's automobile to a location

[3] The State charged Lawrence with assisting a criminal as a class C felony and alleged that Lawrence "did unlawfully harbor, conceal or otherwise assist [Gaboian], who had committed murder, with intent to hinder the apprehension or punishment of [Gaboian] . . . ." Appellant's Appendix at 55.

in Lake Station, and purchasing two cans of carpet cleaner and a mop in order to clean up the victim's blood in the apartment. As to the voluntary manslaughter conviction, at the sentencing hearing, the trial court stated:

> I do care about the fact that you dumped a body like trash. I care about that. No human being should ever be treated in that fashion. And that's exactly what you did. And that is unacceptable. . . . That is so unacceptable that I find that . . . under the principal count of voluntary manslaughter, that's an aggravating factor. What you did after the fact is an aggravating factor that is absolutely unacceptable, because that goes beyond just having sudden heat – and lead – that may have led to someone's death. You dumped a body and you treated that person in such an inhumane manner, that you gave him no reason for being. You treated him in a fashion that is absolutely unacceptable.

Transcript at 155-156. We conclude that the trial court considered the fact that Lawrence dumped Bennett's body not as material elements of assisting a criminal but as the nature and circumstances of the offense of voluntary manslaughter. Consequently, the trial court did not abuse its discretion by considering the nature and circumstances as an aggravating factor. See Sallee v. State, 777 N.E.2d 1204, 1215 (Ind. Ct. App. 2002) (holding that the length of time over which the offenses occurred and the continuing violation of the victim could be summarized as describing the nature and circumstances of the crime), trans. denied; Harrison v. State, 644 N.E.2d 888, 892 (Ind. Ct. App. 1994) (holding that the nature and circumstances of the offense were proper aggravating factors), trans. denied.

Moreover, even assuming that the trial court abused its discretion by considering this as an aggravator, we can say with confidence that the trial court would have imposed the same sentence given the remaining aggravators, which Lawrence does not challenge.

II.

The next issue is whether Lawrence's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, 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). Lawrence requests this court to reduce her sentence.

Our review of the nature of the offense reveals that Bennett was invited over to Lawrence and Gaboian's apartment. Bennett and Lawrence were involved in a sexual encounter, and Lawrence told Gaboian that the encounter was "non consensual." Appellant's Appendix at 60. Gaboian shot Bennett in the forehead with Bennett's handgun in the living room, but Bennett was still alive. Gaboian asked Lawrence to give him a knife, and Lawrence handed Gaboian a knife "while she was under sudden heat from the above described sexual encounter" but she "knew that [Gaboian] intended to kill [Bennett] with the knife and she observed [Bennett] being stabbed by [Gaboian] with said

knife." Id. Bennett died as a result of the shooting and stabbing. Lawrence aided and assisted Gaboian in attempting to conceal the crime by moving Gaboian's truck, accompanying Gaboian in his truck to the location where they dumped Bennett's body, driving Bennett's automobile to a location in Lake Station, and purchasing two cans of carpet cleaner and a mop in order to clean up the victim's blood in the apartment.

Our review of the character of the offender reveals that Lawrence pled guilty but the State dismissed charges of murder and murder in the perpetration of a robbery. The trial court stated that it believed that Lawrence was a "very manipulative person." Transcript at 154. The trial court also found Lawrence's dishonest and manipulative character as an aggravator. As a juvenile, Lawrence pled guilty to battery and was placed on probation. On May 23, 2005, Lawrence took her mother's truck without permission and was arrested as a runaway.[4] A pre-dispositional report was filed that alleged that Lawrence violated the conditions of her probation. In a report dated June 1, 2005, a probation officer stated that Lawrence "has stated that she has not been taking probation or the courts seriously. She finds probation a joke and feels nothing can happen to her. . . . Since her detainment, [Lawrence] states that she will be taking the court's [sic] seriously." Appellant's Appendix at 284. Lawrence's probation was modified, and she successfully completed probation.

[4] At the sentencing hearing, Lawrence's mother testified that Lawrence was actually given permission to take the truck by someone else, but Lawrence's mother did not find out that Lawrence had permission until a year later.

When Lawrence was fifteen years old, Dr. John Carter diagnosed her with depression. When Lawrence was sixteen years old, she was diagnosed with battered wife syndrome while she was incarcerated at the Lake County Juvenile Detention Center. In 2007, Lawrence was diagnosed with Post Traumatic Stress Disorder. Lawrence began smoking marijuana when she was fourteen years old and progressed to daily use. Lawrence also began snorting cocaine two to three times a month when she was eighteen years old. Lawrence successfully completed substance abuse counseling in November 2007 while she was incarcerated.

After due consideration of the trial court's decision and in light of Lawrence's age and diagnoses, we find Lawrence's sentence inappropriate. A medical progress notation from the jail reflects her expressed concerns that she has bipolar disorder. She has diagnoses of depression, battered wife syndrome, and post traumatic stress disorder. At least some of these disorders may reasonably have contributed to her previous lack of concern about probation and strongly support a sentence reduction. Accordingly, we conclude that Lawrence's sentence for voluntary manslaughter as a class A felony should be reduced to twenty-five years to be served concurrently with the four year sentence for assisting a criminal as a class C felony, for a total sentence of twenty-five years in the Indiana Department of Correction.

For the foregoing reasons, we remand this case to the trial court with instructions to issue an amended sentencing order and to issue any other documents or chronological case summary entries necessary to impose a sentence of twenty-five years.

Remanded with instructions.

BAKER, C. J. and MATHIAS, J. concur