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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0603-CR-114
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0501-FA-02

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jeffrey Harris ("Harris") appeals his conviction of and sentence for Attempted Murder, a Class A felony.[1] We affirm.

Issues

Harris raises two issues on appeal, which we restate as follows:

1) Whether the trial court abused its discretion in admitting a police officer's statement that the defendant was arrested after investigating officers concluded he was the shooter; and

2) Whether the trial court abused its discretion in finding no mitigating circumstances at sentencing.

Facts and Procedural History

On January 14, 2005, Walter Rondo ("Rondo") and Jamar Martin ("Martin") drove to the residence of Harris and Lisa Palacio ("Palacio"). While accounts of the incident differ, Harris and the State agree that Harris shot Martin three times—twice in the posterior portion of the left shoulder and once in the left hand. Bleeding, Martin left the residence, placed himself under a car, called the police, and waited for their arrival. He survived, despite suffering a punctured lung.

The State filed an Information, charging Harris with Attempted Murder, a Class A felony, Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony,[2] and

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[1] Ind. Code § 35-42-1-1. Attempted murder is a Class A felony. I.C. § 35-41-5-1.

[2] I.C. § 35-47-4-5.

Battery, a Class C felony.[3] The State later amended its Information, excluding the count of Unlawful Possession of a Firearm by a Serious Violent Felon.

At trial, Martin testified that Harris appeared high, loud, and agitated. According to Martin, Rondo and Palacio, Harris questioned why Martin had delayed in entering the residence, and why Martin had his hands in his pockets. Palacio testified that Harris explained that he was "just tripping," meaning that he was paranoid. Appendix, Trial Transcript at 415. In the year that they had known each other, Palacio had never seen Harris act similarly. She considered his demeanor "very paranoid." Id. at 416. Suddenly, Harris said, "m_____ f_____, I'll kill you," and shot Martin. Id. at 96. According to Rondo, he asked why Harris shot Martin. Harris replied, "I told him not to put his hands in his pockets." Id. at 214. In contrast, Harris testified that Martin tried to rob him, and that he shot Martin in self-defense.

Defense counsel cross-examined Officer Delmar Stout as follows:

> Q: You conducted an investigation into the shooting, is that correct?
> A: Correct.
> Q: And you did a thorough investigation.
> A: Yes.
> Q: And who was arrested, based on your investigation?
> A: After the statements and everything and reviewing the evidence, reviewing the witnesses statements, the defendant, Jeffrey Harris, was concluded to be the shooter of the victim, Jamar Martin.

Id. at 786-87. Defense counsel objected that the statement was inadmissible as stating an opinion of guilt. The objection was overruled.

The jury found Harris guilty of both counts, but the trial court entered judgment of

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[3] I.C. § 35-42-2-1.

conviction only on the attempted murder verdict. The trial court found no mitigating circumstance, but found as an aggravating circumstance his prior criminal history, the fact that "prior leniency has not deterred the defendant's criminal behavior," and Harris's admission that he had dealt drugs. Id. at 1004-05. Harris was sentenced to forty years imprisonment, to be fully executed.

Discussion and Decision

I. Opinion Evidence

Indiana Evidence Rule 704 controls the admissibility of opinions on ultimate issues.

> (a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Our standard of review for the admission of evidence is well settled.

> A trial court has broad discretion in ruling on the admissibility of evidence. Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court.

Abran v. State, 825 N.E.2d 384, 389 (Ind. Ct. App. 2005) (citing Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003)), reh'g denied, trans. denied.

Here, defense counsel asked Officer Stout whether the investigation was thorough, and who was arrested. Officer Stout answered, based upon the investigation, that Harris "was concluded to be the shooter of the victim, Jamar Martin." App., Tr. Trans. at 787.

Defense counsel's objection was not sustained. Furthermore, counsel did not move to strike the statement or otherwise request that the jury be admonished to disregard the statement.

On appeal, Harris argues that the trial court abused its discretion in allowing Officer Stout to testify that Harris was the shooter. Essentially, Harris argues that the officer's testimony violated Evid. R. 704(b) because his identification of Harris as the shooter constituted an opinion that Harris was guilty of attempted murder. In support, Harris cites Butler v. State, 658 N.E.2d 72 (Ind. 1995).[4] The Butler Court, however, was reviewing a post-conviction court's consideration of Butler's having been adjudicated a habitual substance offender. Within that context, the State presented testimony from a deputy prosecutor regarding the status of a prior offense. The Butler Court concluded that the prosecutor's testimony was entirely factual. Accordingly, it found no error. Id. at 79. In so holding, our Supreme Court emphasized that, "[t]here is no error, of course, where the testimony refers only to issues of fact." Id.

Similarly, Officer Stout confirmed merely that Harris was arrested, and that police had concluded that he was the shooter. Harris, himself, admitted as much. In his brief, he even acknowledges that identification of him as the shooter "does not necessarily negate his claim of self-defense." Appellant's Br. at 7. While Evid. R. 704(b) prohibits testimony regarding opinions of guilt, it cannot remove the implicit message in a criminal trial that the State is accusing the defendant of criminal conduct. The fact of arrest, by definition, is accusatory. We conclude that the trial court made no error in admitting Officer Stout's statement because

the statement was entirely factual. To rule otherwise would allow defendants to create reversible error simply by asking an officer whom he arrested.

II. Sentencing

At the time of Harris's offense, the presumptive term for a Class A felony was thirty years imprisonment.[5] Ind. Code § 35-50-2-4. As many as twenty years may be added for aggravating circumstances, or as many as ten years may be subtracted for mitigating circumstances. Id. Finding three aggravating circumstances, but no mitigating circumstances, the trial court enhanced Harris's sentence by ten years.

The appropriate sentence is within the trial court's discretion, and the trial court will only be reversed if it has abused that discretion. Bacher v. State, 722 N.E.2d 799, 801 (Ind. 2000). A sentencing court is under no obligation to find mitigating factors at all, Echols v. State, 722 N.E.2d 805, 808 (Ind. 2000), and need not explain the absence of a finding of mitigating circumstances. Bacher, 722 N.E.2d at 803.

The sentencing court must consider all evidence of mitigating circumstances presented by a defendant, but need not agree with the defendant as to the weight or value to be given proffered mitigating facts. Id. The court cannot ignore mitigating factors that are clearly supported by the record, and the failure to find a mitigating circumstance clearly supported by the record may imply that the circumstance in question was overlooked. Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995). However, the trial court need not consider, and we will not

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[4] Appellant's Brief actually cites "Bockworthy v. State, 658 N.E.2d 72 (Ind. 1995)." Our search reveals no reference to "Bockworthy" in the North Eastern Reporter.

remand for reconsideration of alleged mitigating factors that are highly disputable in nature, weight or significance. Wilkins v. State, 500 N.E.2d 747, 749 (Ind. 1986).

Harris argues that the trial court abused its discretion in not finding any mitigating circumstances. Specifically, Harris argues that the trial court should have found mitigating circumstances in the fact that Harris appeared to others at the crime scene to be in a "drug-induced paranoia," and in the fact that Rondo induced or facilitated the crime by going to Harris to purchase drugs. Appellant's Br. at 9.

At trial, Harris testified that he consumed beer and "probably woke up in the morning and probably smoked a little marijuana" on the day of the shooting. App., Tr. Trans. at 811. He further testified, however, that he did not consume any drugs or alcohol that afternoon or evening. During sentencing, defense counsel argued that, "[m]ost of them were in a chemical fog, particularly their witnesses." Id. at 992 (emphasis added). On appeal, however, he endorses the victim's perception that he was in a "drug-induced paranoia" the night of the incident. Appellant's Br. at 9. On this basis, he argues that the trial court should have considered drug use and his drug-induced paranoia to be mitigating circumstances. Thus, the defendant's own testimony contradicts his argument on appeal. The trial court was not obligated to find mitigating circumstances that were highly disputable in nature.

Finally, Harris argues that a mitigating factor should have been found in his making "no attempt to finish killing Martin and even permit[ing] him to crawl outside and call the police." Appellant's Br. at 9. We note that Harris was convicted of attempted murder, not

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[5] The General Assembly enacted advisory sentencing, effective April 25, 2005. P.L. 71–2005. Harris's

murder. He does not explain how this mitigates the offense of attempted murder. He shot his victim three times. The trial court did not abuse its discretion in finding only aggravating circumstances.

Conclusion

We conclude that the trial court did not abuse its discretion in admitting Officer Stout's statement that the police concluded that Harris was the shooter, or in finding no mitigating circumstances at sentencing.

Affirmed.

VAIDIK, J., and BARNES, J., concur.

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conduct, however, occurred prior to enactment of the statute.