

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.

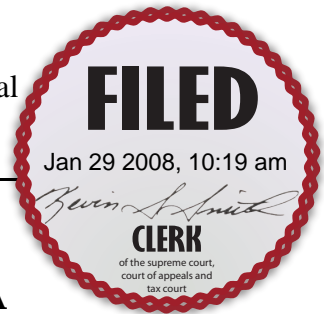
ATTORNEY FOR APPELLANT:

BRUCE E. ANDIS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

FELIPE ROMERO,)

Appellant-Defendant,)

vs.)

No. 49A02-0706-CR-502

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Commissioner
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0403-PC-48178

January 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Felipe Romero appeals his sentence for Class B felony criminal confinement and Class D felony intimidation. We affirm.

Issue

Romero presents one issue for our review: whether he was properly sentenced.¹

Facts

In March of 2004, Romero and his live-in girlfriend K.W. had an argument, and K.W. feared leaving the residence. On March 20, 2004, Romero became intoxicated, and K.W. fled to a neighbor's house. K.W. beat on Lashawna Tutson's front door, crying, and asking if she could have a place to stay. Tutson offered her a place to stay. Tutson did not know K.W. and had not met her before that day.

An hour later, Romero appeared at Tutson's house while she and K.W. sat on the front porch. Romero grabbed K.W.'s arm and told her to come home, but she refused and went inside. He returned around 3:00 or 4:00 a.m. the next morning and began beating on the front door and asking for K.W. Tutson told him she was not there and he left. He came back around 7:00 a.m., this time banging on the front door and the windows of the house. He was asking, "where that bitch at?" Tr. p. 54. He repeatedly beat on Tutson's bedroom window until she yelled that K.W. was not there. Romero then

¹ Romero raised an additional issue in his Statement of the Issues, "Did the trial court abuse its discretion when it denied Romero's motion to withdraw his guilty plea?" Appellant's Br. p. 1. Romero did not address or develop this issue in his Summary of the Argument, Argument, or Conclusion. By failing to develop or provide cogent argument, Romero has waived this claim for appeal. See Ind. Appellate Rule 46(A)(8); Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005).

replied, “bitch you lying, she in there” and “if she in there I’m going to fuck you and blow your house up.” Tr. p. 55.

Approximately fifteen to twenty minutes later, K.W. attempted to leave Tutson’s house. She was walking down the sidewalk when Romero pulled up in his car and jumped out. K.W. began to run down the street, but Romero grabbed her by her shirt and her hair. He began to drag her back in the direction of his vehicle, through the mud, and onto the sidewalk and street. Romero was yelling that he was going to kill her. He held what was believed to be a hacksaw to her neck, which a witness described as a “little bitty saw with a whole bunch of edges.” Tr. 61. He ripped off her shirt during this process. Romero fled when another neighbor yelled from her porch.

The State charged Romero with Class B felony criminal confinement, Class C felony intimidation, Class D felony intimidation, Class A misdemeanor battery, and Class A misdemeanor domestic battery. The case proceeded to a jury trial on July 15, 2004, but after two witnesses testified Romero pled guilty to Class B felony criminal confinement and Class D felony intimidation. On August 17, 2004, the trial court sentenced him to fifteen years for the criminal confinement and two years for the intimidation, to be served consecutively. On April 23, 2007, he filed a verified petition to file a belated notice of appeal, which was granted.

Analysis

Romero seems to argue that he was sentenced in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). For Blakely purposes, a trial court could enhance a sentence under Indiana’s “presumptive” sentencing scheme based only

on those facts that were established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived jury rights and stipulated to certain facts or consented to judicial factfinding. Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005) (citing Blakely, 542 U.S. at 301, 124 S. Ct. at 2536).

Although he raises reasons other than Blakely to support why certain aggravators were inappropriate, Romero seems to contend that because he did not admit to the facts used to aggravate his sentence, the trial court also improperly enhanced his sentence under Blakely. However, Romero's written plea agreement provides in part:

The defendant acknowledges that the defendant has a right, pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution, to have a jury determine, by proof beyond a reasonable doubt, the existence of any fact or aggravating circumstances that would allow the Court to impose a sentence in excess of the statutory presumptive sentence and to have the State of Indiana provide written notification to the defendant of any such fact or aggravating circumstance. The defendant hereby WAIVES such rights and requests that the Judge of the Court make the determination of the existence of any aggravating and/or mitigating circumstances. . . .

App. p. 40. Because Romero expressly waived his right to have the aggravating circumstances found by a jury, the trial court properly made such findings. Romero has no Blakely claim. See Strong v. State, 820 N.E.2d 688, 690 (Ind. Ct. App. 2005) (explaining that defendants may waive Blakely arguments by a guilty plea stipulating to the facts supporting a sentence enhancement or consenting to judicial factfinding), trans. denied.

Romero next argues that the trial court improperly considered the aggravating and mitigating circumstances when it sentenced him. Sentencing decisions lie within the discretion of the trial court. Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court enhanced or reduced a presumptive sentence, it must have: (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance was determined to be mitigating or aggravating; and (3) articulated its evaluation and balancing of the circumstances. Id.

The trial court found the following four aggravating circumstances in determining Romero's sentence. First, his criminal history included a conviction for misdemeanor assault with a deadly weapon against the same victim. Second, the trial court found the nature and circumstances of the crime to be an aggravator. Third, the trial court found the nature and circumstances of the intimidation, particularly that the victim Tutson was merely acting a good Samaritan, to be an aggravator. Fourth, the trial court found that Romero attempted to place blame for his convictions on the alleged incompetence or dishonesty of the court appointed translator and his public defender. Romero contends that the trial court actually found six aggravators, but a comprehensive reading of the transcript reveals otherwise. As for mitigators, the trial court acknowledged but seemed to give very little weight to the fact that Romero works to send money back to Mexico to support his aging parents and his son. After identifying these factors, the trial court found that the aggravators outweighed the mitigators and imposed an enhanced sentence.

Romero first argues that his criminal history is not significant enough to be an aggravating circumstance and support an enhanced sentence. We disagree. The prior

conviction, although a misdemeanor, was still an act of violence against the same victim. The prior conviction was also close in time to the instant offenses, happening just thirteen months earlier. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (“The weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability.”) Moreover, though the trial court made a specific comment about only the misdemeanor conviction, Romero’s criminal history included another conviction for trafficking in marijuana and offenses for public intoxication and possession of narcotics with unknown dispositions. The pre-sentence investigation revealed he had not led a law-abiding life.

Romero contends that the trial court also improperly speculated about the potential additional criminal history, then used that potential as an aggravator. This contention is not supported by the record. The transcript reveals that although the trial court noted the lack of additional criminal history, it was clear in expressing that it would not inject its own speculation regarding that history as an aggravator. The trial court stated:

And as to his criminal history, while it is not the worst I’ve ever seen, I will also note that given his circumstances as I strongly suspect them to be, and while you all know I do not consider that to be aggravation, I figure anybody has the right to go where they want to go and try to lead a better life, but it also leaves me in a position where I don’t know what his criminal history really is. I do find aggravation that he has a prior assault with a deadly weapon, even as a misdemeanor from April the 9th of ’03 which involves the same victim here. So I find that to be aggravation.

Tr. p. 124 (emphasis added). The statement, read in context, clearly indicates that the trial court acknowledged and suspected details were lacking as to Romero's criminal history, but expressly stated he would not consider those suspicions as an aggravating factor. The trial court did not abuse its discretion in assigning aggravating weight to Romero's criminal history.

Romero next argues that the trial court improperly considered an element of the crime of intimidation as an aggravating factor. The trial court stated:

I also find the facts under the intimidation charge to be particularly aggravating because the victim in that case was someone who had done nothing but take in a woman who was unknown to her, who does what we hope more people would do, was to get involved, and what she got from it was a night of terror and threats, I'll burn down your house, I'll fuck you up, I'll do this, I'll do that, when all she had done was offer common courtesy and decency to another human being.

Tr. p. 125.

The Indiana Code sets out the elements of intimidation as "a person who communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act. . . ." Ind. Code § 35-45-2-1(a)(2). Romero argues that allowing K.W. to stay at her house constituted merely a "prior lawful act" by Tutson. This view ignores the other particular circumstances surrounding the situation that night. Tutson had never met K.W. before and was merely acting as a good Samaritan by offering overnight shelter to a stranger in need of help. Romero's verbal threats escalated during K.W.'s stay and were accompanied by violent conduct, including Romero banging on the windows and doors of Tutson's home. The trial court focused on

these circumstances and the aggravator found was not simply that Tutson engaged in a lawful act. The trial court did not abuse its discretion in considering as an aggravator that the victim of the intimidation was acting as a good citizen. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) (reasoning that the particularized circumstances beyond the basic elements of an offense may properly be considered as aggravating factors).

Romero next argues that the trial court found that Romero's delay in pleading guilty was an aggravating circumstance. The transcript does not support this argument. Although it is clear that the trial court referenced Romero's delay, the statements cited by Romero were taken out of context. The trial court was addressing Romero's contentions that he was misled into going to trial rather than taking a plea.

Finally, Romero argues that the trial court improperly considered his claims that others had misled him in the course of his case as an aggravating circumstance. Romero contends the record does not support such a finding and reliance on those claims violated Blakely. As explained earlier, Romero expressly waived all Blakely claims in his plea agreement and this argument fails. Romero had accused the translator and his public defender of misleading him into going to trial. He stated at the sentencing, "The other judge offered me a probation for two years and I didn't sign it because Mr. Diaz said if my girlfriend didn't come the next day I would go home and that's why I didn't sign it." Tr. p. 114. Speculating that Romero was merely trying to withdraw his plea, the trial court responded, "I think what you had hoped was that your girlfriend wouldn't show up and you didn't take into consideration that there were other witnesses who saw what you did." Tr. p. 114. At a later point in the sentencing hearing, the trial court declared that he

was offended by Romero's blame of people he found to be "honorable, intelligent people upon whose services I rely." Tr. p. 126. In that regard, the trial court specifically outlined the reasons it found that circumstance to be aggravating and did not abuse its discretion in this finding.

Conclusion

The trial court did not abuse its discretion in sentencing Romero to an aggregate sentence of seventeen years. We affirm.

Affirmed.

SHARNACK, J., and VAIDIK, J., concur.