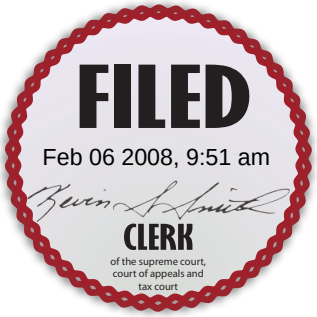

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IN THE
COURT OF APPEALS OF INDIANA

GREGORY NURRENBERG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A05-0706-CR-304
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William G. Sleva, Judge
Cause No.47D02-0605-FA-425

February 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Gregory Nurrenberg appeals his conviction of and sentence for murder, a felony. Nurrenberg raises two issues, which we restate as whether the trial court abused its discretion in declining to instruct the jury on the lesser included offense of voluntary manslaughter and whether his sixty-five-year sentence is inappropriate given the nature of the offense and his character. Concluding the trial court acted within its discretion in declining to instruct the jury on voluntary manslaughter, we affirm the conviction. However, concluding the sixty-five-year sentence is inappropriate, we reverse and remand with instructions to enter a fifty-five-year sentence.

Facts and Procedural History

The victim, Sherry Dickey, lived and was in a relationship with Nurrenberg's aunt, Carla Godsey, for many years. Dickey and Godsey obtained custody of Nurrenberg when he was eight years old, and Nurrenberg lived with Dickey and Godsey for most of his childhood. Godsey was murdered in 1998.[1] Nurrenberg continued living with Dickey until 2004, when he was twenty-one years old.

Nurrenberg struggled with mental health issues at various points in his life. In 1996, he spent several weeks in a hospital receiving treatment for depression. In 2005 and 2006, Nurrenberg was again struggling with mental health issues. He had thoughts of random violence and began showing up hours late for work. At one point, he took a trip through southern Indiana and northern Kentucky, believing that "the reason [he] was driving was because [he] was looking for someone to kill." State's Exhibit 67 at 2 (voluntary statement

of Nurrenberg).

On May 26, 2006, Nurrenberg arrived at Dickey's home at roughly 9:30 a.m. for a planned weekend visit. The two conversed about plans for the day and Nurrenberg's desire to enlist in the National Guard. At one point, Dickey walked over to the dryer to check on some clothes. Nurrenberg began having thoughts of violence, grabbed a pipe wrench, and began hitting Dickey in the head. After knocking her down, he struck her several more times with the wrench, ultimately killing her.

Nurrenberg changed his clothes, went to buy some new shoes, and returned to Dickey's home. He left again in the evening to purchase various cleaning supplies, but never made an effort to clean up or conceal Dickey's body. He eventually left in Dickey's car and drove to Lake Monroe, where the police found and arrested him the next day. He gave two voluntary statements, admitting to the facts as stated above.

On May 30, 2006, the State charged Nurrenberg with murder, a felony, vehicle theft, a Class D felony, and theft, a Class D felony. On July 13, 2006, Nurrenberg filed his Notice of Intention to Interpose Insanity Defense. On April 2, 2007, the trial court held a jury trial, which concluded on April 9, 2007. At this trial, Dr. David Crane indicated that he diagnosed Nurrenberg as having either Schizo-Affective Disorder or Schizo Typal Personality Disorder. Dr. Ned Masbaum testified that he had diagnosed Nurrenberg as having Schizo-Affective Disorder, Depressed Type, and that Nurrenberg had violent "impulses coming from his unconscious mind that he could no longer control on a conscious level. This is the hallmark of a person having an early stage of a Schizophrenic breakdown." Transcript at 463.

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[1] See Bailey v. State, 763 N.E.2d 998 (Ind. 2002).

However, both doctors testified that Nurrenberg understood the wrongfulness of his conduct and was capable of controlling whether he acted on his impulses to commit violent acts.

Nurrenberg's counsel tendered a jury instruction on the offense of voluntary manslaughter as a lesser included offense of murder. The trial court declined to give the instruction, over Nurrenberg's objection, stating that "Indiana law still requires some provocation by the victim and . . . none of the evidence suggests that there was any type of provocation whatsoever by the victim." Id. at 489. The jury found Nurrenberg guilty but mentally ill.

On May 10, 2007, the trial court held a sentencing hearing. Following counsels' argument, the trial court made the following statement:

> There is a mitigating circumstance, there is no prior criminal history. None whatsoever. That is a mitigating circumstance. That is the only mitigating circumstance I'm going to find. I am aware and mindful that Mr. Nurrenberg's young life, as well as young adult life, . . . was very troubled, he went through circumstances that most people would never ever go through, . . . but I'm not finding that specifically as a mitigating circumstance. . . . In terms of aggravating circumstances, I do specifically find this crime was heinous. I think the evidence at trial makes clear what heinous means, given the nature of the offense, which I believe the Court is allowed to consider. The testimony from Dr. Jacobi was fairly detailed and graphic. Of course, you couldn't make certain conclusions or definite conclusions about how long Ms. Dickey was able to live unconscious, how long it took her to bleed to death . . . . I remember his talking about injuries on her hand or hands, I believe, in an attempt to ward off the blows . . . even more specifically, the number of wounds to her body, particularly the head . . . . I agree, all murder is horrible, all murder is bad. Not all murders are the same. This was particularly brutal. It was heinous. . . . It wasn't a stabbing, it wasn't a shooting, it was a very violent hands on, up front, up close murder. . . . I'm also finding that he was in a position of trust. We normally think of position of trust of an adult and child or teacher or student, babysitter and child, but I don't believe that's the only position of trust we can have. Family members can be in a position of trust. . . . [E]ven if I did find that there was a mitigating circumstance of his prior difficulties in life, his mental illness or disease, I do not believe that would be

> sufficient to outweigh the aggravating circumstances I found. . . . I believe that the position of trust could be sufficient to outweigh mitigating circumstances, even if I didn't find the brutality or heinousness of the crime . . . . I believe the aggravating circumstances greatly outweigh the mitigating circumstances.

Id. at 560-62. The trial court then sentenced Nurrenberg to the maximum legal sentence of sixty-five years, with one year suspended to probation. Nurrenberg now appeals his conviction and sentence.

Discussion and Decision

I. Jury Instruction

We review a trial court's decisions regarding jury instructions for an abuse of discretion. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). When reviewing a trial court's decision to give or refuse tendered instructions, we consider "whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions." Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 893 (Ind. 2002). When deciding whether to give an instruction on a lesser included offense, the trial court should determine whether the offense is either inherently or factually included in the charged offense. Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995). "If the offense is either inherently or factually included, the court must give the instruction if there is a serious evidentiary dispute about the elements distinguishing the offenses." Lemond v. State, 878 N.E.2d 384, 389 (Ind. Ct. App. 2007). The defendant is not entitled to an instruction on a lesser included offense "unless the evidence would have warranted a jury's finding that the lesser offense was committed while the greater was not." Johnson v. State, 518 N.E.2d 1073, 1077 (Ind. 1988). If a serious evidentiary dispute exists regarding the

distinguishing element, it is reversible error for the trial court to refuse the instruction. Brown v. State, 770 N.E.2d 275, 280 (Ind. 2002).

A person commits voluntary manslaughter when he knowingly or intentionally kills another "while acting under sudden heat." Ind. Code § 35-42-1-3(a). "The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder . . . to voluntary manslaughter." Ind. Code § 35-42-1-3(b). Therefore, voluntary manslaughter is inherently a lesser included offense of murder, distinguished by the factor that the defendant killed under sudden heat. Earl v. State, 715 N.E.2d 1265, 1267 (Ind. 1999). In order to establish sudden heat, "the defendant must show 'sufficient provocation to engender passion.'" Id. (quoting Johnson, 518 N.E.2d at 1077). The defendant may demonstrate such provocation by showing "such emotions as anger, rage, sudden resentment, or terror [that are] sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." Johnson, 518 N.E.2d at 1077. The mere showing that the defendant felt anger at the time of the killing does not require an instruction on involuntary manslaughter. Matheney v. State, 583 N.E.2d 1202, 1205 (Ind. 1992), cert. denied, 504 U.S. 962 (1992).

Although the voluntary manslaughter statute does not indicate that the victim must cause the sudden heat, Indiana case law makes clear that such must be the circumstances. See Culver v. State, 727 N.E.2d 1062, 1071 (Ind. 2000) ("Defendant presented no evidence that he was angry with the victim nor did he present evidence that he was in some way provoked by the victim." (emphasis added)); Allen v. State, 716 N.E.2d 449, 453 (Ind. 1999)

(holding trial court properly refused to give voluntary manslaughter instruction where "there was no evidence that [the victim] and [the defendant] even exchanged words in the car"); Potts v. State, 594 N.E.2d 438, 439 (Ind. 1992) (recognizing that where defendant had argued with one victim, and then fired shots at other victims in the area, "[t]here is of course absolutely no evidence in this record to justify the finding of sudden heat in regard to the other victims of the shooting"), cert. denied, 507 U.S. 1039 (1993); Matheney, 583 N.E.2d at 1205 ("However, there was no evidence to indicate that [the victim] provoked [the defendant] either by words or actions."); Montano v. State, 649 N.E.2d 1053, 1058-59 (Ind. Ct. App. 1995) ("We find no evidence that [the defendant's] niece provoked [the defendant] in any manner, thus he was not entitled to the [voluntary manslaughter] instruction for her death."), trans. denied.

Also, the evidence introduced by Nurrenberg regarding the inner rage he felt goes to his state of mind, not provocation. See Culver, 727 N.E.2d at 1071 (recognizing that the evidence pointed to by the defendant "described his state of mind and not provocation"); Allen, 716 N.E.2d at 453 n.2 ("Although [the defendant] also points to a court-appointed psychiatrist's testimony that he had suffered a 'rage reaction,' in the absence of some evidence of some provocation [by the victim] this does not warrant giving a voluntary manslaughter instruction."); Wilson v. State, 697 N.E.2d 466, 474 (Ind. 1998) ("An otherwise normally stressful encounter does not suddenly inflame sudden heat, mitigating murder, simply because a person suffers from a psychological disorder which gives him a 'hair trigger.'"); Barker v. State, 695 N.E.2d 925, 933 (Ind. 1998) (recognizing that evidence

that the defendant had "slept very little in the days just prior to the killings, was having convulsions . . . and was consuming 'speed' immediately before the incidents," was "an attempt to explain [the defendant's] state of mind generally but does not illustrate 'provocation' for purposes of sudden heat"); Montano, 649 N.E.2d at 1058 ("Evidence of anger without provocation is not sufficient to support a voluntary manslaughter instruction.").

We conclude the trial court properly refused Nurrenberg's proffered instruction on voluntary manslaughter, as no evidence was introduced indicating that Dickey in any way provoked Nurrenberg, and the evidence pointed to by Nurrenberg regarding his violent impulses goes to his state of mind, not the presence of sudden heat.

II. Appropriateness of Sentence[2]

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on reh'g, 875 N.E.2d 218. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d

[2] Nurrenberg also argues that the trial court abused its discretion in declining to find his mental illness to be a mitigating circumstance. Because we choose to reduce Nurrenberg's sentence under Appellate Rule 7(B), it is not necessary to address this argument. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007)

635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

Here, the trial court sentenced Nurrenberg to sixty-five years, the maximum sentence for murder.[3] Ind. Code § 35-50-2-3 (indicating that murder has an advisory sentence of fifty-five years, a minimum sentence of forty-five years, and a maximum sentence of sixty-five years). "The maximum possible sentences are generally most appropriate for the worst offenders." Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007).

In regard to the nature of the offense, we recognize, as did the trial court, that this was a brutal crime, involving multiple wounds inflicted with a wrench. Still, we recognize that all murders are brutal, and do not find the nature of this offense to inherently render a maximum sentence appropriate. See Newhart v. State, 669 N.E.2d 953, 956 (Ind. 1996) (brutal nature in which husband murdered his wife was insufficient to support maximum

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(recognizing that where the trial court's sentencing statement is inadequate, appellate courts may exercise their option to review the defendant's sentence under Appellate Rule 7(B)).

[3] We recognize that the trial court suspended one year of this sentence. However, Nurrenberg still received the maximum sentence, as "[a] suspended sentence is one actually imposed but the execution of which is thereafter suspended." Drakulich v. State, 877 N.E.2d 525, 534 n.10 (Ind. Ct. App. 2007) (quoting Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring in result)).

sentence).

Also, we recognize that Nurrenberg killed a person who had taken him into her home and treated him as a member of her family. This relationship between Nurrenberg also makes the nature of the offense more egregious. Cf. Walter v. State, 727 N.E.2d 443, 448 (Ind. 2000) (trial court properly considered as an aggravating circumstance the fact that defendants' victims were a spouse and an aunt who had permitted the defendant to live in her home); Reyes v. State, 828 N.E.2d 420, 424 (Ind. Ct. App. 2005) (trial court properly found defendant's relationship with the victim to be an aggravating circumstances where the two were friends, and the defendant "used his relationship with [the victim] to gain access to [the victim's] home"), aff'd in relevant part, 848 N.E.2d 1081 (Ind. 2006); Berry v. State, 819 N.E.2d 443, 452-53 (Ind. Ct. App. 2004) (trial court properly noted fact that defendant and victim were cousins in articulating its reasons for finding the nature and circumstances of the crime to be an aggravating circumstance), trans. denied.

In regard to Nurrenberg's character, the record clearly indicates that he suffered from mental health issues. Indeed, the jury found him guilty but mentally ill. Our supreme court has identified four factors that should be considered when considering a defendant's mental illness and its effect on sentencing: "(1) the extent of the defendant's inability to control his or 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." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)), trans. denied. We

have previously concluded that a defendant with no criminal history "who is suffering from a severe, longstanding mental illness that has some connection with the crime(s) for which he was convicted and sentenced is entitled to receive considerable mitigation of his sentence." Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied. On the other hand, where a defendant is "capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense," mental illness should not be as significant a factor for sentencing. Scott v. State, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006), (concluding that defendant's mental illness should have been given little weight), trans. denied.

The record indicates that Nurrenberg's mental illness stems from stressors including his father murdering his father's parents when Nurrenberg was a young child, and his aunt being murdered in 1998. Nurrenberg had been hospitalized for depression roughly ten years before the instant offense. Two doctors testified that they had diagnosed Nurrenberg with mental illnesses – either Schizo-Affective Disorder or Schizo Typal Personality Disorder. The doctors' testimony also indicated that Nurrenberg "was able to partially continue functioning . . . . [H]e was partially impaired, but he was still functioning." Tr. at 466. Both doctors testified that Nurrenberg had violent impulses, although they also recognized that he had been able to control these impulses in the past. Still, the record clearly establishes some sort of nexus between Nurrenberg's mental illness and the commission of the crime. Cf. Weeks v. State, 697 N.E.2d 28, 32 (Ind. 1998) (reducing defendant's sentence from maximum to presumptive sentence and concluding "although there is no clear nexus between

Weeks's illness and the killing, there is sufficient showing of his erratic behavior to require that his illness be considered in sentencing"). After examining the record as a whole, Nurrenberg's history of mental illness weighs in favor of a conclusion that a maximum sentence is inappropriate. See Reid, 876 N.E.2d at 1117 (concluding a maximum sentence for conspiracy to commit murder was inappropriate, in part based on the defendant's history of mental health problems).

Importantly, Nurrenberg also has a complete lack of criminal history, a factor that generally comments favorably on a defendant's character as it indicates the defendant had been leading a law-abiding life for a significant amount of time before committing the instant offense. See Ind. Code § 35-38-1-7.1(b)(6) (the court may consider that the defendant had been leading a law-abiding life as a mitigating circumstance). By identifying the lack of criminal history as a statutory mitigating circumstance, our legislature "appropriately encourages leniency toward defendants who have not previously been through the criminal justice system." Biehl v. State, 738 N.E.2d 337, 339 (Ind. Ct. App. 2000), trans. denied. Also, as our sentencing scheme is founded upon principles of reformation, and not vindication, see Ind. Const. art. I § 18, courts should attempt to distinguish offenders with no or minor criminal histories from those with extensive criminal histories, see Bluck v. State, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999); cf. Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997) (where defendant's criminal history consisted of a public intoxication charge and an A.W.O.L. from military service, and trial court did not find defendant's lack of criminal history to be a mitigating circumstance, supreme court remanded for a new sentencing

hearing). In Sherwood v. State, 749 N.E.2d 36, 40 (Ind. 2001), our supreme court reversed maximum consecutive sentences for murder and conspiracy to commit robbery and instead ordered the defendant to serve concurrent, presumptive sentences, where the only mitigating factor was the defendant's lack of significant criminal history, and the only aggravating factor was the heinous nature of the offense.

Similar to our supreme court's conclusion in Sherwood, we conclude that although Nurrenburg's crime was indeed heinous, we cannot say that this offense "'demonstrate[s] a character of such recalcitrance or depravity' that [it] justif[ies] a [maximum] sentence." Hollin v. State, 877 N.E.2d 462, 465-66 (Ind. 2007) (quoting Frye v. State, 837 N.E.2d 1012, 1014 (Ind. 2005)). Considering that he has no prior criminal history and suffers from mental illness, we conclude a sentence of fifty-five years, with one year suspended to probation, is the appropriate sentence.

Conclusion

We conclude the trial court properly refused to instruct the jury on the crime of voluntary manslaughter and affirm the conviction. We further conclude Nurrenberg's sentence is inappropriate given the nature of the offense and his character, and remand and instruct the trial court to enter a sentence of fifty-five years, with one year suspended.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and MATHIAS, J., concur.