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**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN DALTON,)
)
Appellant-Defendant,)
)
vs.) No. 73A01-0510-CR-470
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Judge
Cause No. 73D01-0406-MR-1

February 19, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Nathan Dalton (“Dalton”) was convicted in Shelby Superior Court of Class C criminal recklessness. The trial court enhanced his sentence by four years, but suspended four years for an aggregate sentence of four years executed and four years suspended. Dalton appeals, raising two issues:

- I. Whether there was sufficient evidence to support his conviction, and,
- II. Whether the trial court abused its discretion in enhancing Dalton’s sentence.

We affirm.

Facts and Procedural History

Dalton was dating Jillena Hinds (“Hinds”) off and on in 2003 and 2004. In February 2004, Dalton and Hinds went to stay at a trailer owned by Gary and Laura Sanders (“the Sanderses”). On February 18, Hinds and Dalton were at the Sanderses’ home. While there, Hinds began kissing the Sanderses’ teenage son, Brendon. Dalton came into the kitchen and caught them kissing, which made him very upset. Tr. pp. 60-62.

Later that afternoon, Dalton, Hinds, and Brendon all went to the Sanderses’ trailer where Dalton and Hinds were staying. Brendon had seen Hinds take a blue pill, which he believed to be Prozac. Although Dalton had not seen Hinds take any pills, he knew by the way she was acting that she had taken them. The three of them began cleaning up the trailer and removing the clutter that previous tenants had left behind. Later that evening, the three of them engaged in recreational drug use. While drinking alcohol and smoking marijuana, the three put on Lidocaine patches and took Xanax pills. While they were at the trailer, Hinds kissed Brendon several times when Dalton was out of the room.

That night Brendon slept in a front bedroom of the trailer. He woke up the next morning to hear Dalton screaming. He found Dalton straddling Hinds on the couch in the living area and screaming that she wouldn't wake up, that she wasn't breathing. Tr. p. 80. Hinds was blue in the face and was not breathing. Brendon did not observe Dalton trying to resuscitate or to perform CPR on Hinds. Brendon's father, Gary Sanders ("Gary"), arrived at that time, realized that Hinds was dead, and suggested that they call the ambulance or police. Dalton then asked him, "Do you think we should?" Id. at 153. Gary said they should call someone, and he and Brendon went to find a telephone. A neighbor called the police.

Indiana State Police Trooper Marcus Brown ("Trooper Brown") heard the dispatch concerning the dead female and came to the trailer. He found Dalton, crying and lying across Hinds's body on the couch. Officer Brown pulled him off of the body to see if he could lend any medical attention to Hinds. Dalton kept whimpering, "I'm sorry," and "It's all my fault" over and over. Id. at 200-01. Officer Brown found that Hinds did not have a pulse. A Deputy Coroner later arrived and determined that she was dead.

Dalton told the deputy coroner, Thomas Joseph Laughlin ("Laughlin"), that Hinds's mother was "gonna think [he] killed her." Id. at 324. Dalton also told Laughlin that he had observed Hinds taking two blue pills, which were Xanax tablets, at about four o'clock the previous afternoon. Dalton said that Hinds's body had not been touched; however, statements by other individuals seemed to imply that Dalton had put a pair of pants on Hinds and had crossed her hands over her stomach.

A toxicology report revealed that Hinds had ingested alcohol, Xanax (an anti-anxiety drug), Darvocet (a pain killer), and Prozac (an anti-depressant), and that she had smoked marijuana. Doctor Michael Evans (“Dr. Evans”), a toxicologist, determined that at the time of her death there was not enough marijuana, Prozac, or Darvocet in her system to have had any effect on her body. Id. at 392, 397, 404. He determined that she did have enough Xanax in her system to be “therapeutic,” but not an overdose. Id. at 403. Her blood alcohol concentration was .16%, also not a toxic level. Dr. Evans determined that the combination of drugs and alcohol in her body at the time of her death would make her “impaired” but would not cause unconsciousness. Id. at 417. He said there was no way Hinds could have overdosed, as the levels of drugs in her system were not “critical.” Id. at 447.

However, the forensic pathologist, Doctor Dean Hawley (“Dr. Hawley”) determined from the autopsy that the cause of death was “asphyxia due to drug and alcohol intoxication and suffocation.” Id. at 561. Dr. Hawley explained that in a typical suffocation death between adults, there is usually more injury on the body than what was found on Hinds. Dr. Hawley also said that the presence of intoxicating alcohol and other drugs, which impaired Hinds, explains why the typical violent injuries were not present in this case. Id.¹ During an autopsy of Hinds’s body, Dr. Hawley did find indentations on the side of her nose, which he said “could [have] been produced by a force which is

¹ The State’s brief seems to imply that Hinds died of an overdose of drugs and alcohol. See, e.g., Br. of Appellee at 12 (“In the case at bar, the State presented substantial evidence at trial that defendant provided drugs and alcohol to Hinds, which resulted in her death.”) Furthermore, the State’s statement of facts is conspicuously missing many key facts regarding the injuries found on Hinds’s body and expert testimony regarding the probable causes of such injuries to be suffocation or strangulation. Indiana Appellate Rule 46(6) (2007) provides that the statement of facts “shall describe the facts relevant to the issues presented for review.” While we acknowledge that this was a lengthy trial that resulted in more than 1400 pages of transcript, we advise the State to more thoroughly review the record in its preparation of briefs submitted to this court.

being applied to pinch the nose closed.” Id. at 538. He also found an abrasion on the side of Hinds’s head, which he believes occurred at or about the time of her death.

Additionally, Dr. Hawley found hemorrhages under Hinds’s forehead or frontal scalp, which he said “are an indication of a force which has obstructed blood flow to the head” and are also commonly found in situations where the force has been caused by strangulation or suffocation. Id. at 547-48. There was also a cut on Hinds’s lower lip with dried blood, an injury with a pattern matching Hinds’s upper tooth, which Dr. Hawley said was consistent with someone receiving a cut lip from a “blunt impact” to the face. Id. at 540.

The State charged Dalton with murder on June 25, 2004. A jury trial commenced on 23, 2005. At the conclusion of the trial, the jury found Dalton not guilty of murder, but guilty of the lesser included offense of criminal recklessness as a Class C felony. The trial court sentenced Dalton to eight years with four years suspended, enhancing the presumptive sentence by four years. Dalton now appeals. Additional facts will be provided as necessary.

I. Sufficiency of Evidence

On appeal, Dalton contends there was insufficient evidence presented at trial to support his conviction. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We must respect the jury’s exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). On review, we look to the evidence most favorable to the verdict and reasonable inferences drawn

therefrom. Id. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. Id.

At trial, there was extensive expert testimony about the injuries inflicted on Hinds's body and how said injuries were consistent with injuries caused by suffocation or strangulation. Dr. Evans testified that the levels of drugs and alcohol in Hinds's system at the time of her death were not high enough to have caused unconsciousness, and certainly were not high enough to cause respiratory depression, or failure.

Dr. Hawley testified that there was hemorrhaging under her forehead or frontal scalp consistent with injuries caused by strangulation or suffocation. He testified that he found an abrasion on her forehead made by a force that wiped off the outer layers of the skin. Dr. Hawley determined that this injury on her forehead was composed of several points of contact where "an object or objects [had] come in contact with the skin..." and that "the pattern of the injury [would] probably match something that caused the injury." Tr. p. 535. He also testified that there was a cut on her lower lip, an injury that matched her front tooth. Dr. Hawley believed that this cut was caused by a blunt impact to the face. Dr. Hawley further explained that Hinds was intoxicated enough that she would have been impaired and would have therefore succumbed to strangulation or suffocation more easily.

Hinds and Dalton were sleeping on the couch in the living room at the time of Hinds's death. Brendon, who was staying in a front bedroom of the trailer, testified that nobody else entered the trailer that night while Hinds and Dalton were in the living room. Id. at 80. In addition, the jury heard testimony regarding several incriminating statements

that Dalton made. For instance, when Gary Sanders suggested they call the police, Dalton asked him, “Do you think we should?” Id. at 153. Dalton also told the deputy coroner that Hinds’s mother was going to think that he had killed her. Id. at 324. Additionally, several people testified about Dalton repeatedly apologizing to Hinds’s body and saying that it was his fault. Id. at 200-01.

A person commits criminal recklessness when he or she “recklessly, knowingly, or intentionally: (1) inflicts serious bodily injury on another person.” Ind. Code § 35-42-2-2(d) (2004 & Supp. 2006). The jury was further instructed that it could find Dalton guilty of criminal recklessness as a Class C felony if it concluded beyond a reasonable doubt that Dalton “committed the recklessness by means of a deadly weapon.” Appellee’s App. p. 10.

Though there appears to be some uncertainty about the exact manner in which Hinds died, we conclude that the totality of the State’s evidence along with the reasonable inferences derived from such evidence have sufficient probative value from which a reasonable trier of fact could infer that Dalton inflicted various severe injuries on Hinds’s with a deadly weapon. See Alexander v. State, 819 N.E.2d 533, 540 (Ind. Ct. App. 2004). A reasonable inference from the evidence supporting a verdict is enough for us to find evidence to be sufficient. Herron v. State, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), trans. denied. Dalton’s claim amounts to an invitation to reweigh the evidence and judge the credibility of his testimony, which we will not do. Thus, we conclude that the State’s evidence was sufficient to support Dalton’s conviction.

II. Sentencing

Dalton further contends that his sentence was improperly enhanced. The trial court enhanced Dalton's sentence by four years above the presumptive, but suspended those four years for an aggregate sentence of four years executed and four years suspended.

Generally, "sentencing determinations are within the trial court's discretion." Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). When our court is faced with a challenge to an enhanced sentence, we must "determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court's evaluation and balancing of the circumstances." Payne v. State, 838 N.E.2d 503, 506 (Ind. Ct. App. 2005), trans. denied. We will not modify the trial court's sentence unless it is clear that the trial court's decision was clearly "against the logic and effect of the facts and circumstances before the court." Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004).

Dalton first asserts that the trial court improperly used the advisory sentencing scheme when it should have used the presumptive sentencing scheme. Between the date of Dalton's offense, February 19, 2004, and the date of his sentencing, June 24, 2005, Indiana Code section 35-50-2-5 was amended to provide for an "advisory" sentence rather than a presumptive sentence. See P.L. 71-2005, § 8 (eff. April 25, 2005). Therefore Dalton contends that applying an "advisory" sentencing scheme violates the prohibition of ex post facto laws contained in Article One, Section Ten of the United

States Constitution as it would subject him to the harsher sentencing under the advisory sentencing scheme.

We note that this amendment to Indiana's sentencing scheme was our legislature's response to Blakely v. Washington, 542 U.S. 296 (2004). Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Since this amendment, our court has been split as to whether the advisory sentencing scheme should be applied retroactively. Compare Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against ex post facto laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet resolved this issue.

However, our review of the sentencing transcript leads us to conclude that we need not address this issue, as the trial court properly sentenced Dalton under the presumptive sentencing scheme. Under the presumptive sentencing scheme, to impose an enhanced sentence the trial court must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d at 365. The trial court articulated two aggravating factors in this case: (1) that the criminal recklessness resulted in death and (2) that it was committed within the presence or hearing of a minor, Brendan Sanders. The court also found as mitigating

circumstances Dalton's lack of a lengthy criminal history and that he was likely to respond affirmatively to probation. After a careful discussion of each aggravating and mitigating circumstance the trial court concluded, "Balancing those factors I'll find that the aggravating circumstances outweigh the mitigators." Tr. p. 1406. We conclude that this sentencing is consistent with the presumptive sentencing scheme under which Dalton claims he should have been sentenced, and therefore, the trial court did not apply the advisory sentencing scheme retroactively.

However, Dalton is correct in his assertion that, under the presumptive sentencing scheme, any aggravating factors relied on by the trial court to enhance a defendant's sentence must conform with Blakely requirements.

On June 24, 2004, the United States Supreme Court decided Blakely, which held that, other than the fact of a prior conviction, facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. Blakely, 542 U.S. at 303-304; Cotto v. State, 829 N.E.2d 520, 527 n. 2 (Ind. 2005). In Smylie v. State, the Indiana Supreme Court held that Blakely was applicable to Indiana's sentencing scheme and required that "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, --- U.S. ---, 126 S.Ct. 545, 163 L.Ed.2d 459 (2005). The Indiana Supreme Court later noted that "Blakely and the later case United States v. Booker[, 543 U.S. 220, 125 S.Ct. 738, 756, 160 L.Ed.2d 621 (2005),] indicate that there are at least four ways that meet the procedural requirements of the Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005).

[A]n aggravating circumstance is proper for Blakely purposes when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted to by a defendant; or 4) stipulated to by the defendant, or found by a judge after the defendant consents to judicial fact-finding, during the course of a guilty plea in which the defendant has waived his Apprendi rights. Id. at 936-937 (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

Howell v. State, 859 N.E.2d 677, 681, (Ind. Ct. App. 2006).

According to Dalton, both of the aggravators used to enhance his sentence violate Blakely. Regarding the aggravating factor that the criminal recklessness resulted in Hinds's death, we note that Dalton made repeated references to Hinds's death during his trial. He testified that at the time he took her pants off and put his pants on her he "had an idea that she was dead." Tr. p. 1183. Dalton also commented that while police officers were investigating he asked "if [he] could go next to the body again." Id. at 1196. Aggravating circumstances admitted by a defendant are proper under Blakely. Marshall v. State, 832 N.E.2d 615, 622 (Ind. Ct. App. 2005), trans. denied. Therefore, we conclude that Dalton stipulated to the fact of the victim's death in his testimony, and thus the trial court did not violate Blakely by considering it as an aggravating circumstance.

Dalton next contends that the trial court improperly relied on Hinds's death as an aggravating circumstance as it was an element of the crime. Dalton was convicted of criminal recklessness, which is defined under Indiana Code section 35-42-2-2(d) as inflicting "serious bodily injury" upon the victim. Dalton maintains that "resulting in death" is the same as "serious bodily injury" and thus may not be given aggravating weight.

Our supreme court, however, has already determined that the seriousness of an injury may be considered even when "serious bodily injury" is used to raise the level of the offense. Lang v. State, 461 N.E.2d 1110, 1113 (Ind. 1984); see also Patterson v. State, 846 N.E.2d 723, 728 (Ind. Ct. App. 2006). In Lang, the defendant was convicted

of robbery, and the offense was enhanced from a Class C felony to a Class A felony because it resulted in “serious bodily injury” to someone other than the defendant. See Ind. Code § 35-42-5-1 (2004). The trial court also found the seriousness of the injury as an aggravating circumstance because the injured victim was knocked unconscious and remained in the hospital for several months. Id. at 1112-13. Our supreme court determined that the seriousness of these injuries was a proper aggravating factor for the court to consider in enhancing the defendant’s sentence.

In its analysis, the supreme court relied primarily on Indiana Code section 35-38-1-7, which has subsequently been replaced by Indiana Code section 35-38-1-7.1 (2005), a compilation of the aggravating circumstances that a trial court may consider in sentencing a defendant. Indiana Code section 35-38-1-7.1 provides, “In determining what sentence to impose for a crime, the court may consider the following aggravating circumstances: (1) The harm, injury, loss, or damage suffered by the victim of an offense was (A) significant; and (B) greater than the elements necessary to prove the commission of the offense.” “Serious bodily injury” is defined as an injury that “creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus.” Ind. Code § 35-41-1-8 (2004). Death is a significant injury that requires proof of more than mere “serious bodily harm” as it is defined by this statute. Therefore, we conclude that the trial court properly considered the significance of the injury, i.e. death, in enhancing Dalton’s sentence.

A trial court may enhance a presumptive sentence based upon the finding of only one valid aggravating circumstance. Bradley v. State, 765 N.E.2d 204, 209 (Ind. Ct. App. 2002). Our review of the transcript leaves us no doubt that the trial court would have enhanced Dalton's sentence solely due to this valid aggravating factor. At sentencing, the trial court said:

I'll find the first aggravator to be that your crime resulted in the death of the victim, Ms. Hinds. And I . . . I think that is a very compelling aggravating circumstance. I agree with [the prosecutor's] comments that . . . that all class C felonies are not alike and . . . and this one is different than property crimes and especially when we factor in the fact that . . . that a person lost their life. That is a very strong aggravating circumstance.

Tr. p. 1404. As the trial court properly assigned aggravating weight to the fact that this crime resulted in the death of Hinds, we need not address the validity of the second aggravating factor that Dalton contests. Therefore, we conclude that the trial court properly enhanced Dalton's sentence.

Conclusion

We conclude that there was sufficient evidence supporting Dalton's conviction of criminal recklessness. We further conclude that the trial court properly relied on the seriousness of the injury to the victim as an aggravating circumstance in enhancing Dalton's sentence.

Affirmed.

KIRSCH, C. J., and SHARPBACK, J., concur.