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IN THE COURT OF APPEALS OF INDIANA

AKEEM AKI-KHUAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0706-CR-348
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-9207-CF-00182

MARCH 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Akeem Aki-Khuam, formerly known as Edward Earl Williams, appeals the sentence imposed after he pleaded guilty to three counts of murder. We affirm.

The sole issue for our review is whether the trial court erred in sentencing Aki-Khuam.

Our supreme court summarized the underlying facts in this case as follows:

> In the early morning hours of June 19, 1992, defendant, armed with a handgun, Jemelle Joshua, armed with a shotgun, and three others set out to steal audio and video equipment from the basement of school teacher, Michael Richardson. Defendant and Joshua were admitted to Richardson's home and their three accomplices followed them in. Besides Richardson, they encountered a number of children and adults, including Richardson's sister, Debra Rice, and Robert Hollins. While defendant held his gun to Richardson's head and Joshua held Rice, their accomplices headed for the basement. Hollins intercepted them and began to wrestle with one of them in the kitchen. Defendant responded by shooting Hollins in the back.
>
> The electronic equipment proved too difficult to remove and defendant ordered the occupants of the house to lie down. Rice attempted to escape and Joshua shot her in the chest. As the invaders left the home, defendant shot each of Hollins, Rice, and Richardson once in the head despite Richardson's plea, "Please, don't kill me." A few hours later, defendant would tell his sister that he shot the victims so there wouldn't be any witnesses.
>
> Defendant was charged with the murder and felony murder of each of Robert Hollins, Debra Rice and Michael Richardson. The state also sought the death penalty, alleging as aggravating circumstances that the defendant intentionally killed each of the three victims while committing or attempting to commit robbery and murdered two or more persons by knowingly or intentionally killing the three victims.

Williams v. State, 669 N.E.2d 1372, 1376 (Ind. 1996), *cert. denied,* 520 U.S. 1232, 117 S.Ct. 1828, 137 L.Ed.2d 1034 (1997), (footnotes omitted).

The jury convicted Aki-Khuam of all six counts, and the trial court sentenced him to death. Our supreme court affirmed the convictions and death sentence. *See id.* The

supreme court also affirmed the denial of Aki-Khuam's petition for post-conviction relief. *See Williams v. State,* 724 N.E.2d 1070 (Ind. 2000), *cert. denied,* 531 U.S. 1128, 121 S.Ct. 886, 148 L.Ed.2d 793 (2001).

In December 2000, Aki-Khuam filed a petition for habeas corpus, which the federal district court granted. *See Aki-Khuam v. Davis,* 203 F.Supp. 1001 (N.D. Ind. 2002). The district court ordered that Aki-Khuam be retried or released within 120 days. *Id.* at 1025. On appeal, the Seventh Circuit Court of Appeals affirmed the grant of the petition. *Aki-Khuam v. Davis,* 339 F.3d 521 (7th Cir. 2003).

Aki-Khuam subsequently entered into a plea agreement wherein he agreed to plead guilty to three counts of murder in exchange for the State's: 1) dismissal of the three felony murder counts; 2) withdrawal of the death penalty request; and 3) recommendation that the sentence for one of the murder convictions run concurrently with the others. The parties used the facts as set forth in the supreme court opinion as the factual basis for the guilty plea. The plea agreement further provided in relevant part as follows:

> 6. I understand, I have the right to a jury trial as to any sentencing factors that may be used to increase my sentence on any count, sentencing enhancement, or allegation, to the upper, or maximum term provided by law. I hereby give up the right to a jury trial on any sentencing factors and consent to the judge determining the existence of any sentencing factors within the judge's discretion as allowed by existing statutes and Rule of Court. I also agree this waiver shall apply to any future sentencing imposed following the revocation of probation.

Appellant's App. at 244.

In May 2007, the trial court held a sentencing hearing. The evidence presented at the hearing revealed that Aki-Khuam had a criminal history that included two battery convictions as well as convictions for criminal mischief and carrying a handgun without a permit. The testimony further revealed victim Rice's three grandchildren, ages five, four, and two, were in Richardson's house at the time of the murders. The children were in bed, and the oldest child was waiting for his grandmother to come in and tell him goodnight. That child heard the break-in, his grandmother's screams, and the gunshots. He also saw someone come into the bedroom where he was in bed with his siblings. The three children found their blood-covered grandmother, uncle, and their uncle's friend the next morning. The testimony further revealed that victim Hollins had a twenty-two-year-old wife with three young children, including Hollins' infant son. Following the sentencing hearing, the trial court issued an order that provides in pertinent part as follows:

> Aggravating Circumstances:
>
> 1. The defendant has a history of criminal convictions.
> 2. The court considers the nature and circumstances of the crime to be a major aggravating factor in that the victims were shot in the back of the head execution style after being forced to lie face down.
> 3. The victim in Count VI begged for his life before being killed.
> 4. The killings were heinous and gruesome in nature such as shocks the senses. This was a home invasion robbery that resulted in multiple deaths.
>
> Mitigating Circumstances:
>
> 1. The defendant admitted his guilt by way of plea agreement, thus sparing the court, the victims' families, and the tax payers the time and expense of a trial. The plea agreement also took the "Death Penalty" request off of the table.

2. The defendant was a "model" inmate while incarcerated. However, the court does not attach significant mitigating weight to this fact because good behavior is expected in prison, also defendant was on death row during his incarceration which severely restricted his interaction with other inmates and prison personnel.
3. The defendant was reared in a very dysfunctional household in which he and his siblings were subjected to extreme physical, emotional, and sexual abuse on a regular basis by their father. The Court assigns "moderate" weight to all mitigating factors.

> FINDINGS: After presentation of evidence and hearing argument, the Court finds that the aggravating factors outweigh the mitigating factors.

Appellant' App. at 263-64.

The trial court sentenced Aki-Khuam to fifty years for each count of murder, with two of the sentences to run consecutively to each other and concurrent to the third sentence, for a total sentence of 100 years. Aki-Khuam appeals the sentence.

The sole issue for our review is whether the trial court erred in sentencing Aki-Khuam. At the outset, we note that the crimes in this case occurred in 1992. It is well settled that the sentencing statute in effect at the time the crime is committed governs the sentence for the crime. *Gutermuth v. State,* 868 N.E.2d 427, 432, n. 4 (Ind. 2007). At the time of the murders in this case, the presumptive sentence for murder was 40 years, with no more than 20 years added for aggravating circumstances and no more than ten years subtracted for mitigating circumstances. Ind. Code § 35-50-3-2 (1985). Here, the trial court ordered Aki-Khuam to serve an enhanced fifty-year sentence for each murder.

We further note that because the crimes in this case occurred before the 2005 amendments to the sentencing statutes were adopted, we review the sentences under the presumptive sentencing scheme. *See Gutermuth, 868 N.E.2d at 432, n.4.* Under the

presumptive sentencing scheme, sentencing determinations are within the trial court's discretion, and we will reverse only for an abuse of discretion. *Padgett v. State,* 875 N.E.2d 310, 315 (Ind. Ct. App. 2007), *trans. denied*. It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Id.* When the trial court does enhance a sentence, it must: 1) identify significant aggravating and mitigating circumstances; 2) state the specific reasons why each circumstance is aggravating or mitigating; and 3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.* It is generally inappropriate for us to substitute our judgment or opinions for those of the trial judge. *Id.*

Lastly, we note that a review of a sentence under the presumptive sentencing scheme implicates *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase a sentence above the presumptive sentence assigned by the legislature. *Rodriguez v. State,* 868 N.E.2d 551, 556 (Ind. Ct. App. 2007). An aggravating circumstance is proper under *Blakely* when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted or stipulated by a defendant; or 4) found by a judge after the defendant consents to judicial fact finding. *Id.*

I. *Blakely*

We now turn to the sentencing issues in this case. Aki-Khuam first contends that his sentence violates *Blakely.* Specifically, although he concedes that he agreed in the

plea agreement to allow the judge to determine the existence of any aggravating factors, Aki-Khuam complains that he did not waive his right to be notified about aggravators that the State intended to prove. However, this court has previously determined that *Blakely* does not require that a defendant be provided with notice of every fact upon which the State may rely to seek an enhanced sentence. *Huffman v. State,* 825 N.E.2d 1274, 1276 (Ind. Ct. App. 2005), *trans. denied*. We therefore find no *Blakely* error.

II. Overlooked Mitigating Circumstances

Aki-Khuam next argues that the trial court overlooked certain mitigating circumstances. A finding of mitigating circumstances, like sentencing decisions in general, lies within the trial court's discretion. *Wilkie v. State,* 813 N.E.2d 794, 798 (Ind. Ct. App. 2004), *trans. denied*. When a defendant alleges that the trial court failed to identify or find a mitigating circumstance, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Hillenburg v. State,* 777 N.E.2d 99, 109 (Ind. Ct. App. 2002), *trans. denied*. The trial court is not required to make an affirmative finding expressly negating each potentially mitigating circumstance. *Id.*

Aki-Khuam first contends that the trial court improperly failed to consider his remorse as a mitigating factor. Substantial deference must be given to a trial court's evaluation of remorse. *Corralez v. State,* 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004), *trans. denied*. The trial court, which has the ability to directly observe the defendant and listen to the tenor of his voice, is in the best position to determine whether the remorse is

genuine. *Id.* Aki-Khuam's reference to his statement articulating his remorse is insufficient to establish an abuse of discretion. *See id.*

Aki-Khuam also contends that trial court did not consider that the crime was the result of circumstances unlikely to recur. Our review of the evidence does not reveal significant evidence to support this mitigating circumstance. Thus, it was not clearly supported by the record and the trial court did not err in failing to accept Aki-Khuam's argument in this regard. *See Hillenburg,* 777 N.E.2d at 109.

Aki-Khuam further contends that the trial court overlooked the mitigator that he acted under strong provocation. However, the record of the proceedings reveals no evidence the three victims that Aki-Khuam shot in the back of the head did anything to provoke him. In addition, Aki-Khuam contends that the trial court overlooked his lack of prior criminal history, the likelihood he would respond to short term imprisonment, and the unlikelihood that he would commit another crime. The evidence, however, reveals that Aki-Khuam had a criminal history that included convictions for two batteries, criminal mischief, and carrying a handgun without a permit. In light of Aki-Khuam's criminal history, the trial court did not err in omitting these considerations.

In addition, Aki-Khuam contends that the trial court erred in failing to consider the hardship to his dependent as an aggravating factor. Many people convicted of serious crimes have one or more children, and absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship. *Ware v. State,* 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004). Indeed, these mitigators can properly be assigned no weight when the defendant fails to show why incarceration for a particular

term will cause more hardship than incarceration for a shorter term. *Weaver v. State,* 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. Here, Aki-Khuam does not explain and points to no evidence that the enhanced sentence would impose any more hardship on his eighteen-year-old high school senior son than a shorter sentence. We therefore find no error.

III. Improperly Weighed Aggravators and Mitigators

Aki-Khuam next argues that the trial court erroneously gave too much weight to the aggravating factors and not enough weight to the mitigating factors, and then erred in balancing the factors. The weight assigned to aggravating and mitigating factors is within the trial court's discretion, and the court is under no obligation to assign the same weight to a mitigating circumstance as the defendant. *Covington v. State,* 842 N.E.2d 345, 348 (Ind. 2006). We set aside a judge's weighing of aggravators and mitigators only if there is a manifest abuse of discretion. *Id.*

Aki-Khuam first contends that the trial court gave too much weight to his criminal history, which included convictions for criminal mischief, carrying a gun without a permit, and two batteries. The significance of criminal history as a sentencing consideration varies based upon the gravity, nature, and number of prior offenses as they relate to the current offense. *Wooley v. State,* 716 N.E.2d 919, 929 n. 4 (Ind. 1999). Here, Aki-Khuam's criminal history includes an escalating history of violence, and we find no error in the trial court's weighing of it.

Aki-Khuam also complains the trial court erred when it referred to the crime as "gruesome" and relied on that fact as an aggravator. Merriam-Webster's Dictionary

defines gruesome as: "inspiring horror." Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/gruesome. (last visited Feb. 25, 2008). Aki-Khuam entered the home of a school teacher to steal audio and video equipment. Aki-Khuam shot the teacher, his sister, and the teacher's friend in the head when there were three young children in the house. Aki-Khuam left the three bloody bodies on the floor in the house for the children to find the following morning. This is a crime that inspires horror, and we find no error in the trial court's weighing this aggravating factor.

Aki-Khuam also contends that the trial court should have given more weight to his guilty plea. However, a guilty plea does not automatically amount to a significant mitigating factor. *Sensback v. State,* 720 N.E.2d 1160, 1165 (Ind. 1999). For example, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead is merely a pragmatic one. *Wells v. State,* 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, the State withdrew its death penalty request in exchange for Aki-Khuam's guilty plea. In light of this substantial benefit to Aki-Khuam, we find no error in the trial court giving only moderate weight to this factor.

Aki-Khuam further contends that the trial court did not give enough weight to his good behavior while incarcerated. The trial court did not attach significant weight to this mitigator because the court found that good behavior is expected while incarcerated and defendant was on death row, which restricted his interaction with inmates and prison personnel. Given the trial court's rationale, we find that the court could properly assign these mitigators moderate weight, and we find no error.

Aki-Khuam also contends that the trial court did not give enough weight to his dysfunctional childhood and mental illness. In *Weeks v. State,* 697 N.E.2d 28 (Ind. 1998), our supreme court laid out several factors to consider in weighing the mitigating force of a mental health issue. Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. *Id.* at 30. Our review of the evidence in the case reveals that just a few hours after the murders, Aki-Khuam told his sister that he shot all three victims in the head so there would not be any witnesses. We agree with the State that "[f]ar from revealing a person who was in a disassociative state, this reveals a person who coldly calculated the potential consequences of his actions and killed in order to avoid them." Appellee's Brief at 12. In light of this evidence, the trial court did not err in assigning moderate, but not significant, weight to these mitigating factors.

IV. Inappropriate Sentence

Lastly, Aki-Khuam argues that his sentence is inappropriate. 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).

Here, with regard to the character of the offender, Aki-Khuam has a prior criminal history that includes convictions for two counts of battery, criminal mischief, and carrying a handgun without a permit. Aki-Khuam's prior contacts with the law did not cause him to reform himself.

With regard to the nature of the offense, Aki-Khuam entered the home of a teacher to steal audio and video equipment. While in the home, Aki-Khuam shot three people in the head so there would be no witnesses to his crimes. He left three children in the home to find their grandmother, uncle, and uncle's friend dead in pools of blood the following morning. Aki-Khuam's prior convictions show a pattern of crimes indicating a disregard for other persons and their property as well as an escalation in the threat of violence to those persons. *See Ruiz v. State,* 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Aki-Khuam's sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.