

STATEMENT OF THE CASE

Tommy McElroy appeals from his sentence after he pleaded guilty to two counts of Reckless Homicide, Class C felonies, and one count of Criminal Recklessness, as a Class D felony. He presents the following issue for our review, namely, whether the trial court abused its discretion when it relied on improper aggravating factors to increase his sentence.

We reverse and remand.¹

FACTS AND PROCEDURAL HISTORY

On July 29, 2003, McElroy and twelve other men, all employees of Roland's Painting and Trim, sat in the enclosed cargo section of a box truck as it traveled on Interstate 465 in Marion County. The cargo area contained highly flammable paints, lacquers, and paint thinners. While Otis Turner read a newspaper, McElroy attempted to set it on fire. Although Turner told McElroy to stop, he continued until Turner stood up and poured lacquer on the floor. Then, McElroy bent over the lacquer and lit his lighter, which ignited the fumes and created an "instant inferno." Transcript at 16.

The men pounded on the walls of the truck to alert the driver of the fire. Eventually, the driver stopped the truck and the men exited the cargo area. Each of the men sustained serious burns. As a result of their injuries from the fire, John Webster and Turner died. The other men's injuries required lengthy hospital stays.

¹ McElroy also claims that his sentence is inappropriate in light of the nature of the offenses and the character of the offender, see Indiana Appellate Rule 7(B), but because we remand for resentencing, we do not reach the merits of that claim.

On August 10, 2004, the State charged McElroy with two counts of reckless homicide and one count of criminal recklessness. McElroy pleaded guilty to all three counts and the State agreed to recommend that his sentences run concurrently. On February 4, 2005 the trial court conducted a sentencing hearing and stated the following:

And Mr. McElroy has accepted responsibility and admitted that he is guilty of . . . reckless homicide. The Court will find as mitigating the fact that Mr. McElroy has no prior criminal history. That [sic] he's accepted responsibility by pleading guilty, and that long-term incarceration would be a hardship on his family.

The Court also is going to consider the aggravating circumstances. Pursuant to Statute, the Court is to consider the risk that the person would commit another crime, the nature and circumstances of the offense, the person's criminal record, character and condition. And in considering those things, this Court finds that this is an extremely aggravating offense. It was a horrendous crime. It was a heinous crime. Your reckless behavior was horrific. You were in the back of a truck with over thirteen men. You knew that someone had put inflammable fluid on the ground and you lit a match. Whether you threw the match or – or just attempted to light a cigarette, whatever you were doing, you knew it was reckless. You had no regard whatsoever for the harm that could result from your actions that day. The Court[] [is] going to find as . . . aggravating the horrendous and heinous nature of the offense. The fact that several people were destroyed mentally, physically and financially due to your actions – two people are dead. Ten or eleven people are severely injured, including yourself.

Id. at 88-89. The trial court then stated the names of the victims and the extent of their injuries. The trial court continued:

The Court is going to consider as aggravating the . . . [effect] of the offense on the victims and the family members The Court is going to find on Count One, that the aggravating circumstances clearly outweigh the mitigating circumstances. And on Count One, the Court is going to sentence [McElroy] to eight years executed. On Count Two, Reckless Homicide . . . the Court again finds the aggravating circumstances outweigh the mitigating circumstances, and the Court is going to sentence [McElroy] to eight years executed. On Count Three, Criminal Recklessness, the Court is going to find that the aggravating circumstances outweigh the mitigating circumstances [and sentences McElroy to] three years executed. The Court

will order that Counts One, Two, and Three be served concurrent to one another.

Id. at 89-90.

The trial court identified the following aggravating circumstances in its written sentencing order: (1) McElroy's prior criminal history; (2) the risk that McElroy would commit another crime; and (3) the nature and circumstances of the offense. In addition, the court found the following mitigating circumstances: (1) long-term imprisonment would be a hardship on McElroy's family; and (2) McElroy accepted responsibility when he pleaded guilty. The trial court determined that the aggravating circumstances outweighed the mitigating circumstances, imposed the maximum sentence on each count, and ordered that the sentences be served concurrently. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Aggravating Factors

McElroy contends that the trial court abused its discretion when it imposed the maximum sentence because the court identified improper aggravating factors. Generally, sentencing determinations are within the trial court's discretion and are governed by Indiana Code Section 35-38-1-7.1. Bluck v. State, 716 N.E.2d 507, 511 (Ind. Ct. App. 1999). We review the trial court's sentencing decision, including the enhancement, for abuse of discretion. White v. State, 756 N.E.2d 1057, 1061 (Ind. Ct. App. 2001), trans. denied. When enhancing a presumptive sentence, the trial court must identify all "significant" aggravating and mitigating factors, state why each is considered aggravating or mitigating and articulate the balancing process by which the court determined that the aggravating factors outweighed the mitigating factors. Id. A single aggravating

circumstance is enough to justify an enhancement or the imposition of consecutive sentences. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

Here, McElroy challenges the following four aggravating circumstances:

Effect of the Offense on the Victims and Their Family Members

McElroy maintains that the trial court abused its discretion when it identified the effect his offenses had on the victims and their families as an aggravating circumstance. In particular, McElroy contends that the trial court improperly described the heinous nature of the offenses and then noted, “that several people were destroyed mentally, physically and financially due to your actions” Transcript at 90. Generally, the impact that a victim or a family experiences as a result of a particular offense is accounted for in the presumptive sentence. Simmons v. State, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001) (citing Mitchem v. State, 685 N.E.2d 671, 679-80 (Ind. 1997)), trans. denied. “In order to validly use victim impact evidence to enhance a presumptive sentence, the trial court must explain why the impact in the case at hand exceeds that which is normally associated with the crime.” Id. (quoting Davenport v. State, 689 N.E.2d 1226, 1233 (Ind. 1997), record clarified on reh’g, 696 N.E.2d 870 (Ind. 1998)). Therefore, the emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime. Thompson v. State, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003).

In Thompson, the State charged the defendant with three counts of child molesting. The jury found him guilty as charged. The trial court sentenced him to the

presumptive ten years on each count, with five years added to each for aggravating circumstances and with the sentences to run consecutively, for a total sentence of forty-five years. Id. At the sentencing hearing, the trial court identified the following as an aggravating circumstance:

I'm looking at a situation here where there was psychological trauma to the victim. That psychological trauma was more likely to have been caused by the conduct of [Boyfriend], but certainly this Defendant's conduct in treating this girl and [having] intercourse with a young girl under the age of twelve caused trauma to her.

Id. at 1052. On appeal, this court determined that the trial court's reliance on the psychological trauma to the victim was improper. We stated, "[T]he trial court's sentencing statement did not indicate that the psychological effects on [the victim] were greater than those on any other child who had been molested." Id.

Here, the trial court stated, "The Court is going to consider as aggravating the . . . [effect] of the offense on the victims and the family members" Transcript at 90. But as in Thompson, the trial court's sentencing statement did not indicate that the psychological effects on the victims and their families were greater than other similarly situated victims and their families. Thus, the trial court's reliance on this aggravating factor was improper.

Criminal History

Next, McElroy contends that the trial court abused its discretion when it relied on his criminal history to enhance his sentence. Initially, he directs us to the trial court's conflicting statements regarding his criminal history. At the sentencing hearing, the trial court found "as mitigating the fact that Mr. McElroy has no prior criminal history." Id. at

88. But in the trial court's subsequent written sentencing order, the court identified McElroy's criminal history as an aggravating factor.

The State maintains that "[w]hen there is a discrepancy between the trial court's oral sentencing statement and written judgment orders, [the Court of Appeals] will generally rely on the oral statement as the more accurate reflection of the trial court's decision and reasoning." Appellee's Brief at 5 n.1. The State cites Marshall v. State, 621 N.E.2d 308 (Ind. 1993), to support its position. In Marshall, the sentencing transcript showed that the trial court found the existence of aggravating circumstances, and the court enhanced the sentences for murder, and ordered some terms to run consecutively and others to run concurrently. But in the written sentencing order, the trial court did not identify any aggravating or mitigating circumstances. On appeal, the defendant claimed that the "trial court abused its discretion in its written order by sentencing him to consecutive sentences after finding that no aggravating or mitigating circumstances existed" Id. at 322. The supreme court disagreed and held:

The oral sentencing statement is a clear representation of the trial court's finding of aggravating circumstances. Nowhere in the transcript of the hearing does the trial court state that there are no aggravators or mitigators present in reference to the conspiracy charge or the confinement charges. This misstatement is present in the written sentencing order. It is logical that the transcript created by use of notes taken during the proceeding is more accurate. We find the trial court's statement regarding sentencing located in the transcript of the hearing to be proper.

Id. at 323.

It is generally recognized that "if the oral and written sentences conflict, the oral language governs." United States v. Makres, 851 F.2d 1016, 1019 (7th Cir. 1988), cert. denied, 110 S.Ct. 417 (1989). Our supreme court has noted that the abstract of judgment

is not the controlling document. See Robinson v. State, 805 N.E.2d 783, 794 (Ind. 2004). Rather, it is “a form issued by the Department of Correction and completed by trial judges for the convenience of the Department.” Id. at 792.

In Whatley v. State, 685 N.E.2d 48 (Ind. 1997), the defendant challenged his sentence for carrying a handgun without a license. “At the sentencing hearing the trial judge orally informed the defendant that he was being sentenced to 365 days on this charge to run [concurrent] with the sentence for murder.” Id. at 50. “However, the abstract of judgment . . . reflected that the defendant was sentenced to the handgun charge as a [Class] C felony with a two year sentence.” Id. To resolve the inconsistency between the judge’s in-court pronouncement of sentence and the subsequent abstract of judgment, our supreme court elected “to reinstate the original in-court sentencing and to vacate the subsequent contradictory language.” Id.

Here, the trial court stated at the sentencing hearing that McElroy’s lack of criminal history was a mitigating circumstance. But in the abstract of judgment, the trial court cited McElroy’s criminal history as an aggravating factor. Despite that discrepancy, the trial court imposed the same sentence both at the sentencing hearing and in the abstract of judgment. Given that the oral sentencing statement shows that the trial court considered McElroy’s criminal history as a mitigator, and the sentence imposed is the same in both the oral sentencing statement and the abstract of judgment, there was no error.

Risk that McElroy would Commit Another Crime

Further, McElroy claims that the trial court abused its discretion when it determined that the risk that he would commit another crime was great. Again, the trial court made no mention at his sentencing hearing of the possibility that McElroy would commit another crime. Rather, the trial court stated in its written sentencing order: “Court finds aggravating the defendant has a prior criminal history. Defendant [sic] risk to commit another crime is great.” Appellant’s App. at 14. As noted above, the State contends that the trial court’s oral sentencing statement, which does not mention the risk that McElroy would commit another crime, is proper. Generally, where there is a discrepancy between the sentencing transcript and the abstract of judgment, the transcript of the sentencing hearing controls. See Marshall, 621 N.E.2d at 323 (citing United States v. Roberts, 933 F.2d 517, 519 n.1 (7th Cir. 1991); see also Makres, 851 F.2d at 1019. Thus, like the alleged criminal history aggravator, we do not address the merits of this aggravator because the trial court did not rely on it at McElroy’s sentencing hearing.

Nature and Circumstances of the Offense

Finally, McElroy claims that the trial court abused its discretion when it relied on material elements of the crimes charged as aggravating factors. Specifically, McElroy maintains that the trial court improperly relied on material elements of the crimes charged when it described his conduct as “horrendous and heinous” and made the following statement:

You were in the back of a truck with over thirteen men. You knew that someone had put inflammable fluid on the ground and you lit a match. Whether you threw the match or – or just attempted to light a cigarette, whatever you were doing, you knew it was reckless. You had no regard for

the harm that could result from your actions that day. The Court[] [is] going to find as – as aggravating the horrendous and heinous nature of the offense.

Transcript at 89. McElroy correctly recognizes that the trial court may not use a material element of the offense as an aggravating circumstance. See Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, the trial court may find the nature and circumstances of the offense to be an aggravating circumstance. Id. To enhance a sentence in this manner, the trial court must detail why the defendant deserves an enhanced sentence under the particular circumstances. Vasquez v. State, 762 N.E.2d 92, 98 (Ind. 2001).

In Sipple v. State, 788 N.E.2d 473 (Ind. Ct. App. 2003), trans. denied, the trial court enhanced the defendant’s sentence for involuntary manslaughter because it determined that he committed the crime with a degree of recklessness that was “far beyond the normal amount of recklessness that the court can accept in a case like this.” Id. at 482. In particular, the trial court noted that the defendant “carr[ie]d a loaded weapon with the safety [off] through a dark room knowing that there [were] people present.” Id. On appeal, we held that “the trial court’s explanation was significantly more than the mere recitation of the elements of the offense.” Id.

Likewise, the trial court’s description in the present case was more than the mere recitation of the elements of the offenses. The fact that McElroy ignited a lighter above a pool of flammable liquid in a crowded, enclosed truck is part of the nature and circumstances of the crimes, not an element of the crimes themselves. Thus, the sentencing court’s consideration of the heinous nature of the offenses as an aggravator was permissible. See Veal v. State, 784 N.E.2d 490, 495 (Ind. 2003) (upholding

enhanced sentences in part because of the heinous nature of offenses where defendant shot his victim in the face, raped her, and then killed her with a gunshot to the back of the head).

Balancing the Proper Aggravating and Mitigating Factors

The posture of this case is similar to that considered by our supreme court in Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005). In Trusley, the defendant pleaded guilty to reckless homicide. At her sentencing hearing, the trial court identified five aggravating and three mitigating factors. The court weighed those factors and sentenced Trusley to the maximum term of eight years, with two years suspended to probation. “Trusley appealed her sentence, arguing that her sentence was improperly enhanced because the aggravating factors were neither found by a jury nor admitted in accordance with the holding in Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).” Id. at 925. “Trusley also argued, in more general terms, that the court improperly applied the aggravators, and failed to consider additional mitigating factors.” Id.

On appeal, the supreme court held, “Of the five aggravators found by the trial court, three were improperly considered.” Id. at 927. The court continued:

Although it is frequently stated that “a single aggravator is sufficient to support an enhanced sentence,” the existence of an aggravator does not relieve trial or appellate judges from the obligation to consider what weight to assign a particular aggravator and to balance the aggravators and mitigators.

In this case, examining the two properly found aggravators against the three substantial mitigating circumstances found by the trial court leaves us unable to say with confidence that the enhanced sentence should be affirmed on appeal.

Id. (emphasis added).

Here, the trial court improperly identified one aggravator, namely, the effect on the victims and their family members. If we find error in the trial court's sentencing decision, we may remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating factors at the appellate level. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). After considering both the one properly identified aggravator – the nature and circumstances of the offense – and the three identified mitigators, we cannot say with confidence that McElroy's enhanced sentence should be affirmed on appeal. See Trusley, 829 N.E.2d at 927. While we have constitutional authority to review and revise sentences, we do not think that this is an appropriate case in which to exercise that power. Thus, we reverse and remand for resentencing.²

Reversed and remanded.

BARNES, J., and CRONE, J., concur.

² We need not address issue two considering whether the sentence now vacated is inappropriate in light of the nature of the offenses and the character of the offender.