

STATEMENT OF THE CASE

Appellant-Defendant, Cameus D. Barnett (Barnett), appeals his sentence for criminal deviate conduct, as a Class A felony, Ind. Code § 35-42-4-2, and strangulation, a Class D felony, Ind. Code § 35-42-2-9.

We affirm.

ISSUES

Barnett presents two issues for our review, which we restate as:

- (1) Whether the trial court abused its discretion by considering the victim's sentencing recommendation in determining Barnett's sentence; and
- (2) Whether Barnett's sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

The evidence most favorable to the State and relevant to Barnett's sentencing challenge is as follows. On the morning of October 12, 2007, E.R., an acquaintance of Barnett, was sleeping in her home in Evansville, Indiana, when she was awakened by Barnett "pushing on [her] back." (Trial Transcript pp. 47-50). E.R. yelled to her son, but Barnett put a towel over her face and grabbed her around her neck so that E.R. could not get any air. Barnett then "violently" put his fingers in E.R.'s anus. (Trial Tr. p. 81). Barnett eventually fled the house, and E.R. called police. E.R. told police that Barnett had put his fingers in her anus and also alleged that he had put his penis in her vagina.

On October 16, 2007, the State filed an Information charging Barnett with: Count I, rape, as a Class A felony, I.C. § 35-42-4-1; Count II, burglary resulting in bodily injury, a Class A felony, I.C. § 35-43-2-1; Count III, criminal deviate conduct, as a Class

A felony, I.C. § 35-42-4-2; and Count IV, strangulation, a Class D felony, I.C. § 35-42-2-9. A jury trial was held from October 6-8, 2008. The jury hung on Counts I and II but found Barnett guilty as charged on Counts III and IV.

On October 30, 2008, the trial court held a sentencing hearing. The trial court incorporated into the pre-sentence investigation report (PSI) a letter from E.R., in which E.R. apparently indicated that she felt Barnett deserved the maximum possible sentence.¹ The trial court took E.R.'s letter "into consideration" in imposing the maximum sentence of fifty years for the criminal deviate conduct conviction and the maximum sentence of three years for the strangulation conviction, with the two sentences to run concurrently, for a total executed sentence of fifty years. (Supplemental Tr. pp. 91-92).

Barnett now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. The Contents of Appellant's Brief and Appendix

Before turning to the merits of Barnett's appeal, we find it worthwhile to comment on the brief and appendix filed by his attorney. Regarding the brief, at the back of all of the copies provided to us, Barnett's counsel attached a "Required Short Appendix" that includes, among other documents, a copy of the CCS and a copy of the Notice of Appeal. Indiana Appellate Rule 46(A)(10) requires the appellant to include the appealed judgment or order—the trial court's sentencing order when sentencing is an issue in a criminal appeal—in the brief, but we are unaware of any requirement for a "short appendix" that

¹ We do not know the exact language of E.R.'s letter because it was not included in the copy of the PSI report provided to us on appeal.

includes the CCS and Notice of Appeal. This added seventeen pieces of paper to each copy of the appellant's brief and does little to aid our review. Furthermore, in his Statement of Facts, Barnett's counsel relies completely on the Affidavit of Probable Cause, but he does not provide citations to the appendix pages on which that document appears. Since the Affidavit for Probable Cause constitutes only two pages of a 791-page appendix, such citations would have been helpful.

There are also several problems with the appendix filed by Barnett's counsel. First, the table of contents does not include the date for each item included in the appendix, as required by Appellate Rule 50(C). Second, Barnett's counsel failed to provide us with a copy of the PSI report, despite the fact that the only issue he raises on appeal is the propriety of Barnett's sentence (we thank the State for providing that document). On the other hand, the appendix appears to include copies of every other document from the trial court record, most of which are irrelevant to the sentencing arguments raised on appeal, such as subpoenas and verdict forms. Third, and most notably, the appendix includes full copies of the transcripts of all of the trial court proceedings (including *two* copies of the transcript of the sentencing hearing), and copies of all exhibits filed before and during trial. Because the original transcripts and exhibits are already included in the record on appeal, full additional copies were unnecessary. Barnett's appendix also includes two full copies of the chronological case summary. These duplicative documents turned what could have been a one-volume appendix into a four-volume appendix. We urge counsel to become more familiar with Indiana Appellate Rule 50, which provides guidelines regarding the contents of an appellate appendix.

II. *Barnett's Sentence*

A. *Letter from E.R.*

Barnett first argues that “[t]he trial court abused its sentencing discretion by improperly applying as an aggravating factor the impact his crimes had upon [E.R.]” (Appellant’s Br. p. 7). Subject to our authority to review and revise sentences under Indiana Appellate Rule 7(B), sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

Barnett correctly notes that a trial court, in order to rely upon victim impact as an aggravating circumstance, “must explain why the impact in the case at hand exceeds that which is normally associated with the crime,” *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), and that the trial court provided no such explanation in this case. However, the trial court did not find the impact on E.R. to be an aggravating circumstance. Rather, it simply stated that it was taking E.R.’s letter, which asked for the maximum sentence, into consideration. As noted by the State, our supreme court has addressed this precise situation and held:

The victims’ or their representatives’ recommendations are not the same thing as evidence of the impact of the crime on the victim. Recommendations of this sort are not mitigating or aggravating factors as those terms are used in the sentencing statute, but they may nonetheless properly assist a court in determining what sentence to impose for a crime.

Accordingly, even if the recommendations of [the victim's] family were considered here, there was no error.

Brown v. State, 698 N.E.2d 779, 782 (Ind. 1998) (citations and punctuation omitted).

Barnett has failed to persuade us that the trial court abused its discretion in sentencing him.

B. *Inappropriateness*

As noted above, even if a defendant's sentence is otherwise proper, Article 7, sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. *Anglemyer*, 868 N.E.2d at 491. This appellate authority is implemented through Indiana Appellate Rule 7(B), which permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Id.* The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Barnett has not met this burden.

The main thrust of Barnett's argument is as follows:

Most of BARNETT'S criminal history were misdemeanors and only a few of them involved BARNETT'S touching other individuals in a rude, insolent, or angry manner. The trial court's assertion that BARNETT was a violent person, insofar as such conclusion was premised upon these misdemeanor convictions, is not sufficiently supported by BARNETT'S criminal history to sustain a maximum statutory sentence.²

² Of course, Barnett did not receive the maximum possible sentence in this case. He received the maximum sentence on each individual count, but the trial court ordered the sentences run concurrently (for a total of fifty years) when it could have made them consecutive (for a total of fifty-three years). That being said, the difference between fifty and fifty-three years does not greatly alter our analysis.

(Appellant's Br. p. 9). We are not persuaded by Barnett's attempt to trivialize his criminal history.

Barnett has three prior felonies as an adult, including one for aggravated battery, a Class B felony, and one for battery resulting in serious bodily injury, as a Class C felony.³ He also has four adult convictions for misdemeanor battery, along with seven other misdemeanors. As a juvenile, he committed misdemeanor battery and criminal mischief, as well as what would have been burglary as a Class C felony if committed by an adult. Barnett has not only an extensive criminal history, but a violent one. The fact that he has more misdemeanor convictions than felonies does not render his sentence inappropriate.

Barnett also contends that his sentence is inappropriate because this was the first time he has been convicted of a sex offense and because the jury hung on Counts I and II, rape and burglary resulting in bodily injury. Barnett does not develop these arguments, and we need not dwell on them. The fact that this was Barnett's first sex offense does not necessarily make the maximum sentence inappropriate, especially in light of his extensive criminal history. And, of course, the fact that the jury hung on other counts is

³ During the sentencing hearing, Barnett's counsel asked the trial court not to consider the Class C felony battery because it was committed while this case was already pending. Our supreme court has held that "[c]riminal activity that occurs subsequent to the offense for which one is being sentenced is a proper sentencing consideration." *Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998).

irrelevant to the appropriateness of the sentence for the crimes of which he actually was convicted.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by considering the victim's sentencing recommendation in determining Barnett's sentence and that Barnett's sentence is not otherwise inappropriate.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.