MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Charles McCloud-Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 19, 2022

Court of Appeals Case No. 21A-CR-2607

Appeal from the Lake Superior Court

The Honorable Natalie Bokota, Judge

Trial Court Cause No. 45G02-2103-F1-18

Tavitas, Judge.

[1] Charles McCloud-Smith appeals his sentence for battery resulting in moderate bodily injury, a Level 6 felony, and domestic battery resulting in moderate

bodily injury, a Level 6 felony. McCloud-Smith argues that the trial court abused its discretion by admitting—over objection—a probable cause affidavit ("PC affidavit") at McCloud-Smith's sentencing hearing and subsequently relying on that affidavit in determining McCloud-Smith's sentence. We disagree. Accordingly, we affirm.

Issues

[2] McCloud-Smith raises two issues:

I. Whether the trial court abused its sentencing discretion by relying on information contained in the PC affidavit.

II. Whether the trial court properly found that the nature of the crime was an aggravating factor.

Facts[1]

[3] On March 5, 2021, McCloud-Smith travelled—uninvited—to a home in Schererville. Paige Mills was in the home, and she awoke to McCloud-Smith standing over her. McCloud-Smith was angry and aggressively pushed his fingers into Mills' eyes. Shyann Bell—who shared a child with McCloud-Smith—was also present and attempted to intervene. McCloud-Smith stabbed Bell in the arm with a fork and then fled.

[1] We draw these facts specifically from the stipulated factual basis filed by the parties below.

[4] The State charged McCloud-Smith[2] with Count I, battery resulting in serious bodily injury, a Level 5 felony; Count II domestic battery by means of a deadly weapon, a Level 5 felony; Count III, battery resulting in moderate bodily injury, a Level 6 felony; Count IV, domestic battery resulting in moderate bodily injury, a Level 6 felony; Count V, residential entry, a Level 6 felony; Count VI, theft, a Class A misdemeanor; Count VII, intimidation, a Level 6 felony; and Count VIII, intimidation, a Level 6 felony.

[5] On September 1, 2021, McCloud-Smith entered into a plea agreement whereby he pleaded guilty to Count III and Count IV, and the State agreed to dismiss the remaining counts.[3] McCloud-Smith and the State stipulated, in pertinent part, to the following facts: "Charles McCloud[-]Smith was angry, and aggressively pushed his fingers into Mills' eyes after she had woken up to him standing over her, causing her to suffer from pain and bleeding from her eyes." Appellant's App. Vol. II p. 53. At the sentencing hearing on October 27, 2021, the trial court asked the parties if they had any objections to the pre-sentence investigation report. McCloud-Smith's counsel responded: "[W]e would object to the bottom of page 2 where there's mention of including a Probable Cause Affidavit and Information for the resisting case. We have a Plea Agreement and a Stipulated Factual Basis that I think cover that, your Honor." Tr. Vol. II

[2] The final amended information was filed on July 27, 2021.

[3] The record reflects that this was a global plea agreement, and that a number of counts under a separate cause number were also dismissed.

p. 18. The trial court overruled the objection "pursuant to statute."[4] *Id*. McCloud-Smith's counsel further objected: "Same with page 12, present offence [sic], roman numeral III. Object to the Information Affidavit PC and the warrant to be included. Again, those are all covered by the plea and the Stipulated Factual Basis." *Id*. The trial court similarly overruled McCloud-Smith's second objection.

[6] As part of its sentencing statement, the trial court indicated: "The nature and circumstances of this crime is an aggravating factor. The fact the victim whom you attacked that was sleeping was in a position of particular vulnerability is an aggravating factor. Your [sic] targeting someone who's not in a position to defend him or herself." *Id.* at 44. The trial court found the following aggravating factors:

> 1. The harm, injury, loss, or damage suffered by the victim of the offense was significant; and greater than the elements necessary to prove the commission of the offense in Court IV, the victim suffered permanent disfigurement as indicated in her victim impact statement.
>
> 2. The defendant has a criminal history of juvenile adjudications, misdemeanor convictions and felony convictions which includes 3 juvenile adjudications; 8 misdemeanor convictions and 5 felony convictions. The defendant's extensive criminal history at a

[4] The trial court did not elaborate upon its meaning or upon which statute it was relying.

> relatively young age (28 years old) is an aggravator of great weight.
>
> 3. The defendant has violated the conditions of probation granted to the defendant on 5 separate occasions.
>
> 4. The Court finds the nature and circumstances of the crime to be a significant aggravating factor in that in Count IV, the defendant attacked the victim after entering her home as she slept, uninvited, and as she awakened. This assault of the victim while she was particularly vulnerable is an aggravator of significant weight.

Appellant's App. Vol. II pp. 121-22. The trial court found no mitigating factors. The trial court sentenced McCloud-Smith to an aggregate sentence of four years, the maximum allowed by the plea agreement. This appeal followed.

Analysis

[7] McCloud-Smith argues that the trial court abused its discretion by relying on "matters not properly part of the record," and by improperly considering an aggravator when sentencing McCloud-Smith. Appellant's Br. p. 4. "[S]ubject to the review and revise power [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 discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007); *Phipps v. State*, 90 N.E.3d 1190, 1197 (Ind. 2018). "An abuse of discretion occurs only 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." *Schuler v. State*, 132 N.E.3d 903, 904 (Ind. 2019) (citing *Rice v. State*, 6 N.E.3d 940, 943 (Ind. 2014)).

[8] A trial court abuses its discretion in a number of ways, including:

> (1) "failing to enter a sentencing statement at all"; (2) entering a sentencing statement in which the aggravating and mitigating factors are not supported by the record; (3) entering a sentencing statement that does not include reasons that are clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement in which the reasons provided in the statement are "improper as a matter of law."

Ackerman v. State, 51 N.E.3d 171, 193 (Ind. 2016) (quoting *Anglemyer*, 868 N.E.2d at 490-91), *cert. denied*.

[9] "This Court presumes that a court that conducts a sentencing hearing renders its decision solely on the basis of relevant and probative evidence." *Schuler*, 132 N.E.3d at 905. "When an abuse of discretion occurs, this Court will remand for resentencing only if 'we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.'" *Ackerman*, 51 N.E.3d at 194 (quoting *Anglemyer*, 868 N.E.2d at 491).

[10] First, McCloud-Smith contends that the trial court relied on facts contained in the PC affidavit and that the trial court erred in admitting the PC affidavit. We review challenges to the admission of evidence for an abuse of the trial court's

discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018). In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

[11] The only argument that McCloud-Smith raises in his brief is that the PC affidavit was "unreliable hearsay." Appellant's Br. p. 8. McCloud-Smith did not raise any hearsay objections to the PC affidavit below. Accordingly, the issue is waived. Parties that do "not raise this issue to the trial court, [ ] cannot raise it for the first time on appeal." *N. Indiana Pub. Serv. Co. v. Sloan*, 4 N.E.3d 760, 766 (Ind. Ct. App. 2014) (citing *Einhorn v. Johnson*, 996 N.E.2d 823, 828 n. 4 (Ind. Ct. App. 2013)); *see also Smith v. State*, 792 N.E.2d 940, 943 (Ind. Ct. App. 2003) (citing *Mitchell v. State*, 726 N.E.2d 1228, 1235 (Ind. 2000)).

[12] Waiver notwithstanding, we find *Tate v. State*, 835 N.E.2d 499, 509 (Ind. Ct. App. 2005) to be instructive. In *Tate*, we held that the admission of a probable cause affidavit was erroneous, given that the document constituted hearsay. Nevertheless, we deemed the error harmless because the contents of the affidavit were duplicated in other evidence that was properly admitted.[5]

[5] We note that: "'[i]n general, the admission of evidence that is merely cumulative of other evidence amounts to harmless error as such admission does not affect a party's substantial rights.'" *D.B.M. v. Indiana Dep't of Child Servs.*, 20 N.E.3d 174, 179 (Ind. Ct. App. 2014) (quoting *In re Paternity of H.R.M.*, 864 N.E.2d 442, 450–51 (Ind. Ct. App. 2007)); *Garth v. State*, 182 N.E.3d 905, 917 (Ind. Ct. App. 2022) (citing *Pelissier v. State*, 122 N.E.3d 983, 988 (Ind. Ct. App. 2019)); *see also Tobar v. State*, 740 N.E.2d 106, 108 (Ind. 2000) ("Evidence that is merely cumulative is not grounds for reversal.").

[13] When asked if McCloud-Smith had any objection to the PSI, McCloud-Smith's counsel responded: "[W]e would object to the bottom of page 2 where there's mention of including a Probable Cause Affidavit and Information for the resisting case. We have a Plea Agreement and a Stipulated Factual Basis that I think cover that, your Honor." Tr. Vol. II p. 18. The nature and circumstances of the offense were sufficiently set out in the stipulated factual basis filed as part of the plea agreement. Thus, any error stemming from the admission of the PC affidavit was harmless. Moreover, we note that Indiana Rule of Evidence 101(d)(2) specifically provides that the Rules of Evidence are not applicable to sentencing hearings. We cannot say that the trial court abused its discretion in considering the PC affidavit attached to the pre-sentence investigation report.

[14] We briefly address McCloud-Smith's contention that "the trial court abused its discretion in finding that the nature and circumstances of the crime was an aggravating factor." Appellant's Br. p. 8. McCloud-Smith argues that the stipulated factual basis does not establish that "Mills was in a compromised position at the time of the confrontation." *Id.* at 9. This argument is plainly at odds with the record. The stipulated factual basis contains both the fact that McCloud-Smith arrived "uninvited[,]" and the fact that Mills "had woken up to [McCloud-Smith] standing over her . . . ." Appellant's App. Vol. II p. 53. We agree that the stipulated factual basis does not support the trial court's conclusion that McCloud-Smith attacked Mills as she slept. The gravamen of the finding, however, is explicit: McCloud-Smith attacked Mills when she was particularly vulnerable. We agree with the trial court, and, accordingly, find

that it did not abuse its discretion in considering the nature and circumstances of the crime as an aggravating factor.

Conclusion

[15] The trial court did not abuse its discretion in overruling McCloud-Smith's objections and admitting the PC affidavit. Thus, the trial court did not abuse its discretion when finding the nature and circumstances of the crime to be an aggravator and sentencing McCloud-Smith. We affirm.

[16] Affirmed.

Riley, J., and May, J., concur.