

Case Summary and Issues

Following a jury trial, Zachary McCloud appeals his convictions and eight-year sentence for battery, a Class C felony, and resisting law enforcement, a Class A misdemeanor. For our review, McCloud raises two issues, which we restate as: 1) whether the trial court abused its discretion by denying McCloud's motion for a mistrial; and 2) whether McCloud's sentence is inappropriate in light of the nature of his offenses and his character. Concluding the trial court did not abuse its discretion by denying a mistrial, and McCloud's sentence is not inappropriate, we affirm.

Facts and Procedural History

On June 25, 2009, McCloud called his girlfriend, Cassie Rogge, and asked to see the couple's two young daughters, who both lived with Rogge. McCloud and Rogge had been in a relationship for seven years but physically separated during the preceding two months. Rogge agreed to the visit at a local park but ended the visit after an hour. Later that day, McCloud again called Rogge and several times asked her to go out with him and his friends. Rogge agreed only after McCloud and his friends drove to pick Rogge up, and the group eventually arrived at a trailer home belonging to one of McCloud's friends. McCloud appeared intoxicated and continued drinking. An argument ensued between McCloud and Rogge; Rogge walked outside the trailer home and McCloud followed her outside. McCloud jumped on top of Rogge and choked her from behind, "shoving [her] face into the mud" and making it difficult for her to breathe. Transcript at 83-84. McCloud also hit Rogge repeatedly. Rogge suffered bruises to her neck, arms, and chest

and knots on her head, and was unable to recall the moment when the beating stopped. Rogge testified, “I really thought that [McCloud] was going to kill me.” Id. at 84.

Vanderburgh County sheriff’s deputies arrived on the scene and one of them, Deputy Zuber, managed to handcuff McCloud. McCloud then pushed back with his body as Deputy Zuber tried to place him in a police car. Due to McCloud’s resistance, there was a three-minute struggle until Deputy Zuber succeeded in placing McCloud inside the vehicle.

The State charged McCloud with Count 1, battery resulting in serious bodily injury, a Class C felony; Count 2, strangulation, a Class D felony; and Count 3, resisting law enforcement, a Class A misdemeanor. McCloud filed a motion in limine, which the trial court granted, excluding any reference to prior physical altercations between McCloud and Rogge or to any other prior crimes or bad acts McCloud allegedly committed.

During the two-day jury trial, Rogge testified regarding the June 25, 2009 incident, and the State introduced photographs of Rogge’s injuries taken the following day by a law enforcement officer. Deputy Zuber also testified regarding McCloud’s presence at the scene of the trailer home. During the State’s direct examination of Rogge, the deputy prosecutor questioned her regarding the fact McCloud was writing to her from jail:

- Q. Okay. Told you he wouldn’t do it again, treat you better.
- A. Yeah (affirmative).
- Q. Wanted you to drop the charges?
- A. Like I have every time in the past.

Id. at 96. At that point, the deputy prosecutor had no further questions. McCloud's counsel requested a conference out of the presence of the jury and moved for a mistrial on the grounds that Rogge's reference to dropping charges in the past violated the order in limine. The trial court stated a mistrial would be denied but offered to admonish the jury. McCloud's counsel refused the offer of an admonition, noting an admonition would only further emphasize to the jury the reference to prior charges, and therefore withdrew the motion for mistrial.

The jury found McCloud guilty of Counts 1 and 3 but not guilty of Count 2. The trial court held a sentencing hearing and made the following sentencing statement:

The Court finds the following aggravating circumstances: 1) the defendant's lengthy criminal record in general and specifically his prior convictions for battery in 12-5-97 and . . . battery conviction in 9811-CF-820, battery conviction in 0706-FC-642 and criminal recklessness conviction in 0708-FC-876. All sufficient reasons for an aggravated sentence.

Id. at 210-11. The trial court sentenced McCloud on Count 1 to seven years executed at the Department of Correction and on Count 3 to one year executed, with the sentences to be served consecutively, for a total sentence of eight years. McCloud now appeals.

Discussion and Decision

I. Motion for Mistrial

A. Standard of Review

The grant or denial of a motion for mistrial rests within the sound discretion of the trial court and is reviewed for an abuse of discretion. Booher v. State, 773 N.E.2d 814, 820-21 (Ind. 2002). To prevail on appeal from the denial of a mistrial, "the defendant must demonstrate that the conduct complained of was both error and had a probable

persuasive effect on the jury's decision.” Pierce v. State, 761 N.E.2d 821, 825 (Ind. 2002). “A mistrial is an extreme remedy granted only when no other method can rectify the situation.” Id. “Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, the trial court’s determination of whether to grant a mistrial is afforded great deference on appeal.” Booher, 773 N.E.2d at 820.

B. Prior Bad Acts

Initially the State argues McCloud waived his claim of error by refusing the trial court’s offer to admonish the jury. Our supreme court has stated that “refusal of an offer to admonish the jury constitutes a waiver of any error in the denial of the motion [for mistrial].” Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001); cf. id. at 576 (Dickson and Boehm, J.J., concurring in result) (concluding that “refusal to accept an admonition waives the issue only if the admonition would cure the problem”). In Randolph, the supreme court, notwithstanding its finding of waiver, addressed the merits of the defendant’s claim. Id. at 575; see also Booher, 773 N.E.2d at 820-21 (even though claim of error in denial of mistrial was forfeited, also addressing merits of defendant’s argument). Similarly, this court has noted it may be “particularly prudent” to address the merits of a defendant’s claim in cases where, as here, trial counsel declined an offer to admonish the jury by specifically commenting on “the unsavory position of choosing between emphasizing inappropriate testimony to the jury and waiving appellate review of the trial court’s denial of a motion for mistrial.” Smith v. State, 872 N.E.2d 169, 174-75 (Ind. Ct. App. 2007), trans. denied. Therefore, regardless of whether McCloud waived

the issue by declining to accept an admonition, we choose to address the merits of McCloud's argument. See id. at 174.

McCloud argues that Rogge's reference to prior domestic violence charges was so prejudicial that it denied him a fair trial. We disagree. McCloud is correct that any reference to prior charges or incidents of domestic violence was improper under Indiana Rule of Evidence 404(b), and the State does not argue that any exception to this rule applies. However, improper references to a defendant's criminal history or prior bad acts do not necessarily require reversal, and will not if the reference lacked a probable persuasive effect on the jury's verdict. See Coleman v. State, 490 N.E.2d 325, 328 (Ind. 1986) (police officer's brief, inadvertent reference to mug shots used to help identify defendant did not require reversal following denial of mistrial); Smith, 872 N.E.2d at 175 (despite witness's brief reference to defendant's time spent in juvenile detention center, trial court did not abuse its discretion by denying mistrial). Here, although Rogge's reference to prior charges of domestic violence implied McCloud committed prior bad acts of a certain nature, no specific acts or details of those acts were revealed to the jury, let alone deliberately elicited. Further, there was strong evidence of McCloud's guilt independent of Rogge's testimony: Deputy Zuber confirmed McCloud's presence at the scene of the attack, and the police photographs of Rogge confirmed the extent of her injuries. For these reasons, the trial court did not abuse its discretion by denying McCloud's motion for a mistrial.

II. Inappropriate Sentence

This court has authority to revise a sentence “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). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited . . . to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). Nevertheless, the defendant bears the burden to “persuade the appellate court that his or her sentence has met this inappropriateness standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). “[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

The trial court sentenced McCloud to eight years executed, one year short of the maximum consecutive sentences he could have received for his Class C felony and Class A misdemeanor convictions. See Ind. Code § 35-50-2-6(a) (“A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.”); Ind. Code § 35-50-3-2 (maximum sentence for Class A misdemeanor is one year). Regarding the nature of McCloud’s offenses, he attacked Rogge without provocation and in a manner that caused

her to fear for her life. The trial court did not find any mitigating circumstances, and McCloud does not argue that any significant mitigators were overlooked.¹

Regarding McCloud's character, he does not dispute, even though the pre-sentence investigation report is not in the record, his three prior convictions of battery and one prior conviction of criminal recklessness, as the trial court noted at the sentencing hearing. The cause numbers cited by the trial court indicate McCloud's most recent battery conviction and his criminal recklessness conviction were on charges filed in separate cases in 2007. The State pointed out, and McCloud did not dispute, that at least two of his prior convictions, meaning at least one of the prior batteries, were felonies. Therefore, McCloud has a criminal history that is significant in relation to his present offenses. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (the significance of a criminal history varies "by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability"). Additionally the State pointed out, and it was not disputed by McCloud, that he was on parole at the time of the present offenses. Based on the foregoing factors, we cannot say an enhanced

¹ McCloud argues the trial court "gave no reason why it was imposing a consecutive sentence" for the resisting law enforcement count, "failed to state in detail the reasons why it was imposing a sentence higher than the advisory sentence," and because it noted aggravating circumstances, "should have considered mitigators." Appellant's Brief at 19-20. While McCloud thus appears to challenge the adequacy of the trial court's sentencing statement, he does not specifically argue the trial court abused its discretion in that regard and does not request a remand for clarification or resentencing. Accordingly, we consider the sole issue raised by McCloud to be the appropriateness of his sentence under Appellate Rule 7(B).

sentence is inappropriate in light of the nature of McCloud's offenses and his character.

Conclusion

The trial court did not abuse its discretion by denying McCloud's motion for a mistrial, and McCloud's sentence is not inappropriate in light of the nature of his offenses and his character.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.