

Appellant William M. Lacy appeals his convictions for strangulation, a class D felony,¹ criminal confinement, a class D felony,² and battery, a class A misdemeanor.³ We affirm in part and remand with instructions.

In May 2008, Lacy moved into the home of his friend James Simpson in Brownsburg, Indiana. The two shared living expenses because Simpson had lost his job and Lacy needed a place to live. By September 2008, their relationship had deteriorated and they argued several times.

On September 5, 2008, Simpson was sitting in the family room watching television when Lacy entered. Lacy was angry, grabbed Simpson by the throat, and began strangling him. Lacy repeatedly asked Simpson, “what’s it feel like to know you’re going to die in three minutes?” Tr. pp. 10, 12. During their struggle, Lacy also grabbed Simpson’s arms and pinned them against the couch, causing severe abrasions. After about five (5) minutes, Lacy stopped attacking Simpson and went outside. At that time, Simpson did not call the police because he was frightened that Lacy would attack him again. Simpson called the police two (2) days later.

The State charged Lacy with the offenses identified above. The case was tried to the bench, and the trial court found Lacy guilty on all three charges. The trial court sentenced Lacy as follows:

I’m going to, uh, enter a Judgment of Conviction on Count II, I believe it is, Criminal Confinement, Class D felony and Battery a Class A misdemeanor, those sentences will merge. Under Count I, Strangulation I’m going to

¹ Ind. Code § 35-42-2-9.

² Ind. Code § 35-42-3-3.

³ Ind. Code § 35-42-2-1.

enter a Judgment of Conviction, sentence is 730 days at the Indiana Department of Corrections, credit for 1 + 1 day served, I'll suspend the balance of time, place you on probation for 728 days.

Tr. p. 96.

Lacy raises two issues, which we restate as:

- I. Whether the trial court violated Lacy's protection against double jeopardy under the Indiana Constitution;⁴ and
- II. Whether Lacy's sentence is inappropriate in light of the nature of the offense and the character of the offender.

I. DOUBLE JEOPARDY

We review de novo whether a defendant's convictions violate the Indiana Double Jeopardy Clause. Goldsberry v. State, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005).

A double jeopardy violation occurs when multiple judgments of conviction are entered for the same offense and cannot be remedied by the "practical effect" of concurrent sentences or by merger after conviction has been entered. Morrison v. State, 824 N.E.2d 734, 741-742 (Ind. Ct. App. 2005), transfer denied.

Similarly, in Gregory v. State, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008), transfer denied, a jury convicted Gregory of dealing in methamphetamine and conspiracy to deal methamphetamine. The trial court entered judgments of conviction on both counts and merged the two convictions for sentencing purposes. Id. This Court concluded that merger for sentencing purposes did not cure the double jeopardy violation and directed

⁴ Article I, section 14 of the Indiana Constitution, also known as the Indiana Double Jeopardy Clause, provides, in relevant part, "[n]o person shall be put in jeopardy twice for the same offense."

the trial court to vacate Gregory's conviction for conspiracy to deal methamphetamine. See id.

In this case, the parties do not contest whether Lacy's charges of strangulation, criminal confinement, and battery arose out of the same set of facts. Instead, as was the case in Morrison and Gregory, the issue is whether the trial court cured a double jeopardy violation by entering a judgment of conviction on all three charges against Lacy but merging the three convictions for sentencing purposes. The State concedes that merger for the purpose of sentencing is an insufficient remedy because the entry of a judgment of conviction on all three charges violated the Indiana Double Jeopardy Clause. Therefore, Lacy's convictions for criminal confinement and battery must be vacated.

II. APPROPRIATENESS OF SENTENCE

Lacy's sentencing challenge is governed by Indiana Appellate Rule 7(B), which provides, in relevant part, "[t]he Court 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." We may look to any factors appearing in the record to conduct the examination. Schumann v. State, 900 N.E.2d 495 (Ind. Ct. App. 2009). The burden is on the defendant to persuade us that his sentence is inappropriate. Major v. State, 873 N.E.2d 1120, 1130 (Ind. Ct. App. 2007), transfer denied.

The "nature of the offense" portion of the standard articulated in Appellate Rule 7(B) speaks to the statutory advisory sentence for the class of crimes to which the offense belongs. Id. That is, the advisory sentence is intended to be the starting point for the

court's consideration of the appropriate sentence for the particular crime committed. Id. at 1130-1131. The advisory sentence for strangulation as a class D felony is one and one-half (1 ½) years, with a minimum of six (6) months and a maximum of three (3) years. See Ind. Code § 35-50-2-7.

The character of the offender portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Major, 873 N.E.2d at 1131.

In this case, the trial court sentenced Lacy to 730 days (two (2) years) with all but two (2) days suspended to probation, which was six (six) months greater than the advisory sentence but one (1) year less than the statutory maximum. Furthermore, Lacy had already served the two nonsuspended (2) days at the time of sentencing.

Regarding the nature of the offense, Lacy attacked Simpson, who had taken Lacy into his home when Lacy needed a place to live. Simpson had lost his job and needed someone to help pay living expenses, but Simpson did not have to choose Lacy. Furthermore, during the attack, Lacy caused Simpson to fear for his life. Finally, in the days after the attack, Simpson did not call the police because he was frightened that Lacy would attack him again.

Regarding the character of the offender, Lacy has no criminal history, suffers from several serious health conditions, and the county probation department stated that Lacy would likely respond affirmatively to probation or a short term of imprisonment. It appears that the trial court took these circumstances into consideration by suspending all but two (2) days of Lacy's sentence. Although the nature of the offense supports the

enhanced sentence, the character of the offender supports the trial court's decision to suspend the sentence. Under these circumstances, we cannot say that Lacy's sentence is inappropriate.

For the reasons stated above, we affirm the judgment of the trial court in part and remand with instructions to vacate the Judgment of Conviction as to Lacy's convictions for criminal confinement and battery.

Affirmed in part and remanded.

VAIDIK, J., and MATHIAS, J., concur.