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IN THE COURT OF APPEALS OF INDIANA

ARVESTER WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1001-CR-10
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0711-FB-80

August 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Arvester Williams appeals his conviction for criminal confinement while armed with a deadly weapon as a class B felony[1] and his aggregate sentence for criminal confinement as a class B felony and for possession of a firearm by a serious violent felon as a class B felony.[2] Williams raises two issues, which we revise and restate as:

I. Whether the trial court erred in not giving an instruction on criminal confinement as a class D felony as had been requested by Williams; and

II. Whether Williams's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On May 21, 2006, James Army, Jr., was visiting with friends and walked to a gas station about two blocks from the house of one of his friends in Elkhart, Indiana. Army uses a cane to walk due to "left side weakness" caused by a previous aneurism. Transcript at 383. Army left the gas station, and as he was walking eastward across the parking lot, Williams and another man pulled up in Williams's car and the car "squealed when it stopped." Id. at 381. Army owed Williams some money. Williams "jumped out" of the vehicle, said "[h]ey" to Army, and "came right at [Army]." Id. at 382. As Williams exited his vehicle, Army said "[o]h, s---" and turned around and tried to run. Id. at 383. Army fell down after traveling approximately ten or fifteen feet due to his left side weakness, and Williams caught Army and "had a hold of [Army's] belt and back of [his] collar" and "forced [Army] back into [Williams's] car." Id. at 383-

[1] Ind. Code § 35-42-3-3 (Supp. 2006).

[2] Ind. Code § 35-47-4-5 (Supp. 2006).

385. Army attempted to tell Williams that he had Williams's money, but Williams stated: "No, no it is too late for that. You're getting in the car." Id. at 384.

Williams forced Army to sit in the backseat of the vehicle behind the driver's seat and next to the other man who was with Williams. Army attempted to open the car door, but the vehicle had "child-proof locks on the door so the only way [a person could] get out was to open it from the outside." Id. at 386. Williams drove around for a minute and called a person named Len on the phone and said: "Yeah, I got that n-----. I want you to whoop his ass." Id. Williams drove and picked up Len, who got into the vehicle's front passenger seat. Williams then drove to Williams's house, and Williams's wife came outside with a shoe box and walked to the driver's side window of the vehicle. Williams opened the shoe box, took a pistol out of the box, and placed the pistol underneath the driver's seat of the vehicle. When he saw the pistol, Army "knew [he] was going to get killed." Id. at 393.

After Williams drove away from the residence, Army stated that he had money in an "ATM account" and suggested visiting an ATM. Id. at 387. Williams pulled up next to an ATM machine and let Army out of the vehicle. Army attempted to "find [his] card and . . . buy time," and Williams stood right next to Army and held onto Army's collar. Id. at 396. Army then decided to try to run and, because Williams had "a hold of [his] hoodie," he "yanked out of it so [he] had no shirt on." Id. at 397. Army was able to run only a short distance before Williams and the other men caught him. After being struck in the face, Army was pushed into the vehicle's trunk, and the trunk was closed.

Army noticed that the vehicle began to move and began to feel around for anything that he could use "to try to defend [himself] the next time they opened the trunk," and Army found a slender metal bar in the trunk that he slid into his pants. Id. at 406. Army also attempted to tell the men that he could not breathe, but the men told Army to "[s]hut up." Id. at 407. At some point while he was still feeling around the trunk, Army "pulled on something in the trunk – a cord, a wire; and the trunk opened up." Id. When the trunk opened, Army noticed that the vehicle was stopped, but then immediately "took off very, very rapidly . . . ." Id. at 409. Army jumped out of the trunk and "tumbled and rolled . . . for a good ways" and then stumbled into a convenience store to get help. Id. Paramedics and police were called to the scene, and Army was transported to the hospital.

In October 2006, the State filed an information charging Williams with criminal confinement while armed with a deadly weapon and serious violent felon in possession of a firearm.[3] On September 21, 2009, the State filed an amended information charging Williams with criminal confinement while armed with a deadly weapon as a class B felony and serious violent felon in possession of a firearm as a class B felony. The jury found Williams guilty of criminal confinement while armed with a deadly weapon as a class B felony during the first phase of a bifurcated trial and guilty of being a serious violent felon in possession of a firearm as a class B felony during the second phase of the trial.

[3] The record does not appear to include copies of this original charging information.

The trial court, noting that Williams had two prior felony convictions, had violated the terms of his probation on at least one occasion in the past, and had been charged with a separate felony while on bond in this case, sentenced Williams to a term of eighteen years for his conviction for criminal confinement while armed with a deadly weapon and to a term of twelve years for his conviction for serious violent felon in possession of a firearm to be served in the Indiana Department of Correction, and the court ordered the sentences to be served consecutive to each other for an aggregate sentence of thirty years.

I.

The first issue is whether the trial court erred in not giving Williams's requested instruction on criminal confinement as a class D felony. We apply a three-step analysis in determining whether a defendant was entitled to an instruction on a lesser-included offense. Wright v. State, 658 N.E.2d 563, 566-567 (Ind. 1995). We must determine: (1) whether the lesser-included offense is inherently included in the crime charged; if not, (2) whether the lesser-included offense is factually included in the crime charged; and if either, (3) whether there is a serious evidentiary dispute whereby the jury could conclude the lesser offense was committed but not the greater offense. Id. If the "jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense." Id. at 567. When the trial court makes a finding that a serious evidentiary dispute does not exist, we will review that finding for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998).

As previously mentioned, Williams was charged under Ind. Code § 35-42-3-3 with criminal confinement as a class B felony because he committed the offense while armed with a handgun.[4] During the first phase of the bifurcated trial, Williams requested the trial court to instruct the jury on a lesser-included offense of criminal confinement as a class D felony "on the theory that [Williams] was not armed with a deadly weapon at the time he committed the crime." Transcript at 487. The trial court declined to instruct the jury on class D felony confinement as requested by Williams and explained: "I have reviewed the evidence, and to offer such an option to the jury would be to encourage a compromised verdict, since the evidence presented by the alleged victim is uncontroverted as to the defendant's possession of a firearm . . . while this alleged confinement occurred." Id.

Williams argues on appeal that there was a serious evidentiary dispute regarding whether he was armed. Williams argues that only Army testified as to the presence of a gun and "[i]f that was not a serious evidentiary issue, then there were none." Appellant's Brief at 8. Williams argues that the State's questioning of Army regarding the presence of the handgun illustrated that the prosecution thought that demonstrating that Williams

[4] Ind. Code § 35-42-3-3(a) provides:

> A person who knowingly or intentionally:
>
> (1) confines another person without the other person's consent; or
>
> (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;
>
> commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Class D felony.

Ind. Code § 35-42-3-3(b) provides in part: "The offense of criminal confinement defined in subsection (a) is: . . . a Class B felony if it . . . is committed while armed with a deadly weapon . . . ."

was armed was a critical issue and that "[t]he State obviously anticipated this as a major source of dispute in the elements of proof." Id. at 9. Williams also argues that "the jury might have concluded that the addition of the weapon to Army's version was [his] insurance that [Williams] would not be around to bother him in the future." Id.

The State argues that the only issue is whether there was evidence to give the class D instruction, that "there is no . . . dispute that would allow [Williams] to have the class D felony instruction," and that "[t]he record does not contain any evidence that [Williams] did not have a weapon underneath his seat." Appellee's Brief at 5, 6. We agree with the State.

The record reveals that Army's testimony regarding the handgun was consistent on direct and cross examination. Specifically, Army testified that Williams drove to Williams's house, that Williams's wife came outside with a shoe box and walked to the driver's side window of the vehicle, and that Williams opened the shoe box, took a pistol out of the box, and placed the pistol underneath the driver's seat. Williams does not point to, and our review does not disclose, any testimony or other evidence in the record that he did not obtain the handgun and place it under the driver's seat or that otherwise contradicted Army's testimony regarding the fact that Williams was armed with the handgun. We conclude that there was no serious evidentiary dispute regarding whether Williams committed the offense of criminal confinement while armed with a deadly weapon. Accordingly, the trial court did not abuse its discretion in refusing the instruction on criminal confinement as a class D felony. See Griesinger v. State, 699 N.E.2d 279, 283 (Ind. Ct. App. 1998) (concluding that the evidence was not sufficient to

raise a serious evidentiary dispute about the defendant's use of a knife as a deadly weapon and holding that the trial court did not err in refusing the defendant's proposed instruction on criminal confinement as a Class D felony and giving an instruction only on confinement as a class B felony), trans. denied; see also Mallard v. State, 816 N.E.2d 53, 57 (Ind. Ct. App. 2004) (holding that the evidence was sufficient to support the defendant's Class B felony confinement conviction and noting that under the plain language of Ind. Code § 35-42-3-3(b) the State is required to prove only that the defendant committed the offense of criminal confinement "while armed with a deadly weapon" and that the statute does not require the State prove that the deadly weapon was used during the commission of the offense), reh'g denied, trans. denied.

II.

The next issue is whether Williams's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that this court "may revise a sentence authorized by statute 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." Under this rule, 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). Williams argues that his sentences "should be reduced to the advisory term, resulting in an aggregate sentence of twenty years" and appears to base his argument upon the fact that, although Army was convinced that the events were going to end in his death, Williams did not in fact intend to kill Army, that Williams has shown initiative in obtaining his GED and completing

addictions treatment, and that he comes from a disadvantaged background. Appellant's Brief at 13.

Our review of the nature of the offense reveals that Williams caught Army in the parking lot of a gas station and forced him into Williams's car. When Army told Williams that he had money, Williams said "[n]o, no it is too late for that. You're getting in the car." Transcript at 384. Williams forced Army to sit in the backseat of the vehicle behind the driver's seat, and Army was prevented from opening the vehicle's door because child-proof locks were activated. Williams traveled with Army in the backseat to pick up Len, whom Williams had called to "whoop [Army's] ass," and then drove to Williams's house to retrieve a handgun. Id. at 386. When Army saw the gun, he "knew [he] was going to get killed." Id. at 393. At an ATM, Williams stood right next to Army and held onto Army's collar. When Army attempted to escape, he was struck in the face and pushed into the vehicle's trunk. While in the trunk, Army attempted to tell the men that he could not breathe, and he heard them tell him to "[s]hut up." Id. at 407. We also note that the record shows that Army had an aneurism in 1989, which left him with "left side weakness" and "drop foot" in his left foot, that Army used a cane to walk, and that he could not run far without falling and could not "do too much fighting because [of his] left-side weakness." Id. at 383, 399.

Our review of the character of the offender reveals that in 1986 and 1987 as a juvenile Williams was adjudicated delinquent for receiving stolen property, theft, fleeing from a police officer, curfew/loitering, criminal mischief, and false informing. The presentence investigation report (PSI) reveals that Williams was convicted in 1989 for

burglary of a dwelling and received a sentence of ten years, all of which was suspended except for fifteen months and six years probation. In 1992, while on probation, Williams was convicted of armed robbery and carrying a handgun without a license, and received a sentence of fifteen years for the armed robbery conviction, and his probation was revoked. While released on bond in connection with the instant offenses, five additional charges were filed against Williams, including unlawful possession of a handgun by a violent felon and four drug-related offenses. The record also shows that Williams was employed for at least part of the time after his release from prison in 2003 and that he testified at the sentencing hearing that he started his own company and that he is work-oriented.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See Fuller v. State, 875 N.E.2d 326, 334-335 (Ind. Ct. App. 2007) (holding that the defendant's sentence for criminal confinement as a class B felony five years above the advisory sentence of ten years and aggregate sentence of thirty-five years was not inappropriate in light of the nature of the offense and the defendant's extensive criminal history), trans. denied.

For the foregoing reasons, we affirm Williams's conviction for criminal confinement as a class B felony and his aggregate sentence of thirty years.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.