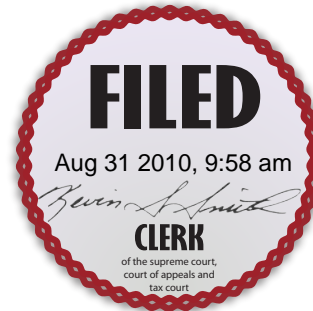


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN H. GRIFFITH,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 91A02-1003-CR-414

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0810-CM-655

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a bench trial, Kevin H. Griffith (“Griffith”) was found guilty of battery resulting in bodily injury,¹ a Class A misdemeanor, and was sentenced to sixty days executed. Griffith now appeals, contending that the State failed to present sufficient evidence to rebut his claim of self-defense.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 16, 2008, James Thoune II (“James”), who lived in a trailer with his parents, his wife, and his children, went deer hunting with his father. While the men were gone, James’s mother had an encounter with Griffith, their next door neighbor in the trailer park, who had called her a “bitch.” *Tr.* at 72. In the early evening, frustrated that another hunter had scared away the deer, James and his father returned to their trailer. While the two men discussed the day’s hunting, James’s mother told them the name Griffith had called her.

Meanwhile, Griffith pulled his car into a driveway about two feet away from the Thounes’ trailer, close enough that Griffith could hear the conversation in the trailer. The parties disagree as to the words that were then exchanged; however, both parties agree about the actions that followed.

Griffith testified that he was on his property next to the Thounes’ trailer when he heard James call him a derogatory name. *Id.* at 66. After asking James what he had said, James repeated the insult. *Id.* Griffith testified that he made an obscene gesture toward

¹ See Ind. Code § 35-42-2-1(a)(1).

James, *i.e.*, “flipped him off.” *Id.* James quickly exited his trailer, pointed his finger at Griffith’s face, and said “Don’t ever call my mother a bitch.” *Id.* at 27, 69.

Griffith testified that he backed up until he could not back up any more. *Id.* at 69. He then kicked James once in the stomach and once in the inner thigh, and punched him in the jaw, claiming at trial that he had acted in self-defense. *Id.* at 70. Griffith admitted that James never touched him. *Id.* at 72.

Following the bench trial, the trial court found Griffith had touched James in a rude, insolent, or angry manner resulting in bodily injury. *Id.* 79-80. Finding that Griffith’s action of “flipping off” James was a “fighting action” meant to provoke a reaction, and that the encounter developed into a “mutual combat situation,” the trial court chose to discredit Griffith’s claim of self-defense. *Id.* at 80, 81. Griffith was convicted of Class A misdemeanor battery resulting in bodily injury. Griffith now appeals.

DISCUSSION AND DECISION

Griffith argues that the State failed to present sufficient evidence to rebut his claim of self-defense. We disagree.

As our Supreme Court has held:

A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. If a defendant is convicted despite his claim of self-defense, this Court will reverse only if no reasonable person could say that self-defense was negated by the State

beyond a reasonable doubt. In any event, a mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. *Wooley v. State*, 716 N.E.2d 919, 926 (Ind. 1999); see I.C. § 35-41-3-2(e)(3) (2002) (“[A] person is not justified in using force if: . . . the person has entered into combat with another person or is the initial aggressor, unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.”). The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. We neither reweigh the evidence nor judge the credibility of witnesses. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed.

Wilson v. State, 770 N.E.2d 799, 800-01 (Ind. 2002) (some citations omitted; alteration in original).

To prevail on a claim of self-defense, Griffith had to show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Id.* at 800. To negate Griffith’s claim of self-defense the State had to negate only one of these essential elements. We find that the State presented sufficient evidence that Griffith participated willingly in the violence.

At trial, Griffith admitted that he had encountered James’s mother earlier in the day and had called her a “bitch.” *Tr.* at 72. Griffith also admitted that, after hearing James call him an offensive name, he asked James to repeat what he said. After hearing the insult repeated, Griffith directed his actions toward James and “flipped him off.” *Id.* at 66. James’s father testified that when Griffith heard what he thought was James insulting him, Griffith told James, “If you have a problem with me, come outside.” *Id.* at

46. This evidence was sufficient to show that Griffith provoked or willingly participated in the physical encounter.

Furthermore, even if Griffith had initially feared being attacked by James, his claim of self-defense must fail because of his failure to withdraw from the encounter. A mutual combatant, whether or not the initial aggressor, must declare an armistice before he or she may claim self-defense. Ind. Code § 35-41-3-2(e)(3); *Wooley*, 716 N.E.2d at 926. Griffith was the only one to engage in the physical touching and never attempted to disengage from the encounter. Although Griffith hit or punched James three times, James, by Griffith's own admission, refrained from physically responding. *Tr.* at 27, 72.

The State presented more than sufficient evidence to negate the claim of self-defense beyond a reasonable doubt.

Affirmed.

RILEY, J., and BAILEY, J., concur.