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IN THE COURT OF APPEALS OF INDIANA

GABERELLA MENIFEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0708-CR-448
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
DIVISION III
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0602-FA-60

February 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Gaberella Menifee (Menifee), appeals her sentence for attempted murder, a Class A felony, Ind. Code §§ 35-42-1-1 and 35-41-5-1.

We affirm.

ISSUE

Menifee raises one issue on appeal: Whether her sentence is inappropriate in light of the nature of her crime and her character under Indiana Appellate Rule 7(B).

FACTS AND PROCEDURAL HISTORY

The following is the factual basis provided by the State at Menifee's guilty plea hearing:

> [O]n the early morning hours of February 4th of 2006, Officers from the Anderson Police Department were dispatched to 1709 Dewey Street where [Menifee] was there, that being her daughter's home. [Menifee] had indicated to the police at that time that her husband John Wesley Menifee, Jr. was back at the residence at 1924 Kerrwood in Anderson, Madison County, Indiana and that the two of them had just argued and that Mr. Menifee had had a firearm and threatened to kill . . . her and himself. At which time she got scared and fled the residence and walked to her daughter's house. The police went to the residence of 1924 Kerrwood to make contact with Mr. Menifee, the defendant was with them at the time out in a police car. . . . The police ultimately kicked the door in to find Mr. Menifee laying about ten feet from the door they kicked in with a gunshot to the back of his head. He was not moving and was presumed dead until a few minute[s] after they were in their [sic] he began to move. At that time, he was taken to the hospital and treated for the gunshot wound to the back of the head. During this time frame, Mr. Menifee had indicated that he did not shoot himself, although he did not know how he was shot or what had happened. During the investigation [Menifee] was taken to the Anderson Police Department and mirandized and questioned concerning these events. She began by reiterating what she had told the police at her daughter's house. She quickly changed that story when she realized that Mr. Menifee was still alive and had indicated that he did not attempt to commit suicide. She gave varying versions of the events throughout the early morning

> hours while she was interviewed. Most of which were shown not to be the truth. Her story would change as the police would give her more information about what had happened. Eventually she did admit to being in their [sic], in the house, when . . . Mr. Menifee . . . was shot. Again, which contradicted what she originally told the police. Eventually she indicated that during a struggle with Mr. Menifee that she at least had her hand on the gun when it was fired, the officers, again questioned her about where her hand was at that time. There were no injuries on her hand, which there would've been due to the nature of the fire arm, had she been trying to grab for it in a defensive posture. There were ultimately two shots that were found to have been fired in looking at the angles. It appeared that one shot missed Mr. Menifee and went into the wall. The other shot again hit him in the back of the head, which was not consistent with an accident from the defendant. And putting her statement together with the physical evidence that was found and the statements of Mr. Menifee as to what occurred, the evidence would prove beyond a reasonable doubt that the defendant did shoot Mr. Menifee in the back of the head with th[e] intent to kill him on February 4th of 2006.

(Transcript pp. 7-10).

On June 7, 2007, the State filed an Amended Information charging Menifee with attempted murder, a Class A felony, I.C. §§ 35-42-1-1 and 35-41-5-1. On June 11, 2007, Menifee entered a plea agreement with the State. In exchange for Menifee's guilty plea, the State agreed to recommend a cap of twenty years on the executed portion of Menifee's sentence. On July 2, 2007, the trial court sentenced Menifee to thirty years with twenty years executed in the Indiana Department of Correction and ten years suspended to probation.

Menifee now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Menifee contends that her sentence is inappropriate. Indiana Appellate Rule 7(B) permits us to revise a sentence 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. *See also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

For a Class A felony, the maximum sentence is fifty years, the advisory sentence is thirty years, and the minimum sentence is twenty years. I.C. § 35-50-2-4. Here, the trial court imposed the advisory sentence of thirty years but suspended ten years to probation, resulting in an executed sentence of twenty years in the Department of Correction. That is, the executed portion of Menifee's sentence equals the minimum allowable sentence for a Class A felony. After due consideration of the trial court's decision, we cannot say that Menifee's sentence is inappropriate.

The nature of Menifee's offense is particularly disturbing. She shot her husband in the back of the head and left him to die. She did not immediately call for help, and once she did contact police, she lied to them about what had happened. In fact, she did not begin telling the truth until after she learned that she had not actually killed her husband. As for the long-term consequences of Menifee's actions, her husband testified at the sentencing hearing that he had been unable to work in the year-and-a-half since the shooting and that he was still recovering from the incident.

Regarding her character, Menifee emphasizes the testimony of family friend Major Boone, who stated that Menifee is "a very sweet person," (Tr. p. 22), and that her husband had abused her. Also, Menifee herself testified that her husband is an alcoholic and that she "went through a lot" because of his alcoholism. (Tr. p. 25). On the other hand, we first note

that this is not Menifee's first run-in with law enforcement. She was convicted of check deception in 2000, and between 1996 and 1999, she was charged with eighteen additional counts of the same crime, many of which were dismissed after Menifee paid restitution. Though we recognize that check deception is substantially less serious than attempted murder, "a record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State." *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). In addition to her arrest record, the pre-sentence investigation report states, "When [Menifee] appeared for trial on June 7[,] 2007, on the Instant Offense, she was found in Contempt of Court and arrested for Public Intoxication." (Appellant's App. Vol. II p. 33).

We have certainly encountered defendants of poorer character than Menifee. However, her crime was particularly brutal—this was very close to being a murder case—and the consequences to Mr. Menifee were serious. Equally important is the fact that the executed portion of Menifee's sentence could not be any shorter than it already is: twenty years, the statutory minimum. Our supreme court has rejected the argument that a sentence for attempted murder is suspendible below the minimum sentence. *Hoskins v. State*, 563

N.E.2d 571, 578 (Ind. 1990) (citing *Haggenjos v. State*, 441 N.E.2d 430 (Ind. 1982), *reh'g denied*).[1] Menifee has failed to persuade us that her sentence is inappropriate.

CONCLUSION

Based on the foregoing, we conclude that Menifee's sentence is not inappropriate.

Affirmed.

KIRSCH, J., and MAY, J., concur.

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[1] Menifee argues that Justice DeBruler's dissent in *Haggenjos* "is more well-reasoned" than the majority opinion and that "in light of the evolution of case law since *Haggenjos* was decided in 198[2], reconsideration is appropriate." (Appellant's Br. p. 6). We first note that because Menifee did not make this argument before the trial court, it is waived. *See Turner v. State*, 870 N.E.2d 1083, 1085 (Ind. Ct. App. 2007) ("As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court."). More importantly, even if we were persuaded by Justice DeBruler's dissent in *Haggenjos*, "[s]upreme court precedent is binding upon us until it is changed either by that court or by legislative enactment." *Dragon v. State*, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002), *trans. denied*.