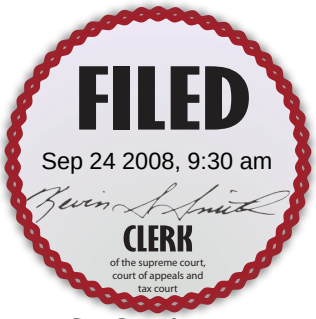

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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY W. ALLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A01-0802-CR-47
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0403-FC-00160

September 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Timothy W. Allen appeals his conviction for Class C felony battery with a deadly weapon for stabbing his girlfriend's son. Specifically, he contends that the evidence is insufficient to prove that he was the one who performed the stabbing, the State failed to rebut his claim of self-defense, fundamental error occurred when the trial court admitted evidence of his prior incidents of battery, the trial court's sentencing statement is not sufficient, and his eight-year sentence with two years suspended is inappropriate. Finding no error and that his sentence is appropriate, we affirm.

Facts and Procedural History

The facts most favorable to the verdict reveal that on March 21, 2004, brothers Frank and Brian Davis went to the Brookville, Indiana, mobile home of their sister, Angela Davis, who lived in the same mobile home park as their mother, Donna Davis. Both brothers had been drinking a little. At some point, Brian went down to his mother's mobile home, where he regularly stayed. While there, he realized that Allen, his mother's on-and-off boyfriend for the past five years, was there, too. It was well known that Brian, and for that matter Frank, did not like Allen, who was close in age to them. Brian tried to get into the bedroom to see Allen, but Allen prevented him from entering, so Brian left but warned Allen that he would be back. As Brian left, Donna encouraged Allen to leave, but Allen said he was tired of running from her sons and stayed.

Brian returned to his sister's mobile home and told Frank that he was "about to fight Timmy Allen." Tr. p. 48. He then ran back to his mother's trailer with Frank following right behind. Frank accompanied Brian "[t]o keep [his brother] from getting

hurt."[1] *Id.* at 23. Frank had no intention of fighting that night. As soon as the brothers entered their mother's mobile home, Allen, who was in the hallway, bombarded them with household items, including a telephone and a vacuum hose. When Allen ran out of things to throw, Frank, who was unarmed, ran toward Allen and was stabbed four times. Frank, whose "intestines started falling out," fell to the floor. *Id.* at 26. Brian observed Allen with what he thought was a Buck knife with a four-inch blade. Allen ran into the bathroom and locked the door, at which point Brian called 911. Frank was airlifted to the University of Cincinnati, underwent two surgeries, and survived.

Police found two knives in the mobile home after the stabbing. One of the knives was found in the bathroom with Allen. Near the knife was a damp washcloth. Donna did not know how this knife, which was a kitchen knife, ended up in the bathroom. Allen, however, said the knife had been there for three weeks because they had been using it to pry open the door. The second knife, a pocketknife, was found in Brian's pocket.

Allen told police during an interview that he was wrestling with Frank and did not know how Frank was stabbed. Allen later told a jailer, though, that Frank tripped and fell on the knife.

The State charged Allen with Class C felony battery with a deadly weapon.[2] A jury trial ensued. Allen testified in his own defense at trial, and the jury found him guilty as charged. The trial court sentenced him to eight years with two years suspended to probation, to be served on home detention. The court also ordered Allen not to have any contact with the victim and his family and entered judgment against Allen for

[1] There had been previous altercations involving Allen and the Davis brothers.

[2] Ind. Code § 35-42-2-1(a)(3).

$33,005.00, which represented lost wages and health care that was not covered by insurance or an agreement with the providers. Allen now appeals.

Discussion and Decision

Allen raises three issues on appeal. First, Allen contends that the evidence is insufficient to support his conviction and that the State failed to rebut his claim of self-defense. Second, Allen contends that fundamental error occurred when the trial court admitted evidence of his prior incidents of battery. Finally, Allen contends that the trial court's sentencing statement is not sufficient and that his sentence is inappropriate.

I. Sufficiency of the Evidence

Allen contends that the evidence is insufficient to support his conviction for Class C felony battery with a deadly weapon. Specifically, he argues that the evidence does not prove that he stabbed Frank. Instead, Allen alleges that Brian could have inadvertently stabbed his brother Frank. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of

innocence." *Id.* at 147 (quotation omitted). The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

In order to convict Allen of battery as charged in this case, the State had to prove that he knowingly or intentionally touched Frank in a rude, insolent, or angry manner and that the offense was committed by means of a deadly weapon, to wit, a knife. Ind. Code § 35-42-2-1(a)(3). The evidence shows that after Brian promised Allen that he was going to return to his mother's mobile home and shortly thereafter both Brian and Frank entered their mother's mobile home, Allen pelted them with a telephone and a vacuum hose. When Allen ran out of things to throw at the brothers, Frank—unarmed—ran toward Allen but was stabbed four times before reaching Allen. At this point, Brian "thought" he saw Allen with a "Buck knife with a four inch (4") blade." Tr. p. 50. Allen then ran to the bathroom and locked himself inside. Police found two knives in the mobile home. One of the knives was found in the bathroom with Allen. Allen claimed the knife had been there for three weeks, but Donna did not know how the knife got there. The other knife was found in Brian's pocket. In addition, Allen told conflicting stories of how Frank was stabbed. The evidence is sufficient to prove that Allen, and not Brian, stabbed Frank.

Allen next argues that "[e]ven if the State proved beyond a reasonable doubt that [he] stabbed Frank Davis, the record establishes [he] acted in self defense." Appellant's Br. p. 17. 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. *Wilson v. State*, 770 N.E.2d 799, 801 (Ind. 2002). 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. *Id.* at 800-01.

A valid claim of self-defense is a legal justification for an otherwise criminal act. *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. Ind. Code § 35-41-3-2. 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. *Wilson*, 770 N.E.2d at 800. 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. *Id.*

The record shows that Allen was a willing participant in the altercation that led to Frank's stabbing. That is, when Brian left his mother's mobile home and indicated he would be returning, Donna encouraged Allen to leave, but Allen said he was not running from her sons anymore. At that point, Allen made the conscious decision to stay. When Brian and Frank entered the mobile home minutes later, Allen was the first to start a physical encounter with the brothers by throwing a telephone and a vacuum hose at them from the hallway. When Allen ran out of things to throw and Frank ran toward him, Allen stabbed him four times, exposing his intestines. One of the stab wounds was in Frank's back. Because Allen was a willing participant, the State successfully rebutted

his self-defense claim. The evidence is therefore sufficient to rebut Allen's self-defense claim.

II. Admission of Evidence

Allen next contends that the trial court erred in admitting evidence of his "alleged commission of prior incidents of Battery and his conviction for Battery with respect to Donna Davis"[3] because such evidence is "irrelevant, inadmissible and highly prejudicial." Appellant's Br. p. 22. For example, Frank testified at trial that Allen has "ball batted" people before, and Brian testified that Allen has "been known to use weapons." Tr. p. 30, 56. Conceding that there was no objection to this evidence at trial, Allen alleges that it constitutes fundamental error. The "fundamental error" exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

Indiana Evidence Rule 404(b) provides that although evidence of a defendant's prior misconduct may not be admitted to prove that the defendant acted in conformity with a certain character trait, such evidence is admissible for other purposes. In particular, such evidence may be admissible as proof of a defendant's intent. The intent exception to Rule 404(b) is available only if the defendant goes beyond merely denying

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[3] The following exchange occurred during Frank's testimony:

> Q: Okay. Why was [Brian] so crazed then? Was there anything else that could be going on there with him?
> A: Because my mom has been beat up so many times by this man, and I – regardless what our mom does, we love her and there [are] police reports where he has beat her.

Tr. p. 38. In addition, Allen testified that he had been convicted of the battery of Donna. *Id.* at 123.

the charged culpability and affirmatively presents a claim of contrary intent. *Evans v. State*, 727 N.E.2d 1072, 1079-80 (Ind. 2000). A defendant's claim of self-defense is a sufficient claim of contrary intent to open the door to Rule 404(b)'s intent exception. *Id.* at 1080. Moreover, the evidence is admissible to rebut the defendant's claim that the alleged victim was the initial aggressor. *Id.*

Here, Allen's attorney argued during opening statements that Allen "didn't bring this on." Tr. p. 6. Defense counsel added that Allen was not "looking for a fight," did not "start trouble," and was trying to "keep [the brothers] away." *Id.* at 6-7. And on appeal, Allen argues that he acted in self-defense. The evidence of Allen's prior incidents of battery, with weapons nonetheless, tends to refute his claim that, on this occasion, the brothers were the initial aggressors and he acted purely in self-defense. Accordingly, this evidence was relevant to rebut Allen's claim of self-defense and was not unduly prejudicial. There is no fundamental error on this issue. As for Allen's argument that his conviction for the battery of Donna does not fall under Evidence Rule 609[4] and therefore should not have been admitted into evidence, he again fails to prove that this rises to the level of fundamental error. As explained above, Allen's batteries of Donna are relevant to rebut his self-defense claim of her sons.

[4] Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

III. Sentencing

Allen attacks his sentence on two grounds. First, he argues that the trial court's sentencing statement is not sufficient. Second, he argues that his sentence is inappropriate.

We initially observe that although Allen was sentenced in December 2007, which is after our sentencing statutes were amended in April 2005, this crime occurred in March 2004. Because the "sentencing statute in effect at the time a crime is committed governs the sentence for that crime," *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007), we address Allen's sentence under the former presumptive sentencing scheme.

Allen first argues that "[t]he trial court made no explicit finding of aggravating and mitigating circumstances in either its oral or written sentencing order. . . . The minimal sentencing statement is not sufficient, as it fails to reveal the trial court's rationale for imposing the maximum sentence." Appellant's Br. p. 30 (record citations omitted). As seen below, although the trial court's sentencing statement could have been more specific, it does reveal the trial court's rationale, specifically, Allen's criminal history and probation violations:

> Well, the Pre-Sentence indicates, uh—four (5) [sic] separate batteries. Uh, other resisting kinds of charges, mischief kinds of charges, destruction of property as misdemeanors not—not, uh—anything large scale. The, uh—Court would . . . [cite] to the . . . Fayette County case where in the Aggravated Battery was Count II, on page five (5) of the Pre-Sentence Report and, uh—note that it is not unlike the case before us. That he was . . . placed on probation in that cause. That the restitution . . . in that cause was not all together different [than] . . . this matter. That one being a[t] thirty-one thousand one hundred and seventy dollars ninety-three cents ($31,170.93). Our current one being at around thirty-three thousand five dollars ($33,005.00). Uh, and, that's only because the family was able to negotiate, uh—with the hospital to . . . pay . . . for . . twenty (20) some odd

> thousand dollars. . . . Pre-Sentence Report also indicates . . . a . . . probation violation petition filed 8/25/98, one that was amended 9/09 of 2000 and one that was amended 8/11 of 2000. There was a probation violation filed 9/21 of 2001 and the admission and agreement on that was, uh—8/26 of "04". There was a probation violation filed 9/21 of "01". I think that's the same one. It's the same admission date. Probation violation filed 2/02 of "07". Um, admitted violation filed 8/10 of "07". So, there's uh—three (3) or four (4) . . . probation violations, admissions and sentences pursuant to . . . those matters that . . . occurred while . . . [Allen] was placed on probation. Uh, the Court will find based on, uh—those matters taken from the Pre-Sentence Report, uh—the victim's impact statement as discussed here today, uh, that the sentence in this matter should be eight (8) years with the Department of Corrections. There should be no . . . allowance for work release . . . . [T]he court will not recommend probation in this matter because, uh—based upon the Pre-Sentence Investigation Report, . . . there have been probation violations filed indicating that [Allen] has not . . . progressed well under those terms of probation. [T]he Court specifically [c]ites again to . . . 21C01-9412-CF-183, Possession of Marijuana as a Class D felony, Aggravated Battery as a Class C felony, Count IV, Leaving the Scene of An Accident Causing Serious Bodily Injury as Class D felony. Uh, and notes the Fayette County sentence of three (3) years on the felonies, uh—the D Felonies and eight (8) years on the C Felonies. Uh, all of that was ran concurrent[ly] so that total number that could [have] been received in that cause was eight (8), uh—with everything running concurrent[ly], and the Court at that time suspended five (5) years to probation, uh—on certain conditions. And uh, --right after that 8/25/98, . . . probation violation petitions filed and amended . . . resulting in a [judgment] of thirty-one thousand dollars ($31,000) and sentenced to twenty-one (21) additional months in that cause. So, . . . the net result of that was that he did four (4) years . . . ended in 2003, and then in 2004, this case occurred. So, . . . not more than a year or so after that matter . . . were these allegations . . . raised. So, . . . the . . . period of time in this matter that should be suspended is . . . two years, no contact with the victim, their families . . . and there are no . . . requirements other than reporting [while on probation].

Sent. Tr. p. 11-13. The trial court details Allen's criminal history and his probation violations and points out that this crime occurred on the heels of his release for a similar crime. These are proper aggravators. The trial court's oral sentencing statement is therefore sufficient. *See Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007) (citing

Dumbsky v. State, 508 N.E.2d 1274, 1278 (Ind. 1987); *Abercrombie v. State*, 275 Ind. 407, 417 N.E.2d 316, 319 (1981)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Finally, Allen argues that his sentence of eight years with two years suspended is inappropriate in light of the nature of his offense and his character pursuant to Indiana Appellate Rule 7(B). Appellate Rule 7(B) provides, "The 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." The burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for Allen's character, as he concedes in his brief, he "has an extensive criminal history consisting of 33 prior convictions since 1988," of which twenty-six are misdemeanors. Appellant's Br. p. 31. In addition, Allen has several probation violations. Despite Allen's alleged troubled youth, he has had many chances, including probation, to get his act together but has failed at every chance.

As for the nature of the offense, Allen speculates that had the police been called early on (as he asked Donna to do), perhaps no one would have been hurt. Allen also commends himself for doing everything in his power to avoid conflict with the Davis brothers. Although it is true that Brian is the one who went to his mother's mobile home and became angry when he found Allen sleeping there, Allen had the clear opportunity to leave at that point. In addition, Allen is the one who initiated a physical confrontation when the Davis brothers returned by throwing household items at them. Perhaps if Allen had chosen a different course of action at that point, no one would have been hurt either.

Moreover, Allen stabbed Frank, who was unarmed, four times, exposing his intestines and nearly causing his death. At the time of the stabbing, Frank had yet to touch Allen. This was an extreme course of action to take. Allen has failed to persuade us that his eight-year sentence with two years suspended is inappropriate.

Affirmed.

KIRSCH, J., and CRONE, J., concur.