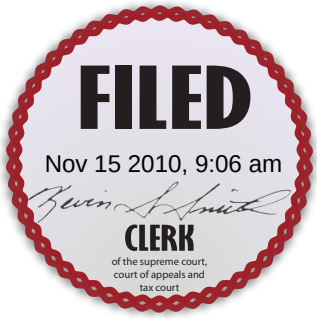

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IN THE COURT OF APPEALS OF INDIANA

DEWAYNE E. RHYE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-1004-CR-215
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0905-FD-419

November 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Dewayne Rhye ("Rhye") was convicted in Vanderburgh Superior Court of Class D felony conspiracy to commit theft, Class D felony criminal recklessness resulting in serious bodily injury, and Class B misdemeanor criminal recklessness. He was ordered to serve consecutive sentences for each conviction, resulting in an aggregate sentence of three and one-half years. Rhye appeals his sentence and argues that the trial court abused its discretion by imposing consecutive sentences and that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Facts and Procedural History

In April 2009, Rhye asked a friend, Roger Curtis ("Curtis"), to steal anhydrous ammonia, and Rhye agreed to pay him $200. On April 24, 2009, at approximately 9:30 p.m., Rhye and Curtis drove to the Warrick County Co-op. Rhye dropped Curtis off and then drove away. Curtis proceeded to the anhydrous ammonia tank, hooked up tubing and a cap to the tank, and turned the tank on. Because the cap had a hole in it, more anhydrous ammonia came out of the tank than expected. Curtis attempted to shut the valve off, but could not do so. Curtis fled, but left his equipment hooked up to the tank with the valve open. Curtis called Rhye, who picked him up and drove him back to his residence.

Several individuals driving in the area near the Co-op unknowingly drove into the large cloud of anhydrous ammonia caused by Curtis's and Rhye's attempted theft. One victim, Karen Ours, felt like she was "burning" and she could not breathe. She was hospitalized for several hours, and continued to suffer symptoms for three weeks after exposure.

On May 8, 2009, Rhye was charged with Class D felony conspiracy to commit theft, Class D felony attempted illegal possession of anhydrous ammonia, Class D felony criminal recklessness resulting in serious bodily injury, and Class B misdemeanor criminal recklessness. A jury trial was held on February 17, 2010, and Rhye was found guilty as charged.

Rhye's sentencing hearing was held on March 10, 2010. Rhye was ordered to serve consecutive terms of eighteen months for Class D felony conspiracy to commit theft, eighteen months for Class D felony criminal recklessness resulting in serious bodily injury, and six months for Class B misdemeanor criminal recklessness, for an aggregate sentence of three and one-half years. The trial court declined to enter judgment on the Class D felony attempted illegal possession of anhydrous ammonia count on double jeopardy grounds. Rhye now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Rhye argues that the trial court abused its discretion when it ordered him to serve his sentence for Class D felony criminal recklessness resulting in serious bodily injury consecutive to his sentence for Class B misdemeanor criminal recklessness.[1] Rhye also argues that his three and one-half year sentence is inappropriate in light of the nature of the offense and the character of the offender.

First, we address Rhye's argument concerning his consecutive sentences. Rhye contends that because the State was required to prove that Rhye inflicted serious bodily

[1] Rhye does not challenge the trial court's decision to impose consecutive sentences for Class D felony conspiracy to commit theft and Class B misdemeanor criminal recklessness.

on Karen Ours to convict him of Class D felony criminal recklessness, and her injury was not "'greater than the elements necessary to prove the commission of the offense[,]'" the trial court improperly relied on Ours's injuries to impose a consecutive sentence on this charge. Appellant's Br. at 6 (quoting I.C. § 35-38-1-7.1(a)(1)).

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds on reh'g, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Id. (quotation omitted). See also Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008) ("The decision to impose consecutive sentences lies within the discretion of the trial court.").

Pursuant to Indiana Code section 35-50-1-2, to "determine whether terms of imprisonment shall be served concurrently or consecutively," the trial court may consider the aggravating and mitigating circumstances enumerated in Indiana Code section 35-38-1-7.1(a) and (b). Moreover, it is a well established principle that multiple crimes or victims constitute a valid aggravating circumstance that a trial court may consider in imposing consecutive sentences. O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001); Townsend v. State, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007), trans. denied.

Rhye was convicted of Class D felony criminal recklessness resulting in serious bodily injury to Karen Ours. He was also convicted of Class B misdemeanor criminal recklessness for performing "an act that created a substantial risk of bodily injury to

another person, to wit: Mary Sallee, Stan Lindauer, Chad Stalker, C.S., R.S., Nicholas Dewig, John Rye, Zachary Bittner, and/or Donald Boston." Appellant's App. p. 109.

Contrary to Rhye's argument, the trial court did not rely solely on Ours's injuries in deciding to impose consecutive sentences. The trial court also concluded that consecutive sentences were warranted because

> to do otherwise would be to gravely diminish the seriousness of the harm that [Rhye's] behavior caused and the threat, the real threat to the lives and health and welfare of the innocent people that were caught up in this and to the people who were called to the scene. Firefighters, the law enforcement officers, who responded so quickly and professionally who were also at risk from what you had done.

Tr. p. 302. Rhye's attempt to steal anhydrous ammonia caused injury and the risk of injury to many individuals. We therefore conclude that the trial court did not abuse its discretion when it ordered the sentence for Count Three, Class D felony criminal recklessness to be served consecutive to the sentences for Class D felony conspiracy to commit theft and Class B misdemeanor criminal recklessness.

Rhye also argues that his aggregate three and one-half year sentence is inappropriate in light of the nature of the offense and the character of the offender because he has no prior criminal history, he did not intend to harm anyone, and he expressed remorse at the sentencing hearing. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. Alvies v. State, 905 N.E.2d 57, 64 (Ind. Ct. App. 2009) (citing Anglemyer, 868 N.E.2d at 491). This appellate authority is implemented through Indiana

Appellate Rule 7(B), which provides that a 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." Anglemyer, 868 N.E.2d at 491.

However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007).

Rhye was ordered to serve consecutive eighteen-month sentences for his two Class D felony convictions. Eighteen months is the advisory sentence for a Class D felony. I.C. § 35-50-2-7. Rhye was also ordered to serve a consecutive maximum six-month sentence for his Class B misdemeanor conviction. I.C. § 35-50-3-3.

Concerning the nature of the offense, Rhye asked Curtis to steal anhydrous ammonia, and Curtis assumed Rhye needed it to make methamphetamine. Tr. p. 139. Rhye drove Curtis to the Co-op, and their attempt to steal the anhydrous ammonia caused the release of an anhydrous ammonia cloud. Several individuals were exposed to the anhydrous ammonia, causing bodily injury and/or creating a substantial risk of bodily injury to them. This included serious bodily injury to Karen Ours who was hospitalized for several hours and exhibited symptoms for three weeks after she was exposed to the anhydrous ammonia.

Concerning the character of the offender, the trial court assigned little weight to Rhye's lack of criminal history because "the behavior of the defendant in this case indicated that he was involved in other criminal behavior, that he committed other crimes during the course of this . . . episode that he was not charged with[.]" Tr. p. 300.

Under the facts and circumstances before us, we conclude that Rhye's aggregate three and one-half year sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.