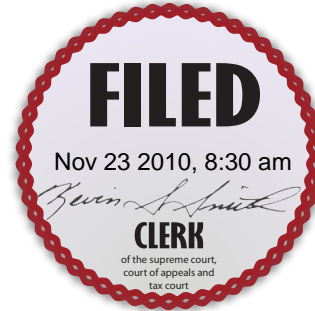


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN THRASH,)
)
 Appellant- Defendant,)
)
 vs.) No. 49A02-1005-CR-483
)
 STATE OF INDIANA,)
)
 Appellee- Plaintiff,)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0809-FB-216760

November 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Steven Thrash was convicted, following a jury trial, of aggravated battery, a Class B felony, and sentenced to ten years with four years suspended. Thrash appeals and raises two issues, which we restate as: 1) whether sufficient evidence rebuts Thrash's claim of self-defense; and 2) whether Thrash's sentence is inappropriate in light of the nature of his offense and his character. Concluding the evidence is sufficient but Thrash's ten-year sentence is inappropriate, we affirm in part and revise and remand in part.

Facts and Procedural History

On August 6, 2008, twenty-two-year-old Thrash was at a pub socializing with friends Kristin Kroft, Tiffany Ehret, Ross Bromstrup, and Lea Nichols. Nichols was Thrash's girlfriend at the time. At some point in the evening, Steven Spengler came over and sat down at the friends' table and began making unwanted flirtations and advances toward Kroft and Nichols. Kroft and Nichols eventually asked Spengler to leave, but to no avail. According to Spengler, Thrash then approached him and asked him to leave, and Spengler placed his hands on Thrash's shoulders. Spengler told Thrash that Thrash "didn't want to . . . go outside" and "I don't want to go outside with you." Transcript at 198. According to Thrash, Spengler accompanied these words by saying, "bitch, I'll kill you." Id. at 431.

Pub employee Robert Ramsdell heard a "loud crash," id. at 92, and seconds later saw Spengler lying motionless on the floor, on his back. Thrash was on top of Spengler. Witnesses recounted that while Spengler was on the floor and motionless, Thrash

punched Spengler in the face multiple times. Two patrons rushed over and pulled Thrash off of Spengler. At that time, Spengler had lost consciousness and was bleeding from his face. Spengler suffered injuries including a broken nose, injuries to both eye sockets, bone fractures between his eyes, a left cheekbone fracture, and a broken upper jaw. Treatment of these injuries required two surgeries and Spengler was hospitalized for eight days. Spengler's treating physician testified he must have been punched at least five times for such injuries to result. Spengler suffered from double vision for five to six months following the incident.

The State charged Thrash with aggravated battery, a Class B felony. A jury trial was held at which Thrash testified he did not intend to hurt Spengler but reacted out of fear because Spengler choked and threatened him. The jury found Thrash guilty as charged. The trial court held a sentencing hearing on January 6, 2010, and sentenced Thrash to ten years with six years executed and four years suspended. In April 2010, the trial court ordered Thrash to make restitution to Spengler in the amount of \$13,477.48. Thrash now appeals his conviction and sentence.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

Upon a challenge to the sufficiency of the evidence to rebut a claim of self-defense, we apply the same standard of review as for any claim of insufficient evidence. Kimbrough v. State, 911 N.E.2d 621, 635 (Ind. Ct. App. 2009). Accordingly, we neither reweigh the evidence nor judge the credibility of witnesses. Wilson v. State, 770 N.E.2d

799, 801 (Ind. 2002). We will reverse only if no reasonable person could say that the State disproved the defendant's claim of self-defense beyond a reasonable doubt. Id.

B. Self-Defense

“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(a). A person is justified in using deadly force and does not have a duty to retreat “if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony.” Id. However, 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.” Ind. Code § 35-41-3-2(e). When a defendant has raised a self-defense claim in a prosecution for aggravated battery, the State must disprove at least one of the following elements beyond a reasonable doubt: (1) the defendant was in a place where he had a right to be; (2) he did not provoke, instigate, or participate willingly in the violence; and (3) he had a reasonable fear of death or great bodily harm. Wilcher v. State, 771 N.E.2d 113, 116 (Ind. Ct. App. 2002), trans. denied.

Laying aside the question of whether Thrash was initially justified in using force to repel Spengler's touching of him,¹ multiple witnesses testified that Thrash continued to punch Spengler while he was on the ground and motionless. At that time Thrash no

¹ We note the equivocal evidence regarding whether, as Thrash testified, Spengler choked him and pulled him toward the ground. Nichols testified Spengler placed his arm around Thrash's neck, but Kroft testified she did not see Spengler do anything that looked like an attempt to harm Thrash.

longer had a reasonable fear of death or great bodily harm. The amount of force he continued to use was no longer necessary to repel the attack and was out of proportion to the requirements of the situation, with the result that Thrash became a willing participant in the violence. See Gerald v. State, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995) (“[T]he force used must be proportionate to the requirements of the situation. Where a person has used more force than is reasonably necessary to repel an attack, the right of self-defense is extinguished”) (citation omitted), trans. denied. In determining whether the degree of force that the defendant exerted exceeded the bounds justified to defend himself, the extent and severity of the victim’s injuries are relevant. Martin v. State, 784 N.E.2d 997, 1006 (Ind. Ct. App. 2003). The State’s medical evidence showed that Thrash punched Spengler at least five times and inflicted multiple severe injuries. Thus, the jury could reasonably have concluded the State proved Thrash’s use of force against Spengler was not reasonable. The evidence is therefore sufficient to sustain Thrash’s conviction despite his claim of self-defense.

II. Inappropriate Sentence

This court has authority to revise a sentence “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.” Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans denied. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Inappropriateness review includes

consideration of all aspects of the penal consequences imposed by the trial court, including the length of the total sentence and the fact that a portion of the sentence is suspended. Davidson v. State, 926 N.E.2d 1023, 1025 (Ind. 2010). “[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

The trial court noted as an aggravating factor Thrash’s two prior offenses, separate cases of theft as a Class D felony. Both offenses were charged within five months before Thrash’s present offense and were not reduced to convictions until after Thrash was charged in the present case. Thus, according to the pre-sentence investigation report (“PSI”), Thrash “was not on Probation/Parole” at the time of the present offense. PSI at 4.² The PSI does not indicate any juvenile delinquency in Thrash’s past.

The trial court noted as mitigating circumstances Thrash’s subjective belief he was acting in self-defense and Spengler’s actions which “to a certain extent . . . contributed” to the offense. Tr. at 571. The sentencing range for Thrash’s offense, a Class B felony, is six to twenty years with the advisory sentence being ten years. Ind. Code § 35-50-2-5. In sentencing Thrash to ten years with six years executed and four years suspended, the trial court explained that it was constrained by law to impose at least six years of executed time and, in view of Thrash’s prior offenses, he should have additional

² The State asserts that “[p]rior attempts at probation have been wholly ineffective at altering [Thrash]’s behavior.” Brief of Appellee at 9. However, it is clear from the PSI that Thrash was not placed on probation for the theft convictions until after he committed the present offense, and the PSI states Thrash has “no known revocations.” PSI at 4.

suspended time as an incentive to lead a law-abiding life following his release from prison.³

Regarding the nature of the offense, Thrash's offense strikes us as less severe than the typical instance of aggravated battery. Aggravated battery as a Class B felony is defined as the knowing or intentional infliction of injury on a person "that creates a substantial risk of death or causes: (1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) the loss of a fetus[.]" Ind. Code § 35-42-2-1.5. The proof at trial was only that Thrash caused a protracted impairment of Spengler's vision, not a permanent disfigurement or disability nor a substantial risk of death. Thus, Thrash's actions, though violent, fall on the lower end of what constitutes aggravated battery. Further, as the trial court recognized, Thrash's culpability is somewhat mitigated by Spengler's role in precipitating their physical encounter. See Ind. Code § 35-38-1-7.1(b)(3) (providing it may be considered a mitigating circumstance that victim induced or facilitated the offense).

Regarding Thrash's character, his prior thefts are dissimilar to the present offense, and there is no indication that aside from the present offense he has ever been arrested or charged for violent conduct. The record shows Thrash is a hard-working individual: following graduation from high school he has worked as a pipefitter, earning up to \$24 per hour, and attended Ivy Tech Community College for two years during that time. Thrash also completed most of a multi-year apprenticeship in the local steamfitters union, an apprenticeship he will have an opportunity to "reinstate" following his incarceration.

³ Thrash concedes that the minimum sentence of six years for his present offense is non-suspendible. See Ind. Code § 35-50-2-2(b)(4)(T) (providing trial court may suspend only that part of the sentence for aggravated battery that is in excess of the minimum).

Tr. at 523. Thrash has strong support from family, friends, and the community as evidenced by the thirteen letters of recommendation written to the trial court on his behalf. The trial court commented on the considerable number of persons who attended the sentencing hearing or testified in support of Thrash's character at sentencing. At the sentencing hearing, Thrash expressed his remorse for causing Spengler's injuries and acknowledged that "I reacted on instinct, and now I know that that's not right, and . . . I learned from it." Id. at 551. Three months after he was sentenced, Thrash agreed, without a contested hearing, to be liable for more than thirteen thousand dollars in restitution to Spengler, even when explained by the trial court that restitution in a criminal proceeding is not dischargeable in bankruptcy as is a civil tort judgment. This factor, too, weighs in favor of Thrash's character. See Ind. Code § 35-38-1-7.1(b)(9) (providing it may be considered a mitigating circumstance that defendant has made or will make restitution to victim).

While we give "due consideration" to the trial court's sentencing decision, App. R. 7(B), inappropriateness review does not involve great deference to the trial court. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). The current version of Rule 7(B), allowing revision of "inappropriate" even if not "manifestly unreasonable" sentences, "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). Thus, the dissent's reference to the trial court's discretion in sentencing focuses more on the law in its prior incarnation than the current standard of review as directed by our supreme court.

Considering all of these factors together, we conclude Thrash’s ten-year sentence is inappropriate in light of the nature of his offense and his character. We therefore revise his sentence to eight years, with six years executed as required by Indiana Code section 35-50-2-2(b)(4)(T) and two years suspended to probation. See Filice v. State, 886 N.E.2d 24, 40 (Ind. Ct. App. 2008) (revising sentence for two Class B felonies from ten years to eight years because the “offenses were not worse than other offenses of this nature and [defendant’s] character [was] persuasively mitigating”), trans. denied. This cause is remanded for a revised abstract of judgment consistent with this opinion.

Conclusion

The evidence is sufficient to rebut Thrash’s claim of self-defense, but his ten-year sentence is inappropriate. Thrash’s conviction is affirmed and his sentence is revised to eight years with six years executed and two years suspended.

Affirmed in part and revised and remanded in part.

MAY, J., concurs.

VAIDIK, J., concurs in part, dissents in part with separate opinion.

**IN THE
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STEVEN THRASH,)	
)	
Appellant-Plaintiff,)	
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vs.)	No. 49A02-1005-CR-483
)	
STATE OF INDIANA,)	
)	
Appellee-Defendant.)	
)	

VAIDIK, Judge, concurring in part, dissenting in part.

I respectfully dissent from the majority’s decision to revise Thrash’s sentence for aggravated battery from ten years with four years suspended to eight years with two years suspended. Because I believe that Thrash’s sentence is not inappropriate, I would affirm.

Initially, I note that the trial court sentenced Thrash to the advisory term of ten years and suspended four years thus requiring Thrash to serve the mandatory minimum sentence of six years. Of the four years suspended, the trial court ordered Thrash to serve only two years on probation, which left two years of the suspended sentence not subject to probation. In its revised sentence, the majority requires Thrash to serve the mandatory minimum six-year executed sentence and two years of probation but then removed the remaining two-year suspended sentence. In my opinion, this slices the discretion of the trial court too thin. In other words, given the deference to which a trial court is entitled in sentencing, I cannot say that a trial court’s sentence is inappropriate because it requires

an additional two years of a suspended sentence within an otherwise advisory sentence. This is not the type of “outlier sentence” which requires correction.

Furthermore, contrary to the majority’s characterization, I believe that the nature of the offense is severe. Thrash punched Spengler at least five times and continued to do so while Spengler was on the ground motionless. Spengler, who lost consciousness, suffered a broken nose, injuries to both eye sockets, bone fractures between his eyes, a left cheekbone fracture, and a broken upper jaw. Spengler underwent two surgeries, was hospitalized for over a week, and suffered from double vision for five to six months following the attack. The nature of the offense alone justifies the trial court’s partially suspended advisory sentence.

Finally, even though Thrash’s two felony theft charges were not reduced to judgment until after Thrash was charged in the present case, both thefts occurred and were charged before this offense. Thus, Thrash’s prior run-ins with the law did not deter him in this instance. Accordingly, I believe that the majority places too much emphasis on Thrash’s lack of prior criminal history.

I would therefore affirm the trial court’s decision in all respects.