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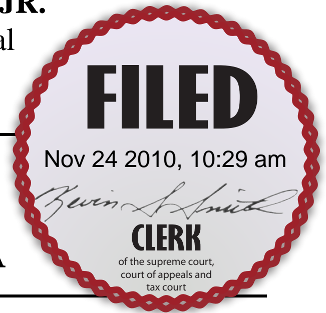


# IN THE COURT OF APPEALS OF INDIANA

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| ROGER SLOAN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-1002-CR-195 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
The Honorable Stanley E. Kroh, Commissioner
Cause No. 49G04-0910-FC-88647

**November 24, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Roger Sloan appeals his conviction of and sentence for Class B felony battery[1] and being an habitual offender.[2] We affirm.

## FACTS AND PROCEDURAL HISTORY

On October 13, 2009, David Jones was stabbed five times in the left arm and shoulder in the parking lot of a bar. Sloan was arrested a few days later, after patrons of the bar identified him as the man that stabbed Jones. He was charged with Class C felony battery and the State amended the charging information to include a charge of Class B felony aggravated battery. The State also alleged Sloan was an habitual offender.

After a jury trial, Sloan was convicted of Class B felony aggravated battery and Class C felony battery. Sloan stipulated to being an habitual offender. The trial court vacated the Class C felony battery conviction to avoid exposing Sloan to double jeopardy and sentenced Sloan to twenty years for Class B felony aggravated battery. That sentence was enhanced by ten years for the habitual offender finding, for an aggregate sentence of thirty years of incarceration.

## DISCUSSION AND DECISION

1. <u>Sufficiency of the Evidence</u>

When reviewing the sufficiency of the evidence to support a conviction, we 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, and not ours, to assess witness

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[1] Ind. Code § 35-42-2-1.5.
[2] Ind. Code § 35-50-2-8.

credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when we are confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the verdict. *Id.* at 147.

Class B felony aggravated battery occurs when a defendant "knowingly or intentionally" inflicted injury on a victim and the injury caused "serious permanent disfigurement" or "protracted loss or impairment of the function of a bodily member or organ." Ind. Code § 35-42-2-1.5. The State alleged Sloan caused Jones to suffer "protracted impairment of the function of a bodily member, that is: use of arm and/or shoulder," (App. at 40), and "permanent disfigurement, that is: scarring." (*Id.* at 71.)

Sloan argues the State failed to prove Jones' injuries amounted to "serious permanent disfigurement" or "protracted loss or impairment of the function of a bodily member or organ," as required for his Class B felony conviction.[3] *See* I.C. § 35-42-2-1.5.

[3] Our legislature did not define "permanent," "disfigurement," "protracted," or "impairment." Therefore, we turn to our rules of statutory interpretation to determine and give effect to the intent of the legislature. *James v. State,* 755 N.E.2d 226, 230 (Ind. Ct. App. 2001), *trans. denied.* "We look to the plain language of the statute and attribute the common, ordinary meaning to terms found in everyday speech." *Id.*

"Permanent" means "continuing or enduring without fundamental or marked change." *Id*. (quoting Webster's Third New International Dictionary 1683 (1993)). "Disfigurement" is "to make less complete, perfect or beautiful in appearance or character: deface, deform, mar." *Id*. (quoting Webster's Third New International Dictionary 649 (1993)). "Protracted" is "to draw out or lengthen in time: prolong." *Neville v. State*, 802 N.E.2d 516, 518 (Ind. Ct. App. 2004) (quoting American Heritage Dictionary (3rd ed. 1994)), *trans. denied* (page number omitted in original opinion). "Impairment" is "the fact or state of being damaged, weakened, or

To support his argument, Sloan attempts to distinguish Jones' injury from cases in which victims were found to have suffered a "protracted impairment in function" of a body part, as required by Ind. Code § 35-42-2-1.5. *See*, *e.g.*, *Fleming*, 833 N.E.2d at 89 (sufficient evidence of "protracted impairment" when the victim, who was kicked in the face, had a crooked nose, had trouble breathing out of one side of his nose, had trouble blowing his nose, and was unable to distinguish some smells); *Mann v. State*, 895 N.E.2d 119, 122 (Ind. Ct. App. 2005) (sufficient evidence of protracted impairment when victim had muffled hearing for two months after being kicked in the head). We do not find those cases distinguishable, and note each result is fact-sensitive.

The State presented evidence it was "probably almost two weeks [after the battery] before [Jones] was able to really get up and move about." (Tr. at 90.) Jones testified that when he returned to work as a mechanic almost a month after the battery, he still could not lie on his back without pain. *Cf. Neville*, 802 N.E.2d at 518 (determining the jury did not properly find protracted impairment because the victim did not testify at trial and the State presented no evidence regarding how long the injury would cause loss or impairment of the victim's leg).[4]

At the time of trial, Jones had scars from the wounds he sustained from Sloan, he had a lack of sensation he opined might be nerve damage near one of the scars, and he still

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diminished." *Fleming v. State*, 833 N.E.2d 84, 89 (Ind. Ct. App. 2005) (quoting Black's Law Dictionary 754 (7th ed. 1999)).

[4] Sloan asserts, without explanation or citation to authority, that Jones' initial hospital stay being only six or seven hours precludes finding he experienced "serious permanent disfigurement" or "protracted loss or

experienced sharp pains near where the injuries occurred. Jones testified about the extent to which his injuries prevented him from working and the extent to which he was still experiencing pain at the time of the trial, which was three months after the battery. This was sufficient evidence of "protracted impairment" or "permanent disfigurement" to convict Sloan of Class B felony aggravated battery.

2. Appropriateness of Sentence

Sloan argues his sentence[5] is inappropriate based on his character and the nature of the offense. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E. 2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offense, the trial court found "the facts of this case to

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impairment of the function." Ind. Code § 35-42-2-1.5. We decline to so hold, as there is no apparent connection between the length of an initial hospital visit and the extent of lasting effects of an injury.

[5] The sentence range for a Class B felony is six to twenty years; the advisory sentence is ten years. Ind. Code § 35-50-2-5. For a sentence enhancement as a habitual offender, the trial court must first find a defendant committed two prior unrelated felony offenses. It may not enhance the sentence by "more than three (3) times the advisory sentence for the underlying offense," and "the additional sentence may not exceed thirty (30) years." Ind. Code § 35-50-2-8. Sloan argues pursuant to Ind. Code § 35-50-2-2, the minimum sentence for Class B felony aggravated battery, six years, was not available for suspension in this case.Sloan indicates he is only challenging the twenty-four years of his sentence that cannot be suspended. It is not clear from Sloan's brief what he is attempting to argue with this assertion, and thus is it waived. See T.R. 46 (A)(8) (requiring each argument to be supported by cogent reasoning).

be an aggravating factor in that you attacked someone with a deadly weapon and stabbed them, [sic] I think the evidence was, five times." (Tr. at 330.) Sloan notes there was no evidence he planned the attack, and all parties had been consuming alcohol, which may have "exacerbated the situation and caused tempers to run higher than ordinary." (Appellant's Br. at 11.) We decline to hold lack of planning and lowered inhibitions relieve Sloan of responsibility for his actions.

With regard to Sloan's character, one relevant factor is criminal history. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Sloan has fifteen convictions as an adult and had his first juvenile adjudication when he was eleven. His crimes have included theft, robbery, burglary, battery, forgery, resisting law enforcement, and operating a vehicle while intoxicated. Sloan had been out of jail for only thirty-seven days when he stabbed Jones. The court did not recognize the content of recorded jail telephone calls as an aggravating factor, but it noted the calls shed light on Sloan's character because in them he was "bragging about being able to get away with stabbing someone, and that gives the Court some concern coupled with your criminal history about the prospects of rehabilitation." (Tr. at 331.)

Sloan offers "his history of alcohol abuse and poverty as stressors that have made it difficult for him to conform to all of society's expectations. He also suffers from anti-social tendencies and anxiety, which only compound that problem." (Appellant's Br. at 11.)[6] The trial court found Sloan's age was a mitigating circumstance, as he was forty-nine years old at

the time of the crime and thus could be in jail until he was seventy-nine. The trial court also found Sloan's guilty plea to the habitual offender charge to be a mitigating circumstance. But it stated, "I think you had a choice that night of whether or not you went out in the parking lot, and whether you displayed and took your knife and stabbed the victim like you did." (Tr. at 331.)

We cannot say Sloan's newly-asserted mitigators or his age overshadow his significant criminal history, and when combined with the vicious nature of his offense, we cannot find his sentence inappropriate.

## CONCLUSION

There was sufficient evidence to support Sloan's conviction, and we cannot say his sentence is inappropriate based on his character and the nature of his offense. We therefore affirm.

Affirmed.

ROBB, J., and VAIDIK, J., concur.

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[6] It does not appear these asserted mitigators were presented to the trial court. Thus they are waived. *Rogers v. State*, 878 N.E.2d 269, 273 (Ind. Ct. App. 2007).