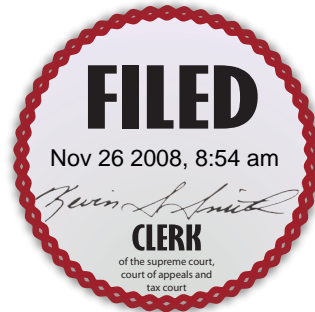


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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS K. MILLER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 79A02-0803-CR-291

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable J. Michael Trueblood, Judge *Pro Tempore*
Cause No. 79C01-0608-FC-47

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Thomas Miller appeals his conviction, following a bench trial, for Class C felony Battery Committed By Means of a Deadly Weapon,¹ for which he received a four-year sentence in the Department of Correction, with two years executed and two years suspended to probation. Upon appeal, Miller claims that (1) he was deprived of his right to counsel under the United States and Indiana Constitutions, (2) there was insufficient evidence to sustain his elevated Class C felony conviction, and (3) the trial court incorrectly concluded that he had a duty to retreat. We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of August 15, 2006, Mark Miles was sitting inside his car in a parking lot near the Love Shack in West Lafayette, waiting to make a left turn onto State Street. Two males approached Miles, one of whom was Miller. Miller walked up to within approximately one to two feet of Miles while the other male remained in front of Miles's car. Miller, who had a cup in his hand and smelled of alcohol, leaned toward Miles's window, which was open, and stated, "[H]ey bro, what's up, give me five." Tr. p. 25. Miles responded by telling Miller that he did not know him and to "take a hike." Tr. p. 25. Miller responded by asking, "[W]hat's the matter, you can't give a brother five?", to which Miles again responded that he did not know Miller and for him to "take a hike." Tr. p. 25.

Miller then walked toward the other male standing near the front of Miles's car and hit the hood of Miles's car with his fist. This angered Miles, who stepped out of his car and told Miller that in the event the car had sustained damage, "You're in trouble,

¹ Ind. Code § 35-42-2-1(a)(3) (2006).

pal.” Tr. p. 67. Upon finding no immediately apparent damage, Miles told Miller that he was “lucky” because if there had been damage, Miller would “go[] to jail.” Tr. p. 29. Miller responded by asking Miles, in a sarcastic voice, if Miles thought he was “cool” because he had a “Lexus,” prompting Miles, who was driving an Alero, to respond that Miller did not even know what a Lexus looked like. Tr. p. 29.

According to Miles and witness Karla Geyer, Miles attempted to walk away from Miller, but Miller followed Miles. As Miller neared Miles, Miles asked Miller, “[W]hat do you think you’re doing?” and told him to “back off,” and “stay away.” Tr. p. 31. Miller smirked, said a few muffled words, and continued to follow Miles. Miles told Miller to “back off” several additional times, to no avail. Miles turned to face Miller, and Miller “got right up to [Miles’s] face.” Tr. p. 32. Miller continued to be “rude” and “aggressive.” Tr. p. 32. Miles continued telling Miller to “back off,” Miller continued to approach, so Miles, assuming there would be a fight, pushed Miller back, causing him to stumble backward and fall approximately seven feet from Miles.

Miller responded by reapproaching Miles, pulling a knife from his pocket, swinging at Miles with his left hand in an allegedly “uppercut” motion, and stabbing Miles in the abdomen. Tr. p. 34. Miller then threw the knife in a nearby trash can and left the scene.

Officer Dave Lord of the West Lafayette Police Department responded to the scene, where he found Miles suffering from a stab wound. Officer Lord subsequently apprehended Miller, handcuffed him, and found the knife in a nearby trash can.

Miller does not dispute that he was under the influence of alcohol on the night in question. According to Miller, upon pulling the knife from his pocket, he opened it and warned Miles that he had a knife and to “back off,” at which point, according to Miller, Miles said, “What the f*** are you going to do with that?” and took a step toward Miller, causing Miller to stab him. Tr. p. 131.

On August 16, 2006, the State charged Miller with Class C felony battery committed by means of a deadly weapon (Count I) and Class D felony criminal recklessness (Count II). The trial court held a bench trial on September 26-27, 2007. At the close of evidence, the trial court stated that it had “reviewed the physical evidence and photographs” and that it would review a witness statement in State’s Exhibit 11. Tr. p. 161. The trial court then asked the parties to return at “about” a specified time, at which point the trial court indicated it “would have a verdict for [them].” Tr. p. 161. Both parties, each of whom responded by saying, “Thank you,” indicated their assent to these proceedings. Tr. p. 161.

Upon resuming the record, the court made the following statement: “It occurred to me that I did not permit counsel for either side to make a summation in this case. I will tell you I’m willing to allow you to do that the [sic] chances of it changing my decision are remote.” Tr. p. 161. The State responded by waiving closing argument. Defense counsel similarly responded by stating, “Judge—old Judge that I tried many cases in front of said [to me] don’t fall in love with the sound of voice [sic] so I would waive also.” Tr. p. 161.

The trial court found Miller guilty of Count I, Class C felony battery committed by means of a deadly weapon and, upon concluding that Count II was a lesser-included offense, entered judgment of conviction on Count I only. Following a January 4, 2008 sentencing hearing, the trial court sentenced Miller to a term of four years in the Department of Correction, with two years executed and two years suspended to probation. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Miller claims that the trial court effectively deprived him of his right to counsel by failing to provide for closing argument, that there was insufficient evidence to convict him of a Class C felony, and that the trial court incorrectly concluded that he had a duty to retreat pursuant to Indiana Code section 35-41-3-2 (2006). We address each of Miller's claims in turn.

I. Right to Counsel

Miller claims that the trial court denied his counsel the opportunity to make a closing argument, effectively depriving him of his right to counsel under both the United States and Indiana Constitutions. The State responds by arguing that defense counsel waived closing argument.

The Sixth Amendment right to counsel includes the right to present closing argument, even in a bench trial. *Herring v. New York*, 422 U.S. 853, 858-63 (1975). “While it may be that the opportunity to make final argument is required as a basic element of the adversary criminal process, . . . such does not preclude a waiver of the same” under appropriate circumstances. *See Lee v. State*, 175 Ind. App. 17, 20-21, 369

N.E.2d 1083, 1085 (1977) (citing *Herring*, 422 U.S. 853). Failure to request closing arguments at the proper stage of trial proceedings when arguments would otherwise be heard waives the claim that the right to present closing arguments was improperly denied. *See Casterlow v. State*, 256 Ind. 214, 217-18, 267 N.E.2d 552, 553-54 (1971). In the absence of a showing that defense counsel requested final argument or was denied an opportunity to make one, it cannot be said that the trial court denied a defendant's right to make a closing argument. *See Lee*, 175 Ind. App. at 21, 369 N.E.2d at 1085.

Here defense counsel had two opportunities to request closing argument but failed to take advantage of either. The record demonstrates that after the close of evidence on the second day of trial, the trial court concluded the record by indicating to the parties that it would consider the evidence and return with a verdict. Although this was the proper stage in the proceedings when closing arguments otherwise would have been heard, neither party asked to make a closing argument. There is nothing in the record suggesting pressure by the trial court requiring the parties to expedite the trial process or forgo closing argument. Indeed, the proceedings were sufficiently relaxed that the trial court made an offhand reference to a prior case involving one of the witnesses, and he suggested that the parties return for a verdict at "about" a specified time.

Later, when the trial court resumed the record, it indicated that the omission of closing arguments had been inadvertent and asked the parties if they wished to make a summation. Both parties responded by waiving closing argument. Although the trial court had indicated by this point that the chances were "remote" that any arguments would alter its decision, we are unconvinced that this statement was so decisive or

coercive that defense counsel lacked a meaningful opportunity to object or make a summation.

We acknowledge, as Miller points out, that other jurisdictions have declined to find waiver in cases where circumstances suggest that defense counsel had no meaningful opportunity to object. *See Hunter v. Moore*, 304 F.3d 1066, 1071-72 (11th Cir. 2002) (trial court immediately announced verdict upon close of evidence); *United States v. King*, 650 F.2d 534, 536-37 (4th Cir. 1981) (trial court permitted closing argument but told counsel a decision had already been made and that argument would be futile). In this case the trial court did not immediately announce the verdict at the close of evidence, nor did it condemn as futile any effort by counsel to present a summation. To the extent that Miller bases his claim on the court's referencing the "remote" chance that summation would affect the verdict, we must observe that, in this adversarial system, attorneys routinely object, make a record, and make arguments in order to promote and preserve their positions, even when all indications by the trial court suggest that a ruling in their favor may be remote.

Here, defense counsel failed to request closing argument at the close of evidence, refused the court's subsequent invitation to make a closing argument, and, having indicated his wish not to "fall in love with the sound of [his] voice," made the strategic decision not to overstate his case. Tr. p. 161. Given this record, we cannot say that trial counsel was deprived of a meaningful opportunity to object or make a summation. Accordingly, Miller's claim that the trial court deprived him of his right to closing

argument is waived. *See Casterlow*, 256 Ind. at 217-18, 267 N.E.2d at 553-54; *Lee*, 175 Ind. App. at 20-21, 369 N.E.2d at 1085-86.

Miller argues in addition that Article 1, Section 13 of the Indiana Constitution extends greater protections than does the Sixth Amendment with respect to the right to counsel and that this court should apply that extended right in the instant context of closing arguments. While Article 1, Section 13 does afford greater protections in certain circumstances, *see Malinski v. State*, 794 N.E.2d 1071, 1078 (Ind. 2003), Miller acknowledges that there is no case law suggesting that these greater protections apply in the context of closing arguments. Even if these protections did so apply, we are unpersuaded that they would provide relief in circumstances where the defendant had full representation by counsel and counsel made a strategic decision to forgo closing argument. We decline Miller's invitation to develop the law to that effect.

II. Sufficiency of the Evidence

A. Deadly Weapon

Miller next challenges the sufficiency of the evidence to support his Class C felony battery conviction by claiming that there was insufficient evidence to establish that his knife was a deadly weapon. Pursuant to the charging information, the State was required to prove that Miller (1) knowingly or intentionally; (2) touched Miles in a rude, angry, or insolent manner; (3) by means of a deadly weapon, specifically a knife. *See* Ind. Code § 35-42-2-1(a)(3). A “deadly weapon” is defined, in pertinent part, as any device or weapon that, “in the manner it is used, or could ordinarily be used, or is

intended to be used, is readily capable of causing serious bodily injury.” *See* Ind. Code § 35-41-1-8 (2006).

Our standard of review for sufficiency of the evidence claims is well-settled. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* Reasonable doubt is a doubt which arises from the evidence, the lack of evidence, or a conflict in the evidence. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

Miller’s argument focuses in large part upon his claim that Miles, who sustained a flesh wound to his abdomen, did not suffer serious bodily injury. Because the trial court stated, in finding Miller guilty, that Miles had sustained “serious bodily injury,” to buttress its conclusion that the knife was a deadly weapon, Miller attempts to challenge his conviction on the grounds that Miles did not suffer serious bodily injury.

Regardless of whether Miles actually sustained serious bodily injury, the operative question here is whether Miller’s knife was *capable* of inflicting serious bodily injury. *See* Ind. Code § 35-41-1-8. As Miller acknowledges, courts look to the capacity of an object to inflict serious bodily injury under the factual circumstances of the case in order to determine whether an instrument is a deadly weapon. *Phelps v. State*, 669 N.E.2d

1062, 1063 (Ind. Ct. App. 1996). In evaluating whether sufficient evidence exists to establish the existence of a deadly weapon, we look to “whether the weapon had the actual ability to inflict serious injury under the fact situation and whether the defendant had the apparent ability to injure the victim seriously through use of the object during the crime.” *Whitfield v. State*, 699 N.E.2d 666, 670 (Ind. Ct. App. 1998), *trans. denied*.

Notably, defense counsel conceded at sentencing that Miller’s knife, which had a one-and-one-half-inch blade, qualified as a “deadly weapon.” Tr. p. 173. Although Miller argues that this was a relatively small knife and that it was used primarily as a “box cutter,” we are uncertain as to how these factors suggest that it was not a deadly weapon. Both pocket knives and utility knives have been held to be deadly weapons. *See Hollowell v. State*, 707 N.E.2d 1014, 1020-21 (Ind. Ct. App. 1999) (pocket knife); *Robinson v. State*, 543 N.E.2d 1119, 1120 (Ind. 1989) (utility knife). Indeed, one need look no further than the tragic events of September 11, 2001, to conclude that small knives and box cutters present just as great a danger, if not a greater danger, than larger, more visible knives.

Further, the fact that the knife did not inflict serious injury is irrelevant so long as it had the capacity to do so under the circumstances at issue. In *Robinson*, the defendant cut the victim with a utility knife, causing injury to her ear. In concluding that the knife was a deadly weapon, the Court reasoned that “had the same type of injury been delivered to the victim’s throat, it could have been life-threatening.” *Id.* at 1120. Similarly here, Miller, in an aggressive and drunken show of bravado, plunged a hidden, one-and-one-half-inch knife blade a full inch into Miles’s flesh. The fact that he

happened to miss a crucial organ or blood vessel does not alter the life-threatening nature of the weapon. We conclude there was sufficient evidence that Miller's knife was a deadly weapon to sustain his conviction for Class C felony battery.

B. Self-Defense

Miller's final argument is that the trial court erred in discrediting his claim of self-defense on the allegedly erroneous grounds that he had a duty to retreat. The standard of review for a challenge to the sufficiency of the 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). We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. *Id.*

A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. *Id.* at 800; *see* Ind. Code § 35-41-3-2(a) (2006). 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. A mutual combatant or an initial aggressor must declare an armistice before he or she may claim self-defense. *Id.* at 801. Pursuant to Indiana Code section 35-41-3-2(e)(3),

[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.

According to Miller, Miles initiated physical force when he shoved Miller, and Miller was justified in using force to protect himself in response, especially in light of his relatively small size. Regardless of the exact act by Miles prompting Miller to stab him, the record supports the trial court's conclusion that Miller was the initial aggressor and that he was statutorily required to retreat before making a cognizable claim of self-defense. Miller approached Miles, initiated the contentious nature of their interaction, hit Miles's car, taunted Miles, and followed Miles, refusing to let him terminate their encounter when Miles sought to do so. Miller's suggestion that these facts do not demonstrate that he was the initial aggressor, that certain acts should not be interpreted as aggression, or that eyewitness accounts of Miller's aggression are not credible is simply an invitation to reweigh the evidence, which we decline to do. The trial court was within its fact-finding discretion to conclude from the record that Miller had a duty to retreat, that he failed to do so, and that his self-defense claim lacked merit. We find no error on this point.

Having concluded that defense counsel waived closing argument, that there was sufficient evidence that the knife was a deadly weapon, and that the trial court did not err in denying Miller's self-defense claim on the basis that he had a duty to retreat, we affirm Miller's conviction for Class C felony battery committed by means of a deadly weapon.

The judgment of the trial court is affirmed.

NAJAM, J., and BAILEY, J., concur.