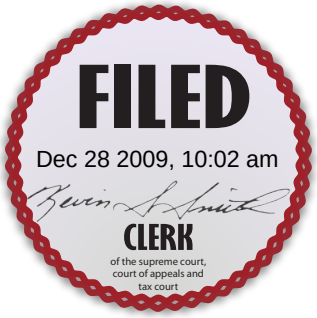

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IN THE
COURT OF APPEALS OF INDIANA

JOSE CUEVAS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0905-CR-292
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas J. Stefaniak, Jr., Judge
Cause No. 45G04-0805-FA-21

December 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jose Cuevas, Jr. appeals his conviction of Aggravated Battery,[1] a class B felony, and the sentence imposed thereon. Cuevas presents the following restated issues for review:

1. Did the trial court commit reversible error in excluding evidence?

2. Was the sentence imposed inappropriate in light of Cuevas's nature and the character of the offense?

We affirm.

The facts favorable to the conviction are that Cuevas and the victim, Marbelin Jeronimo, were the parents of a child who was born in August 2007. Cuevas paid child support from January to May in 2008, when the couple was married. After the May 23, 2008 wedding ceremony, Cuevas surprised Jeronimo by driving to Chicago where Cuevas persuaded Jeronimo to stop his child support payments because they were married. Cuevas had a bottle of vodka in the car. In addition, they purchased Red Bull and mixed cocktails in the parking lot and drank them. Cuevas told Jeronimo that he wanted to spend the night in a hotel. Eventually, they rented a room at the Day's Inn in Merrillville, Indiana. They consumed more alcohol in the parking lot before going to their room.

Once inside their room, they filled the Jacuzzi with water, undressed, and got in. Cuevas asked Jeronimo to engage in anal sex and she refused. Cuevas persisted in his request and then continually inserted his finger into her anus. Jeronimo repeatedly asked Cuevas to stop and he eventually did. Jeronimo informed him "I could go to the cop [sic] right now with this, you know. It doesn't matter if we are married or not." *Transcript* at 112.

[1] Ind. Code Ann. § 35-42-2-1.5 (West, PREMISE through 2009 1st Regular Sess.).

Cuevas grabbed her by the back of the neck and forced her head under the water. A struggle ensued and Jeronimo managed to get out of the tub, falling to the floor. Cuevas got out of the Jacuzzi and, standing over her, punched Jeronimo in the eye. He then proceeded to punch her in the face repeatedly, saying, "I am going to kill you, you bitch", and "[a]ll you wanted from me is child support". *Id*. at 113-14. Jeronimo attempted to fight back by scratching and swinging at him. All the while, Cuevas continued to punch her. Cuevas eventually put his finger in Jeronimo's eye while they were struggling on the floor, and then he began to bite her.

By that point, Jeronimo could no longer see because there was too much blood in her eyes. She crawled to the door, opened it, and left the room. When she did, she heard Cuevas say "help me, my wife is trying to kill me". *Id*. at 117. Crawling and clutching at the walls for support, Jeronimo called out for help and said that Cuevas was killing her. Vanessa Hrebenyak, the assistant manager at Days Inn, heard Jeronimo's cries and then saw her. Upon seeing Jeronimo, Hrebenyak called 911, grabbed a pair of scissors for protection, and ran to Jeronimo. Hrebenyak observed that Jeronimo was naked, covered in blood, her nose was displaced, her lips were swollen, her eyes were swollen shut, and her hair was wet with blood. Hrebenyak saw Cuevas standing naked in the doorway of his room.

Police and emergency medical personnel soon arrived. Officer Konstantin Nuses of the Merrillville Police Department observed blood on the walls where Jeronimo had crawled. Cuevas told police that Jeronimo had attacked him during an argument about child support and that he was just defending himself. Nuses noted no visible injuries on Cuevas, although

he had dried blood on the upper part of his body. Officer Nuses accompanied Cuevas into his room so that Cuevas could clean up and get dressed. The officer noted that the bathroom was in "complete disarray" and that "[t]here was blood everywhere on the ground." *Id*. at 41.

Jeronimo was taken to a hospital, where she stayed for three days. Medical personnel there noted contusions on her cheeks, forehead and mouth, eyes swollen so severely they were entirely shut, and several bite marks on her arm. As a result of her injuries, Jeronimo underwent eye surgery at the University of Chicago Hospital and was unable to work for two months.

Cuevas was charged with attempted murder as a class A felony, aggravated battery and criminal deviate conduct as class B felonies, and battery as a class C felony. Following a jury trial, the jury found Cuevas not guilty of attempted murder and criminal deviate conduct, and guilty of aggravated battery and battery. Following the trial, Cuevas submitted a motion to correct error, claiming that the trial court improperly excluded a tape recording of a radio transmission from Officer Steve Clausen, the first officer to arrive on the scene on the night Jeronimo sustained her injuries. The trial court denied that motion and entered judgment of conviction for aggravated battery, dismissing the battery verdict on double jeopardy grounds.

1.

Cuevas contends the trial court committed reversible evidence in excluding a tape recording of a transmission sent by the first officer to arrive on the scene. Our standard of review for the admissibility of evidence is well established. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on

appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id*. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id*.

Cuevas's defense consisted of the claim that Jeronimo initiated the altercation by attacking him, and therefore that his actions constituted self-defense. A valid claim of self-defense is a legal justification for an otherwise criminal act. *Pinkston v. State*, 821 N.E.2d 830 (Ind. Ct. App. 2004), *trans. denied*; *see also* Ind. Code Ann. § 35-41-3-2(a) (West, PREMISE through 2009 1st Regular Sess.).

At trial, which was held February 16-18, 2009, the State introduced into evidence a recording of Hrebenyak's 911 call, which was recorded on a CD that had been provided to the defense on July 14, 2008, during discovery. That CD evidently contained six separate sections, including Hrebenyak's 911 call and five others. One of the other five sections was a recording of a male officer who arrived on the scene and can be heard stating, "female subject with – looks like head injuries and male subject with head injuries as well." *Transcript* at 350. At trial, defense counsel sought to admit this recording into evidence. Counsel explained that on the Friday before trial, he played the statement in question to Detective Jeff Rice and asked the detective whose voice it was. Detective Rice first said he could not tell, and then stated that it was Officer Clausen. Deputy prosecutor Michelle

Jatkiewicz, who was present at the deposition, interjected "it's Officer Berzac." *Id*. at 352. Detective Rice stated that the two sounded alike, to which Jatkiewicz responded, "I know they sound alike, but that's Officer Berzac, I just spoke to him." *Id*.[2] At that point, defense counsel subpoenaed Officer Berzac. After defense counsel completed cross-examination of Officer Berzac at trial several days later, he approached the bench and stated that he wanted to introduce the radio message into evidence. At that point, Jatkiewicz stated to defense counsel, "Oh, I talked to him today, that's not him." *Id*. During the ensuing colloquy defense counsel sought to introduce the recording and the State objected on hearsay grounds. Defense counsel argued that it was admissible under the business records exception to the hearsay rule. The trial court denied the motion to admit the recording.

Cuevas contends the trial court committed reversible error in excluding the recording. We need not decide whether the trial court erred in excluding the evidence because even assuming for the sake of argument that it did, the error was harmless. Errors in the exclusion of evidence may be disregarded as harmless unless they affect the substantial rights of the party. Ind. Trial Rule 61; *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002). "To determine whether an error in the introduction of evidence affected a defendant's substantial rights, [we] consider[] the probable impact of that evidence upon the jury." *Wilson v. State*, 770 N.E.2d at 802.

Cuevas claimed that he inflicted the injuries upon Jeronimo in self-defense. In order to prevail on a claim of self-defense, Cuevas was required to show he (1) was in a place

[2] During the discussion of this issue at trial several days later, Jatkiewicz claimed she had only stated an

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. *Pinkston v. State*, 821 N.E.2d 830. The amount of force that an individual may use to protect himself or herself must be proportionate to the urgency of the situation. *Id*. When more force is used than is reasonably necessary under the circumstances, the right of self-defense is extinguished. *Id.*

Cuevas sought to introduce the recording indicating he had suffered injuries almost certainly to bolster his claim of self-defense. If he could prove he had suffered injuries, it might have supported an inference that Jeronimo did indeed initiate an attack upon him. In order to succeed in a claim of self-defense, however, it would not have been enough to show that Jeronimo was the initial aggressor. He would also have had to show that he did not use more force than was reasonably necessary under the circumstances. *See id*. The jury heard Jatkiewicz and Officers Nuses and Berzac testify that although they initially observed blood on Cuevas's upper body and face, they saw no injuries anywhere on his person except carpet burns on his knees. All three also testified that they saw him after he washed off, and again observed no injuries. Jatkiewicz went so far as to state that she was standing "right next" to him after he had washed off, and that "he looked just like he had when he checked [in]." *Transcript* at 148.

Cuevas claimed, on the other hand, that Jeronimo had injured his groin, loosened his teeth, scratched his face in several places, and caused his nose and left ear to bleed. In support of his claim, Cuevas introduced photos of his face allegedly taken the next morning

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opinion that it sounded like Officer Berzac.

by his mother. Those close-ups of Cuevas's face depict, at most, several small scratches and, according to Cuevas, a reddened eye. The reddened eye is not apparent to this court in the photograph. If these photographs and Cuevas's testimony about the occurrence did not convince the jury that he responded to an initial attack by Jeronimo with reasonable force, the initial assessment of an officer arriving on the scene upon first viewing Cuevas would not have done so either. Specifically, the only injuries the statement would have addressed were those pertaining to Cuevas's head. Those injuries, such as they are, are clearly depicted in the photographs he entered into evidence. Moreover, even assuming Jeronimo initiated the altercation, in view of the extensive injuries apparent in the photographs of Jeronimo after the attack, the general statement that Cuevas had head injuries would have done nothing to render the savage beating of Jeronimo a "reasonable" response. In other words, the recording would not have helped establish his defense of self-defense.

Thus, in view of the nature of Cuevas's permitted exhibits and testimony, which the jury obviously disbelieved or disregarded, the excluded exhibit would almost certainly have had little persuasive effect. *See Wilson v. State*, 770 N.E.2d 799. Therefore, there is no reversible error here.[3]

2.

Cuevas contends the sentence imposed is inappropriate in light of Cuevas's nature and

[3] We note here that the State addresses two related matters that Cuevas might arguably be said to have presented on appeal, i.e., the trial court's denial of Cuevas's request for a continuance and the denial of his right to present a defense. To the extent Cuevas mentions those claims in his appellate brief, it is only in passing. A party who fails to develop a legal argument or provide adequate citation to authority and portions of the record waives the issue for appellate review. *Davis v. State*, 835 N.E.2d 1102 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8). These arguments are waived.

the character of the offense. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. Cuevas bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

With respect to the nature of the offense, the victim's testimony about the attack upon her describes a savage, senseless beating at the hands of her new husband – a person in a position of trust. The photos taken of Jeronimo immediately afterward graphically depict the serious injuries she suffered all over her body, but most especially to her face and head. She also suffered several serious bite marks on her arms – bite marks that broke the skin. The evidence favorable to the conviction reveals that Cuevas commenced the beating after nearly drowning Jeronimo when she complained about his unwelcomed digital penetration of her anus. Clearly, the nature of the offense supported a sentence greater than the advisory, ten-year sentence.

With respect to Cuevas's character, his criminal history includes only one prior conviction – an Illinois conviction in 2004 for aggravated unlawful use of a weapon as a class 4 felony. He was also placed on six months' probation in 1997 after being found guilty of the misdemeanor offense of unlawful use of a vehicle. The trial court noted that Cuevas

had otherwise led a law-abiding life for a relatively substantial period of time before this incident. The court also noted that Cuevas graduated from high school and had been gainfully employed in the same position for approximately thirteen years. Cuevas points out on appeal that he supported his family and "had no history of violence generally and specifically no prior history of violence with the victim." *Appellant's Appendix* at 11. The trial court diminished the mitigating value of this same assertion at sentencing, however, stating:

> The Court views that as a mitigator, frankly, though of very low weight, because when we deal with offenses of domestic violence, we often see that people lead law-abiding lives in other arenas of their life but there is a peculiar aspect to the relationship with one spouse or lover and tremendous violence can occur. We note in response to counsel's arguments about Mr. Cuevas being law-abiding, that there is a critical difference that occurred this day in their relationship and that is that they were married[.] [T]he Court observes that there were cases of violence where there is no history of violence except where people became married. Quite frankly, I'm not going to psychoanalyze that. The point is this is a case of extreme violence[.]

Transcript at 467.

We agree with the trial court's observation that the capacity for extreme violence characterizing the attack upon his new wife is more reflective of the character element upon which the sentence for this offense should be based, rather than his alleged history of non-violent behavior. Moreover, we note that the trial court considered Cuevas's prior felony offense as a crime of violence. Taken as a whole, we agree that Cuevas's character does not counterbalance the extreme and senseless brutality of the attack upon Jeronimo. Therefore, we conclude that a twelve-year sentence, which represents two years more than the advisory sentence for a class B felony, is not inappropriate.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.