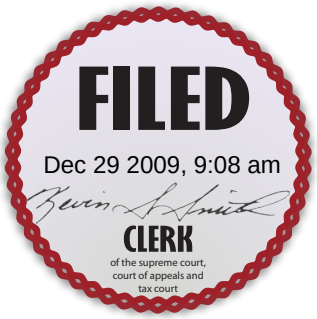

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IN THE
COURT OF APPEALS OF INDIANA

DAWN ELIZABETH MCDOWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A04-0908-CR-459
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0307-FB-261

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Dawn Elizabeth McDowell ("McDowell") appeals her conviction for Voluntary Manslaughter, as a Class A felony.[1] We affirm.

Issues

McDowell presents four issues for review:

I. Whether McDowell was denied a fair trial by the admission of evidence that she contacted her attorney as opposed to summoning 9-1-1 assistance;

II. Whether the State presented sufficient evidence to negate McDowell's claim of self-defense;

III. Whether McDowell's sentence is inappropriate; and

IV. Whether the restitution order fails to comply with relevant statutory requirements.

Facts and Procedural History

The relevant facts were stated in McDowell's previous appeal as follows:

> McDowell and [Christopher] Crume had been living together at a campground for several months. Early on the morning of June 25, 2003, after attending a party and consuming alcohol, the two were returning to the campground in a car driven by Crume when their arguing became physically violent, and the defendant stabbed Crume in the neck. He died several days later.

McDowell v. State, 885 N.E.2d 1260, 1261 (Ind. 2008).

The jury found McDowell guilty of Aggravated Battery, Involuntary Manslaughter, and Voluntary Manslaughter, and the trial court entered judgments of conviction accordingly. Subsequently, because of double jeopardy concerns, the trial court vacated its judgments of

[1] Ind. Code § 35-42-1-3(a)(1).

conviction on the lesser counts. McDowell appealed the Voluntary Manslaughter conviction, which a panel of this Court affirmed. McDowell v. State, 872 N.E.2d 689 (Ind. Ct. App. 2007). McDowell sought transfer, and the Indiana Supreme Court reversed the Voluntary Manslaughter conviction, upon finding that an instruction "authorized the jury to infer an intent to kill simply because a death resulted from a deadly weapon in the hands of the defendant." McDowell, 885 N.E.2d at 1261. The Court also set aside the trial court's order vacating the Aggravated Battery and Involuntary Manslaughter convictions. Id. at 1264.

McDowell was retried and again convicted of Voluntary Manslaughter. The trial court sentenced McDowell to forty years imprisonment, with five years suspended to probation. She was also ordered to pay restitution of $3,218.74, the balance remaining on the original order for $6,818.74 restitution to the victim's family members. The trial court again vacated the Aggravated Battery and Involuntary Manslaughter convictions. This appeal ensued.

Discussion and Decision

I. Evidence of Telephone Call to Attorney

McDowell contends that the trial court should have struck testimony that she had, after the altercation had ended and she was able to get to a telephone, telephoned an attorney as opposed to 9-1-1. The following testimony was elicited at trial:

> Prosecutor: [D]id she express to you some concern about you calling the police?
>
> Witness: Yes, she did. At first she didn't want me to call the cops. I'm sorry, like I said, it's been a long time ago.

Prosecutor: OK, and did she eventually call the police?

Witness: Yeah.

Prosecutor: Did she call 9-1-1?

Witness: No, I believe she tried to get a certain officer that she said knew the case.

Prosecutor: And that was her first call? Not to 9-1-1 but to some officer that she said knew about the case, is that accurate?

Witness: No, I believe she called her lawyer first.

(App. 419.) McDowell moved to strike the answer on grounds that she had a constitutional right to contact an attorney. The motion was denied, and McDowell now argues that the evidentiary ruling penalized her for invoking her right to an attorney, which she characterizes as a "fundamental right of criminal defendants." Appellant's Brief at 11.

We review a trial court's decision to admit evidence for abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 546 U.S. 1108 (2006). We will find that a trial court has abused its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." Id. Even when we find that a trial court has abused its discretion by admitting evidence, we will not reverse unless the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 548 U.S. 910 (2006). In determining whether or not a party's substantial rights were affected by the erroneous admission of evidence, we "assess the probable impact of that evidence upon the jury." Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

It is constitutionally improper for a prosecutor to comment negatively upon a defendant's exercise of the right to counsel. Riddley v. State, 777 So.2d 31, 34 (Miss. 2000). However, the Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings. Sweeney v. State, 886 N.E.2d 1, 8 (Ind. Ct. App. 2008) (citing Davis v. United States, 512 U.S. 452, 456 (1994)), trans. denied, cert. denied, 129 S. Ct. 506 (2008).

Apart from the Sixth Amendment right to counsel, a defendant's right to due process under the Fifth and Fourteenth Amendments may be violated when a prosecutor elicits evidence and comments thereupon with regard to the defendant's contact with an attorney. State v. Palenkas, 933 P.2d 1269, 1280 (Ariz. Ct. App. 1996), cert. denied, 521 U.S. 1120 (1997). See also Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) (prosecutor "may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt"); United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980) ("it is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel"); United States ex rel. Macon v. Yeager, 476 F.2d 613, 616 (3d Cir. 1973) (prosecutor's comment that defendant called his attorney the morning after the incident amounted to constitutional error).

Here, the prosecutor did not specifically ask the witness if McDowell had called her attorney. However, the sequence of telephone calls had been thoroughly addressed in pre-trial argument and the prior trial. We must conclude that the prosecutor acted with full knowledge of what response would be forthcoming, but surreptitiously elicited arguably

prejudicial evidence. We disapprove of such tactics. Nevertheless, the prosecutor did not invite the jury to infer that McDowell's call to her attorney was probative of her guilt. Indeed, the prosecutor did not comment at all upon McDowell's consultation with her attorney. As such, McDowell has not shown that the admission of the challenged testimony denied her a fair trial.

II. Sufficiency of the Evidence

McDowell contends that she did not intend to kill Crume, and the State failed to prove otherwise. More specifically, she argues that the State failed to present sufficient evidence to negate her claim of self-defense.

In order to support a conviction for Voluntary Manslaughter, the State was required to prove that McDowell knowingly or intentionally killed Crume while acting in sudden heat. Ind. Code § 35-42-1-3. The offense is a Class A felony if it is committed by means of a deadly weapon. See id. Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm. Bartlett v. State, 711 N.E.2d 497, 500 (Ind. 1999).

A valid claim of self-defense is legal justification for an otherwise criminal act. Birdsong v. State, 685 N.E.2d 42, 45 (Ind. 1997). The defense is defined in Indiana Code Section 35-41-3-2(a):

> 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. However, a person:
>
> (1) is justified in using deadly force; and

(2) 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. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

When a defendant raises a claim of self-defense, she is required to show three facts: (1) she was in a place where she had a right to be; (2) she acted without fault; and (3) she had a reasonable fear of death or serious bodily harm. Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). Once a defendant claims self-defense, the State bears the burden of disproving at least one of these elements beyond a reasonable doubt. Hood v. State, 877 N.E.2d 492, 497 (Ind. Ct. App. 2007), trans. denied. The State may meet this burden by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by relying upon the sufficiency of its evidence in chief. Id. Whether the State has met its burden is a question of fact for the factfinder. Id. The trier of fact is not precluded from finding that a defendant used unreasonable force simply because the victim was the initial aggressor. Birdsong, 685 N.E.2d at 45.

If a defendant is convicted despite her claim of self-defense, we will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. Wilson v. State, 770 N.E.2d 799, 800-01 (Ind. 2002). The standard on appellate review of a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Id. at 801. 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, the verdict will not be disturbed. Id.

McDowell concedes that she inflicted the fatal wound upon Crume. She testified that she did so because Crume would not let her exit his vehicle, and that he had struck her and pulled her hair. According to McDowell, she took a paring knife from her purse and placed it in her waistband, intending it for protection because she planned to hitchhike. However, Crume did not stop the vehicle, even after McDowell cursed and kicked him, and attempted to jump from the moving vehicle. As Crume held onto her, McDowell struck with the knife without specific aim, "to inflict pain so he would let go." (Tr. 340). To some extent accepting McDowell's version of events, the State essentially relied upon evidence that McDowell used excessive force even if Crume was the initial aggressor.

The pathologist testified that Crume had sustained a one and one-quarter-inch wide laceration to his neck, with a depth of two inches through the trachea and into the esophagus. McDowell admitted that she had struck out with the knife, a deadly weapon, while in close proximity to Crume. She further admitted that she had done so after smoking marijuana and drinking approximately twenty-five beers and two drinks of brandy. There is sufficient evidence to permit the factfinder to conclude that McDowell did not act without fault, and that she used unreasonable force.

III. Sentence

At the outset, we observe that McDowell committed her crime in 2003, prior to the legislative replacement of sentencing statutes providing for "presumptive" sentences with

sentencing statutes providing for "advisory" sentences. McDowell was convicted and sentenced in 2009. Because "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime," the presumptive sentencing scheme is applicable here. Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). For a Class A felony, the presumptive sentence was thirty years, with a statutory range between twenty and fifty years. Ind. Code § 35-50-2-4. Accordingly, McDowell received a sentence in excess of the presumptive sentence.

She contends that her forty-year sentence is inappropriate under 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. The burden rests upon the defendant to persuade us that his or her sentence is inappropriate. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007). In performing our review, we assess "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).

As to the nature of the offense, McDowell inflicted a fatal stab wound upon her domestic partner with a knife that she had carried in her purse. The homicide was precipitated by the couple's voluntary intoxication and their verbal and physical altercation. After it became apparent that Crume was badly injured and bleeding profusely, McDowell made no attempt to render assistance to him. When she reached 9-1-1 after placing other

calls, she did not request medical aid for Crume, but instead described her own minor injuries and requested protection from retaliation.

As to the character of the offender, McDowell has a remote criminal conviction for battery upon a police officer and two more recent misdemeanor alcohol-related offenses. Additionally, she was convicted of a misdemeanor offense while out on bond for the instant offense. Despite her pattern of alcohol-induced offenses, McDowell failed to seek and maintain appropriate treatment for substance abuse.[2] She apparently suffers from depression and panic disorders, to which the trial court accorded some mitigating weight. However, the trial court also found that McDowell did not exhibit genuine remorse, because she suggested that the victim was to blame.

In sum, the nature of the offense and the character of the offender suggest that an aggravated, but less than maximum, sentence is appropriate. McDowell received a sentence of forty years, ten years above the presumptive and ten years less than the maximum. Moreover, five years were suspended to probation.[3] McDowell has not persuaded us that this sentence is inappropriate.

IV. Restitution Order

Finally, McDowell argues that the trial court erred when it ordered her to pay restitution but did not inquire into her ability to pay or set the manner of performance as

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[2] McDowell apparently received some treatment seventeen years ago.

[3] Such an "extension of grace or privilege by a trial court results in a sentence that is not equivalent to the restriction placed on one's liberties imposed by a fully executed sentence." Hollar v. State, 916 N.E.2d 741, 744 (Ind. Ct. App. 2009).

required by Indiana Code Section 35-38-2-2.3. The State acknowledges that a trial court ordering a defendant to pay restitution as a condition of probation has a duty to comply with statutory requirements. The State contends that, as a practical matter, this is best done when McDowell is released on probation after serving the executed portion of her sentence. We agree. See Rich v. State, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008) ("under section 33-37-2-3(b) [costs statute], the trial court was not required to hold a hearing until Rich has completed the executed portion of his sentence"), trans. denied.

Conclusion

McDowell was not deprived of a fair trial by the admission of evidence that she called her attorney. The State presented sufficient evidence to negate her claim of self-defense. McDowell's sentence is not inappropriate, but the trial court must conduct a restitution hearing when she has completed the executed portion of her sentence.

Affirmed.

BAKER, C.J., and ROBB, J., concur.