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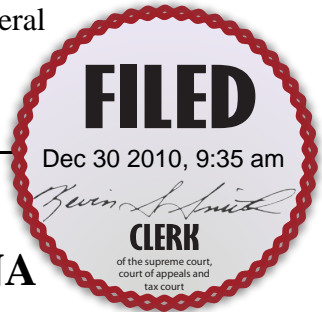
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**IN THE
COURT OF APPEALS OF INDIANA**

TROY H. WORTHINGTON, SR.,)

Appellant-Defendant,)

vs.)

No. 45A03-1004-CR-223)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM NUMBER 1
The Honorable Salvadore Vasquez, Judge
Cause No. 45G01-0910-FC-129

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Troy H. Worthington, Sr. (Worthington), appeals his sentence following a plea of guilty to criminal recklessness, a Class D felony, Ind. Code § 35-42-2-1.

We affirm.

ISSUE

Worthington raises one issue on appeal, which we restate as follows: Whether his sentence is appropriate in light of his character and the nature of the offense.

FACTS AND PROCEDURAL HISTORY

On October 25, 2009, Worthington entered the home of his ex-girlfriend, Julie Story (Story). Worthington and Story disagree about whether or not Story invited Worthington to enter her home, but the rest of the facts are undisputed. After entering Story's home, Worthington found Story's friend, John Lee, sleeping in her bed. Worthington began to yell at Story, and then he grabbed the left side of her face, shoved her against the wall, and struck her on top of the head. As a result of this incident, Story sustained a laceration to the top of her head that required several staples to close.

On October 26, 2009, the State filed an Information charging Worthington with battery, a Class C felony, I.C. § 35-42-2-1. On March 9, 2010, the State and Worthington filed a plea agreement with the trial court, wherein the State agreed to file an Amended Information adding Count II, criminal recklessness, a Class D felony, I.C. § 35-42-2-2(d)(1). In this agreement, Worthington agreed to plead guilty to Count II, criminal recklessness, in exchange for the State's dismissal of Count I, battery. In addition, Worthington further

agreed that he would not receive an option for misdemeanor treatment as a result of his guilty plea.

On March 30, 2010, the trial court accepted Worthington's plea agreement and sentenced him to three years, one and one-half years to be served in the Department of Correction, and one and one-half years to be served on probation. As aggravating factors, the trial court noted (1) that Worthington had a history of criminal convictions; (2) that prior leniency by criminal courts had not had a deterrent effect on his behavior; (3) that on October 21, 2009, he had been sentenced to twelve months at a pretrial diversion program for criminal mischief in another case; (4) that Worthington had a pending conversion charge in yet another case, which had an active warrant at the time of this trial court's sentencing; and (5) that the victim's injury here was especially significant. As a mitigating factor, the trial court noted that Worthington pled guilty and admitted responsibility. During the sentencing hearing, the trial court also acknowledged that this was Worthington's first felony conviction and that Worthington did not have a history of violent crimes.

Worthington now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

Here, Worthington argues that his sentence is inappropriate in light of his character and the nature of the offense. Under Indiana Appellate Rule 7(B), this 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. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006). Although this court is not required to use “great restraint,” we nevertheless exercise deference to a trial court’s sentencing decision, both because Appellate Rule 7(B) requires that we give “due consideration” to that decision and because we recognize the unique perspective a trial court has when making decisions. *Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App. 2007). The “principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). In addition, the defendant bears the burden of persuading this court that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

II. *Character of the Offender*

With respect to the character of the offender, we note that Worthington’s criminal history is especially troubling. As Worthington argues, this is his first felony conviction, and he does not have a criminal history of domestic abuse or beating women. It is significant, however, that he has had multiple misdemeanor convictions and that he has been granted leniency several times in the past, only to commit further misdemeanor crimes shortly thereafter. He received twelve months pretrial diversion in a case where he was charged with criminal mischief, and then he committed the instant offense four days later. He has also received supervision or probation in multiple instances, and none of these programs seem to have made a difference; twice trial courts have had to revoke

his probation. Based on this history, we cannot hold that the trial court's sentence was inappropriate in light of Worthington's character.

III. *Nature of the Offense*

Turning to the nature of the offense, Worthington pled guilty to criminal recklessness as a Class D felony. Under Indiana Code section 35-42-2-2(d)(1), a person is criminally reckless if he or she recklessly, knowingly, or intentionally "inflicts serious bodily injury on another person[.]" The advisory sentence for a Class D felony is one and one-half years, while the minimum sentence is six months and the maximum sentence is three years. I.C. § 35-50-2-7.

Worthington argues that it was inappropriate for the trial court to impose the maximum sentence allowed for a Class D felony because the trial court inappropriately considered Story's injury as an aggravating circumstance, even though it should not have because serious injury is an element of criminal recklessness. We disagree. The supreme court of Indiana has determined that an element of an offense may be an aggravating factor if the court specifies its reasoning in making such a determination. *Tidmore v. State*, 637 N.E.2d 1290, 1292 (Ind. 1994). Subsequent courts have interpreted *Tidmore* to hold that the manner of a crime can be an appropriate consideration. *See Hornbostel v. State*, 757 N.E.2d 170, 183 (Ind. Ct. App. 2001) (use of bare hands in a murder was a proper aggravating factor in a murder sentence). The *Hornbostel* court noted that "[w]hile it is true that killing is an element of murder, using your bare hands is not an element of murder." *Id.* at 183.

Here, we think it is noteworthy that the trial court primarily focused on Worthington's criminal history rather than Story's injury. This history is more than sufficient to support the trial court's sentence. In addition, though, the trial court's consideration of Story's injury was not improper, because it focused on the nature of her injury, not the existence of her injury. The trial court's specific words in its oral sentencing statement were: "you know, you hurt her pretty bad this time[,] requiring her to take these staples in her head as a result of your actions, your injury." (Sentencing Transcript p. 22). As a result, we cannot conclude that Worthington's sentence is inappropriate in light of the nature of his offense.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Worthington.

Affirmed.

ROBB, J., and BROWN, J., concur.