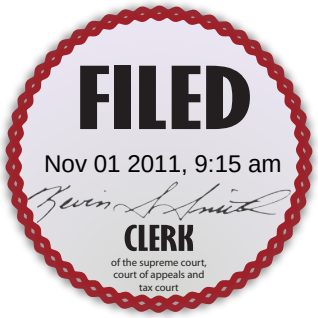

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IN THE COURT OF APPEALS OF INDIANA

MICHAEL A. MAXIE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1103-CR-117
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0812-FC-102

November 1, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Michael A. Maxie appeals his conviction of and sentence for battery on a pregnant woman, a class C felony,[1] and interference with reporting a crime, a class A misdemeanor.[2]

We affirm.

ISSUES

1. Whether the trial court abused its discretion when it denied defense counsel's motion to withdraw.

2. Whether the State presented sufficient evidence to support Maxie's conviction of interference with reporting a crime.

3. Whether Maxie received effective assistance of counsel at the sentencing hearing.

FACTS

In 2007, Procela Hummer began living with Maxie in an Elkhart County apartment complex. Hummer became pregnant by Maxie in February of 2008.

On June 14, 2008, at approximately 3 p.m., Maxie left the Elkhart County apartment to go to South Bend. Sometime later, a friend called Hummer and invited her to the friend's son's graduation party. Hummer called Maxie, who told Hummer not to be gone long. Hummer went to the party with friends, and she called Maxie two times during the party. However, Maxie did not answer. Hummer left the party at

[1] Ind. Code § 35-42-2-1(a)(8).

[2] I.C. § 35-45-2-5(1)

approximately 9 p.m., checked her phone, and learned that Maxie had called her six times and left three messages. Hummer "got scared" and listened to the messages, in which Maxie informed her that she needed to be home at a certain time and accused her of flirting with men at the party. (Tr. 715). Hummer considered the messages left by Maxie to be "nasty." (Tr. 714).

When Hummer arrived at the apartment, she became "terrified" when she saw that Maxie was home. (Tr. 715-16). As Hummer entered the apartment, Maxie approached her, pointed his finger in her face, and told her she needed to be at home. Hummer entered the bedroom and placed her cell phone and keys on a bedroom table. Maxie followed her into the bedroom, "yelling" and "cussing" at her. (Tr. 718). Maxie grabbed Hummer's cell phone and keys and placed them in his pocket. Maxie then approached Hummer and put his hands on her neck to the point that Hummer could "hardly breathe." (Tr. 718). Maxie pushed Hummer's head into the bed's headboard, causing her physical pain. Maxie then grabbed the land line phone and took it into the living room.

Hummer, who was crying, left the bedroom and sat down on a couch in the living room. Fearing that a neighbor would hear Hummer crying, Maxie grabbed Hummer's mouth and "squished it hard," causing cuts inside her mouth and on her bottom lip. (Tr. 731). Hummer was unable to call for help because Maxie had taken the phones.

Hummer fell asleep and woke up the next morning at approximately 9 a.m. Maxie would not allow her to leave the apartment, but around 5 p.m. he received a phone call,

placed Hummer's car keys on a table, and stepped outside on the patio to take the call. Hummer immediately grabbed her coat, purse, and the car keys and ran outside to her vehicle.

As Hummer drove out of the parking lot and down the street, she saw a marked Elkhart Police Department vehicle. She flagged down the officer driving the vehicle, Police Corporal Christopher Grathen, who stopped to investigate. Corporal Grathen observed that Hummer was "very upset, borderline hysterical, and crying." (Tr. 867).

Hummer told Corporal Grathen that Maxie had pushed her head into a headboard and squeezed her mouth on the previous night. She also told him that she couldn't call for help because Maxie had removed the phones. Corporal Grathen had Hummer drive to the police station, where she prepared a statement and an officer took pictures of her injuries.

On December 30, 2008, Maxie was charged with battery on a pregnant woman, domestic battery, and interference with reporting a crime. At the initial hearing, Maxie informed the trial court that he could not afford an attorney and asked the trial court to appoint an attorney for him. The trial court appointed the Elkhart County Public Defender's office to represent Maxie, and on April 3, 2009, Elkhart County Public Defender Peter D. Todd entered an appearance on Maxie's behalf. However, Maxie later secured private representation and attorney Rod Sniadecki entered an appearance on July

27, 2009. Sniadecki subsequently was disbarred and the trial court vacated his appearance on Maxie's behalf on May 6, 2010.

On June 22, 2010, Elkhart County Public Defender Michelle Voirol entered an appearance on Maxie's behalf. At an August 16, 2010 hearing, Maxie informed the trial court that he was dissatisfied with Voirol's representation, stating that she was incompetent and had a conflict of interest. He also stated that he would attempt to hire private counsel. Voirol indicated that she and her client disagreed on whether he had an Indiana Rules of Criminal Procedure 4 claim. The trial court informed Maxie that it did not control the Public Defender's Office's appointments but that Maxie was free to procure private counsel.

At a September 20, 2010 hearing, Maxie again claimed that he was dissatisfied with Voirol's representation, but he later stated through Voirol that he wanted to proceed to trial. Voirol informed the court that Maxie was abusive, controlling and threatening, but she did not make a request to withdraw her appearance. The trial court again informed Maxie that he was free to hire private counsel but another public defender would not be assigned by the court to the case because "we've been around this block before." (Tr. 93).

At a November 11, 2010 hearing, the trial court set a trial date of January 11, 2011. Maxie made no objection to the setting of the trial date or the competence of counsel. On December 17, 2010, Voirol filed a motion to withdraw after Maxie missed

an appointment because she could not "adequately represent [Maxie] without his cooperation in trial preparation." (App. 76). At a January 4, 2011 hearing on Voirol's motion, Maxie requested that Todd be reappointed, a request which the trial court denied. After the hearing, the trial court denied the motion to withdraw.

A jury trial was held on January 11-12, 2011. The jury reached an impasse, and the trial court was forced to declare a mistrial. A second jury trial was held in February of 2011, and the jury found Maxie guilty of all the charges. Voirol represented Maxie at both trials. On February 28, 2011, the trial court vacated the domestic battery conviction and sentenced Maxie to an aggregate term of nine years, with one year suspended to probation.

DECISION

1. Denial of Motion to Withdraw

Maxie contends that the trial court abused its discretion in denying Voirol's motion to withdraw. He argues that the motion should have been granted because of a conflict with Voirol. He points to (1) his *pro se* filings expressing his dissatisfaction and concerns about Voirol's loyalty to his defense; (2) Voirol's statement during a hearing that Maxie was abusive, controlling, and threatening; and (3) the acrimony that allegedly resulted from his filing of a grievance against Voirol. He classifies the mistrial in the first trial as "luck." (Maxie's Reply Br. at 1).

The decision of whether to permit a defense attorney to withdraw her appearance in a criminal case is within the trial court's discretion, and the denial of a motion to withdraw will result in reversal of a defendant's conviction only where the denial constitutes a clear abuse of discretion and prejudices the defendant's right to a fair trial. *Strong v. State*, 633 N.E.2d 296, 300 (Ind. Ct. App. 1994). The right to counsel of one's choice is an essential element of the right to counsel under the Sixth Amendment to the United States Constitution, but "while the right to counsel is absolute, the right to counsel of one's choice is not." *Galloway v. State*, 656 N.E.2d 1204, 1205 (Ind. Ct. App. 1995), *trans. denied.* The trial court may refuse a motion to withdraw if there will be a resultant delay in the administration of justice, and the trial court's decision in that regard is left to its sound discretion. *Id*.

Here, Voirol's motion was solely based upon her concern that she could not adequately represent Maxie if he missed appointments for trial preparation. Voirol did not contend that withdrawal was necessitated by any conflict with or disdain for Maxie. The trial court denied Voirol's motion because the case had been pending for almost two years and the trial was imminent. Thus, the trial court exercised its discretion to deny the motion because of the delay in administration of justice that would occur if the motion were granted. After the denial and before the filing of this appeal, Maxie made no claim of prejudice arising from denial of Voirol's motion to withdraw or dissatisfaction with Voirol's representation, even when given a chance to make a statement at his sentencing

hearing. More importantly, our review of the trial transcripts and the appendix shows no prejudice arising from the denial of Voirol's motion. Indeed, in response to Voirol's motion, the trial court revoked Maxie's bail, thereby ensuring Maxie's attendance at any future necessary appointments with counsel. In short, the trial court did not abuse its discretion in denying Voirol's motion to withdraw.

2. Sufficiency of the Evidence

To prove the class A misdemeanor of interfering with reporting a crime, the State was required to prove that Maxie, with intent to commit, conceal, or aid in the commission of a crime, knowingly or intentionally interfered with or prevented Hummer from "using a 911 emergency telephone system." I.C. § 35-45-2-5(1). Maxie argues that the State showed only that he prevented Hummer from making a "call for help," which Maxie claims is insufficient to support an inference that Hummer intended to call 911. (Maxie's Br. at 18). Maxie also argues that the State failed to show that he had the intent to prevent Hummer from calling 911, as his taking of the phones could be interpreted as an attempt to keep her home or to keep her from contacting friends.

In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003), *trans. denied.* We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences drawn therefrom. *Id.* at

269-70. The conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Id*. at 270.

Here, Maxie, in the process of battering Hummer, placed her cell phone in his pocket and removed the land line from her bedroom. Hummer testified that she wanted to call for help but could not because Maxie had taken the phones. The State could have been more specific regarding the nature of the "help" that Hummer was seeking. However, the totality of the circumstances, including Hummer's testimony regarding Maxie's battering of her, his taking of the phones out of the bedroom, and her testimony that the first thing she did when she escaped was to flag down a law enforcement officer, warrants the jury's reasonable and logical inference that Hummer would have called 911 if not prevented by Maxie from doing so.

Maxie contends that the State failed to present sufficient evidence to establish that he had the intent, when he took the phones, to prevent Hummer from using the phone to call 911. He argues that he may have intended merely to punish Hummer by not letting her talk to her friends or leave the apartment. He further argues that this "grounding" of Hummer is consistent with his controlling personality. (Maxie's Reply Br. at 6).

Intent is a mental state and, absent an admission by the defendant, the trier of fact must resort to the reasonable inferences drawn from both the direct and the circumstantial evidence to determine whether the defendant has the requisite intent to commit the offense in question. *Stokes v. State*, 922 N.E.2d 758, 764 (Ind. Ct. App. 2010), *trans.*

denied. Intent may be proven by circumstantial evidence and may be inferred from a defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points. *Id*.

In the present case, the evidence establishes that Maxie took the phones during an incident where he choked and battered Hummer and subsequently squished her mouth in fear that the neighbors might hear her crying. The jury could have reasonably concluded that Maxie took the phones with the intent of preventing Hummer from calling 911. The State presented sufficient evidence to support Maxie's conviction of interference with reporting a crime.

3. Effective Assistance of Counsel During Sentencing

Maxie contends that he was not afforded effective assistance of counsel during his sentencing hearing because counsel failed to present any evidence of or argument for mitigation. Specifically, Maxie contends that counsel failed to present any evidence in support of the (1) undue hardship of incarceration upon his family; (2) character testimony of an alleged long-time friend; and (3) lack of severe injuries.

Here, the trial court imposed the maximum eight-year sentence for a class C felony and the maximum one-year sentence for a class A misdemeanor. The trial court ordered the sentences to be served consecutively but suspended one year to probation. The trial court based the sentences upon its finding of the two aggravators. The first is that Maxie had an extensive criminal history that included from sixteen to twenty

misdemeanor convictions, including multiple domestic and battery convictions. The second is that Maxie attempted to control and manipulate both Hummer and the trial process by (1) dictating a letter exonerating him of the charges and forcing Hummer to sign and mail the letter to the prosecutor and the trial court and (2) filing numerous irrelevant documents with the trial court.

In general, claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) a showing that the deficient performance resulted in prejudice to the defendant. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Prejudice occurs when the defendant demonstrates that there is a reasonable probability that, if not for counsel's unprofessional errors, the result of the proceeding would have been different. *Grinstead*, 845 N.E.2d at 1031. A reasonable probability occurs when there is a probability sufficient to undermine confidence in the outcome. *Id.* Failure to satisfy either prong of the two-part test will cause the defendant's claim to fail. *Henley v. State*, 881 N.E.2d 639, 645 (Ind. 2008). If we can dispose of an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Id.*

a. Undue Hardship

Maxie first contends that Voirol was ineffective for not eliciting and/or directing mitigating testimony from him about the alleged undue hardship to his child caused by his incarceration. Maxie did represent to the trial court that he was "sorry for letting down my son, you know?" (Tr. 980).

A trial court is not required to find that a defendant's incarceration would result in undue hardship on his or her dependents. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*. "Many persons convicted of crimes have dependents and, absent special circumstances showing that the hardship to them is 'undue,' a trial court does not abuse its discretion by not finding this to be a mitigating factor." *Id.* Incarceration will always be a hardship on dependents. *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*. In order to merit consideration as a mitigating factor, however, the hardship must be unusual. *Benefield, id.*

Maxie was unemployed with no source of income before his arrest. Hummer, the child's mother, was and is employed. While she was living with Maxie, she was the sole source of money to pay for rent, utilities, food, and other necessities. There were no unusual circumstances to establish an undue hardship arising from Maxie's incarceration. Maxie was not prejudiced by Voirol's failure to fine tune Maxie's statement about the effect of incarceration upon his son.

b. Character Testimony

Maxie also contends that Voirol was ineffective for failing to call Nancy Vazquez as a character witness. Although Maxie's appellate counsel contends that Vazquez would have testified to certain positive character traits exhibited by Maxie over the course of their friendship, there is nothing in the record to indicate that this is true. Indeed, the only references in the sentencing record regarding Vazquez are the presentence investigation report's mention of her as a "friend," and the trial court's statement that she provided funds for Maxie's bail. (Maxie's App. 42; Tr. 987). We cannot ascertain from the record whether Voirol rejected calling Vazquez because she would have given damaging testimony after her friend was convicted of battering a pregnant woman or whether Voirol failed to inquire into the content of any testimony by Vazquez. Furthermore, we cannot say that Vazquez's testimony, even if positive, would have affected the trial court's sentencing decision. Under the circumstances, Maxie has failed to establish prejudice.

c. Level of Injuries

Maxie contends that Voirol was ineffective in not arguing that Hummer's injuries were minor. He further contends that such an argument would have provided a mitigating circumstance for the trial court to consider. Maxie cites *Hurst v. State*, 890 N.E.2d 88, 96-97 (Ind. Ct. App. 2008), *trans. denied* and similar cases in support of his contention.

The cases cited by Maxie determine the fine line between proof of "bodily injury" and "serious bodily injury" and go to the sufficiency of evidence to support a battery conviction that requires a showing of "serious bodily injury." The cases do not refer to mitigation of a sentence following a conviction. The cases cited by Maxie are inapposite and are therefore insufficient to show that Voirol was ineffective for failing to raise the seriousness of the injury in a sentencing hearing.

Maxie has not shown that Voirol failed to provide effective assistance of counsel at his sentencing hearing.

Affirmed.

VAIDIK, J., and FRIEDLANDER, J., concur.