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IN THE
COURT OF APPEALS OF INDIANA

MARTIN REYES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0512-CR-584
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Jr., Judge
Cause No. 46C01-0408-MR-402

October 24, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Martin Reyes (Reyes), appeals his conviction and sentence for Count I, murder, Ind. Code § 35-42-1-1(1); Count II, attempted murder, a Class A felony, I.C. §§ 35-41-5-1, 35-42-1-1; Count III, aggravated battery, a Class B felony, I.C. § 35-42-2-1.5; and Count IV, battery with a deadly weapon causing serious bodily injury, a Class C felony, I.C. § 35-42-2-1(3).

We affirm.

ISSUES

Reyes raises three issues on appeal, which we restate as:

(1) Whether the State presented evidence beyond a reasonable doubt to rebut Reyes' claim of self-defense;

(2) Whether the relevance of photographs of a human heart removed from the body outweighs their prejudicial effect; and

(3) Whether the trial court relied on improper aggravating factors in ordering consecutive sentences.

FACTS AND PROCEDURAL HISTORY[1]

In 2004, Reyes and his wife, Veronica, lived next door to Silbiano Osornio (Silbiano), and his wife Adela Garcia (Adela) (collectively, the Osornios), in LaPorte County. The Osornios lived with their son, Jorge, and one of their daughters, Alma, and

[1] We direct Appellant's attention to Appellate Rule 46(A)(6)(a) requiring the Statement of Facts be supported by page references to the Record on Appeal or Appendix.

her three children. The Osornios' other daughter, Delia, lived nearby with her husband, Jose.

On Saturday, August 28, 2004, Reyes was in bed with his wife when he saw a man peaking through their bedroom window. When Reyes rose, the man ran away. Reyes went outside and saw a tire propped against the house, which allowed the man to see in the window. He then left to run some errands.

That same morning Silbiano and Jorge left around 7 a.m. for work. They returned around 11 a.m. Silbiano went in the house to sleep while Jorge and some others stayed outside to tint car windows. When Reyes returned home, after Silbiano and Jorge, he walked over to the Osornios' home and asked to speak with Silbiano. Reyes put his arm around Silbiano, walked him outside, and accused Silbiano of looking into his window that morning. Silbiano denied the accusation. Reyes told Silbiano, "just shut up you old man." (Transcript pp. 139). Then, Reyes started pushing Silbiano commenting he would not hold up because he was an old man.

At that point, Jorge stepped in and a fight ensued between Reyes and Jorge. After approximately five minutes Silbiano broke up the fight. Reyes retreated into his house, all the while yelling, "it's not over," "you're gonna pay for this," "it's not going to end like this," and "that he was going to kill him." (Tr. pp. 71, 179, 255, 323).

After the fight, Reyes entered and exited his house several times. At one point he drove away hitting Jorge's truck when he pulled in and out of his parking spot. Upon returning home, Reyes remained inside until his brother, Ignacio, arrived.

Later that afternoon, an argument ignited between Delia, the Osornios' daughter, and Veronica, Reyes' wife; a fight ensued. Reyes and Ignacio came outside and separated the women. Jorge ran to Delia's defense and a fight ensued between Ignacio and Jorge. As the two were fighting, Reyes drew a concealed knife and stabbed Jorge in the chest, puncturing his heart. Reyes then proceeded toward Delia when her husband, Jose, pushed him. Reyes and Jose grabbed each other. Then, Ignacio grabbed Jose from behind and Reyes stabbed Jose. After that Reyes went after Jorge's unarmed cousin, Baltazar, with the knife. Baltazar unsuccessfully tried to disarm Reyes and was stabbed in the process. Reyes next turned to Adela who had picked up a shovel. He was waiving the knife around when Silbiano came outside and took the shovel away from his wife. Reyes said, "do you want [anymore] you (sic) mother fuckers?" (Tr. p. 258).

Reyes fled from the yard and several people chased after him. Not far from the scene the police apprehended him. While being taken into custody, Silbiano kicked Reyes in the chin. Jorge died in the yard as a result of the stab wound. Jose was taken to the hospital and required surgery to save his life.

On August 31, 2004, the State filed an Information charging Reyes with Count I, murder; Count II, attempted murder, a Class A felony; Count III, aggravated battery, a Class B felony; and Count IV, battery with a deadly weapon resulting in serious bodily injury, a Class C felony. June 13 through June 21, 2005 a jury trial was held. The jury found Reyes guilty on all counts.

On August 26, 2005, a sentencing hearing was held. The trial court found several mitigating factors: (1) Reyes' lack of criminal history; (2) his life as a law-abiding

citizen; (3) he worked to support his family; (4) he was a very devoted father to his daughters; and (5) the impact his incarceration would have on his financially dependent family. The trial court found no aggravating factors as to the charge of murder, attempted murder, and battery with a deadly weapon. As a result, the trial court sentenced Reyes to fifty years on Count I, twenty-five years on Count II, and three years on Count IV. Count III was merged with Count II for sentencing purposes. With respect to the imposition of consecutive sentences, however, the following aggravating factors were found:

> (1) Three people were almost killed or knifed as a result of the actions of [Reyes].
> (2) The incident happened in front of minor children. [Reyes'] children and the [victims'] children all witnessed these significant acts of violence.
> (3) The incident also happened in front of the victim, [Jorge's], parents, who saw their son killed.
> (4) The actions of [Reyes] have permanently affected his family, the Orsornio family, and all of the children that were involved both financially and emotionally.

(Appellant's App. p. 153). As such, the trial court ordered Counts II and IV served concurrent, but consecutive to Count I.

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

DISCUSSION AND DECISION

I. *Self-Defense*

Reyes first asserts that the State failed to sufficiently rebut his claim of self-defense beyond a reasonable doubt. We review a challenge to the sufficiency of the evidence to rebut a claim of self-defense like we review any sufficiency of the evidence claim; we will not reweigh the evidence or assess the credibility of the witnesses.

Firestone v. State, 838 N.E.2d 468, 472 (Ind. Ct. App. 2005). We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.*

A valid claim of defense of oneself or another person is legal justification for an otherwise criminal act. I.C. § 35-41-3-2(a); *Pinkston v. State*, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), *trans. denied*. In order to prevail on such a claim, the defendant must demonstrate 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. *Id.* The amount of force a defendant may use to protect himself must be proportionate to the urgency of the situation. *Id.* When a person uses more force than is reasonably necessary under the circumstances, his right to self-defense is extinguished. *Id.* When a claim of self-defense is raised and there is support in the evidence, the State has the burden of negating at least one of the necessary elements. *Id.* The burden is satisfied either by rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief. *Id.* If a defendant is convicted despite his 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).

Here, Reyes contends he was protecting himself and his wife from several aggressors whereby the use of a knife was not only reasonable but also necessary. We disagree. Our review of the record indicates that Reyes' brandishing and use of a knife was disproportionate to the urgency of the situation. First, we note that no one involved

in the altercation aside from Reyes possessed a weapon. Next, Reyes points to the crowd chasing him and his being kicked by Silbiano as justification for wielding the knife. However, the record clarifies that those events occurred after he stabbed three people and were obviously in reaction to the escalation of the incident, due solely to the actions of Reyes himself. Thus, we find the State met its burden of rebutting beyond a reasonable doubt that Reyes willingly participated and provoked the violence, and he did not have a reasonable fear of death or great bodily harm. *See Pinkston*, 821 N.E.2d at 842.

II. *Autopsy Photographs*

Reyes next argues the trial court abused its discretion by allowing autopsy photographs of Jorge's heart, after removal from his body, into evidence. In particular, Reyes asserts the probative value of a photograph of a human heart removed from its body was outweighed by its prejudicial effect.

As stated by our supreme court, "because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of photographic evidence only for an abuse of discretion." *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002); *Ketcham v. State*, 780 N.E.2d 1171, 1178 (Ind. Ct. App. 2003), *trans. denied*. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Ketcham*, 780 N.E.2d at 1178. An error involving an abuse of discretion does not require reversal unless it affects the substantial rights of a party or is inconsistent with substantial justice. *Ross v. State*, 835 N.E.2d 1090, 1092 (Ind. Ct. App. 2005), *trans. denied*.

Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence R. 403; *Corbett*, 764 N.E.2d at 627. "Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally." *Id.* (quoting *Amburgey v. State*, 696 N.E.2d 44, 45 (Ind. 1998)). In addition, gruesome photographs are admissible if they act as demonstrative aids for the jury and have strong probative value. *Ketcham*, 780 N.E.2d 1171, 1178.

Autopsy photographs often present a unique problem because the pathologist has manipulated the corpse in some way during the autopsy. *Id.* When a body is altered for a photograph, the concern is that the handiwork of the pathologist may be imputed to the defendant, thereby rendering the defendant responsible in the minds of the jurors for the cuts, incisions, and indignity of an autopsy. *Id.* As such, "photographs are generally inadmissible if they show the body in an altered condition." *Id.* (quoting *Corbett*, 764 N.E.2d at 627). However, "there are situations where some alteration of the body is necessary to demonstrate the testimony being given." *Ketcham*, 780 N.E.2d at 1178 (quoting *Swingley v. State*, 739 N.E.2d 132, 133-34 (Ind. 2000)).

In *Fentress v. State*, 702 N.E. 2d 721, 722 (Ind. 1998), our supreme court held that two photographs, which depicted the victim's skull with hair and skin pulled away from it, were admissible notwithstanding the general rule that autopsy photographs are inadmissible if they show the body in an altered state. Because the pathologist explained what he had done and that the alteration was necessary to determine the extent of the

victim's injuries, the supreme court found that the probative value outweighed the prejudicial effect. *Id.* at 722.

Similar to the instant case, in *Ketcham* the State introduced, and the trial court admitted, an autopsy photograph of a heart removed from the body showing a bullet hole with a ruler indicating scale. *See Ketcham*, 780 N.E.2d at 1179. The pathologist used the photograph to explain the trajectory of the bullet, the internal injuries sustained by the victim from the bullet, and that "the bullet hole to [the victim's] heart was one of several fatal wounds." *Id.* (internal citations omitted). We found the probative value of the picture outweighed any unfair prejudice.

We find the same to be true in this case. The pathologist, Dr. Joseph Prahlow (Dr. Prahlow), used the photographs of Jorge's heart to illustrate the entry and exit point of the knife in the heart. Dr. Prahlow also utilized the picture to describe the angle of the wound, depth of the wound, and the internal bleeding sustained as a result of the stabbing. Finally, Dr. Prahlow testified that Jorge's cause of death was "a stab wound of the chest." (Tr. p. 364). Furthermore, we believe due to the clean, straightforward, and technical nature of the photographs, these photographs could even be considered sterile and "fairly tame for a murder case." *See Corbett*, 764 N.E.2d at 627. Thus, we conclude the trial court did not abuse its discretion by admitting the contested photographs.

Moreover, even if the trial court erred in admitting the photographs, the error does not warrant reversal. An error in admitting evidence is harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial right of a party. *Custis v. State*, 793 N.E.2d 1220, 1226 (Ind. Ct. App. 2003),

trans. denied (citing *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) (given the substantial quantity of incriminating evidence presented, the drawings and postcards did not affect the defendant's substantial rights and did not warrant reversal)). Reyes asserts that Dr. Prahlow had "basically concluded his testimony before any reference was made to the photographs;" thus, the photographs were unnecessary for the State to prove its case, and therefore irrelevant at that point. (Appellant's Br. p. 7).

III. *Consecutive Sentences*

Lastly, Reyes asserts the trial court improperly imposed consecutive sentences. Specifically, Reyes claims the aggravating factors found by the trial court were improper. The trial court found four aggravating factors in order to impose consecutive sentences: (1) three people almost died as a result of Reyes' actions; (2) the incident occurred in front of minor children, including Reyes' and the victims' children; (3) Jorge's parents witnessed his death; and (4) the families of Reyes and the victims will suffer financially and emotionally.

It is well established that sentencing decisions lie within the discretion of the trial court and will be reversed only for abuse of discretion. *Hayden v. State*, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005), *trans. denied*. A trial court may not impose consecutive sentences absent express statutory authority. *Williams v. State*, 787 N.E.2d 461, 463 (Ind. Ct. App. 2003). I.C. § 35-50-1-2(c) gives the trial court discretion to determine whether to impose concurrent or consecutive sentences and allows the court to consider aggravating and mitigating circumstances in doing so. Furthermore, I.C. § 35-50-1-2(a) defines certain crimes as "crimes of violence." Murder and attempted murder are

designated as crimes of violence and are therefore not subject to the limitation of I.C. § 35-50-1-2(c). Thus, we find the trial court did not abuse its discretion by imposing consecutive sentences.

CONCLUSION

Based on the foregoing, we find the State presented sufficient evidence beyond a reasonable doubt to rebut Reyes' claim of self-defense; the relevance of photographs of Jorge's heart after removal from his body outweighs their prejudicial effect; and the trial court properly imposed consecutive sentences.

Affirmed.

BAILEY, J., and MAY, J., concur.