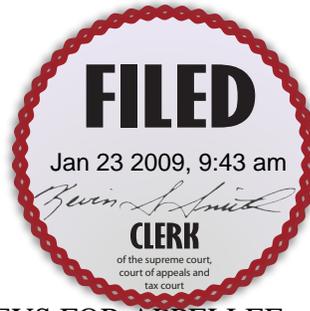


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ELIJAH HENRY ARMES, II,)

Appellant-Defendant,)

vs.)

No. 82A01-0804-CR-204

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0704-FC-303

January 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Elijah Armes, II, appeals his conviction and sentence for battery resulting in serious bodily injury, a class C felony.¹ We affirm.

Issues

Armes presents four issues for our review, which we consolidate and restate as follows:

- I. Whether the trial court was within its discretion in refusing a request for a lesser included offense instruction;
- II. Whether the sentencing decision was supported by valid aggravating and mitigating factors; and
- III. Whether the sentence was appropriate.

Facts and Procedural History

The facts most favorable to the conviction reveal the following. On November 11, 2006, Gary Young, Jason Staples, and Jerrod Hart were drinking at an Evansville bar. Armes, Lee Russell, and Teddy Duneghy, who were at the same bar that night, began interacting with Young, Staples, and Hart. At some point, Young and Duneghy engaged in an arm wrestling match. Disagreement ensued regarding who won and whether money would change hands. The dispute escalated to the point that an officer at the bar ejected all six men.

¹ See Ind. Code § 35-42-2-1(a)(3).

Not surprisingly, the disturbance continued in the parking lot. Armes, a professional boxer, standing six feet tall and weighing three hundred pounds, began fighting with Hart. Staples attempted to intervene but was punched by Armes. The punch knocked Staples to the ground, where he lay unconscious for approximately fifteen minutes. The fighting apparently continued, and police were summoned. However, by the time officers arrived, Armes was gone. Staples, whose tooth had been knocked out and who was bleeding from his eye and mouth, was transported via ambulance to a hospital, where he received stitches near his eye. Staples' dental injury necessitated various corrective procedures, including surgery to remove infection.

On April 2, 2007, the State charged Armes with battery resulting in serious bodily injury. At the conclusion of a two-day trial, a jury found him guilty as charged. On April 2, 2008, the court ordered a five-year executed sentence and specified that Arms was to serve it consecutive to both a four-year sentence and a five-year sentence in other cases. Further facts shall be supplied where relevant.

Discussion and Decision

I. Lesser Included Offense Instruction

On February 22, 2008, after the presentation of evidence at trial, the court reviewed its final instructions with counsel. App. at 32. Armes orally requested an instruction on the lesser included offense of battery as a class A misdemeanor. Supp. Appellant's App. at 1. The court denied the request, determining that the evidence did not support such an instruction. App. at 32. Armes contends that the court abused its discretion when it refused

to give the lesser included offense instruction.

Our supreme court has outlined a three-step analysis to be used by trial courts when determining whether instructions on lesser included offenses should be given. *See Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995). The court must determine the following: (1) whether the lesser included offense is inherently included in the crime charged; if not, (2) whether the lesser included offense is factually included in the crime charged; and, if either, (3) whether a serious evidentiary dispute existed whereby the jury could conclude the lesser offense was committed but not the greater. *Id.* at 566-67; *see also Clark v. State*, 834 N.E.2d 153, 156 (Ind. Ct. App. 2005). A lesser offense is necessarily included within the greater offense if it is impossible to commit the latter without having committed the former. *See Iddings v. State*, 772 N.E.2d 1006, 1016 (Ind. Ct. App. 2002), *trans. denied*.

According to the pertinent statute,

- (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
 - (1) a Class A misdemeanor if:
 - (A) it results in bodily injury to any other person;
 -
 - (3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon[.]

Ind. Code § 35-42-2-1. It is impossible to commit battery causing serious bodily injury without committing battery causing bodily injury; therefore, the class A misdemeanor offense is an inherently lesser included offense of the class C felony offense. Thus, we examine whether a serious evidentiary dispute existed whereby the jury could conclude that the A misdemeanor battery was committed but not the C felony. “When an instruction is refused

on grounds that there is no serious evidentiary dispute, we review that refusal for an abuse of discretion.” *McKinney v. State*, 873 N.E.2d 630, 644 (Ind. Ct. App. 2007), *trans. denied*.

Our legislature has defined “serious bodily injury” as bodily injury that creates a substantial risk of death or that “causes serious permanent disfigurement, *unconsciousness*, *extreme pain*, or permanent or protracted loss or impairment of the function of a bodily member or organ. *See* Ind. Code § 35-41-1-25 (emphasis added). Bodily injury means “any impairment of physical condition, including physical pain.” Ind. Code § 35-41-1-4.

The evidence reveals that when professional boxer Armes hit Staples, Staples fell to the ground and lost consciousness. Armes’ punch not only knocked Staples unconscious for fifteen minutes, but also left Staples bleeding from both his mouth and eye, missing a tooth, and needing multiple stitches. The resulting injuries led to an ambulance ride to a hospital that day, a swollen jaw, and more than a dozen corrective procedures thereafter. Staples also suffered short-term memory loss. In light of the aforementioned, we cannot say that a serious evidentiary dispute existed regarding whether Staples suffered a “serious” bodily injury. *See Davis v. State*, 819 N.E.2d 91, 100 (Ind. Ct. App. 2004) (finding no reversible error where defendant conceded there was ample evidence that victim became unconscious when struck in the mouth; when found, victim was unconscious, bleeding, and missing some teeth), *trans. denied*. Therefore, we conclude that the court was within its discretion in rejecting Armes’ request for the lesser included offense instruction.

II. Consecutive Sentences, Aggravators, and Mitigator

The court explained its sentencing decision as follows:

The Court finds the following aggravating circumstances exist. The defendant [has] twice previously been convicted of batteries which were felonies. He was on probation at the time that this particular offense was committed for a violent felony offense that resulted in serious injury to another. He had previously failed or violated the terms and conditions of his probation. All of those are aggravating circumstances. There are no *significant* mitigating circumstances present here.

The testimony of Teddy Duneghy at the trial, to the Court as an observer of that testimony, was false testimony. To my way of thinking it was patently false but be that as it may it didn't help your cause any with the jury, Mr. Armes, or with this court. *I believe that to impose a concurrent sentence would seriously diminish the grievousness of the crime committed here and the injury sustained by this young person who by all accounts was an innocent victim. He had no ill will toward you whatsoever. His only role in this was trying to break up whatever disagreements had started between the two parties. He was trying to prevent violence and he ended up being seriously injured.*

The Court will find that the aggravating circumstances call for a 5 year sentence. That that sentence will be served consecutively to the sentences – by law it must be consecutive to the sentence in cause number 0402-FC-150 and the Court finds *under the circumstances of this case it should be consecutive to 0703-FB-223*. There will be no credit time or good time since he's accruing that in the other sentences. Costs will be waived and there will be no assessment to the Public Defender Fund since he will be serving an executed sentence.

Tr. at 363-65 (emphases added).

Armes asserts that the court erred in using the “depreciate the seriousness” factor to justify ordering his sentence to be served consecutive to the sentence he received for 0703-FB-223. In addition, he contends that the court erred in not finding a special undue hardship mitigating circumstance. He claims that the combination of the improper aggravating factor, plus the failure to find a significant mitigator, resulted in reversible error.

Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified*

on reh'g, 875 N.E.2d 218. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* Under the advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, therefore, the weight the trial court gives to such factors is not subject to appellate review. *Id.* at 491.

As the italicized portion of the sentencing statement shows *supra*, the court did not consider the “depreciate the seriousness” factor as an aggravating factor. Instead, the court relied on the nature and circumstances of Armes’ crime as an aggravating factor. We see no problem with the court relying on the nature and circumstances of the crime to justify the consecutive sentence. *See Smith v. State*, 881 N.E.2d 1040, 1049 (Ind. Ct. App. 2008) (noting that court could have relied on the nature and circumstances of the crime to justify running a criminal confinement sentence consecutive to other sentences); *see also Plummer v. State*, 851 N.E.2d 387, 390-91 (Ind. Ct. App. 2006).

We are equally unimpressed with Armes’ contention that the court should have found

undue family hardship as a mitigating circumstance. An allegation that the trial court failed to consider a mitigating factor requires the defendant to show that the mitigating evidence is both significant and clearly supported by the record. *Matshazi v. State*, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), *trans. denied*. It is within the discretion of the trial court to determine whether sufficient evidence of significant mitigation has been presented. *White v. State*, 846 N.E.2d 1026, 1034 (Ind. Ct. App. 2006), *trans. denied*. The trial court is not required to explain why it does not find the proffered factors to be mitigating. *Id.*

While the court heard Armes' sister opine that his family would suffer without him, no evidence was submitted regarding what, if anything, Armes had been contributing to his family. Indeed, some evidence actually cut against the argument that Armes' absence would be detrimental to the family. Accordingly, we cannot say that the undue hardship mitigator was clearly supported by the record. Thus, the court did not abuse its discretion in finding no significant mitigating circumstances, nor did it need to defend its rejection of the proposed mitigator. *See Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006) (noting that court is not required to find that a defendant's incarceration would impose undue hardship on dependents), *trans. denied*.

In any event, given the unchallenged significant aggravating circumstances, the court was within its discretion in ordering a slightly greater than advisory sentence to be served consecutive to Armes' other sentences. Specifically, Armes' criminal history is substantial and consists of offenses similar to his current offense. Armes has two previous felony convictions for battery. In addition, at the time he committed the present offense, Armes was

on probation for a violent felony that resulted in serious injury to another. Finally, he had previously violated the terms and/or conditions of probation. Thus, even if we take the nature and circumstance aggravating factor out of the equation, we are confident that the court would have ordered Armes to serve his sentence consecutive to the other sentences. *See Anglemyer*, 868 N.E.2d at 491 (noting that affirmance is proper where we can say with confidence that the trial court would have imposed the same sentence had it considered only proper aggravators).

III. Appropriate Sentence

Finally, Armes challenges the appropriateness of his sentence. He focuses on his reformation while incarcerated, the extreme hardship he claims his family will endure without his assistance, and the fact that the injuries he caused resulted from one punch rather than repeated blows.

Indiana Appellate Rule 7(B) allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require this Court to be extremely deferential to a trial court's sentencing decision, this court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court also recognizes the unique perspective a trial court brings to its sentencing decisions. *Id.* The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

Regarding the nature of the offense, the advisory sentence is the starting point our

legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 494. The advisory sentence for a class C felony is four years, with a fixed term of between two and eight years. Ind. Code § 35-50-2-6. Armes received a five-year term, to be served consecutive to the terms for two separate offenses. As for Armes' current offense, he punched a person who was attempting to stop a fight. Armes' actions not only rendered the victim unconscious but also left him with a variety of injuries that we have already outlined in detail *supra*. Armes left the scene.

Moving next to the question of character, we often look at criminal history. Our supreme court has emphasized that “the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual’s criminal history.” *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). “This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability.” *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

Despite Armes' efforts to paint a different picture of his character, his criminal history is significant. Though not quite thirty years old, Armes has accumulated a lengthy adult record, including three felonies. In particular, Armes' prior history consists of a 2004 felony conviction for battery resulting in serious bodily injury; March 2007 convictions for criminal confinement, battery, and strangulation; a variety of arrests on other charges; as well as two protective orders granted against him. Moreover, Armes' response to the privilege of being released to probation was to commit the current offense – another offense involving serious

bodily injury. Armes' criminal history clearly reflects poorly on his character.

In sum, Armes has not met his burden of persuading us that his sentence violates Indiana Appellate Rule 7(B). While we may have originally ordered a different sentence, we cannot say that the sentence ordered by the court was inappropriate in light of Armes' character and offense.

Affirmed.

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