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IN THE
COURT OF APPEALS OF INDIANA

BRIAN A. STREETER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 84A05-0604-CR-219
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0508-FC-2305

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brian Streeter appeals his conviction and sentence for battery resulting in serious bodily injury, a Class C felony. We affirm.

Issues

Streeter raises two issues for our review:

I. whether the evidence was sufficient to support his conviction; and

II. whether the trial court properly sentenced him.

Facts

On August 25, 2005, Kevin Wall, Roger Walka, and three friends visited Terre Haute and went to the Ballyhoo Tavern. As Wall and Walka were leaving the bar sometime after midnight on August 26, 2005, Streeter approached them, spoke with Wall briefly, and then struck Wall in the face. Wall, who was knocked unconscious by the blow, suffered from a cut, which resulted in a scar, above his eye, a fracture to the bone around one of his eyes, and a broken nose.

On August 29, 2005, the State charged Streeter with battery resulting in serious bodily injury, a Class C felony. On March 6, 2006, the State filed an amended information charging Streeter with the same Class C felony. On March 7, 2006, Streeter's jury trial began, and the jury found him guilty of battery resulting in serious bodily injury on March 8, 2006. On April 6, 2006, the trial court sentenced Streeter to serve eight years in the Department of Correction. Streeter now appeals his conviction and sentence.

Analysis

I. Sufficiency of Evidence

Streeter first challenges the sufficiency of the evidence presented by the State to prove Wall suffered serious bodily injury. When confronted with a challenge to the sufficiency of the State's evidence, we will affirm an appellant's conviction unless, "considering only the evidence and reasonable inferences favorable to the judgment and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Cooper v. State, 831 N.E.2d 1247, 1251 (Ind. Ct. App. 2005) trans. denied.

Indiana Code Section 35-42-2-1(a) defines battery as the knowing or intentional touching of another person in a rude, insolent, or angry manner. The offense is a Class C felony if it results in serious bodily injury or is committed by means of a deadly weapon. Ind. Code § 35-42-2-1(a)(3). "Serious bodily injury" is defined as that which "creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus." I.C. § 35-41-1-25. We conclude that the evidence is sufficient to prove that Wall's injuries constituted serious bodily injury.

Wall's medical records reveal that he suffered forehead and left eyebrow lacerations measuring 2 and 3.5 centimeters, respectively, the larger of which required stitches and resulted in a scar. See Ex. 1, pg. 8. Wall further suffered fractures of his left

orbit and nasal bones. Id. Finally, Wall testified that he lost consciousness as a result of the blow inflicted by Streeter. Specifically, Wall stated, "I turned around to ask [Streeter], you know, what was going on . . . and I remember my buddies picking me up off the ground . . . ." Tr. p. 229. We conclude the evidence that Wall suffered a loss of consciousness is sufficient to support Streeter's conviction for battery resulting in serious bodily injury.

In reaching this conclusion, we note that our supreme court has endeavored to differentiate those injuries that constitute "serious bodily injury" from those that merely constitute "bodily injury." See Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004). In that case, Davis was convicted of Class D felony criminal recklessness involving serious bodily injury after he assaulted his former girlfriend, K.R.[1] As a result of the assault, K.R. suffered from an abrasion and swelling on her knee, a superficial laceration to the inside of her lip, and a fractured pinky finger. Id. at 1177.

In its analysis our supreme court stated, "Our commitment to the role of fact-finders tends to produce considerable deference on a matter as judgmental as whether a bodily injury was 'serious.' The appellate courts have sometimes been willing to sanction convictions resting on rather slim levels of injury." Id. at 1178. The Davis court then compared those "slim levels of injury"—i.e., blows to the back of a victim's head and face resulting in lacerations that required stitches—to "the sort of serious infliction of

[1] Although the case at issue involves a conviction for battery, and not criminal recklessness, resulting in serious bodily injury, the same statutory definition of "serious bodily injury" is applicable to both crimes. See Davis, 813 N.E.2d at 1178 (citing Indiana Code Section 35-41-1-25 for the definition of "serious bodily injury").

damage suggested by the statutory definition of 'serious bodily injury'"—i.e., a beating that broke a victim's leg in four places, required the victim to be hospitalized for four days and wear a cast for three months, and that caused the victim to walk with a limp at the time of trial. Id. (citations omitted). The court concluded that the sum of K.R.'s injuries did not rise to the level of serious bodily injury and reduced Davis's conviction to the lesser-included Class B misdemeanor. Id. at 1178-79.

We read Davis as an admonishment that we more closely scrutinize the evidence of injury in serious bodily injury cases such as Streeter's. Although we are mindful of this, we believe that this case is distinguishable from those the Davis court described as "willing to sanction convictions resting on rather slim levels of injury." Id. at 1178 (citing Williams v. State, 520 N.E.2d 1261 (Ind. 1988), Sutton v. State, 714 N.E.2d 694 (Ind. Ct. App. 1999) trans. denied). The distinguishing factor is that here, there is evidence that Walls lost consciousness as a result of the battery. Loss of consciousness necessarily is serious bodily injury. See I.C. § 35-41-1-25(2).

Finally, to the extent that Streeter bases his sufficiency argument on the fact that that Hall's medical records indicate he denied losing consciousness, this is an invitation to reweigh the evidence. We cannot do so. The State's evidence is sufficient to support Streeter's conviction for battery resulting in serious bodily injury.

II. Sentencing

Streeter next challenges his eight-year sentence. Specifically, Streeter contends that, pursuant to Indiana Appellate Rule 7(B), his sentence is inappropriate in light of the nature of the offense and Streeter's character. Streeter also takes issue with the trial

court's failure to identify any mitigators. The latter argument presents us with a bit of a dilemma because this case is governed by the new sentencing statutes, which eliminated "presumptive" sentences and established a range of permissible sentences.[2] In Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006), we noted:

> [Blakely's] after-effects are still felt because the new statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.

Id.

In Gibson, after noting the difficulties we face in reviewing sentences imposed pursuant to the new sentencing statutes, we next reviewed the mitigators and aggravators found by the trial court in a manner similar to that we employed under the former, "presumptive" system and used our conclusions about the propriety of those factors as a bellwether for assessing the appropriateness of Gibson's sentence. We next analyzed Gibson's sentence according to our authority under Indiana Appellate Rule 7(B) to determine whether it was "inappropriate in light of the nature of the offense and [Gibson's] character." Id. at 149. Until we receive a directive from our supreme court

[2] The new sentencing statutes took effect on April 25, 2005; Streeter committed the instant offense on August 26, 2006.

dictating a more specific framework under which to review sentences, we follow the Gibson model.

In this case, the trial court found Streeter's criminal history, which consists of convictions for minor consumption, public intoxication, and voluntary manslaughter, to be an aggravator. The trial court also found Streeter's status as a parolee at the time he committed the crime at issue to be an aggravator. The trial court found no mitigators.

Streeter first contends that his misdemeanor minor consumption and public intoxication convictions "that were unrelated to this battery are not significant aggravators . . . Those should not be considered aggravators." Appellant's Br. p. 13. To the extent Streeter argues that these convictions should be given no aggravating weight, we disagree and note that a defendant's criminal history has been identified by our legislature as a permissible aggravator. See Ind. Code § 35-38-1-7.1(a)(2). However, "The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005) (quotations omitted) (citations omitted). Streeter's criminal history, including his misdemeanor convictions, is a proper aggravator, separate from the fact of his manslaughter conviction.

Streeter next seems to contend that his status as a parolee at the time he attacked Hall is an improper aggravator. Specifically, he argues: "The Court finds as an aggravator that the defendant has a significant criminal history and then the Court finds that the defendant was on parole for this Manslaughter conviction at the time this crime is alleged to have occurred. Thus the Court is counting the Manslaughter act twice."

Appellant's Br. pp. 11-12. We disagree. The fact that Streeter was on parole at the time he committed the instant offense is a proper aggravator. See Anderson v. State, 798 N.E.2d 875, 881 (Ind. Ct. App. 2003); I.C. § 35-38-1-7.1(a)(6).

Streeter next contends that the trial court failed to assign mitigating weight to his proposed mitigators—that Streeter was employed; that Streeter did not participate in an escape that took place on his cell block while he was detained in the Vigo County jail and, instead, was cooperative with authorities following the escape; and that Streeter is young. "The trial court is not required to find the presence of mitigating circumstances." Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). The trial court has the discretion to determine whether the factors proposed by the defendant are indeed mitigating, and it is not required to explain why it does not find the proffered factors to be mitigating. Id. The trial court's failure to give these factors mitigating weight was not error.

Having concluded that the trial court's identification of mitigators and aggravators was proper, we next address whether, given the nature of the offense and Streeter's character, Streeter's sentence is appropriate. See App. R. 7(B). We conclude that Streeter's sentence is appropriate.

Streeter was on parole following a conviction for voluntary manslaughter when he attacked Hall in the parking lot of a bar, causing him to suffer broken nasal and facial bones and a laceration serious enough that it required stitches. More significantly, Streeter knocked Hall to the ground with enough force that Hall testified he lost consciousness.

We recognize that Hall's injuries, though severe, were not overwhelmingly so; he was treated and released from the hospital within a matter of hours. However, this is not the first time Streeter has acted violently and injured someone. Further, Streeter's attack on Hall took place outside a bar after a night of drinking. Streeter's misdemeanor convictions for minor consumption and public intoxication indicate that this is not the first time he has found himself in alcohol-related legal trouble. Given the similarity of Streeter's prior convictions to the instant offense—particularly the serious violence associated with his manslaughter conviction—we conclude that Streeter's criminal history is entitled to significant aggravating weight. Further, Streeter committed this violent crime while he was on parole for having killed another person. There are no mitigators here. Streeter's eight-year sentence is appropriate given the nature of the offense and Streeter's character.

Conclusion

The evidence is sufficient to support Streeter's conviction for battery resulting in serious bodily injury. His eight-year sentence is appropriate. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.