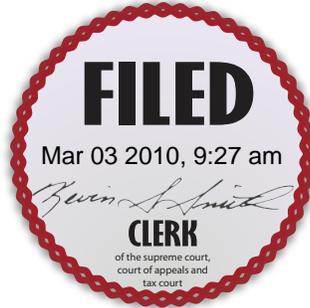


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TONY BROOMFIELD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 27A02-0910-CR-1010

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Warren Haas, Judge
Cause No. 27D03-0901-FD-20

MARCH 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Tony V. Broomfield appeals the sentence imposed after he was convicted of battery resulting in bodily injury, a Class D felony. We affirm.

ISSUE

Broomfield raises one issue for our review, which we restate as: Whether the trial court abused its discretion in determining that the short period between batteries against the same victim was an aggravating circumstance.¹

FACTS AND PROCEDURAL HISTORY

In January of 2009, Broomfield was dating Valencia Weaver, and they were living at the home of Weaver's friend, Tammy Stevens. On January 6, 2009, Weaver was out late, and Broomfield became angry because he did not know where she was or what she was doing. When Weaver returned at approximately 11:00 p.m., Stevens told her not to go upstairs because Broomfield was upset. Weaver did go up stairs, and when she did so, Broomfield "popped" her in the nose. Weaver, whose nose was bleeding, went downstairs and told Stevens that Broomfield had struck her. Police officers arrived shortly after being called to the home.

The State charged Broomfield with one count of battery resulting in bodily injury, a Class A misdemeanor, which was elevated to a Class D felony because Broomfield had a prior conviction for battering Weaver. Broomfield stipulated to the prior battery. A jury found Broomfield guilty of the charge against him.

¹ Broomfield characterizes the issue as whether the sentence was inappropriate under Indiana Appellate Rule 7(B). However, it is clear from Broomfield's brief that he is claiming an abuse of discretion.

During the sentencing hearing, Broomfield waived preparation of the pre-sentence report. At the hearing, Broomfield admitted prior convictions of battery, dealing in cocaine and methamphetamine, possession of cocaine, and criminal conversion, in addition to at least one probation violation. (Tr. Vol.II, at pp. 1-5). The trial court sentenced Broomfield to a term of three-years incarceration, with one year suspended to probation.² In doing so, the trial court included two aggravators in its sentencing order: (1) “[Broomfield’s] criminal history”; and (2) “the fact that it had only been about three months from his battery conviction ... until he battered the same victim....” (Appellant’s App. at 57). Broomfield now appeals.

DISCUSSION AND DECISION

Ind. Code § 35-42-2-1(a)(1)(A) states that a person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits Class A misdemeanor battery if the touching causes bodily injury to the other person. However, the offense is a Class D felony if it results in bodily injury to “the other person and the person who commits the battery was previously convicted of a battery in which the victim was the other person.” Ind. Code § 35-42-2-1(a)(2)(D).

Broomfield contends that the trial court improperly relied on an element of the charged offense as an aggravating circumstance; i.e. the trial court relied on the fact that Weaver was the victim of both batteries as an aggravator. He cites *Davis v. State*, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), *trans. denied*, for the proposition that a

² Ind. Code § 25-50-2-7 provides that a person who commits a Class D felony “shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 ½) years.”

sentencing court may not consider a material element required to enhance an offense as a valid aggravator.

When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). If the recitation includes a finding of mitigating or aggravating circumstances, 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.* An abuse of discretion occurs if the 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.* One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id.* at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id.* at 491.

Although elements of a crime cannot be used to enhance a sentence, a particularized circumstance of a criminal act may constitute a separate aggravating factor. *Morgan v. State*, 675 N.E.2d 1067, 1073 (Ind. 1996). Here, the enhancement of the

battery from a Class A misdemeanor to a Class D felony was based upon the battering of the same victim in a prior instance. Thus, the battering of the same victim was an element of Class D felony battery. However, the trial court focused on the short number of months between the two offenses, not the fact that two offenses occurred. It was clear that the court was reflecting on the probability of a recurrence of the offense. The trial court thus relied on a particularized circumstance, not an element of the offense. In doing so, the trial court did not abuse its discretion.

Affirmed.³

BAKER, C.J., and KIRSCH, J., concur.

³ Because Broomfield did not address the “character of the offender” and the “nature of the offense,” we need not address whether the sentence is inappropriate. However, we note that the combination of the aggravators cited by the trial court is sufficient to support a determination that the sentence was not inappropriate.