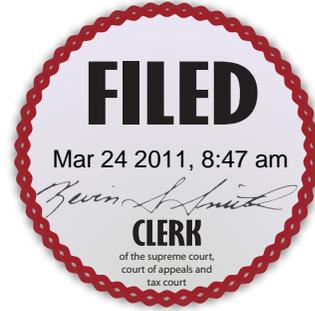


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**IN THE
COURT OF APPEALS OF INDIANA**

FLAVIO GONZALEZ,)
)
Appellant-Defendant,)
)
vs.) No. 79A05-1006-CR-407
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT NO. 2
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0909-FA-32

March 24, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Flavio Gonzalez (Gonzalez), appeals his conviction for criminal confinement while armed with a deadly weapon, a Class B felony, Ind. Code § 35-42-3-3(a)-(b), and his sentences for two Counts of criminal confinement while armed with a deadly weapon, Class B felonies, I.C. § 35-42-3-3(a)-(b); and domestic battery, a Class D felony, I.C. § 35-42-2-1.3(a)-(b).

We affirm.

ISSUES

Gonzalez raises five issues on appeal, which we restate as the following four issues:

- (1) Whether the State presented sufficient evidence to establish beyond a reasonable doubt that Gonzalez committed criminal confinement while armed with a deadly weapon;
- (2) Whether the trial court abused its discretion when it denied Gonzalez's motion for a directed verdict regarding his charge of criminal confinement while armed with a deadly weapon;
- (3) Whether the trial court violated Indiana's prohibition against double jeopardy when it entered convictions for two Counts of criminal confinement while armed with a deadly weapon; and
- (4) Whether the trial court properly sentenced Gonzalez.

FACTS AND PROCEDURAL HISTORY

On September 1, 2009, Gonzalez's wife, Yolanda Gonzalez (Yolanda), took their sixteen-year-old daughter, S.G., to get the oil changed in S.G.'s car. Two of Gonzalez and Yolanda's younger daughters, J.G. and K.G., accompanied Yolanda and S.G., while their other daughter, M.G., stayed at home with Gonzalez. When Yolanda, S.G., J.G., and K.G. returned home, Gonzalez demanded to see Yolanda's receipt. Gonzalez looked at the receipt and became angry at her for spending \$30 on the oil change when he could have done it himself for less money. Gonzalez and Yolanda argued, and Yolanda decided to drive to the bank to withdraw cash to pay him back. When she returned home and gave him the money, though, Gonzalez continued to argue with her. At one point, Gonzalez punched Yolanda in the mouth, causing her to bleed. After Gonzalez punched her, Yolanda yelled to S.G. to call 9-1-1. In response, Gonzalez told Yolanda that she was "going to regret calling 9-1-1." (Transcript p. 24).

Subsequently, Gonzalez walked out to the garage and came back with a bag containing a gun. He took out the gun, cocked the hammer, and pointed it at Yolanda, in the presence of M.G. and K.G. In response, M.G. and K.G. hugged each other and started screaming. Their residence did not have a landline telephone service, but Gonzalez ordered Yolanda and his daughters to give him their cell phones. Unbeknownst to Gonzalez, though, M.G. had recently replaced her cell phone, and Gonzalez picked up M.G.'s old cell phone.

After taking the cell phones, Gonzalez continued to point his gun at Yolanda, and Yolanda started crying and telling him not to shoot her. S.G. stepped in between Gonzalez

and Yolanda and told Gonzalez “not to do anything stupid, because he knew he would regret it later.” (Tr. p. 107). In response, Gonzalez told S.G. that she needed to go to her room. He also told Yolanda that she needed to say goodbye to her daughters, so she hugged them goodbye and told them that she loved them. Yolanda then asked Gonzalez not to do anything in front of their daughters, so Yolanda and Gonzalez walked out to the garage.

Inside, J.G. hid in S.G.’s room and called 9-1-1 with M.G.’s second cell phone, which Gonzalez did not know existed. A few minutes later, S.G. also hid in her room in the closet and called 9-1-1 with the same phone. Outside, Gonzalez attempted to make Yolanda get in the car. She refused because she was certain that he would take her where no one could find her. Instead, she stalled for time by returning to the house to get her mother’s picture and her rosary.

When they returned to the garage, Yolanda begged Gonzalez not to kill her, and he kept telling her that “it was over for her” and that he “was going to kill her.” (Tr. p. 41). At that time, though, Yolanda’s cell phone started ringing. Gonzalez answered the phone and became angry when he discovered that the person on the other end was Yolanda’s male friend. When the call ended, Gonzalez attempted to call Yolanda’s friend back, but he could not figure out how to use her phone. While Gonzalez attempted to figure out her phone, Yolanda escaped from the garage and ran to a neighbor’s house. From there, she called 9-1-1.

By that time, police officers had surrounded the Gonzalez’s house in response to J.G. and S.G.’s telephone calls. The officers identified themselves multiple times and told

Gonzalez to stop, but he attempted to run away from the officers. Two police officers intercepted him and struggled to handcuff him. Once they had handcuffed him, they discovered that his gun was loaded and the hammer on the gun was cocked back.

On September 8, 2009, the State filed an Information charging Gonzalez with Count I, criminal confinement while armed with a deadly weapon, a Class B felony, I.C. § 35-42-3-3(a)-(b); Count II, drawing or using a deadly weapon, a Class C felony, I.C. § 35-45-2-1; Count III, domestic battery, a Class D felony, I.C. § 35-42-2-1.3(a)-(b); Count IV, battery, a Class A misdemeanor, I.C. § 35-42-2-1; Count V, battery with a prior conviction, a Class D felony, I.C. § 35-42-2-1(a)(1)(D); Count VI, attempted murder, a Class A felony, I.C. §§ 35-41-5-1 and 35-42-1-1; and Count VII, criminal confinement while armed with a deadly weapon, a Class B felony, I.C. § 35-42-3-3(a)-(b). A jury trial was held March 23-25, 2010. At trial, Gonzalez pled guilty to battery with a prior conviction, so the trial court renumbered the Counts to avoid notifying the jury of Gonzalez's battery with a prior conviction charge.¹ At the close of the evidence, the jury found Gonzalez guilty of Count I, criminal confinement; Count II, intimidation; Count III, domestic battery; Count IV, battery; and Count VI, criminal confinement. The trial court declared a mistrial as to Count V, attempted murder.

On May 19, 2010, the trial court issued a sentencing order in which it merged Count II with Count VI and Counts IV and VII with Count III. In the order, the trial court sentenced Gonzalez to 18 years executed in the Indiana Department of Correction (IDOC) for Count I,

¹ Battery with a prior conviction was renumbered Count VII.

criminal confinement as a Class B felony, and three years for Count III, domestic battery as a Class D felony, with sentences to run concurrently. The trial court also sentenced Gonzalez to 12 years in the IDOC for Count VI, criminal confinement as a Class B felony, with the sentence to run consecutively to Gonzalez's sentence for Count I. In aggregate, the trial court sentenced Gonzalez to 30 years executed time in the IDOC.

In its sentencing order, the trial court noted the following aggravating factors: (1) the seriousness of the crime; (2) Gonzalez was in a position of trust; (3) Gonzalez had a history of criminal or delinquent activity; (4) two of the victims of the offense were less than twelve years old; (5) Gonzalez had recently violated the conditions of probation, parole, pardon, community corrections, or pre-trial release; and (6) there were multiple victims. As mitigating factors, the trial court noted that Gonzalez was remorseful and had a good work history.

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

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

On appeal, Gonzalez first contends that the State failed to present sufficient evidence to support his conviction for criminal confinement of his daughters while armed with a deadly weapon. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. In addition, we only consider the evidence most favorable to the verdict and the reasonable inferences stemming from that evidence. *Id.* We will only

reverse a conviction when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.* at 212-13.

In order to convict Gonzalez of criminal confinement while armed with a deadly weapon, the State was required to prove beyond a reasonable doubt that Gonzalez “knowingly or intentionally: (1) confined another person without the other person’s consent; or (2) removed another person by fraud, enticement, force, or threat of force, from one [] place to another.” I.C. § 35-42-3-3(a). To “confine” means to substantially interfere with a person’s liberty. I.C. § 35-42-3-1. Criminal confinement rises to the level of a Class B felony if it is committed while armed with a deadly weapon. I.C. § 35-42-3-3(b)(2). *Ransom v. State*, 850 N.E.2d 491, 498 (Ind. Ct. App. 2006).

Here, Gonzalez argues that he never told his daughters to stay in the house. Specifically, the only evidence the State presented in regards to confinement was related to his daughters’ feelings and thoughts that “they could not or should not leave the house because Gonzalez might harm their mother.” (Appellant’s Br. p. 8). According to Gonzalez, their fear of leaving the house due to worry for their mother does not constitute evidence of confinement.

We determined in *Ransom*, though, that a victim’s subjective feeling of confinement is relevant for the purposes of determining whether or not there has been a criminal confinement. *See Ransom v. State*, 850 N.E.2d 491, 498 (Ind. Ct. App. 2006). Similarly, we have held that the standard for determining whether a period of confinement has ended is

only “when the victim both *feels*, and is in fact, free from detention....” *Bunch v. State*, 937 N.E.2d 839, 848 (Ind. Ct. App. 2010) (emphasis added).

Here, Gonzalez took the girls’ phones, thereby implying that he did not want them to have contact with the outside world. S.G. testified that she “did [not] feel like [she] had a choice [but to give up her cell phone]” because she “did [not] want to make [Gonzalez] mad and have him do something to [her] mom.” (Tr. p. 110). In addition, there was evidence that Gonzalez ordered S.G. to her room in response to S.G.’s attempts to stand in between Gonzalez and Yolanda. At trial, when the State asked S.G. whether she felt like she could leave the house, she stated, “No. I could not leave the house.” (Tr. p. 110). Similarly, when the State asked J.G. what she thought would happen if she left the house, J.G. replied that, “If he was going to kill her then I thought it would have probably made it faster or [] sped up the process....” (Tr. p. 140). She also said that she “did [not] think it was safe to leave [the house].” (Tr. pp. 139-40).

This testimony illustrates that Gonzalez’s daughters felt confined to the house to prevent harm to their mother. Moreover, Gonzalez was carrying a gun throughout his interactions with his daughters. These facts, in the light most favorable to the trial court’s judgment, are sufficient to support Gonzalez’s conviction for criminal confinement while armed with a deadly weapon.

II. *Gonzalez’s Motion for a Directed Verdict*

Next, Gonzalez argues that the trial court abused its discretion in denying his motion for a directed verdict on the issue of whether he criminally confined his daughters. In

support of this argument, Gonzalez claims that the State did not produce any evidence to show that he confined them.

The standard for whether a trial court should affirm or deny a motion for directed verdict is governed by Indiana Trial Rule 50(A), which provides that:

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon....

When considering a motion for directed verdict, the trial court may not weigh the evidence presented or the credibility of the witnesses. *State v. Boadi*, 905 N.E.2d 1069, 1072 (Ind. Ct. App. 2009). The trial court may only grant the motion where there is “a total absence of evidence upon some essential issue, or there is no conflict in the evidence and it is susceptible of but one inference, and that inference is in favor of the accused.” *Id.* In a criminal case, the trial court is not authorized to consider whether a reasonable jury could view the evidence presented as constituting proof beyond a reasonable doubt. *Id.* (citing *State v. Goodrich*, 504 N.E.2d 1023, 1024 (Ind. 1987)). On appeal, this court applies the same standard as the trial court; we view the evidence in the light most favorable to the party against whom judgment on the evidence would be entered. *Id.*

In light of the above standard of review, it is apparent that the threshold of evidence required to survive a motion for a directed verdict is lower than the threshold of evidence required to support a conviction. We must hold that the trial court did not abuse its discretion in denying the directed verdict if the State presented *any* evidence to support the elements of

criminal confinement while armed with a deadly weapon. *Boadi*, 905 N.E.2d at 1072. Because we have already concluded that there was sufficient evidence to support the trial court’s judgment, we necessarily also conclude that there was not an absence of evidence on any of the elements of criminal confinement while armed with a deadly weapon. Accordingly, the trial court did not abuse its discretion in denying Gonzalez’s motion for a directed verdict.

III. *Double Jeopardy*

A. *The Indiana Actual Evidence Test*

Next, Gonzalez argues that his two convictions for criminal confinement while armed with a deadly weapon constitute double jeopardy because it is possible that both convictions were based on the same evidence. Particularly, Gonzalez argues that his “focus and primary task was the intimidation and/or confinement of his wife Yolanda.” (Appellant’s Br. p. 11). As a result, there is a reasonable possibility that the evidentiary facts supporting his confinement of Yolanda were also used to establish his confinement of his daughters.

Article I, Section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” We determine whether or not convictions violate this clause by following the standard the Indiana supreme court established in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999). According to *Richardson*, “two or more offenses are the ‘same offense’ [in violation of the prohibition against double jeopardy]...if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of

another challenged offense.” *Id.* at 49 (emphasis in original). However, in *Bunch*, we held that “[i]n situations where the defendant harms or threatens harm to distinct victims, double jeopardy is not violated by multiple convictions.” *Bunch*, 937 N.E.2d at 847.

Following *Bunch*, we conclude that Gonzalez’s two convictions for criminal confinement while armed with a deadly weapon do not constitute the same offense for purposes of double jeopardy because his two convictions are based on harm to distinct victims.

B. *The Continuing Crime Doctrine*

Gonzalez also argues that his two convictions violate the continuing crime doctrine, which is a category of Indiana’s prohibition against double jeopardy. *Walker v. State*, 932 N.E.2d 733, 736 (Ind. Ct. App. 2010). The continuing crime doctrine provides that actions that are sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose and continuity of action as to constitute a single transaction. *Id.* at 735.

Gonzalez claims that, here, the facts supporting his confinement of Yolanda and the facts supporting his confinement of his daughters are so related and compressed in time as to constitute a continuing crime. We cannot agree with this argument for the same reason we cannot agree that Gonzalez’s convictions violated the actual evidence test. Gonzalez’s actions harmed distinct victims, so Gonzalez has been charged with distinct chargeable crimes. According to *Walker*, “the continuing crime doctrine does not apply to factual situations where a defendant is charged with two or more distinct chargeable crimes.” *Id.* at

736. Instead, it applies in those situations where a defendant is charged multiple times with one offense or when a defendant is charged with an offense and a lesser included offense. *Id.* at 737. It is not sufficient to show that two crimes are part of the same “comprehensive criminal scheme.” *Id.* at 737-38.

IV. *Gonzalez’s Sentence*

Finally, Gonzalez argues that the trial court improperly sentenced him. His argument has two parts: first, he argues that the trial court improperly considered aggravating and mitigating factors, and, second, he argues that his sentence was inappropriate in light of the nature of his offense and his character. We will address these two arguments separately.

A. *Aggravating and Mitigating Factors*

Under a previous Indiana rule, trial courts were required to properly weigh mitigating and aggravating factors. Now, under the advisory sentencing scheme, trial courts no longer have such an obligation. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). Instead, “once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then ‘impose any sentence that is...authorized by statute; and...permissible under the Constitution of the State of Indiana.’” *Id.*; *see also* I.C. § 35-38-1-7.1(d) (stating that a court may impose any sentence authorized by statute “regardless of the presence or absence of aggravating circumstances or mitigating circumstances”). Still, a court may not consider an aggravating or mitigating factor in its sentencing statement that is “improper as a matter of law.” *Anglemeyer*, 868 N.E.2d at 491.

Because sentencing decisions are left to the trial court's sound discretion, we will only reverse them on appeal upon a showing of manifest abuse of discretion. *Sanjari v. State*, --N.E.2d--, 8 (Ind. Ct. App. Feb. 11, 2011). 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 is contrary to law. *Wolfe v. Eagle Ridge Holding Co., LLC*, 869 N.E.2d 521, 530 (Ind. Ct. App. 2007). In order to show that a trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Sanjari*, --N.E.2-- at 8. Although a failure to find mitigating circumstances clearly supported by the record may imply that the trial court improperly overlooked them, though, the trial court "is not obligated to explain why it has chosen not to find mitigating circumstances. Likewise, the court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor." *Id.*

First, Gonzalez argues that the trial court should have given less weight to his criminal history and his probation violation because he only has a prior battery conviction from over ten years ago and two Class A misdemeanors – operating while intoxicated and resisting law enforcement – from 2008. In this argument, Gonzalez essentially claims that the trial court improperly weighed his criminal history. As stated above, a trial court is no longer required to properly weigh aggravating and mitigating factors under the advisory sentencing scheme. *Anglemyer*, 868 N.E.2d at 491. Accordingly, the trial court had discretion in the weight it awarded Gonzalez's criminal history, and we conclude that the trial court did not abuse its discretion in that regard.

In addition, Gonzalez also argues that the trial court improperly overlooked the mitigating factors that he supported his family for 16 years and that he had a “past history of psychiatric symptoms in his lifetime, including serious problems with depression and anxiety.” (Tr. p. 503). Gonzalez did raise these issues during his sentencing hearing, so the trial court did not overlook them. Instead, the trial court indirectly acknowledged Gonzalez’s 16 years of support for his family by stating as a mitigating factor that he “had a good work history.” (Tr. p. 539). The trial court’s decision not to award any further mitigating significance to that support was within its discretion. In addition, Gonzalez does not clarify on appeal how his history of depression and anxiety is significant. He states that it might have contributed to his alcohol use, but he does not clarify how alcohol use is a legitimate mitigating factor. Accordingly, the trial court did not abuse its discretion in refusing to acknowledge Gonzalez’s mental history as a mitigating factor.

B. Nature of the Offense and Character of the Offender

Under Indiana Appellate Rule 7(B), this court may also revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006). Although this court is not required to use “great restraint,” we nevertheless exercise deference to a trial court’s sentencing decision, both because Appellate Rule 7(B) requires that we give “due consideration” to that decision and because we recognize the unique perspective a trial court has when making decisions. *Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App. 2007).

The “principal role of appellate review should be to attempt to leaven the outliers and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). In addition, the defendant bears the burden of persuading this court that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

With respect to the nature of the offense, Gonzalez seems to argue that the trial court sentenced him for attempted murder instead of criminal confinement. Gonzalez states that his sentence:

is equivalent to the advisory sentence on the [a]ttempted [m]urder charge as a Class A [f]elony. The trial court attempted to explain that although it ‘respected the judgment of the jury’ in that the jury was hung and did not find ‘intent to kill,’ the trial court felt the police prevented ‘loss of life.’ It almost appears that the trial court was attempting to find a way to give Gonzalez a Class A [f]elony sentence even though Gonzalez was not convicted of [a]ttempted [m]urder.

(Appellant’s Br. p. 4). We cannot agree with Gonzalez’s speculations. From the record, it is apparent that the trial court was merely expressing that the situation was severe and that it could have resulted in loss of life. At the point in the sentencing hearing when the trial court made that statement, it had not even addressed the aggravating or mitigating factors, the nature of the offense, or Gonzalez’s character. Later in the hearing, the trial court discussed the nature of the offense and Gonzalez’s character and stated: “Nevertheless, I can’t imagine a more horrifying situation for his wife and his children.” (Tr. p. 540). From this comment, it is apparent that the trial court judged the nature of Gonzalez’s offense based on the surrounding circumstances, rather than his acquitted attempted murder charge.

Moreover, Gonzalez's sentence was appropriate in light of the nature of his offense. Gonzalez told Yolanda several times that he was going to kill her and confined her through fear and the use of a gun. In addition, Gonzalez punched his wife and threatened her in the presence of their daughters. He then took both his wife and his daughters' phones and told his wife to "say goodbye" to her daughters. These are very traumatic circumstances, especially for the young, minor children that were dependent upon Gonzalez and Yolanda. Even Gonzalez himself concedes that he "cannot deny that the nature of the offense is one of a serious[] nature." (Appellant's Br. p. 14).

Turning to the character of the offender, Gonzalez argues that his sentence is inappropriate because he does not have an extensive criminal history. First, we note that Gonzalez did not receive the maximum sentence he could have received for his convictions. Gonzalez was convicted for two Class B felonies and a Class D felony. Under Indiana Code section 35-50-2-5, a person committing a Class B felony may be imprisoned for a fixed term of between six and twenty years, with an advisory sentence of ten years. Under Indiana Code section 35-50-2-7, a person committing a Class D felony may be imprisoned for a fixed term of between six months and three years, with an advisory sentence of one and one-half years. Under these provisions, Gonzalez could have received a 43 year sentence, rather than a 30 year sentence.

Also, Gonzalez's criminal history may not be extensive, but it is significant. In 1999, Gonzalez was convicted of battery as a Class A misdemeanor. In that incident, Gonzalez picked up Yolanda, carried her out of the house, and "threw her out" because his supper was

not ready. (State's Exh. 1 p. 5). Gonzalez also locked Yolanda out, so she went to a friend's house. When she returned, Gonzalez punched her in the mouth.

Similarly, the facts underlying Gonzalez's 2008 convictions for operating while intoxicated and resisting law enforcement, both Class A misdemeanors, also illustrate his violent behavior towards Yolanda. On November 9, 2008, Yolanda left a high school cross country meet, along with her daughters. At the time, Yolanda and Gonzalez had been separated for two years. Gonzalez followed them in his car and bumped into the rear bumper of her car whenever she stopped at a stop light. She also told police officers that in between stop lights, Gonzalez tried to run her off the road. Then, when she reached a CVS Drugstore, Gonzalez jumped on the hood of her car and began to yell at her.

We agree with the State that the facts underlying these convictions show an increasing level of violence towards Yolanda. Moreover, we think it is significant that in committing the instant offenses, Gonzalez violated his probation for his 2008 convictions. In light of these circumstances, we cannot find that the trial court inappropriately judged Gonzalez's character.

CONCLUSION

Based on the foregoing, we conclude that (1) the State did present sufficient evidence to establish beyond a reasonable doubt that Gonzalez committed criminal confinement while armed with a deadly weapon; (2) the trial court did not abuse its discretion when it denied Gonzalez's motion for a directed verdict regarding his criminal confinement while armed with a deadly weapon charge; (3) the trial court did not violate Indiana's prohibition against

double jeopardy when it entered convictions for two Counts of criminal confinement while armed with a deadly weapon; and (4) the trial court properly sentenced Gonzalez.

Affirmed.

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