



Joe Edward Perigan appeals his conviction by jury of two counts of class D felony battery on a child; one count of class A misdemeanor battery; and one count of class A misdemeanor resisting law enforcement as well as his sentence thereon. We affirm.

Perigan raises five issues, which we consolidate and restate as:

1. Whether the trial court erred in instructing the jury;
2. Whether the trial court erred in admitting evidence; and
3. Whether Perigan's sentence is inappropriate.

The facts most favorable to the verdict reveal that on the evening of December 3, 2007, Lisa Head and her three children returned home to find 52-year-old Perigan, Head's former boyfriend, sitting on the couch in the living room. Head asked Perigan to leave because he was intoxicated, but he refused. Perigan turned to 12-year-old H.C., Head's oldest son, and accused the boy of mistreating Perigan's dogs. When Perigan got up and started to walk towards H.C., Head stepped in front of Perigan and told him not to touch her son. Perigan pushed Head, who fell to the floor. When Head got up, Perigan pushed her into a cabinet.

Nine-year-old D.P., Head's youngest son, came into the room and told Perigan not to push his mother. Two-hundred-pound Perigan shoved the 56-pound boy, who "went off his feet and landed into the cabinets and hit the floor." Tr. at 98. Perigan then punched 126-pound H.C. in the stomach, cheek, and head with his fists. Head called 911 as she and her 11-year-old daughter ran outside. Perigan followed them, and the argument continued on the sidewalk in front of neighbor Rick Norrington's house. Norrington came out to the front porch and saw Perigan poised to strike Head. When

Norrington asked Perigan what he was doing, Head and her daughter ran past Perigan and into Norrrington's house. Perigan approached Norrrington's porch and attempted to push past Norrrington to get into his house. When Norrrington pushed Perigan back to keep him out of the house, Perigan punched Norrrington in the face with his fist. During the altercation, Norrrington's wife also called 911.

Four Lafayette Police Department Officers responded to a dispatch regarding the altercation. Officer Michael Bartholomew arrived to find Perigan on Norrrington's porch swinging his fists at Norrrington. When Perigan saw Officer Bartholomew, Perigan threatened to "rip [the officer's] f\*\*\*\*\* head off." Tr. at 450. Officer Bartholmew told Perigan fifteen to twenty times to get down on the ground before tazing him twice.

After Perigan was subdued and handcuffed, the officers talked to Norrrington, Head, and Head's children. D.P. told Officer Bartholomew that Perigan pushed him down and that his lower back and tailbone hurt. H.C. told Officer Heath Provo that Perigan punched him in the head. H.C. was shaking, crying, and holding an ice pack to his head. Officer Provo felt a quarter-sized quarter-inch lump on H.C.'s head.

The State charged Perigan with two counts of class D felony battery on a child for touching H.C. and D.P. in a rude, insolent, or angry manner. Perigan was also charged with two counts of class A misdemeanor battery for touching Head and Norrrington in a rude, insolent, or angry manner as well as one court of resisting law enforcement.

Before trial, the State filed a notice of intent to use D.P.'s and H.C.'s statements to the officers as substantive evidence at trial pursuant to Indiana Code Section 35-37-4-6, the Protected Person Statute. Following a hearing, the court found that the time, content,

and circumstances of the statements provided sufficient indications of reliability and granted the State's request to use the statements as substantive evidence.

At trial, Perigan testified that Head shoved him first, and that D.P. and H.C. jumped on his shoulders and back as he attempted to leave the house. He further explained that Norrington took a swing at him first, and that he was trying to get the police officers to assist him. At Perigan's request, the trial court gave the jury a self-defense instruction on the class A misdemeanor count alleging that Perigan touched Head in a rude, insolent, or angry manner. The court, however, refused Perigan's request that it give a self-defense instruction on the two class D felony battery of a child counts.

The jury convicted Perigan of the two counts of battery on a child, one count of class A misdemeanor battery for hitting Norrington, and resisting law enforcement. The jury did not convict Perigan of the class A misdemeanor battery for touching Head in a rude, insolent, or angry manner. Following a sentencing hearing, the trial court found the following aggravating factors: 1) Perigan's criminal history, which included five misdemeanor convictions, one felony conviction, and one revoked probation; 2) Perigan's history of illegal drug and alcohol use; 3) Perigan's position of trust with Head's children; 4) the age of one of the victims; and 5) the fact that prior attempts at rehabilitation were unsuccessful. The court found no mitigating factors.

The court sentenced Perigan to two and one-half (2.5) years for one of the class D felony convictions, and three (3) years for the other. The court further sentenced Perigan to one (1) year for the class A misdemeanor battery and one (1) year for resisting law enforcement. In addition, the trial court ordered the sentences for the battery convictions

to run consecutively to each other and concurrently with the sentence for the resisting law enforcement conviction for a total sentence of six and one-half (6.5) years. Finally, the court ordered Perigan to execute four and one-half (4.5) years of the sentence at the Department of Correction and two (2) years at Tippecanoe County Community Corrections. Perigan appeals his convictions and sentence.

### I. Jury Instructions

Perigan first argues that the trial court erred in refusing to give his tendered self-defense instruction on the two D felony battery of a child counts. Specifically, he contends that he was entitled to the instruction “based on his testimony that he acted in self defense when the minor children jumped on his shoulders and back.” Appellant’s Br. at 7. According to Perigan, the “failure to give an instruction that allowed the jury to consider self defense as to the battery counts involving the minor children requires reversal.” Appellant’s Br. at 8.

In determining whether the trial court properly refused tendered instructions, we consider whether the proposed instructions correctly state the law, whether the evidence in the record supports the instructions, and whether the substance of the tendered instructions is covered by other instructions. *White v. State*, 726 N.E.2d 831, 833 (Ind. Ct. App. 2000), *trans. denied*.

A valid claim of self-defense is a legal justification for an otherwise criminal act. *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. Ind. Code § 35-41-3-2. A

defendant's belief that he is being threatened with impending danger must be reasonable and in good faith. *White*, 726 N.E.2d at 834. A claim of self-defense requires a defendant to have acted without fault, been in a place where he had a right to be, and been in reasonable fear or apprehension of bodily harm. *White v. State*, 699 N.E.2d 630, 635 (Ind. 1998).

Here, Perigan was not in a place where he had a right to be because Head had asked him to leave her home. In addition, 200-pound Perigan offered no testimony that he was in fear of bodily harm or the imminent use of unlawful force from a 56-pound nine-year-old and his 126-pound twelve-year-old brother. Perigan does not allege that either child was armed, and we find no such evidence. Under these circumstances, the trial court did not err in refusing to give Perigan's tendered self-defense instruction on the two D felony battery of a child counts.<sup>1</sup>

## II. Admission of Evidence

Perigan next argues that the trial court erred in admitting evidence. The decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Johnson v. State*, 881 N.E.2d 10, 12 (Ind. Ct. App. 2008), *trans. denied*. We will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. *Id.* An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

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<sup>1</sup> Perigan also contends that the trial court erred in refusing to instruct the jury that the "self defense claim must be considered from the defendant [']s viewpoint." However, the self-defense instruction was given only on the class A misdemeanor count alleging that Perigan touched Head in a rude, insolent, or angry manner. The jury did not convict Perigan on this count. Any error in the instruction would therefore have been harmless.

Perigan first contends that the trial court erred in allowing Officers Bartholomew and Provo to testify that D.P. and H.C. told them that Perigan shoved or hit them because the testimony was inadmissible hearsay. However, Indiana Code section 35-37-4-6, the Protected Person Statute, is an exception to the general rule that hearsay is inadmissible. Pursuant to the statute, the statement at issue must be made by child who is less than 14-years-old. IC § 35-37-4-6(c)(1). In addition, the trial court must conduct a hearing outside the presence of the jury and find that the hearsay statement is sufficiently reliable. IC § 35-37-4-6(e)(1). The Indiana Supreme Court has stated that a court may consider the following factors in determining the reliability of a statement being offered at trial: 1) time and circumstances of the statement; 2) whether there was opportunity for coaching; 3) whether there was a motive to fabricate; 4) use of age-appropriate terminology; 5) spontaneity; and 6) repetition. *Pierce v. State*, 677 N.E.2d 39, 44 (Ind. 1997). Lastly, the protected person must testify at trial. IC § 35-37-4-6(e)(2)(A).

Here, D.P. and H.C. are both less than fourteen years old. In addition, before trial, the trial court held a hearing outside the presence of the jury and used the *Pierce* factors to determine that the hearsay statements of Officers Bartholomew and Provo were sufficiently reliable. Lastly, D.P. and H.C. both testified at trial. Perigan does not challenge any of the trial court's findings pursuant to the protected persons statute. The trial court did not err in admitting the officers' statements into evidence pursuant to the protected persons exception to the hearsay rule.

Perigan also argues that the trial court erred in admitting the two 911 recordings of Heard and Norrington's wife into evidence. Specifically, Perigan contends that the

recordings violate the Confrontation Clause of the Sixth Amendment to the United States Constitution, which provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The United States Supreme Court has held that the Confrontation Clause bars admission of testimonial statements of a witness who does not appear at trial unless he is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

The Supreme Court subsequently explained the distinction between testimonial and nontestimonial statements as follows in *Davis v. Washington*, 547 U.S. 813, 822 (2006):

Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet the ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to the criminal prosecution.

In *Davis*, the Supreme Court considered several factors regarding the statements at issue: 1) whether the declarant was describing events as they were actually happening or past events; 2) whether the declarant was facing an ongoing emergency; 3) whether the nature of what was asked and answered was such that the elicited statements were necessary to be able to resolve the present emergency rather than simply to learn about past events; and 4) the level of formality of the interview. *Id.* at 827.

Here, Perigan does not explain how the recordings are either testimonial or nontestimonial. However, our review of them reveals that both calls were made during

an emergency. Screaming and shouting can be heard in the background, and the callers relate what Perigan was doing at that moment. For example, Head said, “He’s ready to kill people. . . . I need somebody out here. He’s going off on a neighbor.” State’s Exhibit 1. Norrington’s wife said, “We need someone here now. A man is beating up on a little girl.” State’s Exhibit 2. At the end of the call, Mrs. Norrington dropped the phone, and screaming, yelling, and crying can be heard in the background. Clearly, the callers were relating the events as they were actually happening, and they were both facing an ongoing emergency.

In addition, the questions asked by the dispatchers were in the nature of determining the events as they were unfolding. They were the types of questions necessary to be able to advise the responding police officers what to expect when they arrived on the scene. Lastly, the level of formality was low. Both callers dialed 911 in response to the emergency. The dispatchers frequently had to repeat their questions because the callers appeared to be more focused on the events around them than the conversations. Further, both Head and Mrs. Norrington testified at trial and were subject to cross examination regarding their respective 911 calls. There is no Confrontation Clause violation, and the trial court did not err in admitting the 911 recordings into evidence.

### III. Inappropriate Sentence

Lastly, Perigan argues that his six and one-half-year sentence is inappropriate. When reviewing a sentence imposed by the trial court, we “may 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. Ind. Appellate Rule 7(b).

Here, with regard to the character of the offender, Perigan has an extensive legal history that includes misdemeanor convictions for driving while suspended, resisting law enforcement, battery resulting in serious bodily injury, and operating while intoxicated. He also has a prior felony conviction for dealing in a schedule II controlled substance, and a prior probation revocation. Perigan's prior contacts with the law did not cause him to reform himself.

With regard to the nature of the offense, Perigan shoved a 56-pound nine-year-old boy and caused him to land in the cabinets and hit the floor. He also punched a 12-year-old boy in the head with his fist, leaving a quarter-sized quarter-inch lump on the boy's head. Lastly, Perigan refused to listen to the police officers when they arrived at the scene and had to be tazered twice. Perigan's prior convictions show a pattern of crimes indicating a disregard for other persons and police officers as well as escalation in the threat of violence to children. *See Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004) (holding that the significance of prior criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense).

Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Perigan's sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.