

STATEMENT OF THE CASE¹

Johnathan Parker appeals his conviction and sentence for Battery with a Deadly Weapon, as a Class C felony, following a jury trial. On appeal we address the following issues:

1. Whether the evidence is sufficient to support his conviction.
2. Whether the admission of testimony from a defense witness regarding an outstanding warrant against Parker constituted fundamental error warranting reversal of Parker's conviction.
3. Whether the trial court abused its discretion when it sentenced Parker to six years in the Department of Correction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 17, 2008, Kimberly Roberson and Antonio Murry were boarding up a broken window at Roberson's home in Indianapolis. Parker, Roberson's husband of two months, had moved out of the home two days earlier following an argument. Murry was Roberson's former boyfriend. Around noon, Parker phoned Roberson and said that he planned to come by the house to pick up some belongings, including his gold teeth. Roberson told him she would not give him the teeth because she had paid for them. After Roberson hung up, the phone rang again. Murry answered and spoke to Parker, who asked Murry to identify himself. Murry gave his name and told Parker "that he can't call [Roberson] no more like that." Transcript at 15.

Approximately eight minutes later, Murry saw a man he did not recognize outside Roberson's residence. The man, Parker, opened the front door of the house with a key.

¹ Judge Stanley E. Kroh presided over the trial as Judge Pro Tempore and over the sentencing hearing as Master Commissioner. Judge Sheila A. Carlisle signed the Abstract of Judgment.

Roberson attempted to close the door, but Parker and his brother, David Thomas, pushed their way in. Murry ran out of the house through a side door in the kitchen.² Murry ran behind the house and heard shots fired. He then realized that one shot had hit him in the leg. Murry crawled to the alley and under a tarp to hide.

After seeing Murry, Parker and Thomas exited the house through the front door and ran along the side of the house where Murry had exited. Cross Allen, Roberson's neighbor across the street, turned to look when he heard shots fired. He saw Parker beside Roberson's house with something in his hand and his arm raised. As the last shot was fired, Allen saw Parker's raised arm come down. Allen then saw Parker and Thomas meet in Roberson's front yard and saw Thomas run to his vehicle and "put[] some[thing] up under or reach[] for something up under" the car seat. *Id.* at 128. Parker kicked Roberson's car and cussed at her, and then Parker and Thomas left.³

In the meantime, Roberson attempted to call the police from her cordless phone, but her phone did not work. She later found that the telephone box had been torn from the house. The box had been located on the side of her house where the shooting had taken place.

The State charged Parker with Battery with a Deadly Weapon, as a Class C felony; Pointing a Firearm, as a Class D felony; and Interference with Reporting a Crime, a Class

² The testimony conflicts on whether Murry grabbed Roberson's handgun from the kitchen table on his way out the door. Roberson gave different accounts on this point at different times. At trial, Roberson said that she later found her gun outside the side door of the house when she was looking for Murry following the shooting.

³ The evidence is conflicting as to whether Parker left with Thomas in the vehicle or departed on foot. Allen testified that Parker left with Thomas in the vehicle. But at trial Thomas testified that Parker had left on foot because Parker had an outstanding warrant.

A misdemeanor. On July 2, 2008, the case was tried before a jury. At the close of evidence, a jury found Parker guilty of battery and pointing a firearm and not guilty of interference with reporting a crime.

At a sentencing hearing on July 29, the trial court entered a judgment of conviction on the battery count and sentenced Parker as follows:

[T]he Court will show that the Judgment of Conviction is entered on County I, Battery, a class C felony only. And the Court will vacate the conviction on Count II as it's what we commonly say, it would merge into Count I. The Court has considered the Pre-Sentence Report and the evidence and the argument that has been presented here today. And the Court must consider as an aggravating factor Mr. Parker's previous convictions as he has stated this morning as well. And that is the conviction for Carrying a Handgun without a License, as a class A misdemeanor, in August of 2005. More significantly, the Court is—appears to be a conviction from July 25th of 2006. From the information I have, he was convicted of Counts I and II . . .

* * *

So it was Counts I, Carjacking, as a B felony, and, Count IV, Carrying a Handgun, again, Without a License. And the Court also having considered the particular circumstances of this case and Mr. Parker, in saying that, I can understand how you would be upset with the relationship not going the way you wanted it to go or had wished that it would go, but what I don't frankly understand is that you would take the steps to—even if someone else gave it to you, of taking a loaded firearm and shooting at someone. Just the particular facts of this case, I think, are an aggravating factor. The Court does believe that a sentence above the presumptive [sic] sentence is appropriate on Count I, Battery, a class C felony. The Court does enter a sentence of six years and that will all be executed time at the Department of Correction. There is no suspended time and no probation. . . .

Transcript at 306-08. The court ordered the sentence to be served consecutive to Parker's sentence in another case. Parker now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Parker contends that the evidence is insufficient to support his conviction for battery with a deadly weapon, as a Class C felony. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove the offense of battery with a deadly weapon, as a Class C felony, beyond a reasonable doubt, the State was required to show that Parker knowingly or intentionally touched Murry in a rude, insolent, or angry manner, namely, by shooting at and against Murry with a handgun. See Ind. Code § 35-42-2-1(a)(3). Parker argues that the “record fails to establish beyond a reasonable doubt that Parker pointed or shot a gun.”⁴ Appellant’s Brief at 12. In support, he points to the conflicting testimony from various witnesses as to whether Parker ever possessed, let alone pointed, a firearm.

But Parker acknowledges that Cross Allen testified that he heard the last shot, saw at that time Parker with his arm raised and something in his hand, and then saw Parker’s raised arm fall. “[A] jury may reject a defendant’s version of what happened and may decide which witnesses to believe. . . . The identification of a single witness is sufficient

⁴ For the same reason, Parker also alleges that the court could not enter judgment of conviction on the verdict convicting him of pointing a firearm.

to support a conviction.” Newman v. State, 483 N.E.2d 36, 37 (Ind. 1985); see also Johnson v. State, 804 N.E.2d 255, 256 (Ind. Ct. App. 2004) (“the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal.”). Allen’s testimony is sufficient to support a finding that Parker shot Murry. Parker’s request that we reject Allen’s testimony is a request that we reweigh the evidence, which we cannot do. See Jones, 783 N.E.2d at 1139. Parker’s contention that the evidence is insufficient to support his conviction is without merit.

Issue Two: Fundamental Error

Parker next argues that his conviction for battery with a deadly weapon should be reversed because the trial court committed fundamental error by admitting “highly prejudicial evidence[.]” Appellant’s Brief at 16. In particular, he contends that the trial court should not have admitted Thomas’ testimony that Parker “fled the scene [on foot] . . . because he had an existing warrant.” Transcript at 220. Although Parker did not object to the admission of that evidence at trial, he contends that his “failure to object was justified” because objecting would only have “call[ed] further attention to the highly prejudicial evidence[.]” Id. at 20. Parker alleges that Thomas’ testimony was inadmissible under Indiana Evidence Rule 404(b) because it created a forbidden inference that Parker had engaged in “‘uncharged misconduct’ and that the charged conduct was in conformity with the uncharged misconduct.” Id. Thus, he argues, the admission of Thomas’ testimony was fundamental error. We cannot agree.

In Kingery v. State, 659 N.E.2d 490, 494 (Ind. 1995), the Indiana Supreme Court considered whether testimony regarding the identification of Kingery’s fingerprints,

which referred to fingerprint cards on file pre-dating the offense in question, improperly introduced evidence of past crimes. The court noted that defense counsel was the first to elicit testimony inferring that the fingerprint cards pre-dated the offense for which Kingery was on trial. The court then held that “[a] party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error. Invited errors are not subject to appellate review. This type of invited error is not fundamental error.” Id. at 494 (emphasis in original).

Here, defense counsel was conducting a direct examination of Thomas when he testified that Parker may have fled on foot because of an outstanding warrant. Parker invited the error by eliciting the testimony. As such, he cannot now ask for review of that alleged error, nor is such an error fundamental error. See id. Parker’s contention that the trial court committed fundamental error is without merit.

Issue Three: Sentence

Parker next challenges his sentence. First, he argues that the trial court abused its discretion when it considered the facts of the case to be an aggravating circumstance. Second, he argues that his sentence is inappropriate in light of the nature of the offense and his character. We address each contention in turn.

Parker contends that the trial court abused its discretion by finding that the nature and circumstances of the offense was an aggravator. He argues that “the elements of a crime cannot constitute an aggravating circumstance.” Appellant’s Brief at 23 (citing Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008)). But in Pedraza, our supreme court held that “this is no longer an inappropriate double enhancement” since the 2005 amendment

to the sentencing statutes. Id. at 80. “[A] trial court that imposes a maximum sentence, explaining only that an element was the reason, would have provided an unconvincing reason that might warrant revision of sentence on appeal.” Id. (emphasis in original). But “the nature and circumstances of a crime can be a valid aggravating factor.” See also Filice v. State, 886 N.E.2d 24, 38 (Ind. Ct. App. 2008) (citing McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001)), trans. denied.

Here, the trial court cited to both Parker’s criminal history and the nature and circumstances of the offense as aggravators warranting a six-year sentence, two years less than the maximum possible sentence.⁵ Thus, under Pedraza, the court provided an adequate reason for Parker’s sentence. Moreover, the circumstances described by the court as an aggravator do not duplicate the elements of the offense. Again, to prove battery with a deadly weapon, the State was required to show that Parker knowingly or intentionally touched Murry in a rude, insolent, or angry manner, namely, by shooting at and against Murry with a handgun. At sentencing the trial court stated:

And the Court also having considered the particular circumstances of this case and Mr. Parker, in saying that, I can understand how you would be upset with the relationship not going the way you wanted it to go or had wished that it would go, but what I don’t frankly understand is that you would take the steps to—even if someone else gave it to you, of taking a loaded firearm and shooting at someone. Just the particular facts of this case, I think, are an aggravating factor.

Transcript at 308. In describing the circumstances of the offense, the trial court referenced Parker’s behavior as a reaction to his broken relationship with Roberson. That

⁵ “A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).” Ind. Code § 35-50-2-6(a).

fact is not an element of the offense. Parker's argument that the court abused its discretion in relying on that aggravator must fail.

Next Parker contends that his sentence is inappropriate in light of the nature of the offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

We first consider whether Parker's six-year sentence is inappropriate in light of his character. In support of his argument, Parker states that he "admittedly has a criminal history[.]" Appellant's Brief at 25. Parker was twenty-three years old at the time of sentencing, and at that point he had accrued a juvenile adjudication for public intoxication, as a Class B misdemeanor, in 2002; a conviction for carrying a handgun without a license, as a Class A misdemeanor, in 2006; and convictions for carjacking, as a Class B felony, and carrying a handgun without a license, as a Class A misdemeanor, in

2006. Parker was on home detention and probation at the time of the instant offense. Parker also points out that he was gainfully employed at the time of the time of the offense and that he has a two-year-old daughter. But our review of the pre-sentence investigation report shows that Parker had a child support arrearage of an undetermined amount. We cannot say that Parker's six-year sentence is inappropriate in light of his character.

Next we consider whether Parker's sentence is inappropriate in light of the nature of the offense. The evidence shows that Parker and Roberson had been married for two months and that Parker had moved out of the home two days before the offense. On April 17, Parker telephoned Roberson about retrieving some of his belongings from the house. Roberson told Parker that he could not have his gold teeth because she had paid for them. When Parker telephoned Roberson a second time, Murry answered. Parker and his brother arrived at the house approximately eight minutes later. Roberson attempted to close the front door on Parker, but he and Thomas pushed their way in. When Murry ran out the side door, Parker ran out the front door in chase and shot several times at Murry, striking him in the leg once. Parker then argued with Roberson while kicking her car before leaving the scene. In sum, Parker, upset with his estranged wife, arrived at her house and shot at Murry unprovoked. We cannot say that six-year sentence is inappropriate in light of the nature of the offense.

Affirmed.

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