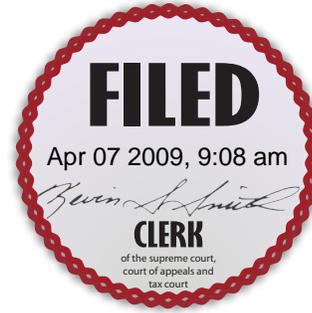


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

SAMMIE McINTOSH,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A05-0806-CR-338
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Steven Rubick, Commissioner
Cause No. 49G04-0709-FC-195640

April 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Sammie McIntosh (“McIntosh”) was convicted in Marion Superior Court of Class C felony battery, two counts of Class A misdemeanor battery, and found to be a habitual offender. He appeals and raises three issues, which we restate as:

- I. Whether the trial court abused its discretion when it excluded the victim’s emergency room records;
- II. Whether the jury’s not guilty verdict on the offense of strangulation was inconsistent with the jury’s guilty verdict for Class C felony battery; and,
- III. Whether the trial court abused its discretion when it imposed consecutive sentences for one Class A misdemeanor battery conviction and the Class C felony battery conviction.

We affirm.

Facts and Procedural History

McIntosh and Venus Tarver (“Tarver”) began dating in 2005. Their romantic relationship continued off and on for the next few years. On August 2, 2007, McIntosh called Tarver repeatedly for several hours. Tarver became angry and drove to McIntosh’s apartment to confront him. McIntosh responded to Tarver’s demand to stop calling by punching her in the nose. McIntosh continued to punch Tarver and bit her on her back and shoulder. He then wrapped his arm around her throat and choked her. After several hours, McIntosh allowed Tarver to leave the apartment and she returned home. Tarver’s son took her to Community East Hospital and Tarver also notified the police.

Despite the August 2nd beating, Tarver saw McIntosh on more than one occasion over the next few weeks. On September 18, 2007, Tarver saw McIntosh at a liquor store and agreed to go to his cousin’s house with him. Eventually, McIntosh asked Tarver for a ride home and she drove him back to his apartment. When she refused his invitation to

come inside, McIntosh punched Tarver in her jaw. He then grabbed her keys and locked the vehicle doors. McIntosh climbed on top of Tarver, put his hands around her neck and began to choke her. Tarver was unable to breathe and felt as though she was falling asleep. When she “came to” as she felt McIntosh loosening his grip, she was lightheaded. Tr. pp. 69-71. McIntosh started punching Tarver again and bit her on the arm. Tarver was eventually able to unlock the driver’s side door of the vehicle, slide out of the car and roll onto the street. A nearby motorist stopped his car after observing Tarver in the street and told McIntosh to leave Tarver alone. McIntosh then grabbed his bike from Tarver’s vehicle and rode away. Tarver was able to return to her vehicle and drive home. She was later taken to the emergency room and treated for her injuries.

On September 20, 2007, McIntosh was charged with Class C felony battery, Class D felony strangulation, Class A misdemeanor domestic battery, and Class A misdemeanor battery for the September 18th incident. He also was charged with Class D felony criminal confinement, Class A misdemeanor domestic battery, and Class A misdemeanor battery as a result of the August 2nd incident. On February 25, 2008, the State filed a notice alleging that McIntosh is a habitual offender.

A jury trial commenced on April 17, 2008. McIntosh was found guilty of Class C felony battery and Class A misdemeanor battery on the charges stemming from the September 18th incident, and found guilty of Class A misdemeanor battery for the August 2nd incident. He was found not guilty of the remaining charges. McIntosh later admitted being a habitual offender.

McIntosh was sentenced on May 9, 2008. He was ordered to serve four years for the Class C felony battery conviction, and that sentence was enhanced by eight years for the habitual offender adjudication. He was sentenced to a concurrent term of one year for the Class A misdemeanor battery conviction stemming from the September 18th incident. He was also sentenced to one year for the Class A misdemeanor battery conviction resulting from the August 2nd incident, and that sentence was ordered to be served consecutive to the sentence for Class C felony battery, for an aggregate sentence of thirteen years. McIntosh appeals. Additional facts will be provided as necessary.

I. Tarver's Emergency Room Records

First, McIntosh argues that the trial court abused its discretion when it excluded Tarver's emergency room records, which he alleges contain inconsistent statements concerning her injuries from the August 2nd and September 18th attacks. It is well-settled in Indiana that the admission or exclusion of evidence falls within the sound discretion of the trial court, and on appeal, we review the trial court's decision only for an abuse of discretion. Mathis v. State, 859 N.E.2d 1275, 1279 (Ind. Ct. App. 2007). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id.

McIntosh desired to admit the medical records to establish that with regard to the September 18th incident, she told medical personnel that "she had not been knocked out and had no neck pain," and that she stated she did not lose consciousness.¹ See

¹ McIntosh also desired to admit the records because Tarver told medical personnel that she was "choked around the neck" after the August 2nd incident. However, McIntosh was not convicted for "choking"

Appellant's Br. at 6. During McIntosh's cross examination of Tarver, she testified that she could not recall whether the emergency room personnel had asked her if she had been "knocked out." Tr. p. 136. Tarver stated she told them that McIntosh choked her "until it was like [she] went to sleep." Id.

However, McIntosh did not attempt to impeach Tarver during the State's case-in-chief, but called her as a witness for the purpose of impeaching her after the State rested its case. Because McIntosh improperly attempted to impeach Tarver, the trial court allowed only minimal questioning concerning her statements to the emergency room personnel, including the following:

COUNSEL: . . . I asked you some things about what you told [the doctors], but is it your testimony that you indicated to them that you lost consciousness or didn't lose consciousness?

TARVER: I told them that I felt it was like a dream like state.

Tr. p. 226. Tarver also stated that she could not recall telling the doctors that she had no neck pain. Tr. p. 229.

Even if we were to assume that the alleged error was properly preserved and that the trial court abused its discretion when it excluded the medical records, the alleged error was harmless. "An error is harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights." Brown v. State, 770 N.E.2d 275, 280 (Ind. 2002).

Tarver as a result of that incident. Moreover, that statement is not wholly inconsistent with her trial testimony that McIntosh wrapped his arm around her neck on August 2nd.

From Tarver's own testimony and McIntosh's improper attempt to impeach her with her medical records, the jury heard evidence that Tarver could not recall the totality of her statements to the emergency room personnel and that her statements to the doctors might have been inconsistent with her trial testimony. Also, in ruling on the admissibility of the records, the trial court noted that "there is enough damning material in there as to the Defendant that the prejudice to him in my opinion would outweigh any benefit." Tr. p. 215. For all of these reasons, any alleged error in the exclusion of Tarver's medical records was harmless.

II. Inconsistent Verdicts

McIntosh argues that the not guilty verdict for strangulation is inconsistent with the guilty verdict for Class C felony battery because the serious bodily injury alleged for Class C felony battery was loss of consciousness. Although this court reviews verdicts for consistency, "perfect logical consistency" is not required. Parks v. State, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000), trans. denied. Yet,

[v]erdicts so extremely contradictory and irreconcilable may require corrective action. However, where the trial of one defendant results in acquittal of some charges and convictions on others, the results will survive a claim of inconsistency where the evidence is sufficient to support the convictions. We will not engage in speculation about the jury's thought processes or motivation.

Simmons v. State, 828 N.E.2d 449, 455 (Ind. Ct. App. 2005) (internal citations omitted).

See also Robinson v. State, 814 N.E.2d 704, 709 (Ind. Ct. App. 2004) ("[J]ury verdicts do not have to be consistent in cases where one criminal transaction gives rise to criminal liability for separate and distinct offenses.").

McIntosh was found not guilty of Class D felony strangulation, which required proof that he applied pressure to Tarver's throat or neck in a manner that impeded her normal breathing and/or blood circulation. He argues that this acquittal is inconsistent with his conviction for Class C felony battery, which required the State to prove that McIntosh "knowingly touch[ed] Venus Tarver . . . in a rude, insolent, or angry manner, and furthermore, said touching resulted in serious bodily injury to Venus Tarver, specifically: loss of consciousness." Appellant's App. p. 23.

At trial, Tarver testified that McIntosh punched her in the jaw and put his hands around her neck and choked her. Tarver was unable to breathe and felt as though she was falling asleep. When she "came to," she felt McIntosh loosening his grip and felt lightheaded. Tr. pp. 69-71. The photographs taken of Tarver after the September 18th incident demonstrate the severity of the beating she suffered at the hands of McIntosh. See Ex. Vol., State's Exs. 23-33. Tarver's left eye was swollen shut and she suffered lacerations on her jaw. Id. From the evidence presented, a jury could reasonably conclude that Tarver's loss of consciousness was caused not only by the choking, but also the repeated punches to her head.

For all of these reasons, the evidence is sufficient to support McIntosh's conviction for Class C felony battery. Therefore, McIntosh's argument is simply an invitation to engage in speculation about the jury's thought processes and to reweigh the evidence and credibility of the witnesses, which we will not do.

III. Consecutive Sentences

In sentencing an offender who has committed multiple crimes, trial courts face a decision as to whether the sentence on each count should run consecutively or concurrently, or a combination of both. Ind. Code § 35-50-1-2 (c) (2007). We review a trial court's decision to impose consecutive sentences for an abuse of discretion. Quiroz v. State, 885 N.E.2d 740, 741 (Ind. Ct. App. 2008), trans. denied.

For the Class C felony battery conviction, which arose from the September 18, 2007 incident, McIntosh was ordered to serve a four-year sentence for Class C felony battery, and that sentence was enhanced by eight years for the habitual offender adjudication. The court also sentenced McIntosh to a consecutive one-year term for the Class A misdemeanor battery conviction arising from the August 2, 2007 incident.

McIntosh argues that the trial court abused its discretion in ordering him to serve the sentences consecutively because his prior criminal history was used to support both the habitual offender finding and the imposition of the consecutive sentences. In support of his argument, McIntosh relies on Pedraza v. State, 887 N.E.2d 77 (Ind. 2008), in which our supreme court stated, “where enhancements of separate counts are based on the same prior conviction, ordering these sentences to run consecutively does constitute an improper double enhancement, absent explicit legislative authorization.” Id. at 81 (citing Sweatt v. State, 887 N.E.2d 81 (Ind. 2008)).

First, we note that only the sentence for Class C felony battery was enhanced due to the habitual offender adjudication because of McIntosh's prior criminal history. McIntosh received a statutorily authorized sentence for Class A misdemeanor battery.

See Ind. Code § 35-50-3-2 (providing that the sentence imposed for a Class A misdemeanor shall not exceed one year). Moreover, in deciding to impose consecutive sentences, the trial court noted McIntosh's criminal history, but also considered that the misdemeanor battery occurred on a separate date. Therefore, we cannot conclude that the trial court abused its discretion when it ordered the sentences for Class C felony battery and Class A misdemeanor battery to be served consecutively.

Conclusion

Any alleged error in the exclusion of Tarver's emergency room records was harmless. The not guilty verdict for strangulation is not inconsistent with the guilty verdict for Class C felony battery. Finally, the trial court did not abuse its discretion in ordering McIntosh to serve consecutive sentences for the Class A misdemeanor battery and Class C felony battery convictions.

Affirmed.

BAILEY, J., and BARNES, J., concur.