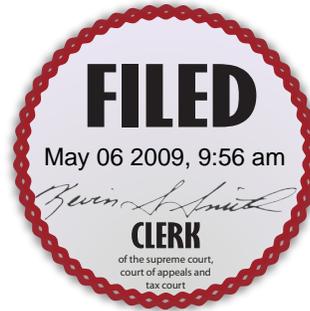


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

JAMES A. EDGAR
J. Edgar Law Offices, P.C.
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

TIFFANY N. ROMINE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH RA,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-0810-CR-590
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge and
The Honorable Kaisa Longoria, Judge Pro Tempore
Cause No. 49F18-0709-FD-180980

May 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Joseph Ra was convicted after a bench trial of criminal confinement¹ as a Class D felony and pointing a firearm² as a Class D felony. He was sentenced to two years on each conviction with one year executed and with both sentences to be served concurrently. He appeals, raising the following restated issues:

- I. Whether sufficient evidence was presented to support Ra's convictions for pointing a firearm and criminal confinement; and
- II. Whether the trial court properly sentenced Ra.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of September 1, 2007, Kelly Bartlett, her fiancé Justin Pope, and Ra were all drinking at Bartlett's residence in Marion County. Bartlett's children were asleep upstairs. Bartlett and Pope got into a verbal argument, and Bartlett called her aunt to come pick up her and her children. Pope left the house shortly after Bartlett made the phone call.

Bartlett woke her children and got them ready to leave. When Bartlett attempted to open the door to let the children out, Ra told her that, "[Pope] said not to let you leave." *Tr.* at 16. Ra tried to shut the door, but Bartlett's children were able to exit. Bartlett's aunt and uncle had arrived outside of the house and heard arguing coming from inside as they approached. After Bartlett's children had gone outside, Ra retrieved an AK-47 that belonged

¹ See Ind. Code § 35-42-3-3.

² See Ind. Code § 35-47-4-3.

to Pope from the laundry room and aimed it at Bartlett's head and again told her that she was not leaving. Bartlett told Ra that, "he better use it now" or he would regret it. *Id.* at 18. Bartlett's uncle tried to enter the house, but Ra pushed the door closed. Bartlett grabbed Ra by the neck when she realized that he did not know how to use the AK-47. Bartlett's uncle was then able to enter the house and observed Ra with one arm across Bartlett's shoulder and the AK-47 in the other hand. Bartlett's aunt also entered the house and heard Ra say, "she ain't goin' nowhere." *Id.* at 46. The aunt called the police, and Bartlett's uncle tackled Ra and held him to the ground until the police arrived.

The State charged Ra with criminal confinement as a Class D felony, pointing a firearm as a Class D felony, and criminal recklessness as a Class D felony. A bench trial was held on August 4, 2008, and Ra was found guilty on all three counts. At the sentencing hearing, the trial court only entered conviction on the first two counts because of double jeopardy concerns. Ra was sentenced to two years on each count with one year executed, and the sentences were ordered to run concurrently for a total executed sentence of one year. Ra now appeals.

DISCUSSION AND DECISION

I. Sufficient Evidence

Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id.*; *Robinson v. State*, 835

N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523.

A. *Pointing a Firearm*

Ra argues that the State failed to present sufficient evidence to support his conviction for pointing a firearm³ because the definition of firearm was not met. He contends that although “the parties referred to the AK-47 as a ‘gun’ throughout [his] trial, the State offered no testimony or documentary evidence to determine whether the item in question” met the definition of a firearm. *Appellant’s Br.* at 10. Because no evidence was elicited to distinguish the AK-47 from a realistic toy or replica, he claims that insufficient evidence was presented to support his conviction.

In order for the State to convict Ra of pointing a firearm as a Class D felony, it was required to prove that he “knowingly or intentionally point[ed] a firearm at another person.” Ind. Code § 35-47-4-3(b). Firearm is defined as “any weapon that is capable of expelling; or designed to expel; or that may readily be converted to expel; a projectile by means of an explosion.” Ind. Code § 35-47-1-5.

³ Ra also argues that insufficient evidence was presented to support his conviction for criminal recklessness as a Class D felony, which required that the State prove that Ra “recklessly, knowingly, or intentionally perform[ed] an act that create[d] a substantial risk of bodily harm to another person . . . while armed with a deadly weapon.” Ind. Code § 35-42-2-2(b), (c). Deadly weapon is defined as “a loaded or unloaded firearm.” Ind. Code § 35-41-1-8(a)(1). As judgment was not entered as to this count, we do not address this argument. Additionally, as we conclude that the definition of firearm was met, Ra’s argument as to this count fails.

At Ra's trial, the State admitted its Exhibit 1, which the testifying officer identified as the AK-47 that he recovered from Bartlett's home on September 1, 2007. The officer testified that when he responded to Bartlett's home on that date, he immediately saw the AK-47 lying on the floor, which was later discovered to be loaded. *Tr.* at 56-57. When the officer identified the exhibit at trial, he also identified that it contained "magazines and rounds." *Id.* at 57. Bartlett testified that Ra had retrieved the gun from her laundry room and described it as a "[b]ig black AK-47." *Id.* at 17, 19. She also identified State's Exhibit 1 as her fiancé's gun and the gun that Ra had pointed at her. *Id.* at 19. Bartlett's uncle also described the gun that he observed Ra pointing at Bartlett as an AK-47. *Id.* at 32. We conclude that the trial court could have reasonably inferred from the undisputed evidence that the AK-47 was a firearm within the common use of that term. Sufficient evidence was presented to support Ra's conviction for pointing a firearm.

B. Criminal Confinement

Ra argues that insufficient evidence was presented to support his conviction for criminal confinement because the State failed to establish that he substantially interfered with Bartlett's liberty. He contends that Bartlett's testimony was incredibly dubious, and therefore it was not reasonable to believe that Ra substantially interfered with her liberty.

Under the incredible dubiousity rule, a court may "'impinge on the jury's responsibility to judge the credibility of the witness only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.'" *White v. State*, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), *trans. denied* (quoting

Stephenson v. State, 742 N.E.2d 463, 497 (Ind. 2001), *cert. denied* (2002)). The application of this rule is rare and is limited to cases where the testimony of a sole witness is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. *Herron v. State*, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), *trans. denied*; *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*.

In order to convict Ra of criminal confinement, the State was required to prove that he “knowingly or intentionally confine[d] another person without the other person’s consent.” Ind. Code § 35-42-3-3(a). Confine is defined as “to substantially interfere with the liberty of a person.” Ind. Code § 35-42-3-1.

We first note that the incredible dubiousity rule is not applicable in the present case because Bartlett was not the sole witness who testified that Ra confined her inside of the house. Both her uncle and her aunt confirmed her testimony. The evidence most favorable to the verdict showed that Ra substantially interfered with Bartlett’s liberty. Bartlett testified that, when she attempted to leave the house, Ra kept her from leaving and that he pointed a gun to her head. *Tr.* at 17, 18-19. She also testified that she did not feel free to leave when Ra aimed the gun at her. *Id.* at 26. Bartlett’s uncle testified that, when he entered the house, he observed Ra with his arm around Bartlett’s shoulder and a gun in his hand. *Id.* at 31. Bartlett’s aunt testified that, when she entered the house, she heard Ra state, “She ain’t goin’ nowhere.” *Id.* at 46. We conclude that sufficient evidence was presented to prove that Ra

substantially interfered with Bartlett’s liberty and to support his conviction for criminal confinement.⁴

II. Sentencing

A. Abuse of Discretion

Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (2007). The statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an 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.* Other examples include entering a sentencing statement that explains reasons for imposing a sentence, including a finding of aggravating and mitigating factors if

⁴ Ra argues that Bartlett was not a credible witness because she was intoxicated on the night of the incident. As we have previously determined that the incredible dubiousity rule does not apply in the present case, Ra’s argument is merely an invitation to reweigh the evidence and judge witness credibility, which we cannot do. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). Ra also contends that Bartlett did not testify that she was in fear of Ra. Being placed in fear is not an element of criminal confinement, so this argument fails. *See* Ind. Code § 35-42-3-3.

any, but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. Because the trial court no longer has any obligation to “weigh” aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to “properly weigh” such factors. *Id.* at 491. 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.” Ind. Code § 35-38-1-7.1(d).

Ra argues that the trial court abused its discretion when it sentenced him. He first contends that the trial court did not provide any detailed reasoning for the sentence imposed. He also claims that the trial court’s use of the seriousness of the offense as an aggravating circumstance was an abuse of discretion because it was not a legitimate reason for increasing his sentence.

Here, at Ra’s sentencing, the trial court stated:

Th[is] is a very serious offense. The results could have been devastating to small children as well as to adults who were present, and the Court has to take that seriously. This had potential for a horrible disaster and this is not something that the Court can look at lightly. And because of the seriousness of this offense, I’m going to have to order some executed time in the Department of Correction[]. I’m going to however find that there are some mitigating circumstances as well as aggravating circumstances. I know that there are some aggravators that the State has observed, small children present, et cetera. I think that your age somewhat mitigates. I know that you’re not that young, but you’re fairly young. Your criminal history certainly mitigates. . . .

Tr. 114-15. The trial court then imposed a sentence of two years on each count with one year executed and the sentences to run concurrently for a total executed sentence of one year.

Under *Anglemyer*, a trial court is to include a reasonably detailed recitation of its reasons for imposing a particular sentence in its sentencing statement. 868 N.E.2d at 490. In its sentencing statement in the present case, the trial court explained the reasons it found to be both aggravating and mitigating. We conclude that the above statement by the trial court included a reasonably detailed recitation of its reasons for Ra's sentence.

Ra next argues that the trial court's reasons given in the sentencing statement did not support the sentence given. He first claims that the seriousness of the offense was an improper aggravating circumstance because it is not a factor listed in Indiana Code section 35-38-1-7.1. Our Supreme Court has stated that the list of aggravating and mitigating circumstances in Indiana Code section 35-38-1-7.1 is a non-exhaustive list that trial courts may consider in imposing sentences. *Anglemyer*, 868 N.E.2d at 488. Further, we conclude that the record supported the finding of the seriousness of the offense and the presence of children as aggravating factors. Although the children were able to exit the house before Ra pointed the gun at Bartlett, they were still in close proximity to the house when Ra did aim the AK-47 at Bartlett's head. The trial court determined that Ra's actions endangered the adults present as well as the children. Ra still had the AK-47 in his hands when Bartlett's uncle entered the house. We conclude that the aggravating circumstances found by the trial court were supported by the record, and it did not abuse its discretion when it sentenced Ra.

B. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Ra argues that his sentence was inappropriate in light of the nature of his offense and his character. He asserts that his sentence should be reduced because no one was hurt as a result of the incident and he should not be considered as "worst offender." *Appellant's Br.* at 15. He also claims that he had strong family support and a record of full-time employment, with a job available to him at the time he was arrested.

As to the nature of the offense, the evidence showed that Ra, who was a guest at Bartlett's home, aimed an AK-47 at her head and would not allow her to leave the house. Although the children had already exited the house when Ra pointed the rifle at Bartlett, he had tried to stop them from leaving by attempting to close the door when Bartlett opened it for the children. Additionally, the children were still in close proximity to the house when Ra had the AK-47, and Ra was still holding the weapon when Bartlett's uncle was able to enter the house. Therefore, Ra's use of the AK-47 placed several different people in danger.

As to Ra's character, the evidence showed that Ra had a minimal criminal history, which included a misdemeanor charge that was dismissed and one misdemeanor conviction.

He was placed on probation for that conviction, but subsequently his probation was revoked for several violations. The evidence also showed that Ra had a job available to him and that his income was used to help support his mother. In light of the nature of the offense and Ra's character, we do not find that his sentence of two years on each Class D felony conviction with one year executed and the sentences to run concurrently for a total executed sentence of one year was inappropriate.

Affirmed.

RILEY, J., and MATHIAS, J., concur.