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.

FILED
May 13 2011, 8:15 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

ANDREW J. BORLAND
Borland & Gaerte
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEVEN H. FOERNZLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1007-CR-827
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0904-FB-43195

May 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Steven Foernzler was convicted of Attempted Murder,[1] a class A felony, and Residential Entry,[2] a class D felony. Foernzler presents three issues for our review:

1. Is the evidence sufficient to sustain his conviction in light of his claim of self-defense?

2. Did the trial court abuse its discretion in admitting evidence of a recorded telephone call Foernzler made from jail?

3. Did the trial court abuse its discretion in excluding the victim's medical records that indicated drug use by the victim?

We affirm.

The facts most favorable to the convictions reveal that Foernzler, Rachel Thomas, and Ronald (Ron) Taylor were longtime friends who had known each other since middle school. Foernzler and Rachel dated for six years and had a child together. They mutually ended their relationship in January 2009 and Rachel moved out of the home they shared, taking their son with her. In late March or early April, Rachel and Ron began hanging out together and dating. When Foernzler learned of their budding relationship, he was not happy about it and told Rachel that it was "pretty fucked up." *Transcript* at 61. In mid-April, Rachel received two text messages from Foernzler in which Foernzler stated that Ron was "dead to me." *State's Exhibits* 8 and 9. Around that same time, Foernzler went to Ron's house and

[1] Ind. Code Ann. § 35-41-5-1 (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011) (attempt); Ind. Code Ann. § 35-42-1-1 (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011) (murder).

[2] Ind. Code Ann. § 35-43-2-1.5 (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011).

confronted him about his relationship with Rachel.

Late in the evening on April 25 and into the early morning hours of April 26, 2009, Rachel and Ron decided to go out, and they made arrangements for Ron's neighbors, David and Kristen Gallagher, who lived in the other half of the duplex, to keep an eye on his house because his ten-year-old son was sleeping. As Rachel and Ron were leaving, they saw a truck that looked like Foernzler's, but could not confirm that it was him. On their way to the bar, Ron and Rachel smoked a marijuana joint. That same evening, Patricia Tanner, an old friend of Foernzler's, ran into Foernzler and his brother-in-law at a local bar. Foernzler told Patricia that he was upset because his girlfriend was cheating on him with a friend of his. Foernzler also told Patricia that he was going to get a knife.

After Ron and Rachel left Ron's home, the Gallagher's heard someone banging on Ron's door. They looked outside and saw two men kicking Ron's door. The men were yelling; one in particular was yelling in an angry voice, "Come out here, you bitch, you're scared of me." *Transcript* at 118. David heard a crack when the door was kicked in and then heard the men inside Ron's home. David heard what sounded like Ron's bedroom door getting kicked in. Shortly thereafter, David heard a vehicle leave and went next door to check on Ron's son. David called Ron to tell him what had happened.

Meanwhile, at the bar, Ron and Rachel had both consumed a drink and had ordered a second round when Ron received the call from David that someone had broken into his home. Ron and Rachel immediately left the bar to return to Ron's home. Ron had a "good idea" of who was responsible and tried calling Foernzler several times. *Id*. at 150. When

Ron and Rachel returned to Ron's home, they found that the front door had been kicked in and that a bedroom door on the inside had also been kicked in.

Later that night, Patricia Tanner ran into Foernzler and his brother-in-law at a different bar. Foernzler told her that he had kicked in a door and that he was going to get a knife because "shit was about to get crazy." *Id*. at 195. After about ten to fifteen minutes, Foernzler looked at his phone and then abruptly jumped up and left the bar with his brother-in-law.

A few minutes later, Foernzler and his brother-in-law arrived at Ron's house and Ron met him outside and the two began arguing. Foernzler asked Ron why he was "blowing up" his phone and Ron accused Foernzler of kicking in his door. *Id*. at 88. Eventually, Ron turned to go back inside and Foernzler started to follow him. Ron turned around and told Foernzler that he was not coming inside and then Foernzler pushed Ron and started hitting him. The two began wrestling around as Ron tried to push Foernzler away from him. Ron yelled, "I'm not fighting you, I don't want to fight you, I don't want to hurt you, I'm not fighting you, I'm not doing this." *Id*. at 125. Ron did not hit back, but Foernzler kept coming at him. All of a sudden Ron started yelling in a terrified voice that he had been stabbed. Foernzler ran and got in his truck and drove away. Ron stumbled to his neighbor's house and fell on the ground. David grabbed a towel and ran to help Ron while Rachel called 911.

Minutes later when the responding officers arrived at the scene, they found Ron lying on the ground with David trying to stop the bleeding from visible stab wounds. Both Ron and the ground were covered with blood, and Ron was crying for help, gurgling, and gasping

for air. Ron told the police that Foernzler had stabbed him. Ron was taken to the hospital where he underwent emergency open-heart surgery and was treated for life-threatening stab wounds. In total, Ron was stabbed eleven times, with the most serious stab wound being to his right chest that severed the right mammary artery causing him to actively bleed out into his chest. Without the immediate surgery, Ron would have died. Ron remained in the hospital for two weeks and was off work for six weeks.

Ron was not armed with a knife or any other weapon at any time that evening or during the altercation. No knife or weapon was found at the scene. Police did find "very noticeable" amounts of blood inside Foernzler's truck and at his house. *Id*. at 332. Ron's DNA was present in some of the blood found inside Foernzler's truck.

On April 27, 2009, the State charged Foernzler with aggravated battery as a class B felony, burglary as a class B felony, and battery as a class C felony. On June 30, 2009, the State filed a motion to amend the charging information, adding a count of attempted murder, a class A felony, and residential entry as a class D felony. The trial court granted the State's motion. The following day the State moved to dismiss the burglary and battery counts from the original charging information. On September 8, 2009, Foernzler filed a notice of his intent to assert the defense of self-defense at trial. A jury trial was held on June 14 and 15, 2010. At the conclusion of the evidence, the jury returned verdicts finding Foernzler guilty on all counts. At a July 9, 2010 sentencing hearing, the trial court vacated the aggravated battery conviction finding that it was encompassed by the attempted murder conviction. The court then sentenced Foernzler to thirty-five years for the attempted murder conviction and a

consecutive term of one and one-half years for the residential entry conviction. Foernzler now appeals.

1.

Foernzler argues that the State failed to adequately rebut his claim of self-defense. The standard for reviewing a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same standard used for any claim of insufficient evidence. *Wallace v. State,* 725 N.E.2d 837 (Ind. 2000). We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* If there is sufficient evidence of probative value to support the conclusion of the trier of fact, the judgment will not be disturbed. *Id.* "A valid claim of self-defense is legal justification for an otherwise criminal act." *Id.* at 840.

To prevail on a self-defense claim, Foernzler must show that he: (1) was in a place where he had a right to be; (2) acted without fault; and (3) was in reasonable fear or apprehension of bodily harm. *Henson v. State,* 786 N.E.2d 274 (Ind. 2003); *see also* I.C. § 35-41-3-2 (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011). When a self-defense claim is raised and finds support in the evidence, the State need only negate one of the necessary elements. *Wilson v. State,* 770 N.E.2d 799 (Ind. 2002). The State may meet its burden by offering evidence directly rebutting the defense, by affirmatively showing that the defendant did not act in self- defense, or by simply relying upon the sufficiency of the evidence from its case-in-chief. *Miller v. State*, 720 N.E.2d 696 (Ind. 1999). In considering a claim of self-defense, the law is well settled that the amount of force used must be proportionate to the urgency of the situation. *Hollowell v. State,* 707 N.E.2d 1014 (Ind. Ct. App. 1999). Where a person uses more force than is reasonably

necessary under the circumstances, the right of self-defense is extinguished. *Geralds v. State*, 647 N.E.2d 369 (Ind. Ct. App. 1995), *trans. denied*.

In arguing that the State did not adequately rebut his claim of self-defense, Foernzler relies upon his own self-serving testimony. At trial, Foernzler testified that Ron was angry at him and accused him of breaking into his home and that when he arrived at Ron's house, Ron met him in the yard. Foernzler maintains that Ron initiated physical contact by aggressively pushing him and grabbing him around the neck such that he could not breathe. At one point, Ron pushed him causing him to fall back a couple of steps. Foernzler testified that this is when he saw a "shiny object" in Ron's hand. *Transcript* at 457. Foernzler testified that he started to panic and began hitting Ron with both hands trying to break Ron's grip around his neck, all the while holding the object he had taken away from Ron. Foernzler did not know how many times he hit Ron during the course of the struggle as he was fighting for his life. After Foernzler was able to break free, he looked Ron in the eye, and then returned to his truck and drove away.

Foernzler's argument is simply a request that this court reweigh the evidence and credit his version of events over the State's evidence. We do not engage in such matters on appeal. The State's evidence was sufficient from which the jury could have concluded that Foernzler was not acting in self-defense. Contrary to Foernzler's claims, Ron and an eyewitness both testified that Foernzler was the aggressor who provoked the conflict and that Ron sought to retreat from the altercation, but Foernzler continued to come at Ron and act violently. Further, the State introduced evidence indicating that Ron was not armed. Although Foernzler testified that the victim choked him, it was Foernzler who escalated the

fight by introducing a knife into it and then he proceeded to stab the victim eleven times.

As noted above, the State need only disprove one element of a self-defense claim. Here, the State's evidence, at the very least, disproves two of them. We therefore affirm Foernzler's convictions.

2.

Foernzler argues that the trial court abused its discretion in admitting evidence of a telephone call Foernzler made while incarcerated at the Marion County Jail. The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id.* A claim of error in the admission or exclusion of evidence will not prevail, however, "unless a substantial right of the party is affected." Ind. Evidence Rule 103(a). Whether an appellant's substantial rights are affected is determined by examining the "probable impact of that evidence upon the jury." *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005).

Prior to submitting the recorded jailhouse phone conversation into evidence, the State presented the testimony of Rachel, Foernzler's former girlfriend, in which she identified the voices on the recording as Foernzler's and three of his friends. Additionally, the State presented another witness establishing the authenticity of the recording. During the phone call Foernzler, seemingly referring to the incident in question, said that he "had something [he] wanted to express" and did not feel anybody was "taking [him] seriously." *State's Exhibit* 51. He also said that "shit happens, people do things" and then expressed anger at

Ron for pressing the charges against him. Foernzler twice commented that he wished he could feel remorse for what he had done but that he was having "trouble doing that" and that he was having a "hard time feeling bad." *Id*. When one of his friends stated that "Ron got what was coming to him," Foernzler laughed. *Id*. He laughed again as he recounted that another friend had shared the same thought.

During trial, Foernzler objected to the admission of his taped conversation on grounds that an insufficient foundation was laid to show it was his voice on the tape. The trial court admitted State's Exhibit 51 over his objection and published it to the jury.[3] On appeal, Foernzler argues that the recorded phone call was not relevant to the issues, and that even if relevant, its probative value was substantially outweighed by its prejudicial effect. Foernzler also argues that portions of the recording constitute inadmissible hearsay. Foernzler acknowledges in his brief that he raises these objections to the admission of the recorded conversation for the first time on appeal. It is well-settled that a defendant may not raise one ground for objection at trial and argue a different ground on appeal. *Howard v. State*, 818 N.E.2d 469 (Ind. Ct. App. 2004), *trans. denied*. The failure to raise an issue at trial waives

[3] During the jury's deliberations, the jury asked to listen again to the recorded conversation and was permitted to do so over Foernzler's objection.

the issue on appeal. *Id*. Therefore, because Foernzler did not object to the admission of the recorded jailhouse phone call on the grounds he now asserts on appeal, he has waived this issue for appellate review. *See id*.

Foernzler attempts to circumvent waiver by arguing that the admission of the recorded phone conversation constituted fundamental error. *See Wilson v. State*, 931 N.E.2d 914 (Ind. Ct. App. 2010), *trans. denied*. "The 'fundamental error' exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). In other words, fundamental error is defined as an error so prejudicial to the rights of a defendant that a fair trial is rendered impossible. *Mathews v. State*, 849 N.E.2d 578.

The recorded jailhouse phone conversation between Foernzler and his friends is relevant to the extent it refutes Foernzler's claim that he acted in self-defense. We acknowledge that the recording contained some information that may be deemed irrelevant or prejudicial, but we do not find that such matters were so prejudicial that Foernzler did not receive a fair trial. To be sure, the evidence of Foernzler's guilt was overwhelming. There is no dispute that Foernzler stabbed Ron eleven times, nearly killing him. Foernzler admitted as much at trial. The evidence showed that Foernzler was mad at Ron because he was dating Rachel (Foernzler's ex-girlfriend and mother of his child); that he told Rachel that Ron was "dead" to him , *State's Exhibits* 8 and 9; that he told another friend that he was getting a knife because "shit was about to get crazy", *Transcript* at 195; and that he angrily kicked in Ron's door and entered Ron's house looking for Ron earlier in the evening on the night in question.

Ron and his neighbor both testified that during the altercation, Foernzler was the instigator and the aggressor and he willingly participated in the violence. Thus, even if we assume, without deciding, that the trial court erred in admitting the recorded jailhouse phone conversation, any such error was harmless. Foernzler has therefore failed to demonstrate that the admission of the recorded phone conversation amounted to fundamental error.

3.

Foernzler argues that the trial court abused its discretion in excluding evidence of drug use by the victim. Prior to trial the trial court granted the State's motion in limine thereby preventing Foernzler from presenting evidence of "[d]rug or alcohol use by any State's witness unless it relates to their ability to perceive and/or recall the events in question", *Appellant's Appendix* at 229, or of the presence of drug paraphernalia near the crime scene. During an offer to prove, Foernzler sought the admission of Ron's medical records that included the results of a drug urinalysis performed on the date of the incident. The urinalysis indicated a positive result above the threshold nannogram level for marijuana and cocaine. The State objected, and the trial court excluded such evidence.

We begin by noting that both Ron and Rachel testified that they smoked a joint and both had a drink earlier in the evening on the day in question. On cross-examination, Foernzler was able to emphasize Ron's use of those substances. Thus, evidence of Ron's drug use on the night in question was already before the jury. The urinalysis results were therefore merely cumulative. We further note that the documents Foernzler sought to introduce into evidence provided no information as to the precise level of the drugs detected nor did they explain what it meant to be above a threshold nanogram level. The jury would

have been forced to speculate what the information meant and whether or not Ron was affected on the night in question (the purpose for which Foernzler sought the admission of such evidence).

Given the foregoing, we conclude that the trial court did not abuse its discretion in excluding this evidence. In light of Ron's testimony that he had smoked marijuana and had a drink prior to the altercation and that his medical records contained no additional relevant information, there is no reasonable likelihood that the exclusion of the medical records impacted the jury's evaluation of the evidence, and more specifically, Foernzler's self-defense claim. As noted above, the evidence of guilt was overwhelming and sufficiently rebutted Foernzler's claim of self-defense. Every witness, besides Foernzler, testified consistently that Foernzler initiated the physical contact, was the aggressor, and voluntarily participated in the violence. Witnesses also testified as to how Ron verbally disclaimed any interest in engaging in a physical confrontation with Foernzler. We find no error in the trial court's exclusion of Ron's medical records.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.