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IN THE
COURT OF APPEALS OF INDIANA

JIMMY E. GRIFFIN, II,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-1008-CR-919
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle III, Judge
Cause No. 48C01-0911-FC-612

May 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Jimmy E. Griffin, II, was convicted of battery[1] and attempted battery,[2] both as Class C felonies. The trial court sentenced Griffin to concurrent eight-year sentences, but suspended two years of each sentence, for an executed sentence of six years. Griffin raises the following restated issues:

I. Whether the trial court erred when, over Griffin's objection, it permitted a witness's prior videotaped statement to police to be shown to the jury;

II. Whether the evidence was sufficient to support Griffin's convictions; and

III. Whether Griffin's sentence was an abuse of discretion and is inappropriate.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On September 6, 2009, at approximately 10:20 p.m., Officer Matthew Kopp of the Anderson Police Department was dispatched to the area of 16th Street and Madison Avenue on a report of shots being fired. The area is a combination of residential and commercial establishments, including bars, restaurants, and hair salons. That night, there was a block party being held in the area, with patrons gathering both inside and outside of clubs, in parking lots, and along sidewalks. Estimates of the number in attendance ranged from 50 up to 200, but all parties agree it was a crowded event.

In attendance were a woman named Shirley Jones and her long-time boyfriend, Clinton King. At some point, they became involved in an argument while inside one of the

[1] *See* Ind. Code § 35-42-2-1.

[2] *See* Ind. Code §§ 35-42-2-1, 35-41-5-1.

clubs, Sonny Ray's; King was grabbing Jones's arm and telling her to leave the nightclub. Jones's niece, Kia Prince, intervened and stood between Jones and King. Thereafter, Prince's boyfriend, Griffin, approached the situation with King and Jones. Griffin, who was wearing a white shirt, pulled at King's shirt a couple of times in an effort to pull King away from Jones, and King punched Griffin and knocked him to the ground. Griffin's family immediately became involved, people were throwing chairs and bottles, and King and Jones ran outside. King got in his car, a 1977 brown Buick, and drove away. *Tr*. at 153. Jones stayed at the scene and continued to be involved in a verbal argument with Griffin's family members. King drove back and stopped at the sidewalk where Jones was standing and asked her to join him in his car. Jones declined, and about that time, King saw Griffin running across a parking lot and "jacking the chamber on his gun." *Id*. at 183. King yelled, "Jimmy has a gun." *Id*. at 143, 184. King then closed the door of his car and "shot down Madison Avenue" in his car. *Id*. at 184. Jones saw Griffin shoot four or five times at King's vehicle as it drove down Madison Street. In his rearview mirror, King saw Griffin shooting at him. Jones called 911.

Officer Kopp, who was one of many officers to arrive at the scene, approached and spoke to a woman named Verna Pullin, who told him that she saw a man in a white t-shirt running in the middle of the street chasing a car and shooting at that vehicle. *Id*. at 76-77, 80. However, she did not know the man and could not identify him. While still at the scene, a man named Willie Rumph approached Officer Kopp and, after some discussion, Rumph showed Officer Kopp an injury to the lower right side of his back that was a raised and welted abrasion, which appeared to Officer Kopp to be "fresh." *Id*. at 65-66. In response to

what Pullin had told him about seeing the man chasing a car and shooting at it, Officer Kopp walked up the street and observed a small bullet-sized hole in the front grill of a yellow and purple Chevrolet parked on the street at 1708 Madison Street. Another officer found a lead projectile, "a slug," resting on the housing of the vehicle's headlamp. *Id*. at 114, 120.

The State charged Griffin with two Class C felonies: battery for discharging a firearm and injuring Rumph and attempted battery for discharging a firearm at King's vehicle. During the jury trial, the State called to testify, among others, Rumph. When asked by the State about the September 6 incident and what he told officers that night, Rumph replied that he could not remember anything. With regard to the injury that officers had viewed on Rumph's back, Rumph's trial testimony was that he did not recall how he sustained the injury; he just recalled having it the following day when he woke up.

Rumph had given a videotaped statement to police on September 6 about what he observed and what happened to him, and the State asked whether he recalled making the videotaped statement; he said, "Uh, yeah. I think so." *Id*. at 88. The State then asked Rumph if viewing the tape would refresh his recollection about events that night; he replied, "Nope." *Id*. Thereafter the jury was recessed, and after some discussion between the court and counsel, the videotape was played for Rumph. When the jury reconvened, the State asked Rumph if viewing the tape refreshed his recollection, to which he replied, "No. Looked like another dude. Looked like he was somebody else," and he confirmed that watching the videotape did not refresh his recollection about what he said to police that night. *Id*. at 91.

The State sought to play Rumph's videotaped statement for the jury under Evidence

Rule 803(5), recorded recollection, but Griffin objected on the basis that it was hearsay and playing the tape violated his Sixth Amendment right of confrontation. *Id*. at 93. Over Griffin's objection, the trial court ruled that, pursuant to Rule 803(5), the State was permitted to play the videotaped statement to the jury. In it, Rumph stated that he "heard a couple of gunshots," so he grabbed a small child, and ducked behind a car for safety. *Id*. at 103. After some moments, Rumph felt a burning sensation on his back. He did not see anyone running or shooting. He heard about 4 or 5 shots total.

Officer Travis Thompson, a "scene technician" with the Anderson Police Department, said that he took photographs of Rumph's back that night and did so at Officer Kopp's request because Rumph had been struck by a stray bullet. *Id*. at 114, 121. The photographs were admitted into evidence at trial. Officer Thompson also recovered the "slug" from the yellow and purple Chevrolet that was parked in a lot next to a house at 1708 Madison Avenue. *Id*. at 114.

King testified at trial that, after he saw Griffin shooting at his car, he drove home. He did not call police, but later in the month a detective from Anderson Police Department came to King's house, interviewed him, and took pictures of his car. At trial, King identified photographs depicting a small hole in his car's mud flap that was not there before he went to Sonny Ray's on September 6, but was there when he got home. The photographs were admitted into evidence at trial.

The jury convicted Griffin with battery and attempted battery, both as Class C felonies. The trial court sentenced Griffin to eight years of imprisonment for each conviction, but suspended two years of each term and ordered that they be served

concurrently, for an executed sentence of six years. He now appeals.

DISCUSSION AND DECISION

I. Rumph's Videotaped Statement

Griffin claims the trial court erred when it permitted the State to play Rumph's prior recorded video statement to the jury. We review a trial court's decision to admit evidence for an abuse of discretion. *Marcum v. State*, 772 N.E.2d 998, 1000 (Ind. Ct. App. 2002). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Ballard v. State*, 877 N.E.2d 860, 862 (Ind. Ct. App. 2007). We will not reverse the trial court's decision unless it represents an abuse of discretion that results in the denial of a fair trial. *Id.*

Griffin argues that the trial court's admission of the videotaped statement was improperly admitted hearsay; therefore, his conviction should be reversed. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay evidence is generally inadmissible pursuant to Indiana Evidence Rule 802. *Ballard*, 877 N.E.2d at 862. However, our evidence rules provide the following exception for admission of hearsay as a recorded recollection:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Evid. R. 803(5). This exception allows admission of a recorded statement if:

> (a) the memorandum or record relates to a matter about which a witness once had knowledge, (b) the witness has insufficient recollection at trial to enable the witness to testify fully and accurately, (c) the witness is shown to have

> made or adopted the memorandum or record, (d) the memorandum or record was adopted when the matter was fresh in the witness's memory, and (e) the memorandum or record is shown to reflect the witness's knowledge correctly.

Horton v. State, 936 N.E.2d 1277, 1282 (Ind. Ct. App. 2010) (citing *Impson v. State*, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000)). "[B]efore a statement can be admitted under the recorded recollection hearsay exception, certain foundational requirements must be met, including some acknowledgment that the statement was accurate when it was made." *Ballard*, 877 N.E.2d at 862 (quotation omitted); 13 Robert Lowell Miller, Jr., Indiana Practice: Indiana Evidence § 803.105 (3d. 2010). A trial court should not admit a witness's statement into evidence when the witness cannot vouch for the accuracy of the statement nor remember having made the statement. *Ballard*, 877 N.E.2d at 862 (citing *Kubsch v. State*, 866 N.E.2d 726, 735 (Ind. 2007) (where trial court correctly denied introduction of witness's prior statement where witness could not vouch for statement that she could not even remember making), *cert. denied* (2008).

Here, Griffin argues that Rumph never vouched for the accuracy of the video statement he gave to police and it was error for the trial court to admit it. We agree. While Rumph eventually conceded that it was, in fact, him in the video and that he made a statement to police, *Appellant's App*. at 137, 144-47, he stated that he did not recall the events of the evening nor did he recall making the statement. Accordingly, Rumph did not vouch for the accuracy of the statement made to police, and the State failed to show that the recorded recollection correctly reflected Rumph's knowledge. The videotaped statement should not have been admitted under Indiana Evidence Rule 803(5). *Kubsch*, 866 N.E.2d at 726 (videotape properly not admitted at trial where person did not remember making it and

thereby did not vouch for its accuracy).

Because Rumph's videotaped statement was inadmissible hearsay, we address the issue of harmless error. 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 the substantial rights of the parties. *Marcum*, 772 N.E.2d 1002. Reversal is required only if the record reveals that the improper evidence was likely to have had a prejudicial impact on the average juror such that it contributed to the verdict. *Id.* Here, in the absence of Rumph's videotaped statement there was little, if any, evidence that he was injured by a stray bullet or to otherwise link Griffin to Rumph's back injury.

As we noted in *Ballard* and *Marcum*, domestic battery cases, we sympathize with the trial court's efforts to find a proper basis for admitting evidence in cases when the complaining witness recants; however, we are unable to say here that the improper admission of Rumph's statement was harmless error. *Ballard*, 877 N.E.2d at 864; *Marcum*, 772 N.E.2d at 1002. We therefore reverse and vacate Griffin's conviction for Class C felony battery.

II. Sufficiency of the Evidence

Next, we examine whether the State presented sufficient evidence to convict Griffin of attempted battery, stemming from shots fired at King's vehicle.[3] When reviewing the sufficiency of evidence supporting a conviction, we will not reweigh the evidence or judge the credibility of witnesses. *Stewart v. State*, 866 N.E.2d 858, 862 (Ind. Ct. App. 2007)

[3] Griffin also claims that the evidence was insufficient to convict him of battery upon Rumph; because we reversed and vacated that conviction, above, we do not reach it separately here.

(citing *Staton v. State*, 853 N.E.2d 470, 474 (Ind. 2006)). We must look to the evidence most favorable to the conviction together with all reasonable inferences to be drawn from that evidence. *Id*. We will affirm a conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id*. A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *White v. Stat*e, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*.

To convict Griffin of Class C felony attempted battery with a deadly weapon, the State was required to prove that he (1) engaged in the commission of a substantial step toward (2) knowingly or intentionally (3) touching another person (4) in a rude, insolent, or angry manner (5) by means of a deadly weapon. *See Stewart*, 866 N.E.2d at 864 (citing Ind. Code §§ 35-42-2-1, 35-41-5-1). The requisite culpability for attempted battery with a deadly weapon exists if the defendant's conscious objective is to shoot another person, or where the defendant is at least aware of a high probability that, by his or her conduct of shooting, one of the bullets would strike another person. *Id*. at 849-50. Thus, to successfully prove attempted battery in this case, the State was required to prove that Griffin took a substantial step toward knowingly or intentionally touching King in a rude, angry, or insolent manner by means of a deadly weapon. *See* Ind. Code §§ 35-41-5-1, 35-42-2-1; *see also Richeson v. State*, 704 N.E.2d 1008, 1010-11 (Ind. 1998).

Here, in claiming that the evidence was insufficient, Griffin challenges only the intent element of the offense, asserting that the State failed to prove that he possessed the requisite intent to batter King. This court has observed that "intent is a mental function; therefore

absent an admission, the trier of fact must resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences thereof, a showing or inference of intent to commit that conduct exists." *Isom v. State*, 589 N.E.2d 245, 247 (Ind. Ct. App. 1992), *trans. denied.*

The record before us shows that while Griffin did not explicitly state his intent to batter King, the evidence and facts admitted at trial would allow the jury to reasonably infer that intent. Our review of the record indicates that on the evening of September 6, 2009, Griffin had been attempting to intervene in an argument between King and Jones in Sonny Ray's nightclub. King tired of Griffin's attempts to pull him away from Jones, and he punched Griffin, knocking him to the ground. King ran out of the club and got into his car; minutes later, King saw Griffin "come across the field … towards my car." *Tr*. at 184. After King yelled that Griffin had a gun, King drove away in his car. Pullin, Jones, and King each observed Griffin chasing King's car and shooting at it as King drove down Madison Avenue. After getting home that night, King discovered a small bullet-sized hole in the mud flap of his car, which was not there before the incident. This evidence provides a reasonable jury with ample evidence from which to conclude that Griffin intended to batter King. We therefore find that sufficient evidence supports Griffin's attempted battery conviction.

III. Sentencing

The advisory sentence for a Class C felony is four years. Ind. Code §35-50-2-6. For Griffin's two Class C felony convictions, the trial court imposed concurrent sentences of eight years, with two years suspended on each, for an executed sentence of six years; however, as a result of our holding in this case concerning the error in receiving Rumph's

videotaped statement, Griffin's conviction for battery is vacated and we now review only his sentence for Class C felony attempted battery upon King.

At the hearing, the court identified as mitigators: (1) Griffin graduated from college, and (2) his family spoke highly of him and the sentence would work a hardship on his family. *Tr*. at 344; *see also Appellant's App*. at 12. The court discussed the seriousness of the offense, namely that Griffin ran down the street in an area crowded with people, carrying a firearm, shooting and chasing after an automobile. The court noted that "[w]e could very easily be here on an unbelievably horrible set of circumstances if someone had gotten killed." *Tr*. at 344. The trial court identified as aggravators: (1) Griffin's criminal history, and (2) imposition "of less than what the court is imposing" would depreciate the seriousness of the offense. *Id*.

A. Abuse of Discretion

Griffin argues that the trial court abused its discretion when it sentenced him. 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 (Ind. 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.*

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer*, 868 N.E.2d at 490. "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*. A trial court abuses its discretion if it fails to enter a sentencing statement or if it finds aggravators unsupported by the record. *Id*. When a trial court has found improper aggravators, we must remand for resentencing if we cannot confidently say the "court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491. 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.* 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). On appeal, we will review both the written and oral sentencing statements to discern the findings of the trial court. *Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002).

Griffin contends that the trial court abused its discretion by relying on invalid aggravators. First, Griffin asserts that the "depreciate seriousness of the offense" aggravator only applies if the trial court is considering imposing something less than the advisory. *See Davidson v. State*, 849 N.E.2d 591, 595 (Ind. 2006) (generally, consideration of depreciate seriousness of offense factor is improper where there is nothing to indicate trial court was considering less than advisory sentence). He argues that because there is no evidence that the trial court here was considering anything less than the advisory, the court's use of that

aggravator was erroneous. However, Griffin's argument fails to address precisely what the trial court here stated when it sentenced Griffin. It said that "imposition of a sentence *less than what the Court is gonna impose* would depreciate the seriousness of the offense." *Tr*. at 345 (emphasis added). That is, anything less than an eight-year sentence with two years suspended, would depreciate the seriousness of the offense. As the State points out in its brief, Indiana courts have drawn a distinction between a statement that "less than the advisory (previously presumptive) sentence" would depreciate the seriousness of the offense, and a statement that "less than an enhanced sentence" would depreciate the seriousness of the offense. *Appellee's Br*. at 17. Our supreme court held in *Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006) that "it is not error to enhance a sentence based upon the aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the crime committed." Because the trial court's statement -- that "imposition of a sentence less than what the Court is gonna impose," *i.e.* an enhanced sentence of eight years, "would depreciate the seriousness of this offense" -- pertains to the imposition of an enhanced sentence, rather than a reduced one, it did not abuse its discretion in considering this to be an aggravating circumstance. *Storey v. State*, 875 N.E.2d 243, 252 (Ind. Ct. App. 2007), *trans. denied* (2008).

The trial court also relied upon Griffin's criminal history as an aggravator. Under Indiana Code section 35-38-1-7.1(a)(2), a defendant's prior criminal record is a circumstance that the court may consider in sentencing. However, the significance of a criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. *Rhoiney v. State*, 940 N.E.2d 841, 848 (Ind. Ct. App. 2010).

Griffin argues that the trial court erred "in affording any weight to [his] criminal history as an aggravating circumstance." *Appellant's Br*. at 15. Specifically, Griffin maintains that his criminal history should not have been considered an aggravator because it consisted of no juvenile offenses and four adult convictions, all of which were misdemeanors that were not related to the present charges of battery and attempted battery. He urges that "[t]he prior convictions are of a different character than the instant offense and do not approach the seriousness of this offense." *Id*. at 16. While we agree that Griffin's prior convictions are not on equal footing in terms of severity, we disagree that they are of a different character. Most if not all are alcohol-related convictions, including public intoxication, furnishing alcohol to a minor, and driving under the influence. The trial court illustrated its concern that alcohol was likely a precipitating factor of the current offense, stating "You're not to enter any bar or tavern whose primary business is the serving of alcoholic beverages. [] I think that's partly the problem where a lot of this started." *Tr*. at 346. We are persuaded by the State's position that "Defendant's criminal behavior is increasing in severity and he has not been deterred by . . . prior misdemeanor convictions from committing new criminal acts," *Appellee's Br*. at 17, and we find that it was not an abuse of discretion for the trial court to consider Griffin's criminal history as an aggravator. We conclude that the trial court did not abuse its discretion when it imposed a sentence of eight years, with six years executed, for the attempted battery conviction.

B. Appropriateness

Griffin also challenges the appropriateness of his sentence pursuant to Indiana Appellate Rule 7(B), under which we may revise a sentence authorized by statute if, after due

consideration of the trial court's decision, this court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Our review focuses on the aggregate sentence rather than on the number of counts, the length of sentence on any individual count, or whether the sentence runs concurrently or consecutively. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We do not look to see whether the defendant's sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is "inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007), *trans. denied* (2008). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer*, 868 N.E.2d at 490.

Griffin suggests that, because the crimes did not result in any major injuries, the nature of his offenses do not support the trial court's decision to impose an eight-year sentence. We disagree. After King punched Griffin and knocked him to the ground, Griffin pursued a dangerous course of action. In the midst of a busy nighttime block party, Griffin ran down the middle of Madison Avenue chasing and shooting at King's car, which ended up with a bullet-sized hole in the mud flap. Griffin discharged his gun not once, but four or five times. His conduct threatened not only King, but many bystanders, including children. The existence of multiple victims of a crime is an appropriate justification for increasing the sentence for that crime. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (citing *French v. State*, 839 N.E.2d 196, 197 (Ind. Ct. App. 2005), *trans. denied* (2006)). The nature of these circumstances support the trial court's imposition of the eight-year term of imprisonment with six years of that executed at the Department of Correction.

Regarding Griffin's character, we recognize that this case represents his first felony

conviction. However, the record before us reveals that Griffin had four prior misdemeanor convictions, and at least seven other arrests. Although a record of arrests by itself is not evidence of a defendant's criminal history, it is appropriate to consider such a record as a poor reflection on the defendant's character, because it may reveal that he or she has not been deterred even after having been subjected to the police authority of the State. *See Rutherford*, 866 N.E.2d at 874 (citing *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005)). One arrest occurred while Griffin was out on bond in the present case, and for that he was charged with Class D felony receiving stolen property, Class A misdemeanor carrying a handgun without a license, and possession of a handgun with obliterated identifying marks. While we acknowledge that his college education is a positive character attribute, we find that his repeated contacts with the criminal justice system reflect poorly on his character. Griffin has failed to persuade us that his eight-year sentence, with two years suspended, is inappropriate.

Affirmed in part, reversed in part, and remanded for the trial court to vacate the battery conviction.

MATHIAS, J., and VAIDIK, J., concur.