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ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Deputy Public Defender
Leonard, Hammond, Thoma & Terrill
Fort Wayne, 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

PHILLIP D. LASTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-1011-CR-727
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-1006-FD-544

June 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Phillip D. Laster ("Laster") appeals his conviction for Domestic Battery, as a Class D felony.[1] We affirm the conviction and remand for sentence correction.

Issues

Laster presents two issues for review:

I. Whether there is sufficient evidence to support his conviction; and

II. Whether he received effective assistance of trial counsel.

Facts and Procedural History

On April 10, 2010, Fort Wayne Police received a 9-1-1 call from Ebonie Thomas ("Thomas"), who reported that Laster was beating the mother of his child, Maranda Wallace ("Wallace"). When officers responded, Laster had fled. Wallace was "crying almost to the point of hyperventilating." (Tr. 84.) There was a small child tugging on her leg. Wallace told Officer Grant Sanders that Laster had "clocked her on the side of the head" with a closed fist, that she had fallen into a fetal position, and that Laster had continued to strike her. (Tr. 85.) Officer Sanders photographed injuries to Wallace's face and scalp.

On June 11, 2010, the State charged Laster with Domestic Battery. The State also alleged that Laster is a habitual offender. A jury trial was held on September 14, 2010, and Laster was convicted of the charge against him. He admitted his status as a habitual offender. On October 22, 2010, the trial court imposed a two-year sentence for the Domestic Battery conviction and purportedly imposed a "consecutive sentence" of two and one-half

[1] Ind. Code § 35-42-2-1.3. He does not challenge his adjudication as a habitual offender.

years for the habitual offender adjudication.[2] (App. 208.) This appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence

To convict Laster of Domestic Battery, as a Class D felony, as charged, the State was required to establish beyond a reasonable doubt that Laster knowingly or intentionally touched Wallace in a rude, angry, or insolent manner, that the touching resulted in bodily injury, and that it was committed in the physical presence of a child under the age of sixteen, with Laster's knowledge that the child was present and might be able to see or hear the offense. Ind. Code § 35-42-2-1.3. Laster claims there is a lack of evidence that he acted knowingly or intentionally, that the touching resulted in bodily injury,[3] or that he knew a child was present and might be able to see or hear the offense.

When reviewing the sufficiency of the evidence to support a conviction, we will consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. Id. The intent element may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual consequences to which that conduct usually points. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000).

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[2] A defendant who has been adjudicated a habitual offender is subject to an enhancement of the sentence imposed on the underlying felony, as opposed to a separate consecutive sentence. Ind. Code § 35-50-2-8. We remand to the trial court for correction of the sentence imposed herein.

[3] Bodily injury "means any impairment of physical condition, including physical pain." Ind. Code § 35-41-1-4.

Here, the State presented evidence that Laster had struck Wallace on the side of her head with his fist and had continued to strike her after she fell. Wallace reported to Officer Sanders that she was experiencing pain at the side of her face and the top of her head. Officer Sanders observed and photographed injuries consistent with Wallace's account of events. During Wallace's testimony, she described her head injury as "a lump." (Tr. 64.)

Thomas testified that, when she and Wallace's sister had arrived at Wallace's residence, Wallace was outside. Thomas then saw Wallace and Laster run upstairs and Thomas could hear a "commotion" including Wallace's exclamation "ow, my hair." (Tr. 78.) Thomas heard Wallace's sister yell "Phillip get off of her." (Tr. 74.) Thomas then placed a 9-1-1 call for assistance. Thomas testified that Laster's child and a sibling (aged four)[4] were with Thomas "while the commotion was going on." (Tr. 79.) Additionally, Laster's knowledge of a child's presence is evidenced by his statement to Detective Chrzan that "the child was not right there on top of it, but was in the residence." (Tr. 93.)

From this evidence, the jury could conclude that Laster knowingly or intentionally touched Wallace in a rude, insolent, or angry manner, causing bodily injury, and that Laster knew a child was present and might be able to see or hear the offense.

II. Assistance of Counsel

Laster next claims that he was denied the effective assistance of trial counsel. According to Laster, there is evidence that Wallace started the altercation by throwing things at him and thus, trial counsel should have tendered an instruction on self-defense.

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[4] Thomas testified that neither child was over age sixteen.

To demonstrate ineffectiveness of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Id. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." Id. "Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. Id. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id.

Further, we "strongly presume" that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002). Counsel is to be afforded considerable discretion in the choice of strategy and tactics. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied, 537 U.S. 839 (2002).

A valid claim of self-defense is legal justification for an otherwise criminal act. Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001). In order to prevail on a claim of self-defense a defendant must show: (1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or great bodily harm. Id. at 576. The

phrase "reasonably believes," as used in the Indiana self-defense statute, requires both a subjective belief that force was necessary to prevent serious bodily injury, and that such actual belief was one that a reasonable person would have under the circumstances. Littler v. State, 871 N.E.2d 276, 279 (Ind. 2007). Thus, both objective and subjective standards are implicated. Hood v. State, 877 N.E.2d 492, 495 (Ind. Ct. App. 2007), trans. denied.

"[F]ailure to submit an instruction is not deficient performance if the court would have refused the instruction anyway." Williams v. State, 706 N.E.2d 149, 161 (Ind. 1999). A trial court may accept a proposed instruction if: (1) it correctly states the law; (2) it is supported by the evidence; (3) it is not covered by the trial court's other instructions; and (4) it does not tend to mislead or confuse the jury. Nantz v. State, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001), trans. denied.

Accordingly, it is necessary that we inquire whether the evidence before the jury would have supported the giving of a self-defense instruction in this case. As Laster points out, Wallace testified that she threw trash and cups at Laster before he hit her. However, to support a self-defense instruction, Laster would have been obliged to offer some evidence that he acted without fault and had a reasonable fear of death or great bodily harm. Randolph, 755 N.E.2d at 575. However, Laster did not retreat after Wallace was subdued; rather, he continued to strike her even after she was prone on the floor. Also, there is no evidence of his subjective belief that he feared death or great bodily harm.

We conclude that the trial court would have refused a self-defense instruction. As such, counsel was not deficient for failing to tender one.

Conclusion

There is sufficient evidence to support Laster's conviction for Domestic Battery, and he failed to demonstrate ineffectiveness of trial counsel. Accordingly, we affirm his conviction. However, we remand to the trial court with instructions to vacate the purported consecutive sentence upon the habitual offender adjudication and to attach the two and one-half-year enhancement to the two-year sentence for Domestic Battery.

FRIEDLANDER, J., and BROWN, J., concur.