



## Case Summary

Lavarter Lewis, Jr. appeals the sentence imposed by the trial court following his convictions for Class C felony battery with a deadly weapon and Class A misdemeanor battery and his habitual offender adjudication. Specifically, Lewis contends that the trial court failed to properly consider as substantial mitigating factors that the victim induced or facilitated his own injuries and that Lewis acted under strong provocation. Concluding that the trial court did not abuse its discretion because the proposed mitigating factors were not clearly supported by the record, we affirm.

## Facts and Procedural History

On July 9, 2007, Lewis and Marguerite Evans were working at Plumrose, USA, a bacon processing plant in Elkhart, Indiana. Evans told her boss, Matt Hornish, that the boxes Lewis was putting on the conveyor system kept falling off. Hornish instructed Evans to tell Lewis, “[I]f your boxes keep falling on the floor, that you’re gonna have to open them up.” Tr. p. 118. Lewis called Evans a “b\*\*\*\*” when she relayed the message. *Id.* Evans reported this comment to Hornish.

On July 11, 2007, Lewis bumped into Evans. Evans testified that the bump was more like a hit and that “[she] moved back and got scared.” *Id.* at 119. Evans notified her supervisor. Evans later observed Lewis leaning on the conveyor system staring at her and testified that she felt as if Lewis “was trying to intimidate [her].” *Id.* at 122. Lewis then said, “[I]t’s on at midnight,” referring to the end of their shift. *Id.* at 125. Evans told her boyfriend, Tellys Whitener, who was also employed at Primrose, about Lewis’s behavior.

Whitener approached Lewis, and Lewis repeatedly told Whitener to “get outta [his] face.” *Id.* at 270. Whitener and Lewis eventually went upstairs to the locker room, where the two began “flinching” at one another. *Id.* at 282. Lewis then put his hand in his pocket. Whitener asked Lewis if he had a weapon, and Lewis said, “[D]on’t worry about it. If you run up on me, you gonna see.” *Id.* at 285. Lewis pulled a knife out of his pocket. Whitener struck Lewis, causing him to fall to the ground, and then struck Lewis twice more. Whitener backed away from Lewis with his hands up in the air and said, “If you cut me, you stab me, man, they gonna lock you up for the rest of your life, man.” *Id.* at 289. Lewis responded, saying, “I don’t give a f\*\*\*.” *Id.* Lewis then picked up a water cooler and pursued Whitener as he “backpedaled” to the stairs. *Id.*

Lewis swung the cooler at Whitener as he tried to flee down the stairs. When Whitener blocked the cooler with his hand, Lewis stabbed him. Whitener continued down the stairs and went into the break room. Lewis entered the break room and chased Whitener as he jumped from table to table in an effort to escape. Lewis noticed Evans in the break room and said, “B\*\*\*\*, I ought to stab your a\*\* too.” *Id.* at 306. Whitener distracted Lewis, and Evans left the break room to get help. Lewis found Evans and punched her in the face, significantly displacing her nose and fracturing three bones. *Id.* at 443. Lewis decided to leave the plant, and on his way out he encountered two other employees and yelled at them to “stay clear” of him and “that he didn’t want to have to cut them either.” *Id.* at 389. Lewis entered his car and drove away from Plumrose.

The State charged Lewis with Class C felony battery with a deadly weapon<sup>1</sup> and Class C felony battery resulting in serious bodily injury.<sup>2</sup> The State also alleged that he is a habitual offender.<sup>3</sup> After a jury trial, Lewis was found guilty of Class C felony battery with a deadly weapon and Class A misdemeanor battery<sup>4</sup> and was adjudicated a habitual offender. The trial court sentenced Lewis to an aggregate term of nineteen years with two years of reporting probation upon release. Lewis now appeals.

### **Discussion and Decision**

On appeal, Lewis contends that the trial court failed to properly consider two substantial mitigating factors before imposing the maximum sentence on his felony battery conviction, which was enhanced for being a habitual offender. Appellant's Br. p. 3. Specifically, he argues that the trial court erred by failing to recognize that the victim induced or facilitated his own injuries and that Lewis acted under strong provocation.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). 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.* We review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491.

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<sup>1</sup> Ind. Code § 35-42-2-1(a)(3).

<sup>2</sup> *Id.*

<sup>3</sup> Ind. Code § 35-50-2-8.

<sup>4</sup> I.C. § 35-42-2-1(a)(1).

When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000).

Lewis first argues that the trial court abused its discretion by failing to find as a mitigating circumstance that the victim of the crime induced or facilitated the offense. Lewis alleges that before he stabbed Whitener, he was confronted by Whitener and that he specifically and repeatedly told Whitener to leave him alone. Lewis contends that Whitener followed him to a locker room, where Whitener continued to harass him.

In *Tunstill v. State*, the Indiana Supreme Court determined that the trial court overlooked evidence that the victim induced or facilitated the offense. 568 N.E.2d 539, 546 (Ind. 1991). The victim in *Tunstill* initiated violence after the appellant inadvertently brushed into him. *Id.* In addition, before the victim was stabbed by the appellant, the victim "advanced on and delivered unprovoked blows to [the] appellant as [the] appellant backed away from him." *Id.* The circumstances in *Tunstill* do not exist in Lewis's case. The record reveals that Whitener approached Lewis to talk about Lewis intimidating and bumping into Evans. Whitener struck Lewis only after Lewis pulled a knife from his pocket. In fact, Lewis stabbed Whitener as he backed away in an attempt to flee from Lewis. The allegation that Whitener induced or facilitated his own injuries is not supported by the record. Therefore, the trial court did not abuse its discretion in failing to find this proffered mitigating circumstance.

Lewis also argues that the evidence demonstrates that he was acting under strong provocation and that the trial court abused its discretion by failing to recognize this as a mitigating circumstance. In support of this second contention, Lewis argues that “Whitener engaged in ‘trash talk,’ called Lewis a ‘motherf\*\*\*\*\*,’ lunged at Lewis, hit Lewis in the face causing him to hit the ground, got on top of Lewis, struck him two more times in the face, and continued to talk trash after Lewis had gotten Whitener off of him.” Appellant’s Br. p. 4. Lewis alleges that Whitener’s actions were sufficient provocation to cause him to stab Whitener and chase him in an attempt to stab him again. However, Lewis fails to acknowledge that as soon as Whitener asked to speak with him, Lewis was aggressive and irate. Tr. p. 270. He also fails to mention that violence occurred only after Lewis introduced a knife into the situation.

In *Ousley v. State*, we encountered a situation where a claim of provocation was not supported by the evidence. 807 N.E.2d 758, 763 (Ind. Ct. App. 2004). The appellant’s wife in *Ousley* had fallen in love with another man, and after the appellant read his wife’s diary, an argument ensued during which the wife allegedly hit him. *Id.* The appellant then cut his wife’s throat and shot her with a shotgun. *Id.* We determined that the wife’s actions did not amount to strong provocation as a mitigating factor. *Id.*

Lewis’s provocation argument fails under *Ousley*. Lewis chose to create a potentially violent situation by pulling a knife on Whitener. Lewis continued to pursue Whitener as Whitener backedpedaled in fear. The record reveals that Lewis’s aggressive reaction to being initially approached by Whitener escalated the situation. As in *Ousley*,

the trial court did not abuse its discretion in failing to find strong provocation as a mitigating factor.

We note that Lewis further alleges that “[n]othing in the trial court’s comments demonstrate that it considered the facts as testified to by the victim at trial and referenced by Lewis at sentencing.” Appellant’s Br. p. 5. However, the trial court is under no obligation to explain why it rejects alleged mitigating factors. *Anglemyer*, 868 N.E.2d at 493. Furthermore, the trial court *did* discuss Lewis’s proffered mitigators and outright rejected his contentions that his crime was induced or facilitated and that he acted under strong provocation. Tr. p. 585.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.