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ATTORNEY FOR APPELLANT:

**HILARY BOWE RICKS**
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**ZACHARY J. STOCK**
Deputy Attorney General

**KYLE CASSIDY**
Law Clerk
Indianapolis, Indiana

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# IN THE
# COURT OF APPEALS OF INDIANA

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| MICHAEL CASEY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0812-CR-704 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
The Honorable Stanley E. Kroh, Commissioner
Cause No. 49F18-0807-FD-165087

**July 20, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Michael Casey was convicted after a jury trial of criminal recklessness[1] as a Class D felony and admitted to being an habitual offender[2] in exchange for a reduced sentence on the enhancement. He was eventually sentenced to three years for his criminal recklessness conviction enhanced by two years on his habitual offender admission for a total executed sentence of five years. Casey appeals, raising the following restated issues:

I. Whether sufficient evidence was presented to support his conviction for criminal recklessness as a Class D felony; and

II. Whether Casey's sentence for criminal recklessness was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On July 10, 2008, Woody Pollack had volunteered to cut his neighbor's grass, and as he was doing so, he observed a woman entering and exiting several cars in the area. Believing she was a prostitute soliciting business in the neighborhood, Pollack, a member of the local Neighborhood Watch, told the woman to leave the area. After a brief exchange, she left and walked north up the street. Pollack then continued to cut his neighbor's grass by using a weed-whacker to trim the weeds.

Soon thereafter, Pollack saw some movement in his peripheral vision and turned to see Casey quickly approaching him and yelling angrily. When Casey saw the weed-

[1] *See* Ind. Code § 35-42-2-2.

[2] *See* Ind. Code § 35-50-2-8.

whacker in Pollack's hands, he stopped and said, "I've got something for you," pulling a knife from his pocket. *Tr*. at 69. Casey, while brandishing the knife, lunged at Pollack several times, coming within a foot of stabbing or slashing Pollack. Pollack was able to keep Casey away by raising and lowering the weed-whacker. Others from the neighborhood, who had witnessed this confrontation, interceded, with one man distracting Casey and leading him away and another dialing 911. When the police arrived, the officers placed Casey in handcuffs, and he claimed that he had only brandished his cell phone, pretending it was a weapon, in response to Pollack's unprovoked attack with the weed-whacker. The officers found a knife in the grass nearby, and Casey then admitted that the knife was his.

The State initially charged Casey with criminal recklessness as a Class D felony and criminal trespass as a Class A misdemeanor. Prior to trial, the State dismissed the criminal trespass charge and added an habitual offender allegation. A jury trial was held on September 25, 2008, where Casey claimed self-defense. At the conclusion of the trial, the jury found Casey guilty of criminal recklessness as a Class D felony. He subsequently admitted the habitual offender allegation in exchange for a two-year sentence on the enhancement. At the sentencing hearing, the trial court found Casey's difficult childhood and bi-polar disorder to be mitigating circumstances and his lengthy criminal history, his multiple poor conduct reports from prior incarcerations, and his apparent failed rehabilitation from his numerous prior convictions as aggravating circumstances. The trial court then imposed a three-year executed sentence for the

criminal recklessness conviction enhanced by the two-year sentence on the habitual offender admission for a total of five years executed. Casey 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.

Casey initially argues that the State failed to present sufficient evidence to support his conviction for criminal recklessness. In order to convict Casey of criminal recklessness as a Class D felony, the State was required to prove that he recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person and the act was committed while armed with a deadly weapon. Ind. Code § 35-42-2-2(b), (c)(2). Casey specifically contends that the evidence presented was insufficient to prove that he was in a position to get close enough to Pollack to create any actual risk of injury. He claims that, because Pollack was holding the weed-whacker during the confrontation, it was impossible to get close enough to use the knife to create a substantial risk of bodily injury to Pollack.

Here, the evidence most favorable to the verdict showed that Pollack observed Casey pull a knife with a two- to three-inch blade from his pocket and state, "I've got something for you." *Tr*. at 69. Casey then gestured toward Pollack with the knife and lunged several times at him, coming within a foot of making contact with the knife. The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. *Mathis v. State*, 859 N.E.2d 1275, 1281 (Ind. Ct. App. 2007). The evidence presented at trial was sufficient to establish that Casey, while armed with a deadly weapon, intentionally performed an act that created a substantial risk of bodily harm to Pollack. *See Hall v. State*, 831 N.E.2d 823, 827 (Ind. Ct. App. 2005), *reh'g granted on other grounds*, *trans. denied* (2006). (holding that swinging steak knife "less than one foot away" from victim was sufficient to support defendant's criminal recklessness conviction). Further, Casey's argument that the length of the weed-whacker prevented him from committing the crime is unpersuasive. This court has held that a criminal recklessness conviction was supported by sufficient evidence where defendant swung knife and attempted to stab around another person in order to get to victim. *See id*. The evidence presented was sufficient to support Casey's conviction for criminal recklessness as a Class D felony.

Casey next argues that insufficient evidence was presented to support his conviction because the State failed to disprove his claim of self-defense. He contends that in this situation Pollack was the aggressor because he raised the weed-whacker into the air, and Casey only brandished his knife because he was defending himself. Because

an inference could be made that he was merely defending himself, he asserts that the State failed to disprove his claim of self-defense.

The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. *Brown v. State*, 738 N.E.2d 271, 273 (Ind. 2000); *Green v. State*, 870 N.E.2d 560, 565 (Ind. Ct. App. 2007), *trans. denied*. We neither reweigh the evidence nor judge the credibility of the witnesses. *Brown*, 738 N.E.2d at 273. We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id*. We will affirm the conviction if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

Self-defense is a valid justification for an otherwise criminal act. *Wallace v. State*, 725 N.E.2d 837, 840 (Ind. 2000); *Green*, 870 N.E.2d at 564. A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. IC 35-41-3-2(a). A person is not justified in using force if he enters into combat with another person or is the initial aggressor, unless the person communicates an intent to withdraw and the other person nevertheless continues or threatens to continue unlawful action. IC 35-41-3-2(e)(3). Self-defense is established if a defendant: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Green*, 870 N.E.2d at 564. The State has the burden of disproving self-defense, and therefore, once a defendant claims

self-defense, the State must disprove at least one of the elements beyond a reasonable doubt. *Id*. "The State may meet this burden by rebutting the defense directly, by affirmatively showing that the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief." *Id*.

Here, the only evidence supporting Casey's self-defense claim was his own testimony; all of the other witnesses testified that he was the initial aggressor. The trial court gave the jury a self-defense instruction, and it convicted Casey nonetheless. The jury obviously rejected Casey's testimony, which it has a right to do. Casey's argument, therefore, essentially invites this court to reweigh the evidence, which we cannot do. *Brown*, 738 N.E.2d at 273. We conclude that the State presented sufficient evidence to negate Casey's claim of self-defense.

## II. Sentencing

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 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).

Casey argues that the trial court abused its discretion when it failed to find his admission to the habitual offender enhancement to be a mitigating factor. He also seems to contend that the trial court abused its discretion in not assigning proper weight to his mental condition and in overemphasizing his criminal history.

Initially, to the extent that Casey is arguing that the trial court abused its discretion in assigning improper weight to his mental condition and criminal history, this is no longer a proper consideration for our review. "The relative weight or value assignable to

reasons properly found or those which should have been found is not subject to review for abuse." *Anglemyer*, 868 N.E.2d at 491. As for Casey's admission to the habitual offender allegation, claims that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. *Anglemyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007). A defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Id*. at 220. However, the significance of a guilty plea as a mitigating factor varies from case to case. *Id*. at 221. A guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, or when the defendant receives a substantial benefit in return for the plea. *Id*. A guilty plea may also be considered less significant if there was substantial admissible evidence of the defendant's guilt. *Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), *trans. denied* (2007). Further, a guilty plea is not significant where the State does not receive a benefit in that judicial resources and time were still spent on the defendant. *Gray v. State*, 790 N.E.2d 174, 178 (Ind. Ct. App. 2003).

Here, while Casey's admission to the habitual offender allegation was supported by the record, its omission as a mitigating circumstance was not an abuse of discretion as his admission was not significant. First, Casey's demeanor demonstrated that he was not accepting responsibility for his actions; during his admission to the trial court, he repeatedly responded to questions by the trial court with comments that he knew he "just got railroaded" and that he got "slam dunked on some bull." *Tr*. at 252, 253, 256, 257. Further, by admitting the habitual offender allegation and accepting the State's

agreement, he received a significant benefit in his reduced sentence for the habitual offender enhancement. He only received two years, but could have received up to four-and-a-half years. Finally, there was substantial evidence of Casey's guilt as the State was prepared to admit records showing his multiple felony convictions to meet its burden of proof and Casey's admission did not occur until after the conclusion of a full jury trial. Therefore, significant judicial resources and time were spent, and the State received little benefit from his admission. It was not an abuse of discretion for the trial court to omit Casey's admission to the habitual offender allegation as his admission was not significant.

Casey next argues that his sentence was inappropriate in light of the nature of the offense and the character of the offender. 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). The defendant has the burden of persuading the appellate court that his sentence is inappropriate. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

Casey specifically contends that his three-year sentence for his criminal recklessness conviction was inappropriate. He claims that, as to the nature of the offense, because no one was injured, no real danger was posed to the victim or bystanders, and a knife was used and not a firearm, he should not have received the maximum sentence.

He also argues that his character lends itself to a lesser sentence because his criminal history did not contain any convictions for offenses greater than a Class C felony, he suffers from a mental condition that affects his ability to control his behavior, and he had an abusive childhood.

As to the nature of the offense, Casey quickly approached Pollack while his back was turned and began yelling angrily. He pulled a knife out of his pocket, stating "I've got something for you." *Tr*. at 69. He then lunged at Pollack several times with the knife and came within a foot of either stabbing or slashing Pollack. This attack by Casey was committed in view of neighborhood children playing nearby. Pollack testified that, since the attack, he is more scared to be out in the neighborhood. *Id*. at 267.

As to Casey's character, he had a significant criminal history that consisted of at least eighteen prior convictions. These convictions included seven known misdemeanors and six known felonies; the balance of his convictions was from other states, and the classifications were unknown. Casey also had four prior revocations of probation, and while, previously incarcerated, he had multiple negative conduct reports. Although it is true that Casey suffers from a mental condition and experienced an abusive childhood, the trial court did take these factors into account in its sentencing. We conclude that Casey's three-year sentence for criminal recklessness as a Class D felony was not inappropriate.

Affirmed.

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