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IN THE
COURT OF APPEALS OF INDIANA

RICHARD D. GASPER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A01-1009-CR-474
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles D. O'Connor, Jr., Judge
Cause No. 73C01-0902-FC-3

July 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Richard Gasper appeals his conviction of and sentence for Class C felony battery with serious bodily injury.[1] He presents three issues for our consideration:

1. Whether the trial court erred when it allowed the State to file an Habitual Offender Enhancement more than ten days after the omnibus hearing;
2. Whether the trial court erred in excluding testimony about statements Gasper made during an interview; and
3. Whether Gasper's sentence is inappropriate based on his character and the nature of the offense.

We affirm.

FACTS AND PROCEDURAL HISTORY

In early February 2009, Gasper asked his niece, Shellie Gaston, if he could stay at her apartment. She agreed, on the condition Gasper not consume alcohol in front of her children. He did not comply, so Shellie's husband, James Gaston,[2] told Gasper to leave. James walked Gasper to the door, pushed him out, and closed the door. After approximately two hours, Gasper returned. When James realized Gasper was still intoxicated, he again asked Gasper to leave and walked toward the door. Gasper stabbed James in the back.

Shellie called the police, who arrested Gasper. They discovered a knife that Gasper identified as the knife he used to stab James. Detective Dwenger interviewed Gasper at the

[1] Ind. Code § 35-42-2-1(a)(3).
[2] At the time of the crime, James and Shellie were not married; however, as they were married at the time of the trial, and their marital status is of no relevance to the legal issues in question, we will refer to Shellie as Shellie Gaston.

scene and took his statement regarding the events.

The State charged Gasper with Class C felony battery resulting in serious bodily injury and Class D felony residential entry.[3] The trial court set an omnibus date of April 9. On May 6, the State moved to amend the charges to include an habitual offender enhancement. After a hearing the court granted the motion to amend.

A jury found Gasper guilty of Class C felony battery resulting in serious bodily injury, and Gasper admitted he was an habitual offender. The trial court sentenced Gasper to eight years incarcerated for Class C felony battery resulting in serious bodily injury and enhanced his sentence by eleven years based on his habitual offender status, for an aggregate sentence of nineteen years incarcerated.

DISCUSSION AND DECISION

1. Habitual Offender Enhancement

Pursuant to Ind. Code § 35-34-1-5(e), the State may amend "an indictment or information to include [an] habitual offender charge" no later than "ten (10) days after the omnibus date." But on a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of trial. *Id.* Gasper argues the trial court should not have allowed the State to add an habitual offender charge to his indictment twenty-seven days after the omnibus date because the State did not show good cause.

Gasper has waived our review of this issue. He pled guilty to being an habitual offender, and "[a] defendant cannot question pre-trial orders after a guilty plea is entered."

[3] Ind. Code § 35-42-2-1.5.

Branham v. State, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004). Gasper did not object[4] to the filing of the habitual offender charge during the pre-trial hearing regarding the State's request. *See Jackson v. State*, 735 N.E.2d 1146, 1152 (Ind. 2000) (failure to make a contemporaneous objection at trial waives the issue on appeal).[5] Finally, Gasper did not request a continuance, *see* Ind. Code § 35-34-1-5(d) ("the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense"), which also waives the issue for our review. *See Blanchard v. State*, 802 N.E.2d 14, 40 (Ind. Ct. App. 2004). Waivers notwithstanding, Gasper's argument fails.

To successfully challenge the trial court's decision to allow the State to add the habitual offender charge, Gasper must demonstrate he was prejudiced by the late amendment. *See Jackson v. State*, 938 N.E.2d 29, 39 (Ind. Ct. App. 2010). Gasper has not done so and we therefore cannot hold the trial court erred in allowing the late amendment.

2. Exclusion of Testimony

The admission or exclusion of evidence falls within the sound discretion of the trial court, and we reverse only for an abuse of that discretion. *Wilson v. State*, 765 N.E.2d 1265,

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[4] Gasper argues he should not be precluded from raising this issue on appeal based on his failure to object because the habitual offender enhancement is "a sentencing enhancement – and should be reviewed as claim of sentencing error without requiring objection to have been made at the trial court." (Br. of Appellant at 6.) Even if the issue is related to sentencing, Gasper had multiple opportunities – during the pre-trial hearing, during trial, and during his sentencing hearing – to object to the habitual offender amendment. As noted above there are two other reasons, independent of sentencing, that this issue is waived. Thus, we need not address the argument that the issue is a sentencing matter and an objection was not required in order to raise it.

[5] We were not provided the transcript of the habitual offender amendment hearing, but Gasper admits he did not object to the amendment during the hearing.

1272 (Ind. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*.

At trial, the State called Detective Dwenger, who interviewed Gasper after his arrest. During cross-examination, Gasper attempted to elicit testimony from Detective Dwenger regarding what Gasper told the detective about James. The State objected on hearsay grounds and the court sustained the objection. Gasper claims the trial court abused its discretion when it excluded that portion of his cross-examination of Detective Dwenger.

Gasper has waived this issue because he did not make an offer of proof. *See Dowdell v. State*, 720 N.E.2d 1146, 1150 (Ind. 1999) (an offer of proof is required to preserve an error in the exclusion of a witness' testimony, as the offer of proof allows the trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded).

Waiver notwithstanding, the trial court properly sustained the State's hearsay objection. Hearsay is an out of court statement offered to prove the truth of the matter asserted, Ind. Evidence Rule 801(c), and is generally inadmissible unless an exclusion or exception applies. Evid. R. 802. Once the opponent of a piece of evidence demonstrates it is hearsay, the burden shifts to the proponent of the evidence to demonstrate an exception that would make the hearsay admissible. *Speybroeck v. State*, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007), *reh'g denied*.

Gasper argues Detective Dwenger's testimony regarding his interview with Gasper "cast a negative light on Gasper but gave an incomplete version of [Gasper's] statement."

(Br. of Appellee at 9.) He was therefore prejudiced by the trial court's exclusion of his statements to Detective Dwenger. We cannot agree. Gasper testified on his own behalf, and therefore could give his version of the events on the day of the crime and to explain any misapprehensions left after Detective Dwenger's testimony. *See McElroy v. State*, 553 N.E.2d 835, 840 (Ind. 1990) ("When a defendant is testifying in person, he is free to tell his version of the entire matter as he sees it."). Thus, because Gasper cannot demonstrate he was prejudiced by the exclusion, we need not determine whether the trial court abused its discretion when it excluded Detective Dwenger's testimony about statements Gasper made to him.[6]

3. Appellate Rule 7(B)

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied.* The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[6] Gasper also argues the trial court abused its discretion based on Evid. R. 106, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it." Evidence Rule 106 does not apply, as neither the transcript nor the recording of the interview between Detective Dwenger and Gasper was admitted into evidence.

When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g* 878 N.E.2d 218 (Ind. 2007). The advisory sentence for a Class C felony is four years, with a range of two to eight years. Ind. Code § 35-50-2-6. An habitual offender enhancement provides for "an additional fixed term that is not less than the advisory sentence, for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." Ind. Code § 35-50-2-8. Thus, Gasper's sentence could be enhanced by four to twelve years. The trial court began with eight years for Class C felony battery resulting in serious bodily injury and enhanced it by eleven years because Gasper was an habitual offender, for a final sentence of nineteen years.

When considering the nature of the offense, we address whether there is anything more or less egregious about the offense that makes it different from the "typical" offense accounted for by the legislature when it set the advisory sentence. *Rich v. State*, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), *trans. denied*. Gasper does not argue his offense was less egregious than the "typical" offense, but asserts his crime is not "'the worst' as to justify the imposition of the maximum possible sentence." (Br. of Appellant at 11.)

While there may be more heinous offenses than Gasper's, we "concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*. Gasper stabbed James, a relative by marriage who had

provided him a place to stay. He had been asked to leave because he would not refrain from drinking in front of Shellie's children. The children were present when Gasper stabbed James. James' wound required four staples and caused him pain. We cannot say Gasper's sentence is inappropriate based on the nature of his offense.

When considering the character of the offender, one relevant fact is the defendant's criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The significance of criminal history in assessing a defendant's character varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id*. Gasper's long criminal history began when he was a juvenile in 1983. He has since accrued six felony convictions and thirteen misdemeanor convictions. One felony conviction involved assault with a deadly weapon and three of his misdemeanors involved battery or domestic battery. His probation has been revoked six times, and Gasper was convicted of domestic battery while out on bond for the instant offense. His multiple convictions, especially those involving violent crimes, show a disdain for the law, and thus we cannot say Gasper's sentence is inappropriate based on his character.

CONCLUSION

The trial court did not err when it granted the State's request to belatedly amend Gasper's charging information to include a habitual offender charge. Gasper cannot show harm from the exclusion of testimony from Detective Dwenger regarding what Gasper told him during an interview. Finally, Gasper's sentence is not inappropriate based on his character or the nature of the offense. Accordingly, we affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.