



## Case Summary

Appellant-Defendant Kimberly N. Davis appeals her sentence for two counts of Battery, a Class D felony.<sup>1</sup> We remand with instructions.

## Issue

On appeal, Davis raises four issues. We address the single dispositive issue, whether her sentence is inappropriate.<sup>2</sup>

## Facts and Procedural History

On October 28, 2009, pursuant to a plea agreement, Davis pled guilty to two counts of Battery as a Class D felony. The stipulated factual basis for the convictions is in relevant part:

3. That the victims are the children of the defendant.
4. That between January 2, 2007 and April 15, 2008 the defendant struck [Mc.G.] with a wooden brush multiple times causing a laceration on her head and a swollen lip.
5. That between January 2007 and April 15, 2008 the defendant struck [M.G.] in the back with an extension cord several times causing pain and bruising to [M.G.]'s back area.
6. That all of these events occurred in Lake County, Indiana.

Appendix at 27. The agreement provided that in exchange for the guilty plea, the State would dismiss the remaining charges of two counts of Neglect of a Dependent, as Class C felonies, and Battery, as a Class C felony. The parties agreed that the length of the sentence

---

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

<sup>2</sup> Davis challenges her sentence on various grounds and we acknowledge that it was error for the trial court to find the age of the children to be an aggravating factor where age was a material element of the offense, and no particularized circumstances were identified. However, because we exercise our authority to independently review the appropriateness of Davis's sentence pursuant to Indiana Appellate Rule 7(B), we need not address these issues further. See Phelps v. State, 914 N.E.2d 283, 293 (Ind. Ct. App. 2009).

was left to the discretion of the trial court but that the sentences would be served concurrently. The trial court sentenced Davis to two years imprisonment on each count, to be served concurrently.

Davis now appeals.

### **Discussion and Decision**

Davis contends that her sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to “leaven the outliers.” Id. at 1225. “Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors

that come to light in a given case.” Id. at 1224.

The sentencing range for battery against an individual under the age of fourteen years, a Class D felony, runs from six months to three years, with an advisory sentence of eighteen months. Ind. Code § 35-50-2-7(a). Davis’s sentence for each offense was six months above the advisory, and she requests a revision downward to the advisory sentence.

Our Legislature established an advisory sentence for offenses like those in the case at bar. See Ind. Code § 35-50-2-7. Davis’s offense, while repugnant, is not especially egregious in light of the nature of the crimes for which she was convicted—battery by a person aged eighteen years or more upon a person aged fourteen years or less. See Ind. Code § 35-42-2-1(a)(2). She struck and injured one child with a wooden brush, and the other with an extension cord.

As to Davis’s character, she pled guilty to these offenses and admitted that her actions were worthy of blame. In entering her plea, Davis also sought to protect her children from the additional psychological harm that she feared a trial might impose. While she had no prior criminal history, there is some evidence that Davis exhibited physically abusive behavior toward her children prior to the present offense. Davis was herself abused both as a child and in an adult relationship. While three of her children were placed into foster care after her arrest, by the time of her sentencing she was receiving increased amounts of visitation time with them, including weekend and overnight visitation. Davis was employed (though on maternity leave) and married at the time of her sentencing. She suffered from previously undiagnosed depression and bipolar disorder at the time of the offenses, but was

undergoing active treatment for these disorders when she was sentenced, including taking prescribed medication and regularly attending counseling sessions. She also attended anger management and parental education classes, completing both.

In light of the nature of Davis's crime, admission of guilt, lack of prior criminal history, and efforts to reform, imposing the two-year sentences is inappropriate. We therefore revise Davis's sentences down to the statutory advisory sentences of two concurrent terms of eighteen months and remand this matter to the trial court with instructions to issue an amended sentencing order and to issue or make any other documents or docket entries necessary to impose the revised sentences consistent with this opinion, without a hearing.<sup>3</sup>

Remanded.

RILEY, J., and KIRSCH, J., concur.

---

<sup>3</sup> Davis also challenged the trial court's decision to impose an executed sentence. A trial court "may suspend any part of a sentence for a felony" except in certain situations which do not exist here. Ind. Code § 35-50-2-2(a). The trial court evaluated the mitigating and aggravating circumstances presented to it, including Davis's admission of guilt, her remorse, that she was responsible for the care and custody of children at the time, and the nature of the children's injuries. We find no abuse of discretion in the court's selection of and take no action regarding Davis's executed sentence.