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IN THE
COURT OF APPEALS OF INDIANA

JOHNNY JOE OLINGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 83A01-1012-CR-668
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Bruce V. Stengel, Judge
Cause No. 83C01-1003-CM-79

August 16, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Johnny Joe Olinger appeals his conviction and sentence for Disorderly Conduct,[1] a class B misdemeanor. More particularly, Olinger argues that the evidence was insufficient and that he acted in self-defense. Additionally, Olinger argues that even if there was sufficient evidence, his 180-day sentence is inappropriate in light of the nature of the offense and his character. Finding sufficient evidence and concluding that the validity of Olinger's sentence is moot, we affirm.

FACTS

From January 2010 to March 2010 Olinger and Stacy Olinger were going through a divorce. While the divorce was pending, Stacy began dating John Holiday. There was tension between Olinger, Stacy, and Holiday, especially regarding Olinger's visitation with his and Stacy's five-year-old son.

On March 17, 2010, Olinger and his son were playing at Sportland Park in Clinton while Stacy walked around the track across the street. Holiday eventually joined her and when Olinger saw them walking around the track, he began to text message Stacy, demanding that Holiday leave. Specifically, the following exchange occurred:

> [Olinger]: Com get
>
> [Stacy]: Why? I'm walkin more!
> You wanted to see him why not now
>
> [Olinger]: Your choise butthe rats gona get it
>
> [Stacy]: Get what! Ur son is here so I think you need to cool it and just stay over in the park and play

[1] Ind. Code § 35-45-1-3.

[Olinger]: Iwarndyaz

State's Ex. 1 (errors in original).

Stacy and Holiday returned to their vehicles and talked while they waited for Olinger to finish playing with his son. Stacy sat in the driver's seat of her vehicle while Holiday sat in passenger's seat of his vehicle, and they talked until Olinger approached them.

Olinger placed his son on the ground and began screaming at Holiday. Olinger walked up to Holiday, who was sitting with his vehicle door completely open, and punched him twice. Holiday fought back as he exited the vehicle, and Stacy began to scream as the two men struggled between the two vehicles.

After a few minutes, Stacy managed to break up the fight. Holiday's injuries included a split lip and a bloody nose while Olinger had a red mark around his eye and some bruising. Olinger returned to his vehicle, screaming at Stacy as he walked, and drove away.

On March 19, 2010, the State charged Olinger with class B misdemeanor disorderly conduct. On November 5, 2010, Olinger was found guilty as charged at the conclusion of a bench trial, and a sentencing hearing was held the same day. The trial court sentenced Olinger to 180 days with 150 days suspended to probation. On November 17, 2010, Olinger filed a motion to correct error, which the trial court denied on November 18, 2010. Olinger now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Olinger argues that the State presented insufficient evidence to sustain his conviction for class B misdemeanor disorderly conduct. In reviewing a challenge to the sufficiency of the evidence, this Court does not reweigh the evidence or assess the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Instead, we consider the evidence most favorable to the trial court's ruling and will affirm unless no reasonable factfinder could find the elements proven beyond a reasonable doubt. Id.

Indiana Code section 35-45-1-3 provides, in relevant part, that "[a] person who recklessly, knowingly, or intentionally (1) engages in fighting or in tumultuous conduct . . . commits disorderly conduct, a Class B misdemeanor." Here, the State alleged that Olinger engaged in fighting and tumultuous conduct. Appellant's App. p. 7.

This Court has interpreted "fighting" to mean "a 'hostile encounter; either physical or verbal in nature.'" J.S. v. State, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006) (quoting Black's Law Dictionary 565 (5th ed. 1979)). Additionally, Indiana Code section 35-45-1-1 defines "tumultuous conduct" as "conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property."

In this case, after Olinger sent hostile text messages to Stacy stating that Holiday was "gona get it," he walked up to Holiday and punched him twice. State's Ex. 1; Tr. p. 23. The two men struggled for several minutes before Stacy finally broke them apart, and Holiday's injuries included a split lip and a bloody nose. Tr. p. 36. Under these facts

and circumstances, a reasonable factfinder could conclude that Olinger engaged in fighting or tumultuous conduct.

Nevertheless, Olinger argues that the State failed to negate his claim of self-defense. "A valid claim of self-defense is legal justification for an otherwise criminal act." Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). To succeed on a claim of self-defense, the defendant must show that "he was in a place where he had a right to be; did not provoke, instigate, or participate willingly in the violence," and had a reasonable fear of imminent use of unlawful force. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995).

Here, in light of Stacy's testimony that "Olinger had started the fight," tr. p. 24, a reasonable factfinder could conclude that Olinger provoked, instigated, and willingly participated in the violence. Consequently, this claim fails.

II. Sentence

Olinger argues that his sentence is inappropriate when considering the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). When reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The State counters that Olinger's argument is moot because he has already served his sentence. "An issue is deemed moot when it is no longer 'live' or when the parties lack a legally cognizable interest in the outcome of its resolution." Jones v. State, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006). When a defendant has already served his

sentence, "the issue of the validity of the sentence is rendered moot." Irwin v. State, 744 N.E.2d 565, 568 (Ind. Ct. App. 2001). Generally, this Court does not answer moot questions or render advisory opinions. Id.

In the instant case, on November 5, 2010, Olinger received a 180-day sentence with 150 days suspended to probation. Appellant's App. p. 22. Olinger has served the executed portion of his sentence and was discharged from probation on April 15, 2011. Appellee's App. p. 1. Consequently, the validity of Olinger's sentence is moot, and we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

KIRSCH, J., and BROWN, J., concur.