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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES M. LARKIN, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 89A01-1007-CR-367  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE WAYNE CIRCUIT COURT  
The Honorable David A. Kolger, Judge  
Cause No. 89C01-0906-FA-7

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**March 14, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

James M. Larkin appeals his sentences for robbery as a class A felony,<sup>1</sup> attempted robbery as a class B felony,<sup>2</sup> and battery as a class A misdemeanor.<sup>3</sup> Larkin raises one issue, which we revise and restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm in part, reverse in part, and remand.

The relevant facts follow. In the early morning hours of June 24, 2009, sixteen-year-old M.S. and fourteen-year-old J.D. left J.D.'s house and were walking in J.D.'s neighborhood in Richmond, Indiana. As M.S. and J.D. were walking down 11<sup>th</sup> Street, Larkin, who was twenty-one years old at the time, yelled from a porch for them to come over. M.S. and J.D. walked toward Larkin, and Larkin jumped off the porch and began to approach them. Larkin asked M.S. and J.D. if they were "snitches," and M.S. and J.D. responded "no." Transcript at 228-230. Larkin then pulled out a knife, pointed the knife at M.S.'s stomach, and told the boys to give him everything they had. M.S. and J.D. said that they did not have anything, and Larkin demanded M.S.'s necklace. J.D. told Larkin that the necklace was fake, and Larkin punched J.D. with the hand in which he held the knife. Larkin's fist struck J.D.'s face causing J.D. to be knocked to the ground, resulting in swelling and bruising around his eye, a cut above his left eye, and a chipped tooth.

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<sup>1</sup> Ind. Code § 35-42-5-1(1) (2004).

<sup>2</sup> Ind. Code § 35-42-5-1(2) (2004); Ind. Code § 35-41-5-1 (2004).

<sup>3</sup> Ind. Code § 35-42-2-1(a)(1)(A) (Supp. 2008) (subsequently amended by Pub. L. No. 131-2009, § 73 (eff. July 1, 2009)).

J.D. stumbled to get up, yelled for M.S. to run away, and sprinted two blocks to his house to tell his parents.

As J.D. ran for help, Larkin hit M.S. until he was unconscious and then continued “stomping” on his head. Id. at 351. Larkin pulled a condom, an empty packet of cigarettes, and some money from M.S.’s pocket, and he then discarded the condom and the pack of cigarettes, pocketed the money, and kicked M.S. in his mid-section. Larkin told B.J., his sixteen-year-old cousin, who was awakened by the sound of “thumping” and saw Larkin hit M.S., to “get that piece of s--- out of here before I kill him.” Id. at 260, 265. A neighbor called the police, and Larkin fled toward the rear of the house. J.D. returned with his parents and found M.S. unconscious on the ground with his face very swollen.

Shortly thereafter, police and paramedics arrived. Police located Larkin in a nearby backyard, and when Larkin was ordered by a uniformed officer to stop and turn around, Larkin clenched his fists, assumed a fighting stance, and moved toward one of the officers. The officer told Larkin to stop and turn around again, but Larkin continued to advance. Another officer then tased Larkin, and he was taken into custody.

M.S. and J.D. were taken to the hospital. J.D. received eight stitches and was released. M.S. was “CareFlighted to Methodist Hospital” in Indianapolis where he remained for “around three weeks.” Id. at 208, 212. He spent three or four days in intensive care and was on a respirator. M.S. underwent physical therapy for two weeks. His memory was affected by the incident, and he received therapy to treat his memory

issues. M.S. also has dealt with recurring headaches for which he was prescribed medicine. M.S. dropped out of high school and is a “[t]otally different kid.” Id. at 216.

On June 25, 2009, the State charged Larkin with: Count I, robbery as a class A felony; Count II, robbery as a class B felony; Count III, attempted robbery as a class B felony; and Count IV, battery as a class A misdemeanor. On May 24, 2010, a jury trial commenced, and on May 26, 2010 Larkin was found guilty as charged.

On June 23, 2010, the court held a sentencing hearing. At the sentencing hearing, the State called Larkin’s grandmother who testified that Larkin had sent letters to another grandson of hers, Z.H., which were admitted into evidence. In the letters, Larkin wrote that Z.H. should contact M.S. and J.D. and get them “both . . . [to] say [Larkin] didn’t do it . . . .” Sentencing Exhibit 2. Larkin instructed Z.H. to get them to say that “the one that did it had black hair glasses and two black eyes because Josh had two black eyes when it happened . . . .”<sup>4</sup> Sentencing Exhibit 1. Larkin wrote to “[m]ake sure every one [sic] has the same story.” Sentencing Exhibit 2. Larkin also had phone conversations with both his grandmother and Z.H. In one conversation with his grandmother before his trial, Larkin made threats to kill B.J. “[t]o keep [B.J.] from testifying . . . once [B.J.] . . . decided to tell the truth [and] testify[] against him.” Transcript at 513.

The court found Larkin’s criminal history, his probation violations, that the crime was committed in the presence of a person less than eighteen years old, and that Larkin attempted to get his cousin, a minor, to tamper with the State’s case against him while

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<sup>4</sup> “Josh” was Joshua Johnson, who was a neighbor of Larkin, was with Larkin the night of the incident, and who called 911 and testified against Larkin at the trial.

incarcerated to be aggravators. The court also found that imprisonment will cause an undue hardship on Larkin's children to be a mitigator but assigned it "minuscule" weight in part because he had "been in jail more days than he's been out since his children have been alive." Id. at 533, 542. The court vacated Count II and sentenced Larkin to forty-four years for Count I, sixteen years for Count III, to be served consecutive to Count I, and one year for Count IV to be served concurrent with Count III. Thus, the court sentenced Larkin to an aggregate term of sixty years in the Department of Correction.

The issue is whether Larkin's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Larkin argues that he "is a twenty-one (21) year old male who has made some very bad choices . . . . However, making Larkin serve sixty (60) years is inappropriate." Appellant's Brief at 11.

Our review of the nature of the offense reveals that Larkin's offenses were heinous, and M.S. in particular was left with permanent injuries. Our review of the character of the offender reveals that Larkin was twenty-one years old when he committed the present offenses. Larkin has previous convictions of operating a motor vehicle while intoxicated as a class A misdemeanor, two counts of resisting law

enforcement as class A misdemeanors, two counts of battery as class A misdemeanors, possession of marijuana as a class A misdemeanor, and criminal confinement as a class C felony. Larkin was sentenced on the criminal confinement conviction on April 20, 2009, less than three months before the instant offense, and he was placed on home detention probation. Larkin was wearing a home detention bracelet on his leg when he committed the instant offenses. Larkin was drinking and using drugs while he was on home detention and probation, and he stated at his sentencing hearing that he was “out of [his] mind” the night of the robbery. Transcript at 528.

While his trial was pending, Larkin asked his cousin Z.H. to contact M.S. and J.D. and get them to “both . . . say [Larkin] didn’t do it . . . .” Sentencing Exhibit 2. Larkin also threatened to kill his cousin B.J. “[t]o keep her from testifying . . . once she . . . decided to tell the truth [and] testify[] against him.” Transcript at 513. Larkin’s parents divorced when Larkin was about twelve years old, and Larkin and his father lost touch until Larkin’s arrest on this matter. Larkin has two daughters who were born in 2005 and 2007. The mother of Larkin’s two daughters, Amber Sheets, testified at sentencing that Larkin is a “great father,” that he “makes sure that the girls have everything they need,” and that his daughters “adore him.” *Id.* at 501. At his sentencing hearing Larkin expressed remorse for his actions and apologized to the victims.

Larkin’s inability to stay out of jail in his young life, his commission of the instant offenses while on home detention and probation for a felony, his alcohol and drug use while on home detention and probation, as well as his attempts to get the victims of

his offense to testify that he did not commit the crimes, demonstrate his contempt for the law and support both enhanced and consecutive sentences. Nevertheless, based in particular on Larkin's young age we believe that the trial court's aggregate sentence of sixty years, with none of that time suspended to probation, is inappropriate. Accordingly, we remand with instructions to suspend the final ten years of Larkin's sentence to probation. Thus, we do not modify the individual sentences or aggregate sentence of sixty years imposed by the trial court, but do suspend ten years of the sentence to allow him time while under the supervision of the court to acclimate back into society and also to demonstrate his ability to lead a law-abiding life. See Marlett v. State, 878 N.E.2d 860, 868 n.4 (Ind. Ct. App. 2007) (noting that "[o]ur supreme court clearly has instructed that we may review not only the length of a defendant's sentence for appropriateness, but also placement or how that sentence is to be served") (citing Hole v. State, 851 N.E.2d 302, 304 n.4 (Ind. 2006)), trans. denied.

For the foregoing reasons, we affirm the trial court's aggregate sentence of sixty years, reverse the court's order that Larkin serve all sixty years as executed time in the Department of Correction, and remand this case to the trial court with instructions to issue an amended sentencing order and any other documents or chronological case summary entries necessary to impose a total sentence of sixty years with fifty years executed and ten years suspended to probation.

Affirmed in part, reversed in part, and remanded.

ROBB, C.J., concurs.

RILEY, J., dissents with opinion.

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Appellee-Plaintiff.	)	

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**RILEY, Judge, dissenting with separate opinion.**

I dissent from the majority’s determination to suspend ten years of Larkin’s sentence. I would affirm the trial court and sentence Larking to sixty years executed.