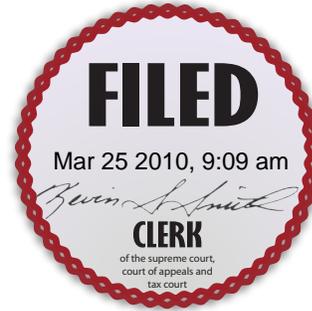


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

DAVID PARDO
Marion County Public Defender Agency
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JAMES HENLEY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0908-CR-711

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara Collins, Judge
Cause No. 49F08-0806-FD-144400

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James Henley appeals his conviction of intimidation. He also appeals his sentence, which was enhanced by an habitual offender finding. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 2, 2008, Beth Hardesty was working at a Village Pantry. She was outside smoking a cigarette when Henley and his brother approached on their bicycles. They parked their bicycles in front of the door. When some customers arrived, Hardesty asked Henley and his brother to move their bicycles. At first, they just looked at her and snickered. They complied after Hardesty again asked them to move their bicycles.

Hardesty took care of the customers and then went back outside to finish her cigarette. Henley was talking on his cell phone, and Hardesty heard him talking about her daughter. Henley indicated he knew where Hardesty's daughter was and he wanted to "go get a hold of her." (Tr. at 17.) Hardesty told him to leave her daughter alone: "I told him he did not need to call, go by, talk to, not to go around her, not to have anything to do with her. That he's a grown man and at that time she was fourteen years old." (*Id.* at 17.)

Henley left, and Hardesty went back inside the store. Within five minutes, there were ten to twelve calls to the Village Pantry's telephone. Henley answered some of the calls, her co-worker answered some of the calls, and sometimes they just let the phone ring. Sometimes, the caller hung up. At other times, the caller told Hardesty she was a "f***** whore and a f***** bitch." (*Id.* at 19.) She knew Henley was the caller because they were neighbors and she recognized his voice.

Eventually, Hardesty said, “James, I know this is you, stop callin’.” (*Id.* at 20.) Henley said he was “going to have [Hardesty’s] son kidnapped from the babysitters and he’s going to rape him.” (*Id.* at 21.) At the time, Hardesty’s eleven-year-old son was staying with a babysitter who lived in the same neighborhood as Hardesty and Henley. Hardesty called the babysitter to make sure her son was safe. She then called her daughter, who was staying at a friend’s house, and told her to stay inside. Hardesty then left to pick up her children. When Hardesty was picking up her son, there were several calls to the babysitter. Hardesty answered one of the calls, and Henley screamed he was “going to beat and rape the babysitter.” (*Id.* at 23.)

Hardesty then took her children home and contacted the police. Henley was charged with Class D felony intimidation,¹ Class B misdemeanor harassment,² and being an habitual offender.³ The jury found Henley guilty of intimidation and harassment, and the trial court merged those two counts. Henley then admitted he was an habitual offender.

At the sentencing hearing, Henley presented evidence he had been accepted to Vincennes University. His pre-sentence investigation report indicates that, seven years earlier, he had been diagnosed with “Adjustment disorder with depressed mood.” (PSI at 6.) He argued his mental health and acceptance to college were mitigating circumstances. The trial court sentenced Henley to three years on the intimidation conviction and imposed a three-year habitual offender enhancement, giving the following explanation:

¹ Ind. Code § 35-45-2-1(a), (b)(1)(A).

² Ind. Code § 35-45-2-2.

³ Ind. Code § 35-50-2-8.

I don't have any options other than the DOC. I do not have any options. And hopefully you'll use that time, I am finding that aggravators are his extensive criminal history, he was on probation at the time of this case and he had a new case while in custody, the new case [has] not yet come to the stage of resolution disposition [sic]. Mitigating, yes you do have the mental capability of applying yourself. You've had extensive juvenile and adult issues and while mental health treatment, especially in this Court, would be the resolution, would be a mitigator; I don't see that you've done anything with it.

(Tr. at 59-60.)

DISCUSSION AND DECISION

Henley argues there is insufficient evidence to support his conviction of intimidation and his sentence is inappropriate in light of his character and the nature of the offense.

1. Sufficiency of Evidence

When reviewing the sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Graham v. State*, 713 N.E.2d 309, 311 (Ind. Ct. App. 1999), *trans. denied*. Rather, we consider the evidence favorable to the verdict and the reasonable inferences to be drawn therefrom. *Id.* We will affirm if there is evidence of probative value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

To convict Henley of Class D felony intimidation, the State was required to prove he threatened to commit a forcible felony with the intent to place Hardesty in fear of retaliation for a prior lawful act. Ind. Code § 35-45-2-1(a), (b)(1)(A). The State alleged Henley threatened “to kidnap and/or rape Ms. Hardesty’s son, with intent that [Hardesty] be placed in fear of retaliation for a prior lawful act, to wit: ordering Mr. Henley to stay away from Ms.

Hardesty's 14 year old daughter.” (Appellant's App. at 28.) Henley argues there is insufficient evidence he made the threat for the reason alleged by the State.

Henley relies on *Casey v. State*, 676 N.E.2d 1069 (Ind. Ct. App. 1997), in which Kimberly Williamson, Douglas Russo, and some friends were at a bar when Bryan Williamson and Tommy Casey started a fight with one of Kimberly's friends. Later in the evening, when Kimberly and Russo were at Kimberly's house, Casey arrived with several other people. Casey attacked Russo and then told Kimberly, “You're next bitch.” *Id.* at 1071. Casey was convicted of intimidating Kimberly.

The State originally did not allege any prior lawful act by Kimberly, but relied on the fact she had not been doing anything unlawful at the time of the threat. Casey filed a motion to correct error, and the State argued Kimberly was engaged in the lawful acts of being a patron at a bar, being at her house, and being a witness to Casey's attack on Russo. On appeal, we found the record did not support the State's contention that Casey was retaliating for any of those actions. *Id.* at 1073. Among other things, we noted Casey's threat did “not demonstrate his reasons for threatening Kimberly or indicate that he was doing so because of any specific prior act.” *Id.* See also *Ransley v. State*, 850 N.E.2d 443, 447 (Ind. Ct. App. 2006) (In finding insufficient evidence that Ransley committed intimidation, we noted, among other things, the alleged victim “was given the chance to testify that Ransley had threatened to kill or harm him for the prior lawful act of arguing,” but he did not.), *trans. denied.*

Henley relies on *Casey* and *Ransley* and notes his statements to Hardesty did not

specify why he was threatening her. However, there was other evidence from which the jury could infer the reason for Henley's threat. In *Casey*, the lawful acts attributed to Kimberly, such as being at her home, were not directed toward Casey, nor were they acts that would typically provoke threats. *See Lainhart v. State*, 916 N.E.2d 924, 940 (Ind. Ct. App. 2009) (describing the alleged prior lawful acts in *Casey* as "too weak or illogical to support an inference that they provoked Casey's intimidation"). By contrast, Hardesty directed an action toward Henley when she told him to stay away from her daughter, and within minutes, she received multiple harassing and threatening phone calls. *See Graham*, 713 N.E. at 312 (considering the timing of the threat to determine the defendant's intent). There was sufficient evidence Henley was retaliating for Hardesty's lawful act.

2. Appropriateness of Sentence

Henley argues his sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*. The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Henley argues his six-year sentence is inappropriate because it is within the range of sentences he could have received if he had carried out his threat. *See* Ind. Code § 35-42-4-3 (child molesting is a Class B felony if the child is under fourteen years of age, the defendant is under twenty-one years of age, and no other statutory enhancements are present); Ind.

Code § 35-50-2-5 (minimum sentence for a Class B felony is six years). Henley’s sentence, however, is based not only on the threat he made, but also his status as an habitual offender.

At the time of the offense, Henley was nineteen years old. By that time, he had two convictions of Class D felony theft and a true finding of child molesting, a Class C felony if committed by an adult. Henley received probation for his true finding and his two prior felony convictions, and he violated his probation each time. While Henley argues this criminal history is “not particularly bad,” (Appellant’s Br. at 11), we consider this record substantial for a nineteen-year-old. Henley also argues his criminal record does not justify both an habitual offender enhancement and a maximum sentence for the intimidation conviction. However, “when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender’s sentence.” *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008).

Henley argues his mental health is a mitigator; however, the trial court considered his mental health and chose not to give it weight. Indeed, the record is equivocal as to whether Henley currently suffers from any mental health issues,⁴ and he has not shown a nexus between his alleged disorder and the offense. *See Corrales v. State*, 815 N.E.2d 1023, 1026 (Ind. Ct. App. 2004) (mental health is not mitigating unless there is “a nexus between the defendant’s mental health and the crime in question”).

Nor is Henley’s sentence inappropriate in light of the nature of his offense. When Hardesty spoke up to protect her daughter from what she deemed to be inappropriate

⁴ In the pre-sentence investigation report, Henley described his mental health as “good.” (PSI at 6.) His

attention from an older man, Henley threatened to kidnap and rape her other child. Henley notes there is no evidence he attempted to carry out his threat, but the record reflects he knew where both children were and he lived in the same neighborhood. Hardesty had to leave work to ensure the safety of her children.

In light of the nature of the offense, Henley's criminal history, and the lone mitigator of his acceptance to college, we cannot say a six-year sentence is inappropriate.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.