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IN THE COURT OF APPEALS OF INDIANA

ANTONIO GOODEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0611-CR-642
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle Gaughan, Master Commissioner
Cause No. 49G16-0606-FD-119689

July 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Antonio Gooden was convicted and sentenced for intimidation,[1] a Class D felony, and invasion of privacy,[2] a Class A misdemeanor. Gooden raises two issues on appeal that we restate as:

I. Whether there was sufficient evidence to prove he committed intimidation and invasion of privacy.

II. Whether his sentence is appropriate based on the nature of the offense and his character.

We affirm.[3]

FACTS AND PROCEDURAL HISTORY

Gooden and Erica Fischmer lived together in an apartment in Marion County. On May 6, 2006, Gooden was charged with domestic battery for hitting Fischmer. As a condition of pretrial release, Gooden was ordered to have no contact with Fischmer. Gooden was aware of the no-contact order and was to move out of the apartment, but he continued to live there after the order was issued.

On June 29, 2006, Fischmer returned to her apartment. She and Gooden began to argue, and she left the apartment to do laundry. Gooden followed her and told her that if she went to court she would be "sorry," and just because he may be in jail did not mean that someone else could not "get" her. *Tr.* at 23. Fischmer felt threatened and took this to mean that even if he was arrested one of his friends may harm her.

Gooden was charged with intimidation as a Class D felony and invasion of privacy

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[1] *See* IC 35-45-2-1.

[2] *See* IC 35-46-1-15.1.

[3] The State has cross-appealed claiming this court is without jurisdiction because Gooden was not entitled to a belated notice of appeal. Because we resolve the substantive issues presented in favor of the State, we do not reach the procedural issues presented in the State's cross-appeal.

as a Class A misdemeanor. After hearing all of the evidence, the trial court found Gooden guilty as charged. The trial court found his criminal history to be an aggravator, found no mitigators, and sentenced Gooden to two years executed with one year suspended to probation on the intimidation conviction, and a concurrent one-year executed but suspended sentence on the invasion of privacy conviction. Gooden now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

A. Standard of Review

When we review sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 835 N.E.2d 1102, 1111 (Ind. Ct. App. 2005) (citing *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind.Ct.App.2003)). We consider only the probative evidence and reasonable inferences that support the trier of fact's conclusion that the defendant is guilty beyond a reasonable doubt. *Id.* "If, from this examination, there is evidence of probative value from which a rational trier of fact could infer guilt beyond a reasonable doubt, then we will affirm the conviction." *Graham v. State*, 713 N.E.2d 309, 311 (Ind. Ct. App. 1999), *trans. denied*. Additionally, conflicts between the testimony of defense and State witnesses are for final resolution by the trier of fact and not an appellate court, unless it may be said that the testimony of the State's witness was inherently improbable and runs counter to human experience. *Id.*

B. Intimidation

First, Gooden contends the evidence was insufficient to support his conviction for intimidation. Specifically, Gooden claims that the state failed to prove beyond a reasonable doubt that he communicated a threat of a forcible felony, and that the State's witness, Fischmer, gave uncorroborated testimony insufficient to support his conviction.

In order to prove intimidation here, the State must have proven: defendant communicated a threat to another person, with the intent that the other person engage in conduct against the other person's will. IC 35-45-2-1. The offense is a Class D felony if it is shown that "the person to whom the threat is communicated . . . is a witness . . . in any pending criminal proceeding against the person making the threat." *Id.* A "threat" in this case, is an expression, by words or action, to unlawfully withhold or cause the withholding of official action, i.e., a witness's testimony. IC 35-45-2-1(c)(4).

Here, Fischmer testified that she felt intimidated when Gooden said to her that she should not go to court or she will be "sorry," and just because he is in jail that did not mean someone could not "get" her. *Tr.* at 23. The State also presented evidence that Gooden had a no-contact order that prohibited him from contacting Fischmer or being in her presence. The State further showed documented evidence that Fischmer was a witness against Gooden in a pending domestic battery case. Although Gooden claims that he never made these statements to Fischmer, the trial court as the trier of fact was free to judge the credibility of the witnesses.

The State is not required to prove a forcible felony to convict a defendant of intimidation as a Class D felony when the person to whom the threat is communicated is

a witness in a pending criminal proceeding against the person making the threat. A threat to commit a forcible felony is a separate element, which may be used to elevate intimidation to a Class D felony. IC 35-45-2-1(b)(1)(A). The statute is phrased in the disjunctive, and the State is not required to prove a forcible felony where it proves the victim was a witness in a pending criminal case against the one making the threat. IC 35-45-2-1(b)(1)(B)(iii).

C. Invasion of Privacy

Next, Gooden contends that the State failed to prove he violated his no contact order and, thus, his conviction for invasion of privacy. To prove Gooden guilty of invasion of privacy the State must have shown and the trial court must have found that Gooden did knowingly violate a no-contact order issued to protect Fischmer by being in her presence. IC 35-46-1-15.;1*Appellant's App*. at 20.

Here, the State proved that Gooden was under a no-contact order, and that he was in Fischmer's presence. Gooden's argument that he was on the lease at the apartment he and Fischmer shared does not excuse his violation of the no-contact order. Thus, again, the trial court did not err in convicting Gooden of invasion of privacy.

II. Sentence Propriety

Finally, Gooden claims his sentence is inappropriate based on the nature of his offense and his character. Gooden contends that he should not have received an enhanced sentence of two years on the intimidation conviction or the maximum one year on the invasion of privacy conviction. Gooden argues that the trial court should have acknowledged that he had a nonviolent criminal history, had a high-school diploma and a

college degree, was employed as a freshman basketball coach at a local high school, had served in the military, and paid weekly child support to his daughter. Gooden asks us to exercise our authority under Indiana Appellate Rule 7(B) to expose these errors and revise his sentence based on the particulars of the offense and his character.

This court may revise a sentence after careful review of the trial court's decision if it concludes that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, this court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). We can only review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the weight given to these reasons. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007).

Here, the trial court should have acknowledged that the sentence would result in an undue hardship to his daughter. *See* IC 35-38-1-7.1(a)(10). Regardless, the trial court justified its sentence in other respects. Specifically, the trial court considered as aggravating, Gooden's criminal history and limited it to only two of his convictions, namely, his 1997 conviction for battery and his 2001 conviction for domestic battery. This criminal history alone was sufficient to enhance his conviction from the advisory sentence. *Mitchell v. State*, 844 N.E.2d 88, 91 (Ind. 2006) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (fact of prior convictions may always be used in consideration of defendant's sentence)). Further, the sentence is not nearly as severe as Gooden complains. He did receive two years (a half a year greater than the advisory) for

the intimidation conviction and one year (the maximum) for the invasion of privacy conviction, but the trial court suspended a year from the former and suspended all of the later. Thus, Gooden was ordered to serve one year executed with one year of probation for violating a no-contact order and threatening a witness in a pending trial. Gooden's sentence is not inappropriate.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.