ATTORNEY FOR APPELLANT:

RANDY M. FISHER
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARY L. BURNETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0703-CR-89
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0607-FC-164

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Mary L. Burnett ("Burnett") appeals her convictions and sentences for battery as a Class C felony and battery as a Class A misdemeanor. She raises three issues on appeal: (1) whether her convictions violate federal and state prohibitions against double jeopardy, (2) whether the trial court abused its discretion when imposing her sentence, and (3) whether her sentence is inappropriate. Finding that her convictions violate state common law double jeopardy, we reverse Burnett's conviction for battery as a Class A misdemeanor. However, in regard to her sentence for battery as a Class C felony, we find that the trial court did not abuse its discretion or impose an inappropriate sentence, and we therefore affirm her four-year sentence.

Facts and Procedural History

On July 20, 2006,[1] Raymond Johnson ("Johnson") resided in a retirement community in Fort Wayne, Indiana. Burnett frequently visited the retirement community to assist another resident. On the morning in question, Burnett and her husband, Richard Woods ("Woods"), went to the property in search of Johnson. Burnett carried a cane because she had suffered a stroke several months earlier.

Burnett and Woods confronted Johnson in the lobby of the complex, where he was seated on a sofa talking with another resident. Using her cane, Burnett struck Johnson from behind. Johnson moved behind another sofa to protect himself. Burnett again swung her cane, this time striking the furniture and breaking the cane in half. Woods picked up the other half of the cane, and he and Burnett proceeded to beat Johnson about

[1] The original charging informations listed the date as July 21, 2006. However, the incident date was later amended to July 20, 2006. Appellant's App. p. 33.

the head, back, legs, and torso. At some point, the cane broke into three pieces. Retirement community employees intervened, including Patrick Patton ("Patton") and James Santamour ("Santamour"), who wrestled the cane away from Burnett and Woods. Burnett then pinned Johnson "in a headlock between her legs" and beat him on the back of his head with her hands. Tr. p. 136. After Patton and Santamour successfully ended the fray, Burnett and Woods drove away from the scene. Officers responding to the incident stopped Burnett and Woods and subsequently arrested them.

The State charged Burnett with battery as a Class C felony, criminal recklessness as a Class D felony, and battery as a Class A misdemeanor. On January 11, 2007, a jury convicted Burnett of the two battery charges. The trial court conducted a sentencing hearing on February 2, 2007, at the conclusion of which the court recognized aggravating and mitigating circumstances. Specifically, the trial court found as aggravating Burnett's criminal history, consisting of nineteen misdemeanors, and that prior efforts at rehabilitation had failed. In mitigation, the trial court recognized Burnett's participation in her church, her physical and mental condition, and that she had no previous felony convictions. Appellant's App. p. 85. The court then found that the aggravators and mitigators balanced and imposed an advisory four-year sentence for the Class C felony battery[2] and a one-year sentence for the Class A misdemeanor battery,[3] to be served concurrently. Burnett now appeals.

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[2] Ind. Code § 35-50-2-6(a).

[3] Ind. Code § 35-50-3-2.

Discussion and Decision

On appeal, Burnett argues that her convictions violate federal and state prohibitions against double jeopardy, that the trial court abused its discretion when sentencing her, and that her sentence is inappropriate. We address each in turn.

I. Double Jeopardy

Burnett argues that her convictions for battery as a Class C felony and battery as a Class A misdemeanor violate federal and state prohibitions against double jeopardy. Because we find her argument regarding Indiana common law dispositive, we need not address her other double jeopardy claims.

A framework of Indiana double jeopardy law is necessary. Article I, Section 14 of the Indiana Constitution provides in part, "No person shall be put in jeopardy twice for the same offense." Under the Indiana Constitution, we review double jeopardy claims pursuant to the "same elements" test and also what is known as the "actual evidence" test. *Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind. 1999). If we determine that "the actual evidence used to convict" the defendant of the challenged offenses was the same, we will conclude that those convictions violate Indiana's Double Jeopardy Clause. *Id.* at 49.

Additionally, "Indiana courts have 'long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in *Richardson*.'" *Simmons v. State*, 793 N.E.2d 321, 327 (Ind. Ct. App. 2003) (quoting *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002)). These rules "supplement[] the constitutional protections afforded by the Indiana Double Jeopardy Clause." *Miller v. State*, 790 N.E.2d 437, 439 (Ind. 2003)

(citing *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002)). Among these is the rule that where a defendant is "convict[ed] and punish[ed] for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished," our common law prohibits conviction and punishment for that offense. *Richardson*, 717 N.E.2d at 55 (Sullivan, J., concurring).

In the present case, Burnett argues that her two battery convictions violate Indiana's common law prohibition of double jeopardy. She argues that Indiana common law principles "prohibit a conviction for Class A misdemeanor battery when the act alleged in support of that conviction was [the] same act alleged in support of conviction for battery as a Class C felony." Appellant's Br. p. 18 (citing *Simmons*, 793 N.E.2d at 321). She cites to a case from this Court in which we granted relief to a defendant challenging identical convictions. In *Simmons v. State*, this Court reviewed a case in which a defendant was convicted of both battery as a Class C felony and battery as a Class A misdemeanor and examined these convictions for common law double jeopardy. In that case, too, the defendant's felony battery charge was premised upon his use of a deadly weapon. We vacated the defendant's Class A misdemeanor conviction after determining that "[t]he act alleged in support of both the Battery convictions [was] the same – that of striking [the victim] with a baseball bat." *Simmons*, 793 N.E.2d at 327. Here, too, the act alleged in support of both of the battery convictions was the same—that of striking Johnson with a cane. While there was evidence before the jury that Burnett beat the victim not only with a cane but that she also repeatedly struck him in the head with her hands, a review of the State's closing argument reveals that the argument before

the jury was that Johnson's injuries were caused by Burnett's cane, not her hands. Tr. p. 227-29. Following *Simmons*'s lead, we conclude that Indiana common law prohibits Burnett's conviction of Class A misdemeanor battery. We therefore vacate that conviction.

II. Sentencing Error

We turn to Burnett's challenge to her advisory four-year sentence for Class C felony battery. Burnett contends that the trial court erred in imposing sentence. She first asserts, in a one-sentence argument, that her sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004), because the trial court found aggravating factors without the use of a jury. This is unavailing. As our Supreme Court recently noted, amendments made to Indiana's sentencing statutes in 2005 make it "now impossible to 'increase[] the penalty for a crime beyond the prescribed statutory maximum,'" "even with judicial findings of aggravating circumstances." *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007), *reh'g pending* (quoting *Blakely*, 542 U.S. at 301). Thus, under the new statutory regime, there can be no *Blakely* violation.

Burnett next contends that the trial court erred in failing to recognize provocation as a mitigating circumstance.[4] We review a trial court's sentencing decisions for abuse of discretion. *Anglemyer*, 868 N.E.2d at 490. A trial court abuses its discretion if its decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.*

[4] Burnett appears to argue that the trial court failed to recognize multiple mitigating circumstances, but the only mitigating circumstance specifically argued in her brief is "provocation and the substantial grounds tending to excuse of justify the crime." Appellant's Br. p. 16. The other mitigating factors that she mentions in this portion of her brief were, in fact, recognized by the trial court.

(citation omitted). One way in which a trial court might abuse its discretion when identifying mitigating circumstances is by "omit[ting] reasons that are clearly supported by the record and advanced for consideration." *Id.* at 491.

At her sentencing hearing, Burnett maintained that Johnson provoked her behavior. Specifically, her attorney argued, "[T]he complaining witness called her a b**** and raised a chair against her, and I would indicate to you that that was a measure of provocation; although it falls short of a – of a defense to the battery as the jury heard it, it is – it is a mitigating circumstance." Sent. Tr. p. 7. The identification of mitigating circumstances, however, is well within the discretion of the trial court, *Hackett v. State*, 716 N.E.2d 1273, 1277 (Ind. 1999), and "[a]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Anglemyer*, 868 N.E.2d at 493. The trial court did not abuse its discretion in failing to identify provocation or related self-defense claims in mitigation because such claims are not clearly supported by the record. The court heard evidence that Burnett walked up behind a seated Johnson, struck him in the head with her cane, beat him persistently with her cane and hands as he tried to protect himself, and only stopped her attack due to the intervention of several employees of the retirement community. In explicitly rejecting Burnett's argument concerning provocation and self-defense, the trial court noted that the jury was instructed regarding self-defense and rejected that as a defense in this case. Sent. Tr. p. 16. This rejection of a proffered mitigating circumstance was within the province of the trial court,

and it is supported by the record and was not an abuse of discretion. *See Anglemyer*, 868 N.E.2d at 493.

Burnett also appears to argue that the trial court improperly weighed the aggravating and mitigating circumstances. This argument, however, is not cognizable, because under Indiana's present statutory regime, "a trial court can not now be said to have abused its discretion in failing to properly weigh such factors." *Id.* at 491.

In sum, the trial court did not abuse its discretion in sentencing Burnett.

III. Appropriateness of Sentence

Even where a trial court has not abused its discretion in sentencing a defendant, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize independent appellate review and revision of a sentence imposed by the trial court." *Id.* (citations omitted). We "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." Ind. Appellate Rule 7(B).

Burnett contends that her four-year sentence is inappropriate in light of her character because of her volunteer work, her physical and mental conditions, and her "minimal" criminal history. Appellant's Br. p. 14. While her apparent record of recent volunteer service is commendable, Burnett's characterization of her criminal history as "minimal" and consisting of "several misdemeanors" is a serious understatement. In fact, her criminal history consists of nineteen misdemeanors committed over a period of approximately thirty-three years. Sent. Tr. p. 17. We cannot say that Burnett's character renders her sentence inappropriate.

As to the nature of the offense, Burnett argues that "substantial self-defense arguments presented at trial . . . provide[d] substantial grounds to excuse or justify the crime" and that she "acted under provocation during this incident." Appellant's Br. p. 14. As previously noted, the trial court and jury rejected Burnett's self-defense argument. We, too, recognize that the evidence reflects that Burnett attacked Johnson, who she apparently considered a friend. Sent. Tr. p. 14. She did so with a cane while he was seated and facing away from her. Burnett managed to strike him multiple times with a cane and her hands before others could successfully intervene. As a result of the ferocity of the attack, Burnett's cane broke into three pieces, and Johnson suffered pain and injuries to his head, face, and upper body. Burnett's four-year sentence is not inappropriate in light of the nature of the offense. Burnett is not entitled to relief under Indiana Appellate Rule 7(B).

Burnett's convictions for battery as a Class C felony and battery as a Class A misdemeanor violate our state common law's prohibition against double jeopardy. We therefore vacate Burnett's conviction for Class A misdemeanor battery. Regarding her remaining four-year sentence for Class C felony battery, the trial court did not abuse its discretion in failing to recognize provocation as a mitigating circumstance, and her sentence is not inappropriate.

We reverse in part and affirm in part.

BAKER, C.J., and BAILEY, J., concur.