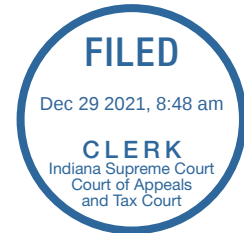


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

Richard Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 29, 2021

Court of Appeals Case No.
21A-CR-1745

Appeal from the Lake Superior
Court

The Honorable Samuel L. Cappas,
Judge

Trial Court Cause No.
45G04-1906-F1-25

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Richard Edward Johnson Jr. (Johnson), appeals his thirty-year sentence following his guilty plea to two Counts of aggravated battery, Level 3 felonies, Ind. Code § 35-42-2-1.5.

[2] We affirm.

ISSUE

[3] Johnson presents this court with one issue on appeal, which we restate as: Whether his thirty-year sentence is inappropriate in light of the nature of his offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] In June 2019, twenty-year-old Johnson lived with Sara Nebel (Nebel) at the residence of Nebel's mother, Amada Vara (Vara). At the time, Nebel was approximately five months pregnant with Johnson's second child. During the night of June 19, 2019, Johnson asked Nebel to perform oral sex in their bedroom, which she refused for several reasons: he was intoxicated, they had been arguing all day, and their one-year-old daughter was asleep in the playpen in their bedroom. Johnson became irate, screaming "you'll do this for somebody else, but you won't do this for me[,]” grabbed her by the hair, “held her down on the bed,” and started choking her. (Transcript pp. 21, 27). Johnson was referring to the fact that Nebel had been raped by a third party while she was pregnant with the couple's first child. He blamed Nebel for “putting herself in that position in the first place.” (Tr. p. 25). He believed that

Nebel was “not a pure vessel to carry [his] child” and “had no right to be a mother” because she had failed to “protect [his] child while the child was in the womb.” (Tr. pp. 28, 31, 62).

[5] Defending herself from Johnson’s attack, Nebel yelled for Vara who was downstairs to help her. Vara ran upstairs and attempted to open the bedroom door by wedging her arm between the door and the doorframe and pushing on the door. Johnson pinned Vara’s arm in the door and “slammed the door on her arm three times.” (Tr. p. 21). Vara finally “busted through” and within seconds, Johnson charged her and “was able to grab her around the neck.” (Tr. p. 28). He threw her on the bed, and “began to strangle ... and strike her about the head and face.” (Tr. p. 28). To defend Vara, Nebel started hitting Johnson, and eventually she “stabbed him” with Johnson’s knife because she was trying “everything to get him away from [Vara].” (Tr. pp. 28, 44). Johnson stood up and grabbed a .38 snub nose revolver. Aiming for Vara’s and Nebel’s upper bodies, Johnson exclaimed, “you know what, F it,” and “just started shooting.” (Tr. p. 36). He shot Vara in the leg and chest and then struck her numerous times while she attempted to stop him from hitting her with the revolver. Johnson shot Nebel in the shoulder and in the right side of her jaw.

[6] When officers arrived at the residence, Johnson was covered in blood. He stepped out of the house, and “willfully surrender[ed].” (Tr. p. 30). Johnson admitted, “I did it. I shot both of them. She was talking crazy and some other [man] got up in her while she’s pregnant with my child.” (Tr. p. 30). Johnson continued to make statements at the hospital, acknowledging what he had done

and that he knew he would go to jail. He claimed that Nebel started the altercation and was calling him the N-word. He never inquired after Vara's or Nebel's injuries, he only asked, "were they dead?" (Tr. p. 31). After the shooting, Vara suffered from a broken arm, broken fingers, and gunshot wounds to the right leg and chest. She continues to suffer from PTSD and permanent nerve damage in her right leg. Vara was forced to stop working because "it was just too much" mentally and she is unable to stand for long periods of time, a requirement of her certified nursing assistant job. (Tr. pp. 16-17). Nebel suffered a shattered jaw that required a titanium plate, and a tooth traveled to her neck where it had to be removed after becoming infected. She has visible scarring on her neck and shoulder and a visible shrapnel wound on her face.

- [7] On June 21, 2019, the State filed an Information, charging Johnson with Level 1 attempted murder, two Counts of Level 3 felony aggravated battery, Level 5 felony domestic battery resulting in bodily injury to a pregnant woman, Level 5 felony domestic battery resulting in serious bodily injury, and Level 5 felony domestic battery by means of a dangerous weapon. On May 5, 2021, Johnson pled guilty to two Counts of Level 3 aggravated battery, with the State dismissing the other charges pursuant to a plea agreement. On July 14, 2021, the trial court conducted a sentencing hearing. At sentencing, the trial court determined that the aggravating factors outweighed the mitigators. The trial court opined that Johnson's plea was "a practical solution" to avoid "substantially increase[ing] his exposure to incarceration" based on the

attempted murder charge alone. (Tr. pp. 70-71). Johnson had developed a criminal pattern with “a concentration of violent offenses,” starting at age fifteen with “two separate offenses that involved a component of physical aggression as a juvenile.” (Tr. p. 70). The court observed Johnson’s unremorseful behavior and his angry outburst directed at Nebel during the hearing. The trial court noted that “prior lenient treatment” had “no deterrent effect.” (Tr. p. 73). The trial court deemed Nebel’s stabbing “necessary to stop the mother from being choked” and “a legitimate injury to [Johnson],” but not a justification for his subsequent action of shooting the women. (Tr. pp. 76-77). At the close of the evidence, the trial court sentenced Johnson to fifteen years executed for each Count, to be served consecutively, for a total sentence of thirty years.

[8] Johnson now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

[9] Johnson contends that his sentence is inappropriate in light of the offense and his character. Indiana Appellate Rule 7(B) empowers us to revise a sentence “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.” Because a trial court’s judgment “should receive considerable deference[.]” our principal role is to “leaven the outliers.” *Cardwell v. State*, 895 N.E.2d 1219, 1222–25 (Ind. 2008). “Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the

defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). The defendant bears the burden to persuade this court that his or her sentence is inappropriate, and we may look to any factors appearing in the record for such a determination, *Stokes v. State*, 947 N.E.2d 1033, 1038 (Ind. Ct. App. 2011), *trans. denied*.

[10] Our analysis of the "nature of the offense" portion of the appropriateness review begins with the advisory sentence. *Clara v. State*, 899 N.E.2d 733, 736 (Ind. Ct. App. 2009). The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). Johnson pled guilty to two Counts of Level 3 felony aggravated battery. The sentencing range for a Level 3 felony is three to sixteen years, with an advisory sentence of nine years. I.C. § 35-50-2-5(b). The trial court sentenced him to an aggravated, consecutive sentence of fifteen years on each Count, for a total sentence of thirty years. Johnson now requests this court to reduce his sentence to the advisory term for the offenses, for a total sentence of eighteen years.

[11] To commit a Level 3 felony aggravated battery, a defendant must, "knowingly or intentionally inflict injury on a person that creates a substantial risk of death or causes: (1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) the loss of a fetus." I.C. § 35-42-2-1.5. Despite Johnson's claim to the contrary, on the night of June 19, 2019, he exceeded the elements of this charge. After a

pregnant Nebel refused to perform oral sex, he became irate and violent. He grabbed her hair and choked her. When Nebel's mother tried to intervene to protect her daughter, Johnson crushed her arm in the door, charged her, threw her on the bed, and started to choke her. Nebel grabbed Johnson's knife and stabbed him to stop him from choking her mother. Johnson took his revolver and began shooting at the women.

[12] Although Johnson claims that the injuries were not more severe than necessary to prove the claim, we disagree. At the time of the offense, a one-year-old child was within gunshot range in the bedroom and each victim was shot twice. Vara was shot in the chest and leg, incurring broken bones and permanent nerve damage that impairs her ability to stand and resulted in her no longer being able to perform her profession. To this day, she suffers from PTSD and cannot work. Nebel, shot in the shoulder and face, suffered a shattered right jaw and has permanent facial shrapnel disfigurement. A tooth travelled from her jaw to her neck, causing an infection and resulting in surgery. We cannot conclude that Johnson's crimes were "accompanied by restraint, regard, and lack of brutality." *Stephenson*, 29 N.E.3d at 122.

[13] Turning to Johnson's character, we take note of Johnson's criminal history. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (even a minor criminal history may reflect poorly on a defendant's character). Johnson has two juvenile adjudications, one conviction, and a history of violence. He committed his first battery at age fifteen. The following year, he graduated to "disorderly conduct, resisting law enforcement, disarming a police officer, and

battery on a public safety officer.” (Appellant’s App. Vol. II, p. 57). Two years later, he was convicted of attempted battery and theft, and received probation. The trial court noted that “in a six-year period of time you had a concentration of violent offenses.” (Tr. p. 70). Johnson’s violent tendencies have increased over time and, as shown by the current offenses, he is not deterred from committing new violent offenses, even attempted murder.

[14] During the sentencing hearing, Johnson continued to misbehave and show disrespect for the institute of justice. At the time he exercised his right of allocution, and even though Johnson said he was sorry for what had happened, the trial court considered him to be remorseful only as a result of the predicament he found himself in. Johnson blamed everyone but himself for his actions on that day: he blamed Nebel for being raped while she was pregnant and stated that this caused the argument, and he blamed Vara for the shooting because she “ricocheted back up on the door until she push[ed] [him] back” resulting in him picking up the gun. (Tr. p. 68). He had vocal outbursts directed at Nebel and the judge, and he cursed every individual in the courtroom, to the point where the bailiff had to interfere multiple times.

[15] Based on the evidence before us, we cannot conclude that Johnson displayed “substantial virtuous traits or persistent examples of good character.” *Stephenson*, 29 N.E.3d at 122. As Johnson failed to persuade us that his sentence is inappropriate in light of the offenses and his character, we affirm the trial court’s imposition of his sentence.

CONCLUSION

[16] Based on the foregoing, we hold that Johnson's sentence is not inappropriate in light of the offenses and his character.

[17] Affirmed.

[18] Robb, J. and Molter, J. concur