MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Johnathan A. Sherman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 5, 2022

Court of Appeals Case No. 21A-CR-1678

Appeal from the Carroll Circuit Court

The Honorable Benjamin A. Diener, Judge

Trial Court Cause No. 08C01-2005-F5-14

Darden, Senior Judge.

Statement of the Case

[1] Johnathan A. Sherman appeals from his conviction of one count of Level 5 felony domestic battery resulting in bodily injury to a pregnant woman,[1] contending that the evidence is insufficient to support his conviction and that the court abused its discretion in sentencing. We affirm.

Facts and Procedural History

[2] On May 12, 2020, Sherman was engaged to Bethany Cadwallader, who was pregnant. The two lived in a house with Nichole Kraushaar, Montrell Baker, Nichole's friend Tiffany, and two small children. On May 12, 2020, Nichole woke up at 8:00 a.m. when her son awakened, and they proceeded to go downstairs. Nichole went into Bethany and Sherman's bedroom because that is where the three of them would often talk. Bethany and Sherman were already having a discussion, and Sherman was drinking alcohol. Nichole testified that they did not talk to each other during the day because Sherman was "blasting music, doing his own thing." Tr. Vol. 3, p. 57.

[3] Sherman continued drinking alcohol throughout the day. Nichole testified that Sherman "had been drinking for a while, so he can handle his, his, his, alcohol. He has been drinking for a while. Like, it wasn't just on vodka he was drinking all day, either. There was different alcohol. Bud Light in the house." *Id.* at 82.

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[1] Ind. Code § 35-42-2-1.3(c)(3) (2020).

[4] Later in the evening, at around 11:20 p.m., Nichole heard Bethany and Sherman yelling at each other in the dining room. Nichole suggested to Bethany that they go upstairs to "give him some space," and "smoke a cigarette." *Id.* at 59-60. Bethany's one-year-old son was downstairs crying in the living room because of a prior argument. Sherman picked up the boy and carried him upstairs where Bethany and Nichole were seated and threw the boy at Bethany. He then walked back downstairs. Bethany, who had caught the boy as she sat on the bed, left him with Nichole and followed Sherman downstairs. Nichole carried the boy downstairs with her, following Bethany.

[5] Apparently, a belated birthday celebration had been planned for Bethany. Sherman went into the kitchen where an ice cream birthday cake had been placed on the stovetop, and he "tried to put candles" on it. *Id.* at 63. Nichole testified that "He was drunk, so he probably was hungry." *Id.* Nichole also testified that Bethany said to Sherman, "it wasn't the time or the place to be putting candles on because he was intoxicated." *Id.* Bethany, who was behind Sherman at the time she said that, noticed that Sherman was becoming more upset. At that point, Bethany began walking backwards away from Sherman.

[6] Nichole had placed the boy down on the floor and was standing between the kitchen and the dining room at the time. Sherman then "hit the cake," and "swiped it with his hand." *Id.* at 65. The cake went "all over the place." *Id.* Bethany continued to back away from Sherman and he continued to follow after her as they faced one another. She stopped when she "backed into the doorframe." *Id.* at 66. Both Bethany and Sherman were screaming at each

other. Nichole, who was twenty-two-years-old at the time, testified that she had known Sherman since they were eight or nine years old and, "I have never seen him like that, ever," "Oh, he was mad. I have never seen Johnathan like that." *Id.* at 67.

[7] Nichole then saw Sherman place both hands around Bethany's neck and Bethany began to cry. Next, Bethany placed her hands under his ribcage to try "to push him off." *Id.* at 68. This appeared to agitate Sherman even more. He then used his left forearm and "hit her on the right side of the face." *Id.* The blow was not "really hard, but it wasn't light either." *Id.* at 69. Bethany then "ends up going to the ground" "in the middle of the dining room." *Id.* According to Nichole, she was "100% positive" that Bethany "was face down" "on her stomach." *Id.* at 69-70. Sherman then "pinned [Bethany] to the ground" by using "his forearm on the back of her neck and his knee in her back." *Id.* at 70. "He would not let her up," and "she was saying she was in pain. Like her stomach was hurting." *Id.* at 71. Nichole said she "wasn't going to get in the middle of it because [she] wasn't going to get hit." *Id*. In addition, she was scared for Bethany's one-year-old son and her own two-year-old son, who were in the living room.

[8] Meanwhile, Tiffany was on the telephone making a call to 911. Nichole shouted for Montrell to help. Montrell pulled Sherman off of Bethany and then led Sherman outside to separate the two. Nichole helped Bethany up from the floor. Bethany took her son outside and Nichole followed along with her son.

Montrell was outside, but Sherman had left the scene. Officers eventually were able to locate and handcuff Sherman.

[9] Carroll County Sheriff's Deputy Drew Yoder responded to the 911 call reporting the domestic disturbance. Deputy Yoder was a former 911 dispatch operator, and a six-year merit deputy with the force in addition to being a K-9 handler. Deputy Yoder spoke with Bethany in the back of the ambulance and briefly took her statement. He observed that she was extremely upset, emotional, and was crying, but did not note any visual injuries. However, Bethany told him that Sherman had backed her into a corner, elbowed her face, put two hands around her neck, and then pushed her to the ground. Deputy Yoder did not take any photographs because he did not observe any physical injuries on her face or neck, but instead focused on quickly getting her medical attention due to her complaint of severe abdominal pain. She told the officer that on a scale of one to ten with ten being the worst, her pain level was a six. Bethany was transported to the hospital in pain and was released later.

[10] Deputy Yoder observed Sherman's behavior after arriving at the scene. Sherman appeared to have been "extremely intoxicated." Tr. Vol. 2, p. 186. Yoder testified that Sherman smelled of alcohol, exhibited slurred speech, his eyes were red, glassy and watery, and he was having "a hard time standing." *Id.*

[11] The State charged Sherman with one count of domestic battery resulting in bodily injury to a pregnant woman as a Level 5 felony, one count of strangulation as a Level 5 felony, and alleged him to be an habitual offender.

[12] Bethany, who had broken off her engagement to Sherman since the altercation, testified at trial about events leading up to the night in question and the night itself. She stated that she and Sherman had attended prenatal appointments together for the ultrasound results when they learned the child's gender. He was well aware that she was pregnant with a boy and had been present when they both shared the news with Nichole.

[13] Bethany testified that on the day of the assault, Sherman came home late in the morning from work and "was drunk when he came home." Tr. Vol. 3, p. 92. He was "stumbling everywhere and slurring his words" and continued to drink. *Id.* at 93.

[14] She testified that later in the afternoon, Sherman somewhat sobered up and they began arguing about a comment Sherman had made to a friend of his that Bethany "wasn't very happy about." *Id.* at 93. That argument lasted for "[m]aybe about 15 minutes." *Id.* at 94. Next, Sherman, Bethany, Montrell, Nichole, and Tiffany drove to Delphi to wrap up a lease she had on an apartment there. While she was completing the paperwork, Montrell had gone to a gas station and purchased a "Mike's Hard Lemonade, like the red one, and [Montrell and Johnathan] were sharing it in the back of Nichole's car." *Id.* at 94.

[15] Bethany had complained to Sherman about drinking an alcoholic beverage in a moving vehicle and Sherman took offense. The two did not speak to each other for "about an hour and a half." *Id.* at 95. Once they were home, Sherman went to their bedroom to rest, and she went to the kitchen to prepare a meal for her son.

[16] Things had calmed down somewhat when Sherman left at nighttime to spend time in Logansport at his daughter's mom's house. He told Bethany that "he wasn't going to drink anymore, and he sent [her] proof that [someone else] had bought him vodka." *Id.* at 96. Bethany said that he spent "maybe 3, 4 hours" there before Nichole picked him up and brought him back home. *Id.* at 97.

[17] Upon returning home, Sherman "came into the house and into the bedroom and rolled on top of my pregnant stomach, so I pushed him off of me. He was very drunk." *Id.* "He was stumbling over things," was cursing, and "being very disrespectful." *Id.* Sherman wanted something to eat, so Bethany went to the kitchen to get some water and make a sandwich for him. When she returned to the bedroom, Sherman had passed out. She left the drink and sandwich on a table in the kitchen. She testified that she went upstairs to smoke a cigarette, and Sherman came upstairs with her son. Sherman "threw [her son] on top of [her] and chucked our, his engagement ring at my face and called me an insufficient mom." *Id.* at 98. Her son landed on her chest when she caught him. Sherman commenced to berate her by cursing and name-calling until they all went downstairs to the kitchen.

[18] Bethany testified that she went into another room to calm down before going into the kitchen. When she entered the kitchen, she saw that Sherman was trying to place candles on her ice cream birthday cake, and she "approached him and [] told him it was an inappropriate time to put candles on a birthday cake. Like you need to sober up. We need to calm things down, you know, go lay down, something." *Id.* at 100.

[19] At that moment, Sherman became very agitated, so Bethany began to back away from him. He came toward her as she did so until she was backed against the doorframe. She stated that Sherman was egging her on, and "was telling me to hit him, to fight him." *Id.* at 101. He was "yelling" in her face "while he [was] screaming, he [was] spitting on my face." *Id.* at 102. He had her blocked against the doorframe such that she told him "you are crushing our son. You need to back up a little bit." *Id.* She put both of her hands under his ribs to move him out of the way when he placed her in "a choke hold and dragged me down to the floor onto [her] stomach." *Id.* She testified that after Montrell pulled Sherman off of her, she felt pain in her "stomach and [her] throat and [her] neck and [her] jaw." *Id.* at 107. She said that her jaw hurt because "[w]hen he put [her] in the chokehold, his fist hit [her] jaw." *Id.*

[20] At the conclusion of Sherman's jury trial, he was acquitted of strangulation, but was found guilty of domestic battery resulting in bodily injury to a pregnant woman. Sherman admitted to his habitual offender status. After considering proffered aggravating and mitigating circumstances, the court sentenced Sherman to four years executed in the Department of Correction and enhanced

the sentence by five years due to his habitual offender status, for an aggregate sentence of nine years executed. Sherman now appeals.

Discussion and Decision

Sufficiency of the Evidence

[21] Sherman argues that the court committed reversible error by finding that there was sufficient evidence to support the jury's decision to convict him of domestic battery. He says that the evidence consisted of "the overwhelming inconsistencies in the testimony of essentially every witness, starting with Deputy Yoder, continuing with Ms. Kraushaar, and ending with the testimony of Ms. Cadwallader." Appellant's Br. p. 10. He argues that "[t]he Trial Court did not possess sufficient evidence to convict the Defendant of Domestic Battery Resulting in Bodily Injury to a Pregnant Woman and, as such, the verdict of the Trial Court should be nullified." *Id.* at 10.

[22] We pause to unpack and clarify a few of the terms used here in Sherman's argument. As for nullification, "[t]he general thrust of the article is that Article I, Section 19 amounts to a constitutionally permissible form of jury nullification. That is, under the Indiana Constitution the jury has the right to return a verdict of not guilty despite the law and the evidence where a strict application of the law would result in injustice and violate the moral conscience of the community. Although jury nullification has been variously defined, this is its central tenet." *Holden v. State*, 788 N.E.2d 1253, 1254 (Ind. 2003). Strictly speaking, the jury returned a guilty verdict, and thus did not opt for jury

nullification here. Second, it was the jury's verdict and not that of the trial court. The trial court entered a judgment of conviction on the jury's verdict. Our task on appeal is not to "nullify" a verdict, but to determine if reversible error has occurred. *See, e.g.*, *Gross v. State*, 444 N.E.2d 296, 299 (Ind. 1983) ("We find no reversible error here as the trial court had an adequate basis to enter the judgment of conviction on the Class D felony after receiving the jury's verdict of guilty on the Class D felony and hearing all of the facts which supported this verdict.").

[23] And to the extent it can be said that the trial court could evaluate the sufficiency of the evidence independently of the jury, Indiana Trial Rule 59(J)(7) does allow for relief "if it determines that the verdict . . . is against the weight of the evidence[.]" We explained in *State v. Hollars*, 887 N.E.2d 197, 203-04 (Ind. Ct. App. 2008) as follows:

> A trial court has wide discretion to correct errors and to grant new trials. In determining whether to grant a new trial, the trial judge has an affirmative duty to weigh conflicting evidence. The trial judge sits as a thirteenth juror and must determine whether in the minds of reasonable men a contrary verdict should have been reached. When a trial court grants a new trial pursuant to Trial Rule 59(J), the granting of relief is given a strong presumption of correctness. We will reverse the grant of a new trial only for an abuse of discretion. This court neither weighs the evidence nor judges the credibility of the witnesses. An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom. An abuse of discretion also results from a trial court's decision that is without reason or is based upon impermissible reasons or considerations.

> As the thirteenth juror, the trial court: (1) hears the case along with the jury; (2) assesses the credibility, intelligence, and wisdom of the witnesses; and (3) determines whether the verdict is against the great weight of the evidence. *However, the "thirteenth juror" principle is not intended to invite the trial judge to cavalierly substitute his or her evaluation of the evidence in place of a contrary evaluation made by the jury, and relief is appropriate only if the jury's determination is unreasonable or improper.*

(internal citations omitted) (emphasis added).

[24] Here, there is no argument advanced on appeal that Sherman asked for the trial court to act as a thirteenth juror, i.e., moved for relief under Indiana Trial Rule 59(J). However, his overarching argument is that the evidence is insufficient to support the verdict and that the court erred by entering a judgment of conviction thereon. We must engage in a sufficiency-of-the-evidence review in either event and address it as such now.

[25] "For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict." *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017). We do not reassess the credibility of the witnesses nor do we reweigh the evidence. *Id.* The conviction will be affirmed unless no reasonable finder of fact could find the element of the crime proven beyond a reasonable doubt. *Id.*

[26] To prove Level 5 domestic battery resulting in bodily injury to a pregnant woman, the State was required to establish that Sherman knowingly or

intentionally touched Bethany in a rude, insolent, or angry manner, that Bethany was a family or household member, that Bethany was pregnant, that Sherman was aware of the pregnancy, and that Bethany suffered pain. Ind. Code § 35-42-2-1(g)(3).

[27] Here, both Nichole and Bethany gave consistent statements and testified that Sherman struck Bethany in the jaw as he held her in a chokehold and pushed her down and pinned her to the floor. It is undisputed that both women testified that Sherman knew that Bethany was pregnant. Further evidence revealed that Bethany and Sherman had attended an ultrasound appointment wherein they learned the gender of their expected child. Deputy Yoder testified that Bethany was visibly pregnant. Both women testified that Bethany and Sherman were living in the same household and that they were engaged. Bethany testified to the pain she felt when Sherman hit her jaw while he had her in a chokehold and the pain she felt when he had her pinned to the floor. Nichole confirmed that Bethany was screaming and "saying she was in pain. Like her stomach was hurting." Tr. Vol. 3, p. 71. Deputy Yoder further testified that his interview with Bethany was abbreviated because she was complaining of abdominal pain and needed prompt medical attention.

[28] "We will affirm a conviction for battery so long as there is evidence of touching, however slight." *Mishler v. State*, 660 N.E.2d 343, 348 (Ind. Ct. App. 1996). And the requisite intent "may be presumed from the voluntary commission of the act." *Id.* The evidence at trial supports the jury's verdict.

[29] Sherman argues that there are inconsistencies in the women's testimony at trial, and with their statements to police immediately thereafter. However, those inconsistencies were fully exploited and explored on cross and re-cross examination. At one point the court asked defense counsel if he had any further cross-examination questions for Nichole. Defense counsel responded, "I am almost afraid to. Yes, there is[sic] a few, Judge." Tr. Vol. 3, p. 76. The court on several occasions asked questions to clarify the sequence of events, the location of various individuals at various times, and the general floorplan and living arrangements of the those living at the house.

[30] The jury, however, was in the best position to evaluate the credibility of the witnesses and assess the weight to be given to their testimony in light of any inconsistencies. Any inconsistencies in the testimony of two or more witnesses go to the weight of the evidence and the credibility of each individual witness' testimony. *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001). As for the elements of the crime, however, the witnesses were consistent, and the jury was convinced that the State had met its burden of proof beyond a reasonable doubt. We find that the evidence was sufficient and that there is no reversible error.[2]

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[2] Without citation to the record, Sherman says in his argument section, "Mr. Sherman's actions do not equate to a conviction of Domestic Battery Resulting in Bodily Injury to a Pregnant Woman, rather the evidence simply provides a story of revisionary history by the alleged victim once she likely became aware that Mr. Sherman was not the baby's father." Appellant's Br. p. 13. At face value, this statement is unnecessarily provocative and does nothing to advance Sherman's legal contentions. We do not address this any further than to remind counsel of Indiana Appellate Rule 46(A)(8)'s requirements for effective appellate advocacy.

Sentencing

[31] Sherman makes a passing reference to our statutory authority under article 7, sections 4 and 6 of the Indiana Constitution to perform an independent review and revision of sentences. *See* Appellant's Br. p. 14. However, the crux of his argument is that the court abused its discretion by overlooking or failing to find mitigating circumstances in imposing Sherman's nine-year aggregate sentence. Therefore, we do not evaluate Sherman's sentence under Indiana Appellate Rule 7(B) and proceed to our abuse-of-discretion review.

[32] "Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense." *Anglemyer v. State* 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id.* "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Id.* "An abuse of discretion occurs if the 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.* (internal quotation omitted). Examples of ways a trial court may abuse its discretion include "a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." *Id.* at 490-91. "Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial

court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.* at 491.

[33] The sentencing range for a Level 5 felony is a fixed term of between one and six years with an advisory sentence of three years. Ind. Code § 35-50-2-6(b) (2014).

[34] Sherman says that the trial court found two aggravating circumstances. Appellant's Br. p. 15. However, in its oral sentencing statement, the trial court identified Sherman's criminal history and delinquent behavior to be the sole aggravating factor and declined to find any mitigating circumstances. Tr. Vol. 4, p. 55. Sherman claims that the trial court abused its discretion by failing to find as mitigating circumstances: 1) his continuing progress toward sobriety, 2) that he pled guilty to being an habitual offender, and 3) that he had a strong familial support system. *See* Appellant's Br. p. 16.

[35] We begin with the premise that a trial court is not obligated "to give the same weight to proffered mitigating circumstances as the defendant does." *Allen v. State*, 722 N.E.2d 1246, 1258-59 (Ind. Ct. App. 2000). "A trial court must include mitigators in its sentencing statement only if they are used to offset aggravators or to reduce the presumptive sentence, and only those mitigators found to be "significant " must be enumerated." *Id.* at 1252. "A trial court is not required to find the presence of mitigating factors or to give the same weight or credit to mitigating evidence as does the defendant, nor is it obligated to accept the defendant's assertions as to what constitutes a mitigating circumstance." *Id.* (internal citations and quotations omitted). "Although a

trial court must consider evidence of mitigating factors presented by a defendant, it is not obligated to explain why it has found that the factor does not exist." *Id.* (internal citations and quotations omitted).

[36] Here, the trial court addressed Sherman's argument about his substance abuse issues, saying that he "only can improve by addressing [his] substance abuse issues," but that he had yet to take responsibility for his problem. Tr. Vol. 4, p. 58. The trial court remarked that "it is insulting that you think you can run from this problem in a manner that does not address it in any proactive way, and then try to turn around and persuade the Court that nothing happened, you're better." *Id.* at 57. And after pronouncing Sherman's sentence, the trial court said, it "will consider a modification of the sentence after the minimum executed has been served and completion of a clinically appropriate substance abuse treatment program as identified by the Indiana Department of Corrections [sic]." *Id.* at 57-58.

[37] Regarding Sherman's admission to the habitual offender enhancement, the trial court said, "for your admission, I am not going to impose the maximum penalty. I will give you a break of one year and only impose the five years as the enhancement." *Id.* at 56. And as for Sherman's familial support, the trial court said, "You are not ready to change your life at all. In fact, you want to persuade the Court that your life doesn't need changed because since this misunderstanding of May 12th, 2020, you've ran and gotten married and your life is better and why should we even be in your life at all anymore." *Id.* at 56-57.

[38] The record reflects that the trial court considered Sherman's proffered mitigating circumstances and either found them to be insignificant, or, in the case of Sherman's admission, adjusted his sentence accordingly. We find no abuse of discretion in the trial court's sentencing evaluation.

Conclusion

[39] We conclude that there was sufficient evidence to support the jury's verdict and the trial court's judgment of conviction. We further conclude that the trial court did not abuse its discretion in sentencing.

[40] Affirmed.

Riley, J., and Pyle, J., concur.