MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ashley Richey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 18, 2022

Court of Appeals Case No. 21A-CR-1865

Appeal from the Vigo Superior Court

The Honorable Michael J. Lewis, Judge

Trial Court Cause No. 84D06-1807-F2-2470

Weissmann, Judge.

[1] Ashley Richey stabbed and killed his roommate, Bradley Lawson, over an argument about whether Richey could bring a stray dog into their shared home. A jury convicted Richey of felony voluntary manslaughter and felony aggravated battery, and after "merging" the convictions, the trial court sentenced Richey to 17½ years in prison for voluntary manslaughter. Richey appeals, arguing that the State did not disprove his self-defense claim and that the trial court overlooked several mitigating factors at sentencing. We disagree and affirm Richey's conviction and sentence for voluntary manslaughter, but remand with instructions to vacate Richey's conviction for aggravated battery.

Facts

[2] Lawson was out in his front yard tinkering with his car when a friend, Wayne Langman, stopped by after work. Langman described Lawson as in good spirits and eager to visit his girlfriend later that evening. After finishing up the work on his car, Lawson went inside the house.

[3] Almost immediately, Langman heard strange noises coming from inside and decided to investigate. But before he could make it inside, Lawson stumbled out of the front door "covered in blood" and clutching his chest. Tr. Vol. II, pp. 45-47. Although Langman called 911 and began CPR, Lawson quickly fell unconscious and died from a stab wound to his chest.

[4] Meanwhile, in the house, Richey went to the bedroom of another roommate and admitted to stabbing Lawson. The roommate reported that Richey appeared "proud." *Id.* at 66. Richey had blood all over his clothes and no

injuries except for a small cut on his wrist. He did not tell the roommate that Lawson instigated the fight or imply he had acted in self-defense.

[5] When police arrived at the house, they found a bloody knife in the kitchen trash can with Richey's DNA on the handle. Speaking with the police, Richey again confessed to stabbing Lawson but now claimed self-defense alleging that Lawson had attacked him first. The State charged Richey with voluntary manslaughter and aggravated battery.

[6] A jury found Richey guilty of both crimes. At Richey's sentencing, the court found that his aggravated battery conviction "merged" with his voluntary manslaughter conviction. Tr. Vol. III, p. 43; App. Vol. II, p. 220. The court therefore sentenced Richey to 17½ years in prison for voluntary manslaughter only.

[7] Without seeking the trial court's permission to file a belated motion to correct error under Indiana Post-Conviction Rule 2(2), Richey moved to correct error one day after the 30-day deadline provided by Indiana Criminal Rule 16(B). The trial court summarily denied the motion the next day. Without seeking the trial court's permission to file a belated notice of appeal under Post-Conviction Rule 2(1), Richey filed a notice of appeal 63 days after the 30-day deadline provided by Indiana Appellate Rule 9(A)(1). After rejecting this appeal once as untimely, this Court's motion panel allowed Richey to proceed after he filed a motion to reconsider. The State renews its motion to dismiss in this appeal.

Discussion and Decision

[8] Richey argues that the State presented insufficient evidence at trial to disprove his self-defense claim and then improperly sentenced him. The State, on cross-appeal, argues that Richey's appeal should be dismissed as untimely under Appellate Rule 9(A). Although we decline to dismiss Richey's appeal as untimely, we otherwise rule against Richey's remaining arguments. But on our own initiative, we remand to vacate Richey's aggravated battery conviction.

I. Timeliness

[9] The State claims Richey forfeited the right to appeal by failing to timely file a notice of appeal under Appellate Rule 9(A). Appellate Rule 9(A)(5) provides: "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Indiana Post-Conviction Rule] 2." In turn, Indiana Post-Conviction Rule (P-C.R.) 2 provides, in pertinent part:

> An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;
>
> > (1) the defendant failed to file a timely notice of appeal;
> >
> > (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
> >
> > (3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

P-C.R. 2(2)(a).

[10] Because Richey's notice of appeal was untimely under Appellate Rule 9(A)(1), a petition to file a belated appeal under P-C.R. 2 was the proper avenue for Richey to bring this appeal. In the interest of judicial economy, we believe it prudent to hear the merits of his case. *See* Ind. R. App. P. 1 ("The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules.").

II. Self-Defense

[11] Richey argues that the State presented insufficient evidence at trial to disprove his self-defense claim. We disagree.

[12] Challenges to the sufficiency of the State's evidence rebutting a defendant's self-defense claim are reviewed like any other sufficiency of the evidence claim. *Brown v. State*, 738 N.E.2d 271, 273 (Ind. 2000). We do not reweigh the evidence or judge the credibility of any witness. *Garland v. State*, 719 N.E.2d 1236, 1238 (Ind. 1999). Our review is limited to considering "only the evidence that supports the verdict and the resulting reasonable inferences; and we will affirm if a reasonable jury could find the defendant guilty beyond a reasonable doubt." *Id.*

[13] "Self-defense is recognized as a valid justification for an otherwise criminal act." *Miller v. State*, 720 N.E.2d 696, 699 (Ind. 1999). As prescribed by statute, "[a] person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Ind. Code § 35-41-3-2(c).

[14] Once the defendant raises a self-defense claim, the State carries the burden of disproving beyond a reasonable doubt one of the following elements of that defense: (1) the defendant was in a place where he had a right to be; (2) the defendant did not provoke, instigate, or participate willingly in the violence; and (3) the defendant had a reasonable fear of death or great bodily harm. *Brown v. State*, 738 N.E.2d 271, 273 (Ind. 2000). The State met its burden.

[15] The State sufficiently proved that Richey provoked, instigated, or participated in the violence. The State's evidence showed that Lawson was in a "good mood" before the attack and looking forward to spending time with his girlfriend later that evening. Tr. Vol II, pp. 27, 48. In contrast, Richey was agitated enough before his fatal encounter with Lawson that he threatened to "kill a mother f*cker" while complaining about Lawson's refusal to let the stray dog into the house. *Id.* at 25. Similarly, Richey's claim that Lawson burst into the kitchen "all puffed up" and began attacking him sharply cuts against the narrative created by the rest of the evidence. Appellant's Br., p. 7.

[16] The jury, acting in its role as the factfinder, "was not obligated to believe [Richey's] self-serving testimony" related to his self-defense claim. *Fitzgerald v. State*, 26 N.E.3d 105, 110 (Ind. Ct. App. 2015); *see also McCullough v. State*, 985 N.E.2d 1135, 1139 (Ind. Ct. App. 2013) (holding that the jury "was under no obligation" to credit defendant's self-serving testimony). Richey's arguments on this point essentially amount to a request to reweigh the evidence, which we will not do. *Wallace v. State*, 725 N.E.2d 837. 840 (Ind. 2000).

[17] The State's description of the scene leading up to Lawson's death, backed up by sufficient supporting evidence, allowed for the jury to find beyond a reasonable doubt that Richey instigated the attack and thus did not kill Lawson in self-defense.[1]

III. Sentencing

[18] Richey contends that the trial court ignored several mitigating circumstances at sentencing. We disagree and find the trial court acted within its sentencing discretion.

[19] "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. On appeal, we find an abuse of discretion when the trial court's 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.'" *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006).

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[1] Richey also argues that the trial court erred in excluding testimony that purportedly showed Lawson's dangerousness. Such evidence may have been relevant to the issue of Richey's reasonable fear of death or great bodily harm by Lawson, but it would not have established a reasonable doubt as to whether Richey provoked, instigated, or participated willingly in the violence. Because the State needed to disprove only one element of Richey's self-defense claim to rebut it, the trial court's exclusion of Richey's testimony was—at best— harmless error. *See* Miller, 720 N.E.2d at 705 (holding exclusion of evidence relevant to self-defense claim was harmless error when "the exclusion had a sufficiently minor impact . . . so as not to affect the substantial rights of Defendant"); *Stewart v. State*, 167 N.E.3d 367, 375-76 (Ind. Ct. App. 2021).

[20] A trial court must enter a sentencing statement explaining its reasons for imposing a particular sentence for a felony offense. *Anglemyer*, 868 N.E.2d at 490. A trial court may abuse its discretion when it fails to enter this statement. An abuse of discretion also occurs when the sentencing statement overlooks reasons clearly supported by the record and advanced for consideration or includes reasons improper as a matter of law. *Id.* at 490-91. "An 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." *Id.* at 493. Richey does not meet that burden.

[21] Richey claims the trial court abused its discretion by glossing over his alleged self-defense as a mitigating circumstance. Appellant's Br., pp. 16-17. The trial court, however, expressly considered Richey's self-defense claim in its sentencing statement: "I don't think self-defense applies in this situation." Tr. Vol. III, p. 105. This decision was within the trial court's sentencing discretion. *Spears v. State*, 735 N.E.2d 1161, 1167 (Ind. Ct. App. 2000) ("The trial court is not obligated to find a circumstance to be mitigating merely because it is advanced by the defendant.").

IV. Merger

[22] We sua sponte address the trial court's "merger" of Richey's convictions for Level 2 felony voluntary manslaughter and Level 3 felony aggravated battery. Tr. Vol. III, p. 43; App. Vol. II, p. 220. Because the trial court entered judgment of conviction on the aggravated battery count, merging the offenses was not

enough to resolve the court's apparent double jeopardy concern. *See Spry v. State*, 720 N.E.2d 1167, 1170 (Ind. Ct. App. 1999) ("Merging, without also vacating the conviction[], is not sufficient to cure double jeopardy violation.), *trans. denied.* As the parties do not contest the trial court's finding that the aggravated battery was "basically the same fact pattern" as the voluntary manslaughter, Tr. Vol. III, p. 43, we remand this case to the trial court to vacate the "merged" aggravated battery conviction.

[23] Affirmed and remanded with instructions.

May, J., and Crone, J., concur.