

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin Edward Rollins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 4, 2022

Court of Appeals Case No.
21A-CR-2234

Appeal from the Jasper Superior
Court

The Honorable Russell D. Bailey,
Judge

Trial Court Cause No.
37D01-1902-F5-85

Mathias, Judge.

- [1] Kevin Edward Rollins was convicted in Jasper Superior Court of Level 5 felony battery. Rollins appeals and raises two issues:

I. Whether the trial court abused its discretion when it refused to tender his self-defense instruction to the jury; and,

II. Whether his three-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

[2] We affirm.

Facts and Procedural History

[3] In 2019, Rollins was employed as a truck driver for Dart Transportation. At approximately 9:00 a.m. on January 31, Rollins was driving his semi-tractor trailer when he noted that one of his trailer tires needed more air. Rollins pulled the truck into a Pilot Truck Stop near Interstate 65 in Remington, Indiana. Several semi-tractor trailers were there waiting in the fuel line. Rollins attempted to drive around the line to reach the air pump but was unable to navigate around one of the semis in the line. Rollins put his semi in park to wait for the line to clear so he could move forward.

[4] Elmer McDonald was the driver of the last truck in line at the fuel pumps. McDonald believed that Rollins was trying to cut in line at the fuel pump. McDonald exited the cab of his truck and walked up to Rollins' truck. McDonald began banging on Rollins' driver side cab door. Rollins ignored McDonald initially but then made an obscene gesture at him.

[5] McDonald started to turn to walk back to his truck when Rollins exited the cab of his truck. McDonald turned to face Rollins and Rollins pushed him. Rollins

then hit McDonald twice. McDonald fell to the ground after he was hit the second time. Rollins returned to the cab of his truck and drove away from the Pilot Truck Stop. McDonald wrote down the number on Rollins' truck and then walked into the truck stop to seek assistance because his nose and ear were bleeding.

[6] After speaking with a law enforcement officer, McDonald sought treatment at a local hospital. The emergency room doctor discovered that McDonald suffered a fractured right eye socket, and McDonald was transported to a hospital in Indianapolis where he underwent surgery to repair the damage to his eye socket. The surgeon had to implant metal plates above and below his eye to repair the damage. McDonald had to stay in the hospital for four days following the surgery. He was also unable to work for five weeks due to his injury.

[7] The responding law enforcement officer determined that Rollins was a Dart Transportation employee and contacted the company to request that they send Rollins back to the truck stop. Rollins returned and spoke to the officer. Rollins said that McDonald was "beating" on his truck cab door "like a wild man." Ex. 8. Rollins told the officer that he ignored McDonald initially, but then he exited the cab of his truck and hit McDonald three times.¹ *Id.* Rollins told the officer that he did not give McDonald "a chance to hit [him] back." *Id.*

¹ Rollins later clarified that he pushed McDonald once and hit him two times. Tr. Vol. 2, pp. 200, 203.

[8] Rollins was charged with Level 5 felony battery resulting in serious bodily injury. His jury trial commenced on June 15, 2021. Rollins testified in his own defense. Rollins admitted that he pushed and hit McDonald but claimed he was afraid of McDonald. Tr. Vol. 2, pp. 198-201. Rollins also testified that McDonald banged on the door of his truck cab but did not attempt to open the door. *Id.* at 206. Rollins asked the trial court to give a self-defense instruction to the jury. The trial court refused his tendered self-defense instruction because the instruction was an incomplete statement of the law. The jury found Rollins guilty as charged.

[9] The trial court sentenced Rollins on July 12. The trial court found that his lack of criminal history was a mitigating circumstance. The court also considered that Rollins was likely to respond to probation and was unlikely to commit another offense as mitigating circumstances. However, the court considered that McDonald's injuries were greater than that necessary to establish the elements of the offense as an aggravating circumstance. After weighing these circumstances, the trial court ordered Rollins to serve a three-year sentence, one year to be served in community corrections and two years suspended to probation.

[10] Rollins now appeals.

I. Self-Defense Instruction

[11] Rollins argues that the trial court abused its discretion when it refused to tender his self-defense instruction to the jury. Instructing a jury is left to the sound

discretion of the trial court, and we review its decision only for an abuse of that discretion. *Schermerhorn v. State*, 61 N.E.3d 375, 381 (Ind. Ct. App. 2016), *trans. denied*. “The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Phillips v. State*, 22 N.E.3d 749, 761 (Ind. Ct. App. 2014), *trans. denied*.

[12] When our court reviews a trial court’s decision to refuse a tendered instruction, “we consider (1) whether the instruction correctly states the law, (2) is supported by the evidence in the record, and (3) is not covered in substance by other instructions.” *Munford v. State*, 923 N.E.2d 11, 14 (Ind. Ct. App. 2010). Moreover, a defendant in a criminal case is entitled to have the jury instructed on any theory of defense as long as it has some basis in the evidence. *Creager v. State*, 737 N.E.2d 771, 777 (Ind. Ct. App. 2000), *trans. denied*. It does not matter whether the evidence is weak or even inconsistent; however, the evidence at trial must provide some probative value to support providing the instruction. *Id.*; see also *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015).

[13] First, we observe that Rollins’s proposed instruction was not a complete statement of the law.² Rollins proposed instruction only advised the jury of the

² The trial court also rejected Rollins’s proposed instruction under the mistaken belief that Rollins was required to provide specific notice to the State of his defense prior to trial. As Rollins notes in his brief, by statute, a defendant is only required to give advance notice of insanity and alibi defenses. Appellant’s Br. at 12 (citing *Ind. Code §§ 35-36-2-1; 35-36-4-1*). Tellingly, the State does not respond to Rollins’s notice argument. Because the trial court properly rejected the instruction on other grounds, we do not address Rollins’s notice argument in this appeal.

circumstances under which a person may use reasonable force to protect himself. A defendant may raise self-defense to justify an otherwise criminal act, but he must present evidence that he (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of the imminent use of unlawful force.³ *Shoultz v. State*, 995 N.E.2d 647, 660 (Ind. Ct. App. 2013), *trans. denied*; see also Ind. Code § 35-41-3-2(c). Moreover, “a person is not justified in using force if . . . the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.” I.C. § 35-41-3-2(g)(3).

[14] Rollins’s instruction did not advise the jury when a person may not use force. Notably, as it is pertinent to this case, the instruction did not inform the jury that a person may not use force where he has willingly participated in a fight with another person or instigated the fight unless he withdraws from the fight.

[15] In any event, even if Rollins’s proposed instruction was a complete statement of law, the instruction was not supported by the evidence. There is no evidence that Rollins had a reasonable fear that McDonald would imminently use unlawful force against him. “The phrase ‘reasonably believes,’ as used in the Indiana self-defense statute, requires both subjective belief that force was

³ A defendant charged with using deadly force must establish that he had a reasonable fear of death or great bodily harm. *James v. State*, 96 N.E.3d 615, 618 (Ind. Ct. App. 2018), *trans. denied*.

necessary to prevent [imminent use of unlawful force], and that such actual belief was one that a reasonable person would have under the circumstances.” *Ault v. State*, 950 N.E.2d 326, 328-29 (Ind. Ct. App. 2011) (quoting *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007)), *trans. denied*; see also *Henson v. State*, 786 N.E.2d 274, 278 (Ind. 2003) (holding that the reasonableness of a defendant’s belief that he was entitled to act in self-defense must be supported by evidence that the alleged victim was imminently prepared to inflict bodily harm on the defendant).

[16] Rollins was safely secured in the cab of his truck when McDonald approached his truck and began banging on the cab’s door. McDonald was angry, but there was no evidence that he intended to inflict bodily harm on Rollins. Because Rollins ignored him, McDonald turned away from the cab door to walk back to his own truck. At that point, Rollins exited his truck cab. McDonald turned around to face Rollins, and Rollins pushed him. Rollins then hit McDonald twice and McDonald fell to the ground. Rollins admitted that he did not give McDonald a chance to hit him back. McDonald suffered severe facial fractures as a result of the battery. Those facts did not justify a self-defense instruction.

[17] The trial court also properly refused Rollins’s proposed self-defense instruction because the evidence established that he used unreasonable force against McDonald. See, e.g., *Boyer v. State*, 883 N.E.2d 158, 162 (Ind. Ct. App. 2008) (explaining that the “State can disprove the defendant was without fault by establishing that [h]e used more force than was reasonably necessary under the circumstances”). The force that Rollins used against McDonald, who is

significantly older than Rollins and had turned away from him, was out of proportion to any alleged threat McDonald posed to Rollins. Rollins pushed and twice struck McDonald, knocking McDonald to the ground. There is no evidence that McDonald physically or verbally threatened Rollins. Under these circumstances, the force that Rollins used, causing McDonald to suffer a fractured eye socket, was unreasonable.

- [18] Because Rollins’s proposed self-defense instruction was not a complete statement of the law and was not supported by the evidence, we conclude that the trial court did not abuse its discretion when it refused to tender the instruction to the jury.

II. Inappropriate Sentence

- [19] Rollins argues that his sentence is inappropriate pursuant to [Indiana Appellate Rule 7\(B\)](#). Under this rule, we may modify a sentence that we find is “inappropriate in light of the nature of the offense and the character of the offender.” [App. R. 7\(B\)](#). Making this determination “turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” [Cardwell v. State](#), 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under [Rule 7\(B\)](#), however, is reserved for “a rare and exceptional case.” [Livingston v. State](#), 113 N.E.3d 611, 612 (Ind. 2018) (*per curiam*).
- [20] When conducting this review, we generally defer to the sentence imposed by the trial court. [Conley v. State](#), 972 N.E.2d 864, 876 (Ind. 2012). Our role is to

“leaven the outliers,” not to achieve what may be perceived as the “correct” result. *Id.* Thus, deference to the court’s sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant’s character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[21] A person convicted of a Level 5 felony battery may be “imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years.” *Ind. Code § 35-50-2-6*. In this case, the trial court imposed the three-year advisory sentence but ordered Rollins to serve one year executed in Community Corrections and suspended two years to probation. When we consider whether the sentence imposed was inappropriate, we may consider all aspects of the penal consequences imposed. *See Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[22] Concerning the nature of the offense, Rollins pushed and hit McDonald causing McDonald to fall to the ground and suffer a significant injury to his eye socket. McDonald initiated the conflict between Rollins and himself, but he had turned to walk back to his truck when Rollins exited his truck cab and attacked McDonald. Rollins admitted that he did not give McDonald a chance to hit him back. The evidence presented at trial establishes that Rollins did not show restraint or a lack of brutality.

[23] On the other hand, Rollins demonstrated positive character traits by returning to the truck stop and cooperating with law enforcement. Rollins has no prior criminal history and served in the Army Reserves for three years. And the probation department concluded that Rollins was unlikely to commit another offense.

[24] After considering both the nature of the offense and the character of the offender, we conclude that Rollins's advisory three-year sentence is not inappropriate. Moreover, the trial court thoughtfully considered Rollins's character when it ordered him to serve one year of his three-year sentence in community corrections and suspended the remaining two years to probation.

Conclusion

[25] The trial court properly refused to tender Rollins's proposed self-defense instruction to the jury. And his three-year sentence, with one year served in community corrections and two years suspended to probation, is not inappropriate in light of the nature of the offense and the character of the offender.

[26] Affirmed.

Brown, J., and Molter, J., concur.