

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brian W. Avery,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 13, 2023

Court of Appeals Case No.
22A-CR-2238

Appeal from the St. Joseph
Superior Court

The Honorable Jeffrey L. Sanford,
Judge

Trial Court Cause No.
71D03-2103-F3-12

Memorandum Decision by Judge Robb
Judges Crone and Kenworthy concur.

Robb, Judge.

Case Summary and Issue

- [1] Following a bench trial, Brian W. Avery was convicted of aggravated battery, a Level 3 felony, and sentenced to three years executed in the Indiana Department of Correction (“DOC”). Avery appeals, raising one issue for our review, which we restate as whether the State presented sufficient evidence to disprove his self-defense claim. Concluding the State’s evidence was sufficient to disprove Avery’s claim of self-defense, we affirm.

Facts and Procedural History

- [2] In March 2021, Avery and Paul Sinka were next-door-neighbors – living in houses located in South Bend, Indiana. Sinka had lived in his house for thirty-four years. Avery moved into his house in November 2020. The backyards of their respective properties, as well as Sinka’s driveway and garage, could be accessed by an alley that ran behind their homes.
- [3] Avery and his son Brandon had been driving across Sinka’s driveway to access Avery’s backyard. On March 23, 2021, Sinka decided to “talk to . . . Avery and . . . Brandon about coming across [his] back drive to access their property.” Transcript of Evidence, Volume 2 at 47. Sinka exited his front door and walked around his house to the back of his property, into the alley, and onto his driveway. Sinka encountered Avery and Brandon standing in Avery’s yard, repairing a gate that was located near Sinka’s driveway. Sinka had brought his

cell phone with him to record the interaction, “in case something happened.”
Id. at 48.

[4] Sinka and Avery argued vehemently over the location of Sinka’s property line. Brandon and his girlfriend joined the argument. When Sinka bent over to point out a post that marked his property line, Brandon grabbed a wooden stick from Avery’s hand and hit Sinka with the stick. Sinka stumbled, and Avery told Brandon and the girlfriend to move away. Avery then told Sinka that he was going to “beat [his] a*s.” *Id.* at 78. Shortly thereafter, Sinka and Avery engaged in a fistfight in Sinka’s driveway. Brandon and his girlfriend ran toward Sinka and Avery and joined in the fight.¹

[5] Sinka was hit in his left eye, and his eye began to swell. While being repeatedly hit, Sinka put his head down, attempting to protect his face. He grabbed Avery by his hair, and, eventually, Sinka and Avery fell to the ground and began “rolling around on the cement.” *Id.* at 53. While Sinka was on the ground, Brandon and the girlfriend beat and stomped on Sinka. Avery bit the tip of Sinka’s left pinky finger completely off, causing Sinka to yell and experience excruciating pain.

¹ Audio and video recordings of the fight were entered into evidence. The recordings of the fight were captured by Sinka’s cell phone and also by Avery’s security camera that was aimed at Avery’s backyard, Sinka’s garage, and the alley. However, portions of the security camera footage of the fight were obscured by Sinka’s garage.

- [6] Sinka’s son Bryant, who lived with Sinka, was asleep in his room when the fight began. Bryant woke to the sound of yelling and decided to investigate. He exited the house through the back door and walked to the “back of the property” and “peeked” over the fence. *Id.* at 85. He saw his father on the ground being beaten by Avery, Brandon, and Brandon’s girlfriend. The girlfriend was stomping on Sinka’s chest, Avery was choking Sinka from behind, and Brandon was punching Sinka. Bryant climbed over the fence and intervened to break up the fight. He shoved the girlfriend away from Sinka, then separated his father and Avery. Avery, Brandon, and Brandon’s girlfriend left the scene of the fight and returned to Avery’s house.
- [7] The police were called, and Avery was arrested. As a result of the fight, Avery sustained scrapes, a bump on his head, and bruising to his eye and neck. Sinka was placed in a neck brace and transported to a local hospital by ambulance. Sinka was missing part of his left pinky finger, his nose was broken, his forehead was bleeding, and his eyes were swollen shut. Sinka’s left hand had to be kept in a protective cone for more than six weeks to allow his finger to heal.
- [8] On March 24, 2021, the State charged Avery with aggravated battery, a Level 3 felony. The State later added an additional count – battery resulting in serious bodily injury as a Level 5 felony.
- [9] On March 10, 2022, the parties filed a plea agreement, under which Avery agreed to plead guilty to the added count of Level 5 felony battery resulting in serious bodily injury. On March 14, the trial court conditionally accepted

Avery's plea. However, during the sentencing hearing held on April 21, Avery told the trial court he believed he had acted in self-defense during the fight with Sinka, and Avery orally moved to withdraw his guilty plea. The trial court then rejected Avery's plea and set the matter for a trial.

[10] On June 1, 2022, Avery waived his right to a jury trial. A bench trial was held on June 7 and 10, during which Avery claimed he acted in self-defense and testified that he was not the initial aggressor. At the conclusion of the trial, the court took the matter under advisement.

[11] On June 17, 2022, the trial court issued its written judgment, finding Avery guilty of aggravated battery, a Level 3 felony. The additional count of Level 5 felony battery resulting in serious bodily injury was dismissed.² At the conclusion of the sentencing hearing held on August 9, the trial court sentenced Avery to three years executed in the DOC. Avery now appeals. Additional facts will be provided as necessary.

² The parties and the trial court agreed that Avery could not be convicted on both the Level 3 and the Level 5 battery counts due to double jeopardy concerns.

Discussion and Decision

Sufficiency of the Evidence

A. Standard of Review

[12] Avery contends the State’s evidence was insufficient to disprove his self-defense claim. As our supreme court has made clear:

For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

Hall v. State, 177 N.E.3d 1183, 1191 (Ind. 2021).

B. Self-Defense

[13] Avery argues his actions were in self-defense and that the State failed to disprove his claim. He maintains that he was on his own property at the time the altercation between him and Sinka occurred, he was not the initial aggressor, and he did not use any deadly weapons during the fight.

[14] “Self-defense is recognized as a valid justification for an otherwise criminal act.” *Miller v. State*, 720 N.E.2d 696, 699 (Ind. 1999); *see generally* Ind. Code § 35-41-3-2. 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).

[15] Here, the State met its burden by presenting evidence that Avery participated willingly in the violence. The State's evidence showed that Avery argued with Sinka over the property lines; told Sinka that he was going to beat him up; then escalated the situation by physically fighting with Sinka, choking Sinka from behind, and eventually biting off the tip of Sinka's pinky finger. Avery could have disengaged from the fight. However, he continued to fight Sinka until Sinka's son intervened and separated the two men.

[16] Likewise, the State's evidence disproved that Avery was in reasonable fear of death or serious bodily injury when he fought with Sinka. Although Sinka did grab hold of Avery's hair, Avery quickly gained an advantage and began choking Sinka from behind. Also, Avery's son and the son's girlfriend joined in the fight, creating a three-on-one situation.

[17] Here, we find the State presented sufficient evidence to disprove Avery's self-defense claim. Avery's arguments on this point essentially invite this court to reweigh the evidence, which we will not do. *Wallace v. State*, 725 N.E.2d 837, 840 (Ind. 2000).

Conclusion

[18] We conclude the State presented sufficient evidence to disprove Avery's self-defense claim. The judgment of the trial court is affirmed.

[19] Affirmed.

Crone, J., and Kenworthy, J., concur.