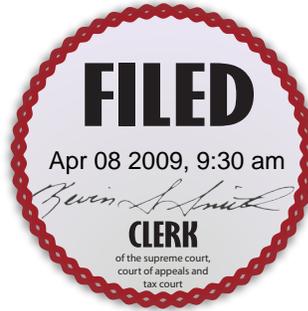


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DARRELL A. POPE, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A04-0809-CR-539

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Clark Rogers, Judge  
Cause No. 49G16-0806-FD-140170

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**April 8, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Darrell Pope appeals his conviction of Strangulation,<sup>1</sup> a class D felony. Pope presents the following restated issues for review:

1. Did Pope's actions constitute reasonable parental discipline?
2. Did the trial court abuse its discretion in permitting the State to ask the child victim leading questions?
3. Was the evidence sufficient to sustain the conviction?
4. Was the evidence sufficient to rebut Pope's claim of self-defense?

We affirm.

The facts favorable to the conviction are that Pope lived with Carla Cross and her fourteen-year-old son, V.C. On June 6, 2008, Pope turned off the television while V.C. was watching it and told V.C. he could not play his games. V.C. got up and left the room, but Pope followed V.C., shouting that it was his (Pope's) television. V.C. tried to go up the stairs, but Pope pushed him into a table. When V.C. attempted again to leave the room, Pope pushed him down. This time, V.C. hit Pope and the two began to fight. Eventually, Pope had V.C. pinned in the corner before a third person pulled him off of V.C. V.C. then went upstairs to his bedroom. V.C. came downstairs again five minutes later and Pope insulted V.C.'s father. V.C. reacted by striking Pope in the face. Pope grabbed V.C., threw him onto the couch, put both hands around V.C.'s neck and began to choke him, squeezing so hard that V.C. was unable to breathe. Someone pulled Pope off of V.C. and V.C.'s sister called police.

Police arrived several minutes later. They observed and photographed red marks and

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<sup>1</sup> Ind. Code Ann. § 35-42-2-9 (West, PREMISE through 2008 2nd Regular Sess.).

bruising on V.C.'s neck. Pope was charged with strangulation and battery, both as class D felonies, battery as a class A misdemeanor, and disorderly conduct as a class B misdemeanor. Following a bench trial, Pope was found guilty of strangulation, but not guilty of the remaining charges.

1.

Pope contends his conviction for strangulation should be reversed because he had legal authority to discipline V.C. Ind. Code Ann. § 35-41-3-1 (West, PREMISE through 2008 2nd Regular Sess.) provides, “[a] person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.” This statute has been interpreted to mean that a parent may engage in reasonable discipline even if such conduct would otherwise constitute battery. *See Dyson v. State*, 692 N.E.2d 1374 (Ind. Ct. App. 1998) (citing *Smith v. State*, 489 N.E.2d 140 (Ind. Ct. App. 1986), *trans. denied*). In order to qualify as a defense, the parent’s conduct must be reasonable and not cruel or excessive. *Smith v. State*, 489 N.E.2d 140.

Even if we were to conclude that Pope is entitled to the protection of the parental privilege statute, *see McReynolds v. State*, No. 82A01-0809-CR-432, \_\_\_ N.E.2d \_\_\_ (Ind. Ct. App, Mar. 4, 2009), we need not dwell long on this question. First, the facts favorable to the conviction reveal that this was not an instance of discipline. Even Pope characterizes his part in it as an act of self-defense. Thus, this was not arguably a case where a child was misbehaving and a person acting in loco parentis was attempting to correct or discipline the child. Rather, it can be characterized as nothing other than a fight. Because the privilege applies only to acts constituting discipline, it does not apply here. Second, and perhaps more

importantly, no plausible argument can be made that choking a child to the point that he cannot breathe could ever be characterized as *reasonable* discipline. *See Dyson v. State*, 692 N.E.2d 1374. Pope is not entitled to invoke the parental discipline privilege in this case.

2.

Pope contends the trial court abuse its discretion in permitting the State to ask V.C. leading questions upon direct examination. Indiana Evidence Rule 611(c) provides that leading questions should not be used on direct examination “except as may be necessary to develop the witness’s testimony.” Our Supreme Court has identified the questioning of child witnesses as fitting within this exception. *See King v. State*, 508 N.E.2d 1259 (Ind. 1987). The Court has explained: “Our case law has allowed leading questions on direct examination to develop the testimony of certain kinds of witnesses--*for example, children witnesses; young, inexperienced, and frightened witnesses; special education student witnesses; and weak-minded adult witnesses....*” *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000) (emphasis supplied). “The trial judge is best able to determine the capabilities of the witness and his decision to permit a certain manner of questioning will not be overturned absent a clear showing of prejudicial error.” *King v. State*, 508 N.E.2d at 1263.

During the direct examination of V.C, the following colloquy occurred:

[State]           What did he say about your dad?

[V.C.]            That he said he hadn’t been in my life and stuff.

Q                 Okay. And that upset you.

A                 (No audible response)

Q And what did you do after he made that comment about your dad?

A Then he (inaudible and crying)

*Transcript* at 12-13. At that point, the trial court asked V.C. if he would like to take a break, and V.C. responded that he would. The court called a brief recess. V.C.'s direct examination resumed after the recess and included the following:

Q Describe how he was choking you. Was he using one hand? Two hands?

A He used two hands. Then he used one.

Q Okay. And when he had two hands on you, where were his hands at?

A Right here.

Q Okay. And when he was ... was he squeezing?

A Yeah.

[Defense] Objection, Your Honor. That's a leading question.

[State] It's a yes or no. That's not a leading question.

[Court] Overruled.

Q Was he squeezing.

A Yeah.

Q I'm sorry.

A Yes.

Q Okay. And did that cause any pain to you?

A Yeah.

Q Were you able to breathe while he was squeezing?

[Defense] Objection, Your Honor. That's a leading question.

[State] Again, it's a yes or no.

[Court] Overruled.

*Id.* at 15-16. Pope contends the trial court erred in permitting the State to ask these leading questions.

We conclude that this situation fits squarely within one of the categories of permissible use of leading questions on direct examination identified by our Supreme Court in *Williams*. At the time he testified, V.C. was only fourteen years old. His fear and discomfort at trial was evident several minutes into his testimony when he lost his composure and began crying. He requested a recess, presumably so he could regain his composure. As the Supreme Court noted, leading questions on direct examination are permitted “to develop the testimony of certain kinds of witnesses--for example, children witnesses; young, inexperienced, and frightened witnesses[.]” *King v. State*, 508 N.E.2d at 1263. V.C. is young and inexperienced, and he was obviously frightened while testifying. Therefore, the trial court did not err in permitting the State to ask the two leading questions to which Pope objected. *See King v. State*, 508 N.E.2d 1259.

3.

Pope contends the evidence was not sufficient to sustain the conviction. The offense of strangulation is defined as follows:

A person who, in a rude, angry, or insolent manner, knowingly or intentionally

...:

(1) applies pressure to the throat or neck of another person; or

(2) obstructs the nose or mouth of the another person;

in a manner that impedes the normal breathing or the blood circulation of the other person commits strangulation, a Class D felony.

I.C. § 35-42-2-9(b). With these elements in mind, Pope contends “there was no testimony that Mr. Pope knew he was impeding [V.C.]’s breathing or that he intended that to happen.” *Appellant’s Brief* at 11. We interpret this as a claim that the State did not sufficiently prove that Pope knowingly or intentionally impeded V.C.’s ability to breathe.

Intent is a mental function that, unless admitted by the defendant, must be determined from considering the defendant’s conduct and the natural and usual consequences thereof. *Gaerte v. State*, 808 N.E.2d 164 (Ind. Ct. App. 2004), *trans. denied*. “The trier of fact must resort to reasonable inferences based on an examination of the surrounding circumstances to determine whether, from the person’s conduct and the natural consequences of what might be expected from that conduct, there is a showing or inference of the intent to commit that conduct.” *Id.* at 166.

We must examine the record to determine whether sufficient evidence supports an inference that Pope intended to “impede[] [V.C.’s] normal breathing or [] blood circulation” when he placed his hands around V.C.’s neck. I.C. § 35-42-2-9(b)(2). Our standard of review for challenges to the sufficiency of evidence is well settled.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder’s exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness

credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

*Gleaves v. State*, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

V.C. testified that Pope placed both of his hands around V.C.’s throat and “started choking” V.C. *Transcript* at 15. V.C.’s claim that Pope “choked” him implies that Pope went beyond merely placing his hands on V.C.’s neck. It implies that once his hands were around V.C.’s neck, Pope applied force sufficient to interfere with V.C.’s normal breathing. *See Merriam Webster’s Online Dictionary*, available at [http://www.merriam-webster.com/dictionary/choke\[1\]](http://www.merriam-webster.com/dictionary/choke[1]) (last visited on March 9, 2009) (“choke” is defined as “to check or block normal breathing of by compressing or obstructing the trachea or by poisoning or adulterating available air”). Indeed, V.C. testified that while Pope was squeezing his neck, he (V.C.) could not breathe. Moreover, photos taken of V.C. by police shortly after the incident show that V.C.’s neck still bore red marks where Pope placed his hands during the incident.

Considering Pope’s conduct and the natural and usual consequences thereof, the evidence was sufficient to permit a reasonable inference that Pope knowingly or intentionally impeded V.C.’s normal breathing when he placed his hands around V.C.’s throat and squeezed. Thus, the evidence was sufficient to support the conviction.

4.

Pope contends the evidence was not sufficient to rebut his claim of self-defense. We

review a challenge to the sufficiency of the evidence to rebut a claim of self-defense using the same standard as that used for any claim of insufficient evidence. *Pinkston v. State*, 821 N.E.2d 830 (Ind. Ct. App. 2004), *trans. denied*. In so doing, we neither reweigh the evidence nor judge the witnesses' credibility. *Id.* The bench trial will not be disturbed if there is sufficient evidence of probative value to support it. *Id.*

A valid claim of self-defense is a legal justification for an otherwise criminal act. *Id.*; *see also* I.C. § 35-41-3-2(a) (West, PREMISE through 2008 2nd Regular Sess.). To prevail on such a claim, the defendant must show 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 death or great bodily harm. *Pinkston v. State*, 821 N.E.2d 830. The amount of force that an individual may use to protect himself must be proportionate to the urgency of the situation. *Id.* When a person uses more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished. *Id.* When a claim of self-defense is raised and supported by the evidence, the State bears the burden of negating at least one of the necessary elements. *Id.* The State may satisfy its burden by either rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief. *Id.*

The evidence favorable to the conviction is that the incident began when Pope angrily told V.C. he could not play a video game. As V.C. tried to withdraw from the encounter, Pope followed, arguing with V.C. When V.C. tried to go upstairs, Pope prevented him from doing so and twice pushed V.C. down. After the second time, V.C. shoved and then "hit" Pope, and a fight ensued. *Transcript* at 9. When that fight ended V.C. went upstairs. When

V.C. came downstairs five minutes later, Pope made a negative comment to V.C. about V.C.'s father and another fight started, with V.C. throwing the first punch. During this part of the altercation, Pope choked V.C., which resulted in the filing of the charges leading to the instant conviction.

On these facts, the State established that Pope was not blameless with regard to instigating the incident. According to V.C., Pope was the one who initiated physical contact in the first half of this altercation (i.e., that which occurred before V.C. went upstairs for five minutes). Then, when V.C. came downstairs, Pope made a derogatory comment about V.C.'s father, and the physical confrontation flared up again. Thus, the State negated one element of the defense, i.e., that Pope did not provoke, instigate, or participate willingly in the violence, and thereby successfully rebutted Pope's claim of self-defense.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.