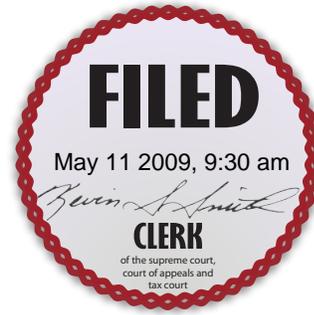


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**IN THE
COURT OF APPEALS OF INDIANA**

MATHEW EKOLA,)
)
 Appellant-Defendant,)
)
 vs.) No. 79A02-0806-CR-559
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0405-FC-23

May 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Mathew Ekola was convicted of two counts of Battery¹ as class A misdemeanors, Public Intoxication² as a class B misdemeanor, and Residential Entry³ as a class D felony and determined to be a Habitual Offender.⁴ The trial court subsequently sentenced Ekola to an aggregate term of ten years imprisonment. On appeal, Ekola presents three issues for our review, which we restate as the following four:

1. Did the trial court abuse its discretion in admitting hearsay evidence over his objection during the habitual offender phase of the trial?
2. Did the trial court abuse its discretion in refusing to instruct the jury on the lesser included offense of criminal trespass?
3. Did the trial court violate the limitation found in I.C. § 35-50-1-2(c) (West, Premise through 2008 2nd Regular Sess.) in sentencing him to consecutive terms?
4. Is the sentence imposed by the trial court inappropriate in light of the Ekola's character and the nature of the offenses?

We affirm in part, reverse in part, and remand.

The facts favorable to the convictions follow. Ekola's family had a contemptuous relationship with the Hayenga family. In the late evening⁵ of April 8, 2004, Cortney Hayenga was watching television at his brother's apartment when Ekola and his son arrived and began pounding on the door. Cortney did not answer the door but instead called the police. Officer Aaron Lorton responded to the call and advised Cortney that he would attempt to locate

¹ Ind. Code Ann. § 35-42-2-1 (West, Premise through 2008 2nd Regular Sess.).

² Ind. Code Ann. § 7.1-5-1-3 (West, Premise through 2008 2nd Regular Sess.).

³ Ind. Code Ann. § 35-43-2-1.5 (West, Premise through 2008 2nd Regular Sess.).

⁴ Ind. Code 35-50-2-8 (West, Premise through 2008 2nd Regular Sess.).

⁵ Sometime between 9:30 p.m. and 10:15 p.m.

Ekola. After Officer Lorton left, Cortney called his father, Michael Hayenga. Michael, who had one leg in a cast, drove to the apartment to stay with Cortney.

Sometime after midnight, Ekola and his son returned and knocked on the door. Cortney and Michael told them they could not enter, and then Ekola forced the door open and entered the apartment, followed by his son. As he entered the apartment, Ekola punched Michael in the face several times and kicked his cast multiple times. Ekola then grabbed Cortney and struck him in the face and head. Michael suffered multiple injuries as a result of the attack, including orbital and maxillary fractures.

Officer Lorton returned to the scene of the fight and noticed that the front door to the apartment, which was in normal condition during his first visit, was now damaged and appeared to have been kicked open. Officer Lorton ordered the arrest of Ekola. Shortly thereafter, Ekola was located and officers initiated a traffic stop and placed him under arrest. Officer Lorton observed that Ekola smelled of alcohol, could not maintain his balance, and had bloodshot eyes.

On May 13, 2004, the State charge Ekola with two counts of battery as class C felonies, public intoxication, a class B misdemeanor, and residential entry, a class D felony. On July 6, 2004, the State alleged Ekola to be a habitual offender.⁶ Prior to trial, the State moved to reduce one of the battery charges to a class A misdemeanor, but left the second charge of class C felony battery unchanged. A two-day jury trial commenced on August 3,

⁶ The habitual offender information alleged that Ekola had been arrested and convicted of at least four prior, unrelated felony offenses.

2005. Ekola failed to appear, so he was tried *in absentia*. At the conclusion of the evidence, the jury found Ekola guilty on all counts, but found that he had committed only a class A misdemeanor battery and not a class C felony battery as charged. Following the second phase of the trial, the jury found Ekola to be a habitual offender. Because Ekola could not be located, sentencing in the matter was deferred. On April 11, 2008, the trial court was advised that Ekola was incarcerated in California. Thereafter, on May 22, 2008, the trial court held a sentencing hearing and sentenced Ekola to one year for each battery conviction, six months for the public intoxication conviction, and three years for the residential entry conviction and ordered the sentences served consecutively. The trial court enhanced the three-year sentence for residential entry by four and one-half years for the habitual offender determination, for a total aggregate sentence of ten years imprisonment. Ekola now appeals.

1.

Ekola contends that the jury's finding that he was a habitual offender should be reversed because the trial court erred in admitting over his objection hearsay evidence that was "horribly prejudicial to Ekola." *Appellant's Brief* At 10. Specifically, he challenges the admission of State's Exhibit 22, which is a seventy-page exhibit containing police reports and witness statements relating Ekola's prior felony conviction for dealing in a sawed-off shotgun. The trial court sustained Ekola's objection in part and overruled it in part, admitting Exhibit 22 for the limited purpose of showing Ekola was arrested for the sawed-off shotgun offense on a particular date.

Because the admission of evidence lies within the sound discretion of the trial court, we review the admission of evidence only for abuse of that discretion. *State v. Lloyd*, 800 N.E.2d 196 (Ind. Ct. App. 2003). Such an abuse occurs when the “decision is clearly against the logic and effect of the facts and circumstances before the trial court.” *Id.* at 198. Errors in the admission of evidence, including hearsay, are to be disregarded as harmless unless they affect the substantial rights of a party. Ind. Trial Rule 61; *Robertson v. State*, 877 N.E.2d 507 (Ind. Ct. App. 2007). In determining whether error in the introduction of evidence affected a defendant’s substantial rights, we must assess the probable impact of the improperly admitted evidence upon the jury. *Robertson v. State*, 877 N.E.2d 507. When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction or where the offending evidence is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and we deem the error harmless. *Id.*

We agree with the State that, to the extent the admission of Exhibit 22 was error, it was harmless. We first note that the trial court sustained Ekola’s objection in part, admitting Exhibit 22 for the sole purpose of establishing the date that Ekola committed the crime of dealing in a sawed-off shotgun. The trial court advised the jury that Exhibit 22 was not to be considered for the truth of any other matter contained in the documents that comprised Exhibit 22.

Moreover, the State presented evidence of multiple prior, unrelated felony offenses, to which Ekola did not object. Indeed, several combinations of the prior, unrelated felony

offenses established by the State are sufficient to sustain the jury's habitual offender determination. In light of the ample evidence that supported the jury's finding that Ekola had in fact accumulated two prior, unrelated felonies, any error in the admission of Exhibit 22 can only be viewed as harmless. *See Beeks v. State*, 839 N.E.2d 1271 (Ind. Ct. App. 2005), *trans. denied*.

2.

Ekola argues the trial court abused its discretion in refusing to instruct the jury on criminal trespass as a lesser included offense of residential entry. Our standard of review is as follows:

When called upon by a party to instruct a jury on a lesser included offense of the crime charged, a trial court must perform a three-step analysis. First, it must compare the statute defining the crime charged with the statute defining the alleged lesser included offense to determine if the alleged lesser included offense is inherently included in the crime charged. *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995). Second, if a trial court determines that an alleged lesser included offense is not inherently included in the crime charged under step one, then it must determine if the alleged lesser included offense is factually included in the crime charged. *Id.* at 567. If the alleged lesser included offense is neither inherently nor factually included in the crime charged, the trial court should not give an instruction on the alleged lesser included offense. *Id.* Third, if a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties to determine if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater. *Id.* It is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense if there is such an evidentiary dispute. *Id.* "If the evidence does not so support the giving of a requested instruction on an inherently or factually included lesser offense, then a trial court should not give the requested instruction." *Id.*

Higgins v. State, 783 N.E.2d 1180, 1187 (Ind. Ct. App. 2003), *trans. denied*.

With regard to step one, we have before held that criminal trespass is not an inherently lesser included offense of residential entry. *Id.* We therefore turn to step two to determine whether, under the facts of this case, criminal trespass was a factually included lesser offense. An offense is factually included if the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense. *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). In *J.M. v. State*, 727 N.E.2d 703, 705 (Ind. 2000), our Supreme Court held that a burglary charge alleging that the defendant “did knowingly or intentionally ‘break and enter’ the residence of another,” sufficiently alleged facts constituting criminal trespass, thus making criminal trespass a factually included lesser offense of residential entry. *See also Higgins v. State*, 783 N.E.2d at 1189 (noting that *J.M.* “implicitly overruled” prior cases holding the contrary and applying the holding of *J.M.* to conclude that a charge of residential entry alleging Higgins did knowingly “break and enter” sufficiently alleged facts constituting criminal trespass). Likewise, here, the State alleged that Ekola did “knowingly or intentionally *break and enter* the dwelling . . . of another person” *Appendix* at 20. Following *J.M.* and *Higgins*, we therefore conclude that the State sufficiently alleged facts constituting criminal trespass and thus, criminal trespass is a factually included offense of the charge of residential entry.⁷

We now turn to step three, the determination of whether there is a serious evidentiary

⁷ We decline the State’s invitation to reconsider our Supreme Court’s holding in *J.M. v. State*, 727 N.E.2d 703.

dispute regarding the distinction between residential entry and criminal trespass upon which Ekola focuses. In this regard, Ekola argues that there is a serious evidentiary dispute about whether Ekola broke and entered the door or merely entered after the door was broken in. To establish that a breaking has occurred, the State need only introduce evidence that even the slightest force was used to gain unauthorized entry. *Payne v. State*, 777 N.E.2d 63 (Ind. Ct. App. 2002).

Here, the evidence demonstrated that the door through which Ekola entered the apartment was substantially damaged and that the damage was consistent with forced entry. In fact, Officer Lorton testified that the door was not damaged when he stopped by earlier in the evening, just hours before the attack. Further, both Cortney and Michael testified that when Ekola came and knocked on the door, they informed him that he could not enter the apartment, but moments later, the door was forced open and Ekola entered, followed by his son. There is no evidence disputing the inference in this testimony that the door was closed and that Ekola had to at least open the door. Ekola presented no evidence tending to contradict Cortney and Michael's account of what occurred. Ekola's son's testimony that he was intoxicated at the time of the attack and could not recall how his father gained entry does not create a serious evidentiary dispute in this regard. Finding no serious evidentiary dispute on the element of breaking, we conclude that the trial court properly refused to give Ekola's requested criminal trespass instruction.

3.

Ekola argues that the trial court erred in sentencing him to consecutive terms totaling five and one-half years for his one felony conviction and three misdemeanor convictions because he claims that all of his convictions arise out of a single episode of criminal conduct.

Before addressing the issue of whether Ekola's convictions arise out of a single episode of criminal conduct, we note the State's argument that I.C. § 35-50-1-2(c) is inapplicable as a limitation on Ekola's sentences for one felony offense and three misdemeanor offenses. That statute provides, in pertinent part, as follows:

[E]xcept for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for *felony convictions* arising out of an episode of criminal conduct shall not exceed the advisory sentence for a *felony* which is one (1) class of felony higher than the most serious of the *felonies* for which the person has been convicted.

I.C. § 35-50-1-2(c) (emphasis supplied). The State maintains that under the plain reading of the statute, the sentencing limitation applies only to consecutive sentencing for felony offenses.⁸ The State acknowledges that this court has previously held that, given the ameliorative nature of the statute, the consecutive sentencing limitation set forth in I.C. § 35-50-1-2(c) applies to instances in which a sentence for a misdemeanor offense is ordered consecutive to a felony sentence and the result is a total sentence that exceeds the statutory limitation found in I.C. § 35-50-1-2(c). *See Purdy v. State*, 727 N.E.2d 1091 (Ind. Ct. App. 2000), *trans. denied*; compare *Dunn v. State*, 900 N.E.2d 1291 (Ind. Ct. App. 2009) (holding

⁸ The State does not dispute that Ekola's convictions were not for crimes of violence.

sentencing cap for offenses that comprise a single episode of criminal conduct does not apply where a defendant is convicted of only misdemeanor offenses). This court has continued to adhere to the *Purdy* court's analysis. See, e.g., *Deshazier v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007), *trans. denied*. Although the State makes some valid arguments in support of its position, we decline the State's invitation to reexamine *Purdy*.

We now turn to the issue of whether Ekola's convictions arise out of a single episode of criminal conduct. In determining whether multiple offenses constitute an episode of criminal conduct, the focus is on the timing of the offenses and the simultaneous and contemporaneous nature, if any, of the crimes. *Reed v. State*, 856 N.E.2d 1189 (Ind. 2006). "[A]dditional guidance on the question" can be obtained by considering "whether 'the alleged conduct was so closely related in time, place, and circumstance that a complete account of one charge cannot be related without referring to the details of the other charge.'" *Id.* at 1200 (quoting *O'Connell v. State*, 742 N.E.2d 943, 950-51 (Ind. 2001)).

Here, clearly the residential entry and battery convictions arise out of a single episode of criminal conduct. Ekola broke and entered the residence and immediately hit Michael in the face and continued to batter him. Ekola then turned on Cortney, hitting him about his head. The batteries were committed as a direct result of Ekola's entry into the apartment. Clearly, the offenses were closely related in time, place, and circumstance. See *Ballard v. State*, 715 N.E.2d 1276 (Ind. Ct. App. 1999). The public intoxication conviction, however, does not arise out of that same episode of criminal conduct, but rather occurred after Ekola was stopped a short time later on a public roadway. Thus, under the consecutive sentencing

limitation set forth in I.C. § 35-50-1-2, the maximum aggregate sentence the trial court could impose for the residential entry and battery convictions could not exceed four years (i.e., the presumptive sentence for a class C felony).

Here, the trial court sentenced Ekola to the maximum term of three years for the class D felony residential entry conviction and to one year terms for each class A misdemeanor conviction, for an aggregate sentence of five years. Given our conclusion that the trial court was limited, in part, in its authority to impose consecutive sentences, Ekola's sentence must be revised. In light of the fact that the trial court imposed the maximum sentence for the class D felony conviction and enhanced that sentence by the maximum of four and one-half years, thereby imposing the maximum sentence (without regard to the limitation of I.C. § 35-50-1-2), we are confident the trial court would have imposed the maximum sentence statutorily permissible. Therefore, to bring Ekola's consecutive sentences for his residential entry and battery convictions under the statutory cap of four years, we reduce the three-year sentence on the class D felony conviction to two years. The one-year sentences on each battery conviction are to be served consecutive thereto, as well as the 180-day sentence for the class B misdemeanor conviction which remains unaffected. Taking into account the habitual offender enhancement of four and one-half years, Ekola's total aggregate sentence is therefore reduced to nine years.

4.

Ekola contends that his sentence is inappropriate in light of his character and the nature of the offense. We have the constitutional authority to revise a sentence if, after

consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Indiana Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Moreover, we observe that the defendant bears the burden of persuading this court that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

With regard to the nature of the offense, we observe that Ekola forcefully entered an apartment after being denied entry and, without provocation, immediately began attacking the two individuals inside. Michael, whose entire leg was in a cast, was punched in the face with such force that he suffered orbital and maxillary fractures. After Michael fell to the couch, Ekola continued to hit and kick him. Ekola then turned to Cortney and struck him in the face and about his head before fleeing. When Ekola was located, he was intoxicated. The nature of the offenses is not deserving of a lesser sentence.

With regard to the character of the offender, Ekola's criminal history speaks volumes. According to the pre-sentence investigation report, Ekola has accumulated nearly twenty criminal convictions, including prior convictions for residential entry and public intoxication. Ekola has had eleven petitions to revoke probation filed against him, with three being found true. In 1994, Ekola was determined to be a habitual substance offender. Ekola does not dispute his prior criminal history, but contends that most of them are alcohol-related

misdemeanor offenses. Ekola also asks this court to consider that he has attended multiple alcohol treatment programs over the course of his life, as well as obtained his GED and demonstrated a substantial work history by maintaining his own business. We find Ekola's character evidence to be overshadowed by his criminal history, which demonstrates Ekola's complete disregard for the law. Ekola's attempts to seek alcohol treatment in the past and his other asserted positive character traits did not deter his behavior on yet another occasion when Ekola put himself above the law. In light of the nature of the offense and the character of the offender, the sentence as revised by this court, which we find to be in line with the trial court's assessment of the aggravating and mitigating circumstances, is not inappropriate.

Judgment affirmed in part, reversed in part, and remanded for correction of sentence in accordance with this decision.

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