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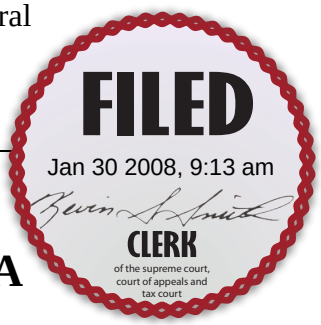

IN THE COURT OF APPEALS OF INDIANA

JEFFREY A. BROOKS,
Appellant-Defendant ,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 44A03-0707-CR-305

APPEAL FROM THE LAGRANGE SUPERIOR COURT
The Honorable George E. Brown, Judge
Cause No. 44D01-0504-MR-00001

January 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jeffrey A. Brooks ("Brooks") was convicted in Lagrange Superior Court of Class A felony attempted voluntary manslaughter, Class C felony intimidation, Class D felony resisting law enforcement, and Class D felony criminal recklessness and sentenced to serve an aggregate sentence of thirty years. Brooks appeals and presents the following three issues:

I. Whether there was sufficient evidence to support his conviction;

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

III. Whether his Class D felony conviction for resisting law enforcement is barred by double jeopardy.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Facts and Procedural History

On March 28, 2005, Brooks began arguing with his girlfriend, Mary Ramer ("Ramer") and her son, Rueben Long ("Long"). During this argument, Brooks fought with Long. Long contacted the police. The police arrived and entered the house with Ramer's permission.

Brooks became angry and picked up a knife from the kitchen and moved towards one of the responding police officers, Officer Tracy Harker ("Officer Harker"). Officer Harker drew his weapon and ordered Brooks to put the knife down. Officer Harker then sprayed Brooks in the face with chemical spray. Brooks put the knife down and sat at the kitchen table. Officer Harker holstered his weapon. Officer Michael Sprunger ("Officer Sprunger") entered the kitchen and Brooks stood up. Officer Harker grabbed Brooks's

right arm, and Officer Sprunger grabbed his left arm. The officers struggled with Brooks. During the struggle, Brooks drew Officer Harker's sidearm and held the gun to Officer Sprunger's abdomen. Brooks's finger was on the trigger guard. Officer Sprunger took the gun out of Brooks's hand. Later examination showed that the gun was in working order with nondefective ammunition. Brooks was subdued and arrested.

On March 31, 2005, the State charged Brooks with two counts of intimidation, three counts of battery, resisting law enforcement, and theft under cause number 44D01-0503-FC-4. On April 15, 2005, the State also charged Brooks with attempted murder and attempted aggravated battery under cause number 44D01-0504-MR-1. The two causes were later consolidated. The State subsequently added charges for attempted voluntary manslaughter, battery, and criminal recklessness.

On December 20, 2006, the trial court granted State's motion to dismiss all counts except attempted voluntary manslaughter, attempted aggravated battery, intimidation, resisting law enforcement and criminal recklessness. The jury trial began that day. On December 21, 2006, the jury found Brooks guilty as charged, and the trial court merged the attempted battery count into the attempted voluntary manslaughter count. The trial court sentenced Brooks to thirty years for the Class A felony attempted voluntary manslaughter conviction; four years for the Class C felony intimidation conviction; one and one half years for the Class D felony resisting law enforcement conviction; and one and one half years on Class D felony criminal recklessness. These sentences were to be served concurrently. Brooks now appeals. Additional facts will be provided as necessary.

I. Insufficient Evidence

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132,1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Brooks argues that the mere pointing of a gun does not constitute attempted murder. While Brooks specifically argues that the pointing of a gun is not an attempt, it appears that his real argument is that he lacked the necessary intent to commit voluntary manslaughter.[1]

Under Indiana Code section 35-41-5-1(a) (2004), "[a] person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime." (emphasis added). Indiana Code section 35-42-1-3(a) (2004) states that a person who commits voluntary manslaughter knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon. Ind. Code § 35-42-1-3(a)(1) (2004).

To support a conviction for attempted voluntary manslaughter, the evidence at trial must show that Brooks intentionally or knowingly attempted to kill Officer Harker while

[1] Brooks's counsel's over-reliance on block quotes makes our review of this issue difficult. Effective appellate advocacy requires more than mere recitation of case law and quotes from the record.

acting in sudden heat. As noted in Isom v. State, 589 N.E.2d 245, 247 (Ind. Ct. App. 1992), trans. denied, "[I]ntent is a mental function; therefore absent an admission, the trier of fact must resort to reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences thereof, a showing or inference of intent to commit that conduct exists."

The record shows that, while Brooks did not explicitly state his intent to kill Officer Sprunger, the evidence and facts admitted at trial would allow the jury to reasonably infer that intent. Specifically, during a struggle with two officers, Brooks took Officer Harker's sidearm and shoved it into Officer Sprunger's abdomen. At trial, Officer Sprunger testified that Brooks had his finger on the trigger guard and his knuckles were white. Tr. p. 71. Additionally, Officer Harker testified that Brooks had a firm grip on the gun as if he was going to fire it. Tr. p. 51. From this evidence, the jury could reasonably determine that Brooks had the necessary intent to commit voluntary manslaughter despite the lack of a fired weapon. Under the facts and circumstances presented, we conclude that a reasonable inference arose that Brooks intended to kill Officer Sprunger and that the State presented sufficient evidence to support the conviction for attempted involuntary manslaughter.

II. Inappropriate Sentence

Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind.

Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007). Additionally, "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Id. at 490.

Brooks essentially asserts that his presumptive thirty-year sentence[2] is inappropriate in light of his character and the nature of the offense. Brooks argues that his lack of criminal history should have been given greater weight than that given by the trial court. While his lack of criminal history may weigh slightly in his favor, we must also look to the nature of the offense. Brooks was convicted of a number of crimes that took place within a short period of time and involved a number of victims. Brooks attacked Long with a knife and injured him, threatened the officers with a knife, struggled with the officers, and during that struggle, Brooks took Officer Harker's weapon and pushed it into Officer Sprunger's abdomen with his finger on the trigger guard. Accordingly, we conclude that Brooks's thirty-year sentence is not inappropriate based on the nature of the offense and the character of the offender.

III. Double Jeopardy

Brooks and the State apparently agree that Brooks's convictions for Class A felony attempted voluntary manslaughter and Class D felony resisting law enforcement violated Brooks's double jeopardy protections under Article 1, Section 14 of the Indiana Constitution. We agree that Brooks's use of a gun formed the basis for both charges and

[2] In 2005, our General Assembly amended the sentencing statutes to provide for advisory rather than presumptive sentences. Because Brooks committed these offenses prior to the enactment of those new statutes, we apply the prior version. See Anglemyer, 868 N.E.2d at 491, n. 9; Ind. Code § 35-50-2-6 (2004 & Supp. 2006).

violated Brooks's double jeopardy protections. See, e.g. Logan v. State, 729 N.E.2d 125, 137 (Ind. 2000).

When two convictions contravene double jeopardy principles, we may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. See, e.g., Campbell v. State, 622 N.E.2d 495, 500 (Ind. 1993) (affirming reduction of class C felony battery to class B misdemeanor battery to avoid double jeopardy). If the conviction cannot be reduced to eliminate the violation, one of the convictions must be vacated. In the interest of efficient judicial administration, the trial court need not undertake a full sentencing reevaluation, but rather we will make this determination, being mindful of the penal consequences that the trial court found appropriate. Richardson v. State, 717 N.E.2d 32, 55 (Ind. 1999).

In the present case, the crime of resisting law enforcement exists as a Class A misdemeanor, a form less serious than the Class D felony, for which the defendant was convicted. Indiana Code section 35-44-3-3 (2004) states in relevant part:

> (a)A person who knowingly or intentionally:
> (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;
> * * *
> commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).
> (b) The offense under subsection (a) is a:
> (1) Class D felony if:
> * * *
> (B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person[.]

The use of a weapon increased what would have been Class A misdemeanor resisting law enforcement to Class D felony resisting law enforcement. If the use of a weapon is not taken into account, Brooks could still be convicted of resisting law enforcement because that crime was factually distinct from the attempted voluntary manslaughter based on his actions before he obtained the firearm. Therefore, we reduce the Class D felony to the Class A misdemeanor and remand to the trial court to enter sentence in conformity with this decision.

Conclusion

Brooks's conviction for Class A felony attempted voluntary manslaughter is supported by sufficient evidence and his thirty-year sentence is not inappropriate. Brooks's conviction for Class D felony resisting law enforcement shall be reduced to a Class A misdemeanor resisting law enforcement and we remand to the trial court for proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

FRIEDLANDER, J., and ROBB, J., concur.