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**IN THE
COURT OF APPEALS OF INDIANA**

GARY M. KINCADE,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-1009-CR-978
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard E. Sallee, Senior Judge
Cause No. 49F10-1001-CM-6676

April 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Gary M. Kincade (“Kincade”) appeals from his conviction for Battery, as a Class A misdemeanor,¹ raising for our review the single issue of whether the State presented sufficient evidence to rebut his claim of defense of another.

We affirm.

Facts and Procedural History

Lyons Truck and Trailer (“Lyons Truck”) was owned by a pair of brothers, Michael Lyons (“Michael”) and Jimmie Keith Lyons (“Jimmie”). On January 27, 2010, Kincade, his father, Gary D. Kincade (“Gary”), and Ed Coultas (“Ed”), a friend of Gary’s, went to Lyons Truck to check on modifications Gary had ordered performed upon a semi-trailer Gary had purchased from the business. Gary was extremely dissatisfied with the work Lyons Truck performed on the trailer and, leaving Kincade and Ed in Ed’s truck, entered Lyons Truck to register his dissatisfaction.

Once inside, Gary was “screaming at the top of his lungs” about his dissatisfaction with the work. Michael and Jimmie each became involved in the altercation. (Tr. 33.) Gary left and re-entered the business at least twice, and Michael eventually instructed him to leave.

At some point, Gary told Michael that he would “whip [Michael’s] ass” and “invited [Michael] outside.” (Tr. 26.) The brothers attempted to “shuffle” Gary out of the business (Tr. 29), with Jimmie eventually standing chest-to-chest with Gary; Michael followed the pair outside.

¹ Ind. Code § 35-42-2-1.

As Michael came out the front door of Lyons Truck, with Michael only two or three feet from Gary, Kincade emerged from the passenger side of Ed's truck and threw a large metal tape measure at Michael, striking Michael on the right temple near his eye. Not knowing that Kincade had thrown the tape measure, Michael pinned Gary to a nearby van, striking him numerous times.

Kincade was charged with Battery, Disorderly Conduct, as a Class B misdemeanor, and Criminal Trespass, as a Class A misdemeanor. A bench trial was conducted on July 23, 2010, at which the Criminal Trespass charge was dismissed upon Kincade's motion pursuant to Trial Rule 41(B). At the conclusion of the trial, the trial court found Kincade not guilty of Disorderly Conduct, but found him guilty of Battery.

On August 17, 2010, the trial court entered a judgment of conviction against Kincade for Battery. The trial court sentenced Kincade to one year of imprisonment, with sixty days executed and the remainder suspended to probation, entered a no contact order, and ordered restitution for medical expenses from injuries Michael sustained after Kincade's attack.

This appeal followed.

Discussion and Decision

On appeal, Kincade concedes the battery upon Michael. He instead contends that there was insufficient evidence to disprove his claim of defense of others—namely, his father Gary—beyond a reasonable doubt.

This court reviews a challenge to sufficiency of the evidence to rebut a self-defense claim under the same standard as any sufficiency of the evidence claim. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999). That is, the verdict will not be disturbed if there is sufficient evidence of probative value to

support the conclusion of the trier of fact. Id. Stated differently, a reviewing court will reverse a conviction where the defendant claimed self-defense only if no reasonable person could say the State disproved self-defense beyond a reasonable doubt. Taylor v. State, 710 N.E.2d 921, 924 (Ind. 1999). In conducting this review, we neither reweigh evidence nor judge witness credibility. Sanders, 704 N.E.2d at 123.

Boyer v. State, 883 N.E.2d 158, 162 (Ind. Ct. App. 2008).

Defense of others as an affirmative defense to battery is established by the Indiana Code. “A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force.” Ind. Code § 35-41-3-2(a).

To support a claim of self-defense, a defendant must have acted without fault, been in a place where he had a right to be, and been in reasonable fear or apprehension of bodily harm. Brewer v. State, 646 N.E.2d 1382, 1386 (Ind. 1995). The defendant’s belief . . . must be reasonable and in good faith, and his “reaction to that belief must be reasonable based upon the surrounding circumstances under which the events have occurred.” Geralds v. State, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995).

White v. State, 699 N.E.2d 630, 635 (Ind. 1998).

Here, Kincade contends that his reaction—throwing the tape measure—was reasonable, that he had a right to be at Lyons Truck, and that “the State failed to prove that he instigated the altercation” (Appellant’s Br. 10), that is, that he acted without fault. Yet there is sufficient evidence in the record, particularly in light of the trial court’s express statement that it found Kincade and the other defense witnesses not to be credible, to support the conviction on the basis that it was unreasonable for Kincade to believe that his father required forcible protection from the imminent use of lawful force.

The trial court found that “throwing that tape measure goes well beyond self defense.” (Tr. 121.) Jimmie testified that though both Michael and Gary were yelling at each other, Michael was standing two or three feet away from Gary, and both brothers testified that they had neither landed nor attempted to land any blows upon Gary when Kincade threw the tape measure. Michael further testified that he had not touched Gary until after Kincade threw the tape measure, after which Gary ran and grabbed Michael by the shirt. In light of the trial court’s determinations of credibility—concluding that “somebody is lying” immediately before finding Kincade guilty (Tr. 121)—and that there was no direct threat of harm to Gary when Kincade threw the tape measure based on Michael’s and Jimmie’s testimony and the reasonable inferences arising therefrom, there was sufficient evidence to sustain the conviction on the basis that Kincade’s use of force was unreasonable.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.