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IN THE
COURT OF APPEALS OF INDIANA

RALPH YOUNG,	)	
	)	
Appellant-Defendant ,	)	
	)	
vs.	)	No. 49A02-0705-CR-379
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Certo, Judge
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49G21-0701-FD-011164

February 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Ralph Young ("Young") was convicted in Marion Superior Court of Class D felony invasion of privacy. Young appeals and raises several issues, which we consolidate, reorder, and restate as:

I. Whether the trial court abused its discretion when it admitted the protective order into evidence;

II. Whether the evidence was sufficient to support Young's Class D felony invasion of privacy conviction;

III. Whether the trial court abused its discretion in sentencing Young; and

IV. Whether Young was subjected to double jeopardy when the trial court entered judgments of conviction and sentenced Young for both Class A misdemeanor and Class D felony invasion of privacy.

We affirm, but remand to the trial court with instructions to vacate the judgment of conviction for the Class A misdemeanor invasion of privacy charge.

Facts and Procedural History

Young and Heather Lee were previously involved in a romantic relationship that resulted in two children. In 2006, Lee obtained a protective order against Young, which prohibited Young from contacting Lee and ordered him to "stay away" from her residence. The protective order was served Young by leaving a copy at his residence.

Shortly thereafter, Young violated the protective order. On November 15, 2006, Young pleaded guilty to Class A misdemeanor invasion of privacy. He was sentenced to 365 days with 281 days suspended to probation. Per the plea agreement and as a term of his probation, the trial court entered a no contact order, which ordered Young to have no contact with Lee and prohibited him from visiting any location where he knew Lee was located. Ex. Vol., State's Ex. 1.

On January 22, 2007, Lee looked out her window and observed Young's vehicle parked nearby. Lee's telephone rang and Young's number was displayed on her caller ID. A few minutes later, Lee looked out the window again and noted that Young's vehicle was in the same location. Young then left the vicinity of Lee's home, but returned shortly thereafter. Young drove the vehicle onto Lee's street and parked it directly in front of her home near her mailbox. Lee's phone then began to ring and she answered it. After recognizing Young's voice, Lee disconnected the call. When Young continued to call her residence, Lee called the police. As the responding police officer neared Lee's home, he observed a vehicle matching the description provided by dispatch on a nearby street. The officer stopped Young's vehicle and arrested him.

Young was charged with Class A misdemeanor invasion of privacy and Class D felony invasion of privacy, due to his 2006 conviction. A bifurcated bench trial commenced on March 21, 2007. Young was found guilty as charged. For the D felony conviction, Young was ordered to serve 545 days, with 365 days suspended. Young now appeals. Additional facts will be provided as necessary.

I. The Protective Order

First, we address Young's argument that the trial court abused its discretion when it admitted the protective order into evidence. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. Payne v. State, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Young argues that the protective order should not have been admitted because the "State offered no evidence that Young was served with a copy or otherwise aware of the order." Br. of Appellant at 19. On November 15, 2006, Young pleaded guilty to Class A misdemeanor invasion of privacy for violating the protective order. Young's claim that he had no knowledge of the protective order is meritless and specious at best. Moreover, contrary to Young's claim, the protective order was highly relevant evidence given that Young was charged with violating it.

II. Sufficient Evidence

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment 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.

Young argues that the evidence is insufficient to support his Class D felony invasion of privacy conviction. To establish that Young committed invasion of privacy, the State was required to prove that Young knowingly or intentionally violated the no contact order issued as a condition of his probation or the protective order issued under Indiana Code chapter 34-26-5. See Ind. Code § 35-46-1-15.1 (2004 & Supp. 2007); Appellant's App. p. 14.

In the charging information, the State alleged that Young violated the no contact order and/or protective order when he "pulled his vehicle in [Lee's] driveway and/or

being at her residence." Appellant's App. p. 14. Young contends that neither the no contact order nor the protective order "on its face" prohibited him "from simply being near [Lee's] residence. Reply Br. of Appellant at 2-3.

Young was not simply "near" Lee's residence. He drove his vehicle into the cul-de-sac where Lee's house is located and parked his vehicle in front of her house next to the mailbox. Tr. p. 19. This conduct violates both the no contact order, which prohibits Young from visiting a location wherever Young knows Lee to be located, and the protective order, which ordered Young to "*stay away from*" Lee's residence. See Ex. Vol., State's Exs. 1 & 2 (emphasis added).

Next, Young argues that Lee's testimony is incredibly dubious. The incredible dubiosity rule provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." Murray v. State, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to instances where the sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. James v. State, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), trans. denied. Our Supreme Court has recognized that "application of this rule is rare and that the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." Stephenson v. State, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

Young argues that Lee's testimony was incredibly dubious because it conflicts with that of another witness. The rule, however, does not apply when there is witness testimony contradicting another witness's testimony. Young's argument is simply an invitation to reweigh the evidence, which we will not do. Young also asserts that Lee's testimony is incredibly dubious because she testified that Young made telephone calls to her on the date of the offense, but the investigating officer testified that he did not recall Lee telling him that Young had called her. Contrary to Young's claim, the alleged inconsistency between Lee's prior statement and her trial testimony goes to the weight and credibility of the testimony, but does not render her testimony incredibly dubious.

Finally, Young argues that the evidence was insufficient to establish that he had previously been convicted of Class A misdemeanor invasion of privacy.[1] Young asserts that the only evidence establishing the prior conviction is the "similarity in names" and such evidence is insufficient.

To establish that Young was convicted of invasion of privacy in 2006, the State was required to present evidence identifying Young as the same individual named in the prior conviction. Walker v. State, 813 N.E.2d 339, 341 (Ind. Ct. App. 2004), trans. denied. "If this evidence yields logical and reasonable inferences from which the finder of fact could determine the defendant is the same defendant disclosed in the previous conviction, a sufficient connection has been shown." Id.

The protective order admitted at trial provides a physical description of Young, his date of birth, and his address. Young was convicted of invasion of privacy in 2006 for

[1] Indiana Code section 35-46-1-15.1 provides that the offense of invasion of privacy is a Class A misdemeanor, but "the offense is a Class D felony if the person has a prior unrelated conviction for an offense under this section.

violating this protective order. The certified copy of the arrest report for the instant offense gives the same physical description of Young, the same date of birth, and a substantially similar address. The Advisement and Waiver of Rights form Young signed as a result of the plea agreement for the 2006 invasion of privacy conviction contains the cause number 49G21-0610-CM-192134. As a result of that conviction, the court entered a probation order and the no contract order under cause number 06192134, and Young signed those orders. Young also ignores the fact that the no contact order he was charged with violating was issued because he was "convicted of the crime(s) of [invasion of privacy], a Class A misdemeanor[.]" Ex. Vol., State's Ex. 1. This evidence is sufficient to establish Young's prior conviction for invasion of privacy.

For all of these reasons, we conclude that the evidence is sufficient to support Young's Class D felony invasion of privacy conviction.

III. Sentencing

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Id. (citation omitted).

Young argues that the trial court abused its discretion when it relied on the following aggravating circumstance: Young "violated a Protective Order issued [] against you by this Court." Br. of Appellant at 25 (citing Tr. pp. 95-96). We agree that the trial court improperly considered this aggravating circumstance. See McElroy v.

State, 865 N.E.2d 584, 589 (Ind. 2007) (A material element of a crime may not be used as an aggravating factor to support an enhanced sentence.).

Young also argues that the trial court abused its discretion when it failed to consider the following mitigating circumstance: Young's care for his disabled mother.

> The finding of mitigating factors is within the discretion of the trial court. A trial court is not obligated to weigh or credit the mitigating factors in the manner a defendant suggests they should be weighed or credited. "The allegation that the trial court failed to find a mitigating circumstance requires [the defendant] to establish that the mitigating evidence is both significant and clearly supported by the record."

McKinney v. State, 873 N.E.2d 630, 645 (Ind. Ct. App. 2007), trans. denied.

Young's mother testified that Young helps her pay some of her bills, takes her to doctor's appointments, and does things for her around the house. Tr. pp. 86-87. However, Young does not claim that he is his mother's sole source of support,[2] and he testified at the sentencing hearing that, prior to his commission of this offense, he had permission from the probation department to move to Alabama for a "job transfer." Tr. p. 88. Accordingly, we cannot conclude that the trial court abused its discretion when it failed to consider that Young's incarceration would be an undue hardship for his mother as an aggravating circumstance.

Although the trial court improperly relied on an aggravating circumstance that was a material element of the crime, we will only remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered the aggravating and mitigating circumstances. Anglemyer, 868

[2] Further, Young testified, "I'm blessed that even though I'm locked up I have a friend who will still help me with my mother here and there but they can't do all that cause they got their own bills." Tr. p. 92.

N.E.2d at 491. Class D felony invasion of privacy carries an advisory sentence of one and one-half years. Ind. Code § 35-50-2-7 (2004 & Supp. 2007).

Here, the trial court sentenced Young to 545 days, which is two days less than the advisory sentence. Moreover, the court suspended 365 days of that sentence to probation. Young's offense was his second invasion of privacy offense against the same victim. For this reason, we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the invalid aggravating circumstance, and therefore, the court did not abuse its discretion when it sentenced Young to 545 days, with 365 days suspended to probation. See Anglemyer, 868 N.E.2d at 491.

IV. Double Jeopardy

Finally, Young argues that the trial court subjected him to double jeopardy when it entered judgments of conviction and sentences on both Class A misdemeanor and Class D felony invasion of privacy. Br. of Appellant at 25. Article One, Section Fourteen of the Indiana Constitution provides that "no person shall be put in jeopardy twice for the same offense."

At the sentencing hearing, the trial court orally entered a conviction and sentence only for the Class D felony invasion of privacy conviction. Tr. p. 96. However, in its abstract of judgment and the chronological case summary, the court imposed concurrent sentences of 545 days, with 365 days suspended for the Class D felony conviction and 365 days suspended for Class A misdemeanor invasion of privacy. See Appellant's App. pp. 7, 11. Accordingly, we remand to the trial court with instructions to correct its

abstract of judgment by vacating the judgment and sentence for Young's Class A misdemeanor invasion of privacy conviction.

Conclusion

The trial court did not abuse its discretion when it admitted the protective order into evidence. Young's Class D felony invasion of privacy conviction is supported by sufficient evidence and the trial court did not abuse its discretion when it sentenced Young to 545 days, with 365 days suspended. However, the court erred when it entered judgments of convictions for both the Class D felony and Class A misdemeanor invasion of privacy counts. Therefore, we remand this case to the trial court to vacate its judgment of conviction for Young's Class A misdemeanor invasion of privacy conviction.

Affirmed, but remanded for proceedings consistent with this opinion.

NAJAM, J., and BRADFORD, J., concur.