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FILED
Feb 07 2011, 9:26 am
CLERK
of the supreme court, court of appeals and tax court

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# IN THE
# COURT OF APPEALS OF INDIANA

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| CARL ANDRE COLEMAN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 20A05-1008-CR-553 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0910-FB-30

**February 7, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Carl Andre Coleman appeals his convictions for Burglary,[1] a class B felony, and Criminal Confinement,[2] a class D felony. Coleman argues that the evidence is insufficient to support his convictions. Additionally, Coleman argues that the aggregate fifty-three-year sentence imposed by the trial court for Coleman's convictions and an additional Habitual Offender[3] finding is inappropriate in light of the nature of the offenses and his character. The State also cross-appeals the trial court's decision to vacate Coleman's conviction for Attempted Rape,[4] a class B felony, arguing that the trial court erroneously concluded that the dual convictions for burglary and attempted rape were prohibited by double jeopardy principles.

Finding that the State has waived its cross-appeal by failing to object below, finding the evidence sufficient, and finding the sentence not inappropriate, we affirm.

## FACTS

On September 14, 2009, after K.B.'s one-year-old son fell asleep on her bed in the apartment they shared, K.B. went to a convenience store located directly behind her apartment building. Coleman followed K.B. home from the store, into her building, and to her apartment door, carrying his bicycle up the stairs. K.B. thought that Coleman might live in her building, so she was not alarmed by his presence. But as K.B. unlocked and opened her apartment door, Coleman wedged his bicycle tire in the doorway and

[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-42-3-3.

[3] Ind. Code § 35-50-2-8.

[4] I.C. § 35-42-4-1; Ind. Code § 35-41-5-1.

forced his way into the apartment. He then locked the door from the inside and blocked the door with his bicycle.

K.B. asked Coleman why he was in her apartment and told him to leave. He responded that "everything was going to be okay. That he was going to take his time with [her]," which she interpreted to mean that he intended to rape her. Tr. p. 181. Although K.B. told Coleman to stop, he shoved her down onto her bed, where her son lay sleeping. Coleman removed his shorts, climbed on top of K.B., and attempted to kiss her and remove her shirt.

K.B.'s friend, Shane Perrin, became alarmed when she did not respond to his attempts to contact her via cell phone. Perrin drove to K.B.'s apartment and knocked on the door. He entered the apartment, noted that K.B. looked terrified, and ordered Coleman to leave. Although Coleman argued with Perrin, he eventually left.

After five or ten minutes, Coleman returned and knocked on K.B.'s door for an extended period of time. K.B., thinking that Coleman would leave if she spoke to him, exited her apartment and stood outside her front door to talk with Coleman as Perrin watched through the peep hole. Perrin noticed that Coleman had backed K.B. into a corner of the hallway, where she was cowering, at which point Perrin opened the door and threatened to call the police. Coleman left.

K.B. summoned her brother and mother, who alerted the authorities of the incident. She was able to give the authorities a description of Coleman but not his name. K.B. and her son spent the night with her family, and when her mother and brother

returned to the apartment the next day, they found a piece of paper with a telephone number written on it stuffed in her doorway. K.B.'s mother pretended to be K.B. and called the number, which belonged to Coleman. K.B.'s mother invited Coleman to come to the apartment. He arrived minutes later, and K.B.'s brother held him until the authorities arrived.

When Coleman was interviewed by the police, he initially stated that he had followed K.B. home to make sure she arrived safely. Later, he said that K.B. had invited him over because she wanted to give him a massage. He denied that he attempted to rape K.B. because he had no need to force himself on women, as "all the women in town wanted him and he could have anybody he wanted." Tr. p. 456. When the interviewing officer left the room, Coleman began talking to himself, saying "[i]f a babe lets you in the crib, you can rub on her ass, her p---y, and any god damn parts of her body until you know for sure that she ain't having sex. Then that is not attempted rape. That's attempted date." Id. at 469.

On October 1, 2009, the State charged Coleman with burglary, attempted rape, and criminal confinement. The State also filed an information alleging that Coleman was a habitual offender. Following Coleman's jury trial, which concluded on June 10, 2010, the jury found Coleman guilty as charged. In a bifurcated proceeding, the jury also found that Coleman was a habitual offender.

At Coleman's August 2, 2010, sentencing hearing, the trial court found that the burglary and attempted rape convictions merged for sentencing purposes, vacating the

attempted rape conviction. The State did not object. At the conclusion of the hearing, the trial court sentenced Coleman to twenty years for burglary and three years for confinement, to be served consecutively, and it enhanced the sentence by thirty years for being a habitual offender. Thus, Coleman's aggregate sentence is fifty-three years imprisonment, and he now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence

Coleman argues that the evidence is insufficient to support his convictions. In reviewing claims of insufficient evidence, we neither reweigh the evidence nor assess witness credibility, and will affirm unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000). To convict Coleman of class B felony burglary, the State was required to prove beyond a reasonable doubt that he broke and entered K.B.'s apartment with the intent to commit rape therein. I.C. § 35-43-2-1. To convict Coleman of class D felony criminal confinement, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally confined K.B. without her consent. I.C. § 35-42-3-3.

The record here establishes that Coleman followed K.B. home from the convenience store, wedged his bicycle tire in her doorway after she opened it, and forced himself into the apartment. He then locked it from the inside and placed his bicycle in front of the door. Coleman said that "he was going to take his time with [K.B.]," which she interpreted to mean that he intended to rape her. Tr. p. 181. Coleman then removed

his shorts, shoved K.B. onto the bed, kissed her, and attempted to remove her shirt. When Perrin arrived and entered the apartment, he observed that K.B. looked terrified and ordered Coleman to leave. Coleman returned and knocked on K.B.'s door until she agreed to go speak with him, whereupon he backed her into a hallway corner and left her cowering.

We find this evidence sufficient to support Coleman's convictions. His only argument is that K.B.'s testimony is so incredibly dubious that we should refuse to credit it. The only time we will invade the jury's province to weigh evidence and judge witness credibility is in the "rare case" where the testimony is so inherently incredible or improbable that it "runs counter to human experience" and "no reasonable person could believe it." Edwards v. State, 753 N.E.2d 618, 622 (Ind. 2001). This rule is only applied in cases "where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." Majors v. State, 748 N.E.2d 365, 367 (Ind. 2001) (emphasis original).

Coleman attempts to argue that K.B.'s testimony was inherently contradictory or equivocal, but the substance of his argument belies that contention. In fact, he identifies what he believes to be K.B.'s poor choices and attacks her credibility. Having reviewed the record, we do not find K.B.'s testimony to be either inherently contradictory or equivocal such that we will second-guess the jury's assessment of her as a believable witness. Additionally, we note that Perrin, K.B.'s brother, and K.B.'s mother all testified

regarding her emotional state and Coleman's actions following the burglary and attempted rape, and their testimony qualifies as circumstantial evidence of Coleman's guilt. In any event, therefore, the incredible dubiosity rule does not afford Coleman with any relief, and his argument regarding the sufficiency of the evidence must fail.

## II. Sentence

Coleman next argues that the aggregate fifty-three year sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Coleman was convicted of burglary as a class B felony, meaning that he faced a sentence of six to twenty years. Ind. Code § 35-50-2-5. The trial court imposed a maximum twenty-year term. Additionally, Coleman was convicted of criminal confinement as a class D felony, meaning that he faced a sentence of six months to three years. Ind. Code § 35-50-2-7. The trial court elected to impose a maximum, consecutive three-year term. Finally, Coleman was adjudged to be a habitual offender, meaning that at most, his sentence could be enhanced by thirty years. I.C. 35-50-2-8(h). The trial court elected to enhance his sentence by the maximum thirty-year term.

As for the nature of the offenses, the record reveals that Coleman followed a lone woman home, used his bicycle to force his way into her apartment, locked the door from

the inside and placed the bicycle in front of the door to prevent her escape, and then attempted to rape her in the same bed in which her one-year-old son lay sleeping. Coleman later persisted in his attempts to contact her, returning to her apartment while Perrin was still there and then again later that night, leaving his telephone number in her door.

As for Coleman's character, his lengthy and significant criminal history speaks for itself. His first contact with the juvenile justice system occurred when he was eleven years old, and he proceeded to amass true findings for robbery, burglary, battery (twice), alcohol offenses, theft (three times), and criminal mischief (twice). As an adult, Coleman has accumulated convictions for class B felony burglary, class B felony robbery while armed with a deadly weapon, and misdemeanor convictions for illegal consumption of alcohol and public intoxication. He has also been arrested for rape, sexual battery, rape of a mentally disabled or deficient person, and theft. He committed multiple probation violations as a juvenile and as an adult, and had only been released from the Department of Correction for approximately three months before committing the instant offenses. Additionally, Coleman is an admitted lifelong gang member. As a juvenile, Coleman had the benefit of alternative supervision, probation, community service, counseling, a diagnostic evaluation, a commitment to the Indiana Boys' School, and a suspended sentence. As an adult, he has had suspended sentences and probation. Despite all of these chances to reform his behavior, Coleman continues to show a complete lack of

respect for the rule of law and a complete disregard for the well-being of his fellow citizens.

We cannot say that the trial court's decision to impose the maximum fifty-three-year term on Coleman is inappropriate in light of the nature of the offenses and his character.

## III. Cross-Appeal

Finally, the State cross-appeals, arguing that the trial court erred by vacating Coleman's attempted rape conviction based on double jeopardy concerns. Initially, we note that where, as here, the trial court declined to enter a judgment of conviction based solely on double jeopardy concerns rather than on any basis related to the resolution of a factual element of the offense, the State is entitled to appeal the ruling and it would not violate double jeopardy for us to find in the State's favor. Smith v. State, 872 N.E.2d 169, 177 n.2 (Ind. Ct. App. 2007).

Previous panels of this court have concluded that the State may raise a claim that a defendant's sentence is illegal for the first time on appeal. See McCullough v. State, 900 N.E.2d 745, 750 (Ind. 2009) (holding that "where a trial court fails to sentence a defendant in accordance with statutory requirements, the State may raise such a claim for the first time on appeal"). Here, however, the State is not arguing that Coleman's sentence is illegal. Instead, the State argues that the trial court erred in reaching a legal conclusion—that double jeopardy principles prohibited it from sentencing Coleman on both attempted rape and burglary. The State could, and should, have objected to this

legal conclusion at the time of sentencing. It did not. See Tr. p. 576 (the trial court, having pronounced the sentence with no intervening objections, asks, "[a]nything further from the State?" and the State responded, "[n]o"). Consequently, the State has waived the argument on appeal and we will not address it.

The judgment of the trial court is affirmed.\

VAIDIK, J., and BARNES, J., concur.