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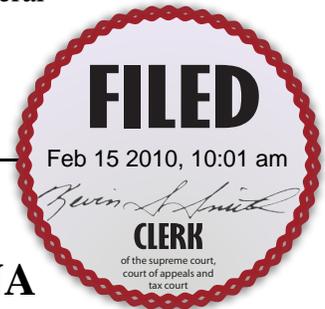
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**IN THE
COURT OF APPEALS OF INDIANA**

RUFINO CASTENADA-NOVA,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 71A05-0907-CR-410

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0911-CF-543

February 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Rufino Castenada-Nova appeals his convictions for class A felony rape and class B felony criminal confinement. He also appeals the forty-five-year enhanced sentence on the rape conviction, which the trial court ordered to be served consecutive to the ten-year presumptive sentence on the criminal confinement conviction, for an aggregate sentence of fifty-five years. We affirm his convictions but remand with instructions to resentence Castenada-Nova to a thirty-year presumptive term on the rape conviction, which will result in an aggregate sentence of forty years.

Issues

- I. Did fundamental error occur as a result of questions asked by the prosecutor during jury voir dire?
- II. Was there sufficient evidence of serious bodily injury to the victim in the form of extreme pain to sustain Castenada-Nova's class B felony criminal confinement conviction?
- III. Did the trial court violate *Blakely v. Washington*, 542 U.S. 296 (2004), in imposing an enhanced sentence on the rape conviction?

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that at approximately 10:30 p.m. on November 1, 2000, C.S. and a friend went to Bleachers Pub in Mishawaka to play pool. After playing several games, C.S. went to the bar to order a drink. While she waited for her drink, a group of men started talking to her in Spanish, and she jokingly responded with the few Spanish words that she knew. The men began talking about "mota," which C.S. knew meant marijuana, and she responded, "[N]o, no, no, no. No mota." Tr. at 247, 248. As C.S.

walked away from the bar to return to the pool table, the men followed her. Castenada-Nova grabbed her arm, forced her outside the bar, then grabbed her hair and shoved her into the back seat of a car. Castenada-Nova got into the back seat with C.S., and another man in the front seat drove off.

Castenada-Nova pulled and twisted C.S.'s hair and forced her face into the seat. She tried to look out the window, but he repeatedly punched and slapped her face and arm. Castenada-Nova hit C.S. so hard that she “would see spots.” *Id.* at 266. During this beating, her “ear never stopped ringing[,]” and she experienced pain that she rated as “[p]lus 12” on a scale of one to ten. *Id.* at 267. Eventually, the car stopped in an alley outside a South Bend duplex, and Castenada-Nova dragged C.S. out of the car by her hair. She screamed for help, and he hit her in the face “as hard as he could[.]” *Id.* at 265.

Castenada-Nova pulled C.S. into the duplex by her hair and dragged her through the kitchen. She grabbed a heavy skillet and attempted to strike him, but he took it away from her and struck her with it. Castenada-Nova dragged C.S. into a bedroom by her hair and repeatedly hit her while he pulled off her clothes. At one point, he hit her face so hard that she saw “white, bright dots everywhere” and “couldn’t even function.” *Id.* at 273. Castenada-Nova struck C.S. with his knee, spread her legs apart, and raped her. During the assault, he bit her all over her body and bit her breast so hard that she thought he had bitten her nipple off. In addition, her tampon was “shoved in a spot it should have never been shoved,” which caused her excruciating pain. *Id.* at 279.

C.S. pushed Castenada-Nova off her and attempted to escape. He grabbed her, threw her against the wall, and choked her, saying, “[Y]ou’re going to die, bitch.” *Id.* at 282. She kicked him as hard as she could, and he fell to the floor. C.S. ran out the back door with her pants around one ankle and hid behind a dumpster until she thought Castenada-Nova was gone. She covered herself with a cardboard box, found a payphone, and dialed 9-1-1.

Before C.S. was taken to the hospital for treatment, she insisted on showing the responding officer the duplex in which she had been raped. Police obtained a search warrant and found C.S.’s clothing inside the duplex, in which Castenada-Nova had resided with his girlfriend. Police also found a farewell note that Castenada-Nova had written to his girlfriend, who never saw him again. C.S. identified Castenada-Nova in a photo array as her assailant, and his DNA was recovered from swabs taken from her breast and neck.

On November 22, 2000, the State charged Castenada-Nova with class A felony rape and class B felony criminal confinement. Castenada-Nova fled the jurisdiction and was not tried until February 2009, when a jury found him guilty as charged. On April 21, 2009, the trial court imposed consecutive executed sentences of forty-five years on the rape conviction and ten years on the confinement conviction, for an aggregate sentence of fifty-five years. This appeal ensued.

Discussion and Decision

I. Prosecutor's Questions During Jury Voir Dire

Prior to jury voir dire, Castenada-Nova's counsel acknowledged that his client's defense was "going to be consensual sexual relations between the parties[.]" Tr. at 15.

During voir dire, the prosecutor asked the venire panel the following questions:

Now, in going back to reasonable doubt, [...] and especially in cases such as this, in a rape case, often times what you have is one person saying that a rape occurred, one person either saying no it didn't, or there was sexual activity but it was consensual. If you're presented with that type of situation, one person saying that a rape occurred, one person saying either no it didn't or it was consensual, would that alone in your mind create reasonable doubt? Or would you be able to listen to all of the evidence and determine who you believed and what the actual situation was?

Id. at 85.

[I]n cases like this, often times, there's a person saying that a rape occurred, and then a person that says that either it didn't or that there was consensual sexual activity. If that's what you hear, one of those two scenarios, would that alone raise reasonable doubt in your mind?

Id. at 140-41 (paragraph format altered). Castenada-Nova did not testify at trial.

On appeal, Castenada-Nova claims that the prosecutor's questions "placed the onus on [him] to personally refute [C.S.'s] testimony" in violation of his Fifth Amendment right not to be compelled to testify. Appellant's Br. at 5. We note, however, that Castenada-Nova did not object to the prosecutor's questions during voir dire. "As a general rule, the failure to object at trial results in a waiver of an issue on appeal." *Stokes v. State*, 908 N.E.2d 295, 301 (Ind. Ct. App. 2009), *trans. denied*.

An exception to the waiver rule is the extremely narrow fundamental error exception. To qualify as fundamental, an error must be so prejudicial to the

rights of the defendant as to make a fair trial impossible. The error must amount to a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.

Id. (citations and quotation marks omitted).

Castenada-Nova contends that the prosecutor's questions constituted fundamental error, in that they "affected the jury's perception of the defense in this case by creating expectation that [he] would testify and admit to having had consensual sexual intercourse with [C.S.] or deny that it ever occurred." Appellant's Br. at 6.¹ We disagree.

"[I]t is permissible for the prosecutor to ask questions of potential jurors to determine whether they understand reasonable doubt and are capable of rendering a verdict in accordance with the law." *Barber v. State*, 715 N.E.2d 848, 850 (Ind. 1999). Likewise, "the parties may attempt to uncover the jurors' preconceived ideas about a defense the defendant intends to use. To make these determinations, the parties may pose hypothetical questions, provided they do not suggest prejudicial evidence not adduced at trial." *Steelman v. State*, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992); *see also Hopkins v. State*, 429 N.E.2d 631, 635

¹ Castenada-Nova contends that he "did not assert a defense of consent nor was the jury instructed on this defense nor was the defense of a general denial asserted. Trial counsel attacked throughout the state's case the credibility of their witnesses." Appellant's Br. at 4. Although it is true that the jury was not instructed on the defense of consent, we note that Castenada-Nova stipulated that his DNA was found on swabs taken from C.S.'s breast and neck. Tr. at 547. We further note that Castenada-Nova's cousin, Juvencio Castenada ("Juvencio"), testified for the defense that in November of 2000 he drove Castenada-Nova and a Caucasian woman from Bleachers Pub to Juvencio's home, during which time he did not hear any arguing or see any use of force against the woman. According to Juvencio, when he reached his home, he got out of the car (which did not belong to him), went inside, and fell asleep. *Id.* at 553-60. Finally, during closing argument, Castenada-Nova's counsel stated that "there were no tears or abrasions found in [C.S.'s] vaginal area"; that although the nurse who treated C.S. "had testified to the fact that there was redness in that area, [she had also testified] that it did not prove that there was sexual assault"; and that there was no evidence that C.S.'s shirt and bra had been "ripped off." *Id.* at 600, 604. Taken together, the foregoing are certainly consistent with a consent defense to the rape charge.

(Ind. 1981) (“[W]e see nothing wrong in using voir dire to inquire into jurors’ biases or tendencies to believe or disbelieve certain things about the nature of the crime itself or about the particular line of defense.”).

The purpose of the prosecutor’s questions to the potential jurors in this case was to determine if a “he-said, she-said” scenario would be sufficient to raise reasonable doubt in their minds. The prosecutor did not state that Castenada-Nova must refute, or would be refuting, C.S.’s version of events. Moreover, the trial court properly conveyed the concepts of reasonable doubt and burden of proof to the jurors throughout the proceedings. During voir dire, the court informed the venire panel that Castenada-Nova was “presumed innocent,” was “under absolutely absolutely no obligation to present any evidence at all[,]” and had “an absolute constitutional right not to take the witness stand[.]” Tr. at 65. The court reiterated these concepts in both the preliminary and final jury instructions. In light of the foregoing, we conclude that Castenada-Nova has failed to establish that any error, let alone fundamental error, occurred as a result of the prosecutor’s questions during voir dire.

II. Sufficiency of Evidence Supporting Criminal Confinement Conviction

Indiana Code Section 35-42-3-3 provides in pertinent part that a person who knowingly or intentionally removes another person by force or threat of force from one place to another commits criminal confinement, a class D felony. The statute further provides that the offense is a class B felony if it results in serious bodily injury to a person other than the confining or removing person. *Id.* Indiana Code Section 35-41-1-25 defines “serious bodily injury” in pertinent part as “bodily injury that creates a substantial risk of death or that causes

... extreme pain[.]” Castenada-Nova claims that the State failed to present sufficient evidence that C.S. suffered serious bodily injury in the form of extreme pain as a result of her removal from the bar to his duplex² and asks that we reduce his conviction to a class D felony.

Our standard of review for such claims is well settled:

We neither reweigh the evidence nor judge the credibility of witnesses. Rather, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

Whitlow v. State, 901 N.E.2d 659, 660-61 (Ind. Ct. App. 2009) (citations omitted).³ We will affirm the conviction “if evidence of probative value exists from which a jury could find the defendant guilty beyond a reasonable doubt.” *Id.* “The uncorroborated testimony of the victim is sufficient to sustain a criminal conviction.” *Johnson v. State*, 837 N.E.2d 209, 214 (Ind. Ct. App. 2005), *trans. denied* (2006).

“Whether bodily injury is ‘serious’ is a question of degree and, therefore, appropriately reserved for the finder of fact.” *Whitlow*, 901 N.E.2d at 661. As mentioned above, C.S. testified that Castenada-Nova grabbed her hair, threw her in the car, and pulled

² See Appellant’s App. at 5-6 (charging information alleging confinement). Castenada-Nova does not challenge the sufficiency of the evidence supporting his rape conviction, which was a class A felony based on serious bodily injury suffered by C.S. in the form of extreme pain. See *id.* at 5 (charging information alleging rape); Ind. Code § 35-42-4-1(b)(3) (elevating rape from class B felony to class A felony if it “results in serious bodily injury to a person other than a defendant”).

³ We direct Castenada-Nova’s counsel to Indiana Appellate Rule 46(A)(8)(b), which states that the argument section of an appellant’s brief “must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.”

and twisted her hair during the ride to his duplex. Meanwhile, he repeatedly punched and slapped her face and arm and hit her so hard that she “would see spots.” Tr. at 266. Her “ear never stopped ringing” during this pummeling, and she rated her pain as “[p]lus 12” on a scale of one to ten. *Id.* at 267. This evidence is more than sufficient to support the jury’s determination that C.S. suffered extreme pain, and thus serious bodily injury, as a result of her confinement.⁴ Therefore, we affirm Castenada-Nova’s conviction for class B felony criminal confinement.

III. Sentencing on Rape Conviction

The trial court sentenced Castenada-Nova as follows:

Let me start with the rape. You know, it’s very difficult to compare one rape to another. For any person who has been the victim of a rape, there is trauma that lingers. So in sentencing on a rape, the Court doesn’t in sentencing mean to diminish one person’s pain or trauma in arriving at a sentence, but certainly [C.S.] was deeply traumatized by what happened to her.

That was evident in the audio tape of the call to the police immediately after she was raped. That was evident in her demeanor while testifying at this trial and that was evidence in what she said today. She told this Court that she continues to live with this and the trauma it has caused her, on a daily basis, and that I consider to be an aggravating circumstance. I consider your criminal history, though minor, as a very minor aggravating factor. A more significant aggravating factor, the facts and circumstances surrounding the case.

I agree with the state that there were several different incidents of serious bodily injury, any one of which this jury could have found to be serious bodily injury. You bit her nipple so hard she thought she had lost it. Pictures

⁴ We are unpersuaded by Castenada-Nova’s reliance on *Davis v. State*, 813 N.E.2d 1176 (Ind. 2004), in which our supreme court determined that a “lacerated lip and a broken pinky finger” did not constitute sufficient evidence of serious bodily injury in the form of extreme pain to support the defendant’s class D felony criminal recklessness conviction. *Id.* at 1177. In *Davis*, the victim “said little at trial by way of describing her level of pain.” *Id.* at 1178. Here, C.S. described her level of pain in vivid detail. We are also unpersuaded by Castenada-Nova’s argument that “[t]here is a real danger in this case that the other injuries to which [C.S.] testified during the course of the sexual assault, the biting of her shoulder and breasts, the struggle to remove her clothes colored her description of the level of the pain which occurred during the removal from the bar to the duplex.” Appellant’s Br. at 9. This argument is merely an invitation to reweigh evidence and judge witness credibility, which we may not do.

documented the bruising to that area. You grabbed her by the throat with such force that you left bruising there and probably could have killed her. You raped her while she had a tampon in her vaginal vault, and she tried to describe the pain, and I believe her when she said it was at such a level that you would not wish that on your worst enemy.

The force with which you raped her was evident from the pictures which showed significant and substantial bruising to her groin. You accompanied this assault with threats to kill her, which I also consider as aggravators - - an aggravating factor in the [] case. There was nothing that happened in that room that night that would have led her to believe that she would leave that house alive. The terror that you caused her is also something I consider when looking at the facts and circumstances of the case.

When I look at the confinement I view it as a separate crime. They were charged separately. It involved, as the prosecutor pointed out, the transporting of [C.S.] from the bar to the house. And while I do not find aggravators there, as I did in the rape, other than the threats to kill, I do find that the abduction added an element of terror to that night for her and was an independent crime upon her that justifies these sentences be imposed consecutively.

Now I did consider a mitigating factor when arriving at a sentence here. I don't find your age, at least at sentencing, to be particularly youthful, nor even do I find a 25-year-old rapist to be able to seek mitigation in his age. You do lack a significant criminal history. So I'm not giving that much weight. I don't think I'm required to view a lack of subsequent criminal history as a mitigator, but I guess it factors in the fact that I don't give much weight to that prior criminal history either.

I share your concern about what will happen to your family. It was a family you created knowing this was hanging over your head. And I don't know what your children are going to do, but I don't view it as of such weight that it balances out what you did to [C.S.].

So I am imposing the following sentence. For the reasons that I stated, on the rape, I am sentencing you to 45 years executed. On the criminal confinement, I am sentencing you to 10 years executed. I am not suspending either sentence. These sentences shall run consecutively to each other, for a total sentence of 55 years.

Tr. at 667-70.

“The sentencing statute in effect at the time a crime is committed governs the sentence for that crime.” *Harris v. State*, 897 N.E.2d 927, 928-29 (Ind. 2008). When Castenada-Nova

committed his crimes in November of 2000, the presumptive sentencing scheme was in effect. Under that scheme, “[a] presumptive sentence served as the starting point and allowed the sentencing court limited discretion to enhance a sentence to reflect aggravating circumstances or to reduce a sentence to reflect mitigating circumstances.” *Id.* at 928. For a class A felony, the presumptive sentence was thirty years, with not more than twenty years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. Ind. Code § 35-50-2-4 (2000). For a class B felony, the presumptive sentence was ten years, with not more than ten years added for aggravating circumstances or not more than four years subtracted for mitigating circumstances. Ind. Code § 35-50-2-5 (2000). Under the presumptive sentencing scheme, when sentencing a defendant on multiple counts, the trial court could impose consecutive sentences if it found at least one aggravator. *Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002).

In *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied*, the Indiana Supreme Court declared that portions of Indiana’s presumptive sentencing scheme violated the Sixth Amendment’s right to trial by jury, following *Blakely v. Washington*, 542 U.S. 296 (2004), in which the U.S. Supreme Court held in pertinent part that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [i.e., the presumptive sentence] must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The *Smylie* court stated,

It is apparent that Indiana’s sentencing system runs afoul of the Sixth Amendment not because it mandates a “fixed term” sentence for each felony,

but because it mandates *both* a fixed term and permits judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term.

A constitutional scheme akin to ours could take one of two forms: (1) our present arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation, or (2) a system in which there is no stated “fixed term” (or at least none that has legally binding effect) in which judges would impose sentences without a jury.

823 N.E.2d at 685. In fashioning a judicial remedy to the Sixth Amendment problem, the court held that “the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana’s existing sentencing laws.” *Id.* at 686.⁵ The court further held that a trial court’s discretion to impose consecutive sentences based on its finding of aggravating circumstances was unaffected by *Blakely*, so long as the aggregate sentence “does not exceed the combined statutory maximums.” *Id.* In other words, pursuant to *Blakely*, an aggravator used to impose consecutive sentences does not have to be found by a jury.

In a subsequent case, the court explained that

Blakely is not concerned, primarily, with what facts a judge uses to enhance a sentence, but with *how* those facts are found. Under *Blakely*, a trial court in a determinate sentencing system such as Indiana’s may enhance a sentence based only on those facts that are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial factfinding.

Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005).

⁵ In response to *Smylie*, the Indiana General Assembly provided a legislative remedy one month later. *See Harris*, 897 N.E.2d at 928 (“[T]he General Assembly eliminated fixed presumptive terms in favor of ‘advisory’ sentences for each offense; it declared that a court could impose any sentence within the statutory range set for the crime, ‘regardless of the presence or absence of aggravating circumstances or mitigating circumstances.’ Ind. Code § 35-38-1-7.1(d) (2005).”).

In this appeal, Castenada-Nova relies on *Blakely* in contending that “[t]he factors cited by the trial judge concerning victim impact and the facts and circumstances of the [rape] itself are the types of aggravators that required a jury determination before they could be utilized to enhance [his] sentence” for his rape conviction. Appellant’s Br. at 12. In response, the State asserts that Castenada-Nova “never raised any *Blakely* or Sixth Amendment objection during his sentencing hearing, even when the trial court was making its findings of aggravating factors[,]” and therefore failed to preserve the issue for appellate review. Appellee’s Br. at 16. We disagree with the State’s assertion.

Indiana Code Section 35-42-4-1(a) states in pertinent part that a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force commits rape, a class B felony. The offense is a class A felony if it results in serious bodily injury to a person other than a defendant. Ind. Code § 35-42-4-1(b)(3). The charging information alleged that Castenada-Nova committed class A felony rape by

knowingly hav[ing] sexual intercourse with [C.S.], a member of the opposite sex, by force or threat of force, to-wit: by punching her with his fist and pulling her clothes off, all in order to compel [C.S.] to have sexual intercourse with him, which resulted in serious bodily injury to [C.S.], to wit: extreme pain.

Appellant’s App. at 5.

At sentencing, the prosecutor requested enhanced and consecutive sentences based on the numerous injuries to which C.S. testified at trial. Castenada-Nova’s counsel replied,

We don’t know what the jury took into account in order to be able to prove the necessary element in order to be able to find Mr. Castenada[-Nova] guilty of

the A and B felonies. That is to say the serious bodily injury. We don't know what the jury took into account. So whereas the state today argues that there were many several incidents or several times when any bodily injury occurred, we don't know which ones the jury had taken into account. So therefore, Your Honor, it's either Mr. Castenada[-Nova] is going to get charged with an A felony or he's going to be charged with a B, because that element of the crime simply can not be used to enhance the sentence

Tr. at 661-62. The trial court responded that it was “allowed to look at the facts and circumstances of the case” and that although it understood that “serious bodily injury is built into the charge, ... I think that I can look at just what that injury was and how many facets of injury.” *Id.* at 663. Castenada-Nova's counsel replied,

I believe the case law indicates that, if there's an element of the offense, that the Court can not use [it] in order to enhance the sentence. And my second position would be that, if the state sought to use any of the other incidents as an aggravator, *it should have been an aggravator that would have been presented to the jury to prove [in] order to use that aggravator against Mr. Castenada[-Nova].*

Id. (emphasis added; paragraph format altered). Although Castenada-Nova's counsel did not utter the words “*Blakely*” or “Sixth Amendment,” we conclude that his objection was sufficient to preserve a *Blakely* claim.⁶

⁶ Castenada-Nova's appellate counsel does not mention this objection in her reply brief but instead contends that her client's “offense occurred before the change in the sentencing scheme and he should be sentenced under the presumptive sentencing scheme and the law applicable to it. Under these circumstances, he properly raised the Blakely issue by challenging his sentence in his initial appellate brief.” Appellant's Reply Br. at 2. Given that Castenada-Nova was sentenced more than four years after our supreme court decided *Smylie*, it is highly doubtful that raising a *Blakely* issue for the first time in his appellate brief would have been sufficient to preserve it for review. *Cf. Smylie*, 823 N.E.2d at 689-90 (noting that *Blakely* claims may be waived but concluding “that it is appropriate to be rather liberal in approaching whether an appellant and her lawyer have adequately preserved and raised a *Blakely* issue[.]” since “*Blakely* represent[ed] a new rule that was sufficiently novel that it would not have been generally predicted, much less envisioned to invalidate part of Indiana's sentencing structure[.]”).

To reiterate, the trial court found that the following aggravators justified an enhanced sentence on Castenada-Nova's rape conviction: (1) C.S. was "deeply traumatized by what happened to her"; (2) Castenada-Nova's criminal history, which the court characterized as "a very minor aggravating factor"; and (3) "the facts and circumstances surrounding the case[.]" as evidenced by C.S.'s testimony and photographs of her injuries. Tr. at 667-68. Castenada-Nova denied that he committed the crimes and thus did not admit to any of the judicially found facts underlying aggravators (1) and (3). At most, the only facts found by the jury beyond a reasonable doubt were those alleged in the charging information; namely, that Castenada-Nova punched C.S. with his fist and pulled off her clothes in order to compel her to have sexual intercourse, which resulted in serious bodily injury to C.S. in the form of extreme pain.⁷ Because forcible sexual intercourse and serious bodily injury/extreme pain are material elements of class A felony rape, they may not be used as aggravators to enhance Castenada-Nova's sentence. *See Rogers v. State*, 878 N.E.2d 269, 274 (Ind. Ct. App. 2007) ("[A] material element of a crime cannot be considered an aggravating circumstance when sentencing a defendant."), *trans. denied* (2008).⁸

Regarding Castenada-Nova's criminal history, we note that

the extent, if any, that a sentence should be enhanced turns on the weight of an individual's criminal history. This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present

⁷ In giving the preliminary jury instructions, the trial court read the charging information nearly verbatim. Tr. at 202-03. In giving the final jury instructions, the trial court recited only the material elements of the charged crimes. *Id.* at 614-15.

⁸ We note that if the facts found by the trial court had been submitted to a jury and proved beyond a reasonable doubt in compliance with *Blakely*, they might well have been sufficient to support an enhanced sentence on Castenada-Nova's rape conviction.

offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability.

Duncan v. State, 857 N.E.2d 955, 959 (Ind. 2006) (citations and quotation marks omitted).

Here, the trial court assigned very little weight to Castenada-Nova's criminal history, which consists of a single conviction for public intoxication, a class B misdemeanor. Ind. Code § 7.1-5-1-3. The presentence investigation report suggests that Castenada-Nova committed this crime only a matter of months before he committed the instant crimes, but public intoxication is clearly dissimilar to and substantially less serious than criminal confinement and rape.

Based on the foregoing, we conclude that the enhancement of Castenada-Nova's rape sentence cannot stand. Therefore, consistent with our authority to review and revise sentences pursuant to Article 7, Section 6 of the Indiana Constitution, we remand with instructions to resentence Castenada-Nova to the presumptive term of thirty years on the rape conviction. The trial court need not hold a new sentencing hearing.⁹ Because the trial court's finding of a separate aggravator to justify consecutive sentences for the rape and confinement convictions does not violate *Blakely*, we affirm the order for consecutive sentences. Thus, after remand, Castenada-Nova's aggregate sentence will be forty years.

Affirmed and remanded.

RILEY, J., and VAIDIK, J., concur.

⁹ We decline to allow the State a second opportunity to prove the improper aggravators (or an opportunity to prove new aggravators) to a jury, given that it was "clear at the time of sentencing that *Blakely* required proving such facts to a jury." *Neff v. State*, 849 N.E.2d 556, 561 (Ind. 2006).