

Appellant-defendant Robert Hall appeals his convictions for Rape,¹ a class A felony, and two counts of Criminal Deviate Conduct,² a class A felony. Specifically, Hall argues that (1) the trial court violated the principle of double jeopardy when it entered three convictions based upon the same evidence of Hall's threat of deadly force, (2) the trial court erred by not making a specific finding to support the imposition of consecutive sentences, and (3) the 110-year aggregate sentence is inappropriate based on the nature of the offense and Hall's character. Finding no error, we affirm the judgment of the trial court.

FACTS

At approximately 5:15 a.m. on November 7, 2003, P.G. left home to walk to her job at a nearby McDonald's restaurant in Indianapolis. As P.G. walked through an open parking lot, Hall "charged" her and said, "Bitch, you know what I want." Tr. p. 18, 19. Hall grabbed P.G.'s hair, told her to lower her pants and unbutton her belt, and struck her in the face several times. P.G. removed her pants because she "just got tired of being hit and punched [and] knew what he wanted." Id. at 21. After Hall pushed P.G. to the ground, he attempted to penetrate her vagina with his penis, but he was unable to maintain an erection. Hall then "jerked" P.G. to her knees and penetrated her anus with his penis. Id. at 25. When she continued to struggle, Hall turned P.G. around and forced her to perform fellatio on him, saying, "Bitch, you're sucking this." Id. Hall then pushed P.G. to the ground again and inserted his penis into her vagina. Hall proceeded to lie on

¹ Ind. Code § 35-42-4-1.

² I.C. § 35-42-4-2.

the ground and pulled P.G. on top of him and made her perform fellatio on him again. Throughout the attack, Hall continually referred to P.G. as a “bitch” and a “filthy whore” and told her that he would kill her if she did not do what he said because he “had a gun.” Id. at 26, 27.

After the physical attack, Hall pushed P.G. to the ground and told her to cover her head with her jacket. Hall dumped the contents of P.G.’s purse onto the ground and searched her things. Hall demanded that P.G. give him any jewelry that she was wearing and she complied. After Hall took P.G.’s belongings, it “got quiet for a few minutes[,]” and Hall was gone when P.G. uncovered her head. Id. at 35. After the attack, which lasted for approximately ninety minutes, P.G. was taken to a hospital and submitted to an exam where the hospital staff collected physical evidence.

In September 2005, the Indianapolis Police Department was informed that DNA samples taken from P.G.’s body after the attack matched Hall’s DNA profile. On September 7, 2005, Deputy Michael Hewitt showed a photo array to P.G. and “she immediately became shaken and began sobbing again and without hesitation, identified [Hall’s photo].” Id. at 128. Further DNA testing conclusively established the DNA match. At trial, Hall admitted to having sex with P.G. on November 7, 2003, but testified that it was consensual and that they “just had fun.” Id. at 223.

On October 11, 2005, the State charged Hall with class A felony rape, three counts of class A felony criminal deviate conduct, and class B felony robbery. On December 2, 2005, the State notified the trial court that it would seek to have Hall sentenced as a habitual offender pursuant to Indiana Code section 35-50-2-8. A two-day jury trial began

on June 5, 2006, and the jury found Hall guilty of class A felony rape and two counts of class A felony criminal deviate conduct.

On June 6, 2006, Hall waived his right a jury trial on the habitual offender enhancement and, after a bench trial, the trial court found Hall to be a habitual offender. The trial court held a sentencing hearing on June 28, 2006, and sentenced Hall to fifty years imprisonment for the class A felony rape conviction and enhanced the sentence by thirty years because of Hall's habitual offender status, for an aggregate term of eighty years imprisonment for the rape conviction. It also sentenced Hall to thirty years for each of the class A felony criminal deviate conduct convictions. The trial court ordered that the criminal deviate conduct convictions run concurrently with each other but consecutively to the felony rape conviction, for an aggregate term of 110 years. Hall now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Hall argues that the trial court violated the Double Jeopardy Clause of Article 1, section 14 of the Indiana Constitution when it entered the convictions for class A felony rape and two counts of class A felony criminal deviate conduct “based upon the same evidence of ‘deadly force or threat of deadly force.’” Appellant’s Br. p. 5. Hall argues, therefore, that the proper remedy is to reduce two of the convictions to class B felonies.

The Double Jeopardy Clause in the Indiana Constitution, embodied in Article 1, Section 14, provides, “No person shall be put in jeopardy twice for the same offense.” Our Supreme Court has concluded that this provision was intended to prohibit, among

other things, multiple punishments for the same actions. Richardson v. State, 717 N.E.2d 32 (Ind. 1999). In Richardson, our Supreme Court established a test for analyzing double jeopardy claims. According to that test, multiple offenses are the same offense in violation of Article I, Section 14, “if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” 717 N.E.2d at 49. If the evidentiary facts establishing one offense establish one or several—but not all—of the essential elements of the second offense, there is no double jeopardy violation. Spivey v. State, 761 N.E.2d 831 (Ind. 2002).

Here, Hall claims that there was a violation of the Indiana Double Jeopardy Clause under the actual evidence test, not the statutory elements test. To show that two challenged offenses constitute the same offense under the actual evidence test, “a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Id. at 832. Application of the actual evidence test requires the reviewing court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective, considering the jury instructions, argument of counsel, and other factors that may have guided the jury’s determination. Id.

To convict Hall of class A felony rape, the State was required to prove beyond a reasonable doubt that Hall knowingly or intentionally had sexual intercourse with P.G. and committed the act by using or threatening the use of deadly force. I.C. § 35-42-4-1.

To convict Hall of class A felony criminal deviate conduct, the State was required to prove beyond a reasonable doubt that Hall knowingly or intentionally caused P.G. to perform or submit to deviate sexual conduct and committed the act by using or threatening the use of deadly force. I.C. § 35-42-4-2. Deviate sexual conduct is defined as an act involving either a sex organ of one person and the mouth or anus of another person or the penetration of a sex organ or anus of a person by an object. I.C. § 35-41-1-9.

Here, although each of the three offenses were elevated to class A felonies by virtue of the same threat of deadly force—Hall’s threat to P.G. that he would kill her if she did not do what he said because he “had a gun,” tr. p. 26, 27—that threat was only one element of each offense. As our Supreme Court explained in Spivey:

The test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. In other words, under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

Spivey, 761 N.E.2d at 833 (emphases in original). Hall’s double jeopardy claim fails in light of our Supreme Court’s rationale in Spivey. While the same threat of deadly force was an element of each of Hall’s convictions, it was merely one element of the offenses. Each of the convictions encompassed other elements that were proven to the jury by unique evidence—i.e. that Hall had sexual intercourse with P.G., that Hall forced P.G. to

perform fellatio on him, and that Hall performed anal sex on P.G.³ Appellant’s App. p. 24-25; Tr. p. 22-23, 24-25, 26-27, 29-30. Thus, although the evidence that Hall threatened P.G. with deadly force was a necessary element for each offense, the same evidentiary facts did not establish all of the essential elements of the rape and criminal deviate conduct offenses. Therefore, there was no violation of the Indiana Double Jeopardy Clause.

II. Sentencing⁴

A. Trial Court Findings

Hall argues that the trial court erred when it failed to specifically state its reason for ordering the thirty-year criminal deviate conduct conviction sentences—which it ordered to run concurrently to each other—to run consecutively to the eighty-year

³ Hall does not argue that the State presented insufficient evidence to sustain any of these convictions.

⁴ Indiana’s sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Hall committed his criminal offense before this statute took effect but was sentenced after the effective date. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

While our Supreme Court has not explicitly ruled which sentencing scheme applies in these situations, a recent decision seems to indicate the date of sentencing to be critical. Prickett v. State, 856 N.E.2d 1203 (Ind. 2006). The defendant in Prickett committed the crimes and was sentenced before the amendment date. In a footnote, our Supreme Court stated that “[w]e apply the version of the statute in effect at the time of Prickett’s sentence and thus refer to his ‘presumptive’ sentence, rather than an ‘advisory’ sentence.” Id. at *3 n.3 (emphasis added). Because Hall was sentenced on June 28, 2006, we will apply the amended statute and refer to Hall’s “advisory” sentence.

sentence for the rape conviction. Hall argues that we must remand his case to the trial court because, although the trial court did find aggravating and mitigating circumstances, it did not specifically state its reason for imposing consecutive sentences.

It is well established that “the same factors may be used both to enhance a presumptive sentence and to justify consecutive sentences.” Ratliff v. State, 741 N.E.2d 424, 432 (Ind. Ct. App. 2000) (emphasis added). As our Supreme Court held in Price v. State:

Although enhancing a sentence and imposing consecutive sentences are separate and distinct decisions, they are governed by the same statutory aggravating circumstances. The same factors may be used to enhance a presumptive sentence and to justify consecutive sentences. When a trial court imposes consecutive sentences even though not required to do so by statute, we examine the record to ensure that the court explained its reasons for selecting the sentence it imposed. The trial court statement of reasons must include the following components: (1) identification of significant aggravating and mitigating circumstances; (2) specific facts supporting a finding of the aggravators and mitigators; and (3) some statement demonstrating that the trial court evaluated and balanced the mitigating and aggravating circumstances in determining the sentence.

725 N.E.2d 82, 86 (Ind. 2000).

Here, the trial court found Hall’s prior criminal history—which includes nine prior misdemeanor convictions and five prior felony convictions—to be a significant aggravating circumstance at sentencing. Tr. p. 291. It stated:

Your [actual convictions from your] criminal history takes up . . . nine, arguably ten pages in your Presentence Report. . . . It’s clear, from reviewing this history, that you are a person that has no intention of ever following the law. It’s clear, from your criminal history, that you have had opportunities for lesser sanctions . . . and yet you continue to commit crimes and bring yourself back into the Criminal Justice System.

Id. at 291-92. The trial court gave minimal mitigating weight to the fact that Hall had waived his right to a jury trial on his habitual offender status, but it rejected his argument that his diabetic condition or children were mitigating factors.

While Hall argues that the trial court erred by not specifically stating the aggravating circumstance that supported the imposition of consecutive sentences, the trial court explicitly found, “the most clearly significant aggravating circumstance that I find is your prior criminal history.” Id. After balancing the aggravating and mitigating circumstances, the trial court determined “the aggravating circumstances significantly outweigh that minimal mitigating circumstances” Id. at 296. In light of the language in Price, we find no error in the trial court’s sentencing statement. 725 N.E.2d at 86.

B. Appropriateness

Hall argues that the 110-year sentence is inappropriate in light of the nature of the offenses and his character. Specifically, Hall argues that his age—forty-three years at the time of sentencing—and his condition as an “insulin-dependent diabetic” make the sentence inappropriate because he may not live to complete the sentence.

We note that our court has the constitutional authority to revise a sentence if, after due consideration of the trial court’s decision, we find that the sentence is “inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court’s decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v.

State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). 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).

As for the nature of the offenses, we initially note that Hall attacked P.G. for approximately ninety minutes, forcing her to perform unwanted sexual acts. Tr. p. 51. In addition, the trial court stated at sentencing:

I don't think I've seen an adult victim of a sex offense so impacted during her testimony as [P.G.] was. She—I saw her shaking on her way up to the stand, shaking the entire time she testified, and, again, shaking here today, when she is here for the sentencing hearing. And it—there is absolutely no way to dispute, if you were here in this courtroom, observing this trial, that this crime had a tremendous impact on [P.G.]. And the record speaks for itself as to the circumstances of that crime and how brutal they were.

Id. at 291. Hall attacked P.G.—a complete stranger—in a parking lot as she walked to work. After raping her, forcing her to perform fellatio, and engaging in anal sex, Hall left P.G. bruised and bloodied in a parking lot. While P.G.'s physical wounds may have healed, the emotional and psychological scars from Hall's attack will haunt her for the rest of her life. The heinous nature of these offenses does nothing to convince us that Hall's sentence is inappropriate.

Turning to Hall's character, we believe that his extensive criminal history elucidates his true nature. As the trial court noted, Hall has been given every chance to become a law abiding citizen and, instead, has chosen to lead a life of lawlessness. As a result of Hall's prior offenses—which mostly involved drugs—Hall has been incarcerated five times, including a seven-year term that he served in Kentucky. P.S.I. p. 4. Short-term incarceration did nothing to rehabilitate Hall, and we agree with the trial court that

Hall's extensive criminal record makes it clear that he "has no intention of ever following the law." Tr. p. 291. Hall's character does nothing to assist his argument that his sentence is inappropriate.

In light of the nature of the offenses and Hall's character, we do not find the 110-year sentence to be inappropriate. While we acknowledge Hall's argument that he is in his mid-forties, insulin dependent, and may not live to see freedom, we cannot say that the sentence is inappropriate in light of the extremely heinous nature of the crimes and his generally distasteful character. As the trial court aptly noted at sentencing, "[O]ne of the things that, in reading a transcript, that someone reading it doesn't have [is] the benefit of seeing witnesses as they've testified in open court. I was the trial judge sitting on [Hall's] case, and I saw every witness testify in this case, including [Hall]." Id. at 289. The trial court was in the proper position to sentence Hall and, as the reviewing court, we cannot conclude that the 110-year sentence it imposed is inappropriate.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.