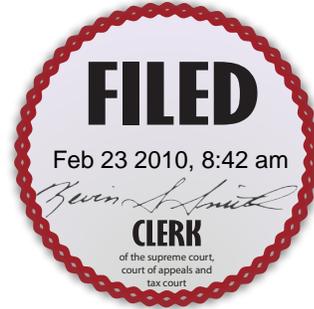


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

MARK SMALL
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GEORGE ODONGO,)
)
Appellant-Defendant,)
)
vs.) No. 79A02-0812-CR-1172
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0710-FB-30

FEBRUARY 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant George Odongo appeals his convictions of criminal deviate conduct, a Class B felony, Ind. Code § 35-42-4-2, and sexual battery, a Class D felony, Ind. Code § 35-42-4-8.

We affirm.

ISSUES

Odongo presents five issues which we consolidate and restate as:

- I. Whether the trial court erred in admitting certain evidence.
- II. Whether Odongo's right against double jeopardy was violated.
- III. Whether there was sufficient evidence to support Odongo's convictions.
- IV. Whether the trial court erred in sentencing Odongo.

FACTS AND PROCEDURAL HISTORY

In August 2007, R.J. went to a dance on the campus of Purdue University. On her way home from the dance at approximately two a.m., she encountered Odongo, James Bumanglag, and Jonathan Cappelli. Odongo approached R.J. and asked her to have sex with him, but she refused Odongo's offer. Odongo began groping R.J., touching her breasts, and putting his hand down her pants and inserting his fingers into her vagina. R.J. returned to her dormitory and told her friends about the incident but did not contact the authorities until the next day. Also the following day, R.J. was examined by Jennifer Knowles, a sexual assault nurse examiner ("SANE") at the hospital.

Based upon this incident with R.J., Odongo was charged with criminal deviate conduct, as a Class B felony; sexual battery, as a Class D felony; and confinement, as a Class D felony. Following a jury trial, he was convicted of criminal deviate conduct and sexual battery. The court sentenced him to an aggregate sentence of eight years.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE

A. Testimony of SANE

Odongo contends that Knowles' testimony constitutes an impermissible opinion and legal conclusion under Indiana Evidence Rule 704(b) and that her testimony was not needed to assist the trier of fact as required by Ind. Evidence Rule 702(a). The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that discretion. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Odongo asserts that the trial court should not have allowed Knowles' testimony because it is an impermissible opinion of Odongo's guilt and an impermissible legal conclusion under Evidence Rule 704(b). Evidence Rule 704(b) states:

Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

On direct examination, Knowles was questioned and testified as follows:

STATE: Okay. And is that type of trauma that you saw in her genitals the superficial laceration, the scratches, the hematoma is that consistent with consensual contact or not consensual?

[Objection by defense counsel based upon Evid. R. 704 which is overruled by trial court]

STATE: Base[d] upon your training and experience in all of these examinations that you've done[,] the physical evidence you saw on [R.J.]'s body was that consistent with consensual or non consensual sexual contact?

KNOWLES: It's consistent with a non consensual – I am not saying that it can't happen but it's very consistent with non consensual.

Tr. at 238-39 and 240.

Knowles' testimony does not constitute opinion testimony of Odongo's guilt. She did not state that R.J.'s injuries were definitely caused by non-consensual contact by Odongo; rather, she stated that R.J.'s injuries were consistent with that type of contact based upon her knowledge and experience as a SANE. The trial court did not err in admitting this testimony. *See, e.g., Turner v. State*, 720 N.E.2d 440, 444-45 (Ind. Ct. App. 1999) (finding that trial court did not err in admitting nurse's testimony that striation and stippling on child's genitals "indicate a possibility of something occurring in that area" and that striation "is indicative of some type of abuse" that "could be from finger manipulation"); *Swoaks v. State*, 519 N.E.2d 149, 150-51 (Ind. 1988) (seeing no abuse of discretion by trial court in allowing nurse's testimony that defendant's cuts and abrasions were consistent with other cuts she had treated which were known to be cuts caused by broken glass).

We note that the testimony in the present case is quite different from the testimony that occurred in the non-binding authority cited by Odongo. In *State v. Hudson*, 208 P.3d 1236, 1239 (Wash. Ct. App. 2009), the two SANE experts *explicitly* testified that the victim's injuries were caused by nonconsensual sex. Further, because Hudson did not dispute that his encounter with the victim had caused her injuries, the testimony of the SANE amounted to statements of his guilt. The SANE here did not purport to positively identify the cause of the injuries or the perpetrator.

In addition, Odongo argues that Knowles' testimony constitutes an impermissible legal conclusion as prohibited by Evidence Rule 704(b). Knowles' made no legal conclusion; rather, she rendered her opinion, based upon her knowledge and experience, about the type of sexual contact that would typically result in or is consistent with the types of injuries sustained by R.J. Thus, Knowles' testimony does not run afoul of Evidence Rule 704(b) as to either basis argued by Odongo.

Odongo also claims that Knowles' testimony was not necessary in order to assist the jury in understanding the evidence as required of expert testimony under Evidence Rule 702. He notes that Knowles characterized R.J.'s injuries as "superficial" and concludes that the jury was capable of determining the nature of the injuries.

Whether a witness has specialized knowledge beyond that generally possessed by a lay person and that will be helpful to a jury is a matter entrusted to the broad discretion of the trial court. *Newbill v. State*, 884 N.E.2d 383, 398 (Ind. Ct. App. 2008), *trans. denied*, 891 N.E.2d 51. Evidence Rule 702(a) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

We first note that although Odongo objected to Knowles' testimony regarding the nature of R.J.'s injuries, he did not object generally to Knowles testifying as an expert. Knowles testified that she had been a registered nurse since 1982. She further testified that she was certified as a SANE in 2000, and she explained each step of the sexual assault examination process. Finally, she testified as to R.J.'s injuries using exhibits. We conclude that Knowles' specialized knowledge was helpful to the jury to understand the import of the exhibits, which reflected physical findings, as well as to the meaning of those findings. We believe that whether a certain injury to the female genitalia is indicative of consensual or nonconsensual contact is beyond the common knowledge and experience of the average lay person. Therefore, we find no abuse of discretion in the trial court's decision to allow Knowles' expert testimony. Accordingly, there was no error in the admission of this evidence.

B. Testimony of Police Officer

Odongo's second assertion of evidentiary error concerns the testimony of the police officer. Like Knowles' testimony, the officer's testimony allegedly constitutes impermissible opinion testimony under Evidence Rule 704(b). However, Odongo did not object at trial to the officer's testimony on the basis of Evidence Rule 704(b). Rather, at trial, Odongo's objection was on the basis of speculation and extension beyond the

officer's area of expertise. *See* Tr. at 395. Consequently, this issue is waived for appellate review. *See Collins v. State*, 835 N.E.2d 1010, 1016 (Ind. Ct. App. 2005), *trans. denied* (holding that issue is waived for review where party objects on one ground at trial and raises different ground on appeal).

II. DOUBLE JEOPARDY

Odongo next challenges his convictions on double jeopardy principles. He argues that there is a reasonable possibility that the jury relied upon the same actual evidence in convicting him of both criminal deviate conduct and sexual battery.

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. *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999). Under this 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 v. State*, 761 N.E.2d 831, 833 (Ind. 2002). Application of the actual evidence test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the fact-finder's perspective. *Newgent v. State*, 897 N.E.2d 520, 525 (Ind. Ct. App. 2008). In determining the facts used by the fact-finder to establish the elements of each offense, it is proper to consider the charging information, jury instructions, and arguments of counsel. *Id.*

The jury was instructed that to find Odongo guilty of sexual battery, the evidence must have proved that he knowingly or intentionally, with the intent to arouse or satisfy his own sexual desires or the sexual desires of R.J., touched R.J. when she was compelled to submit to the touching by force or the imminent threat of force. Appellant's App. at 78, Final Instruction No. 6. As to the charge of criminal deviate conduct, the jury instructions stated that to convict the defendant, the evidence must prove that Odongo knowingly or intentionally caused R.J. to perform or submit to deviate sexual conduct when she was compelled by force or the imminent threat of force. Appellant's Appendix at 77, Final Instruction No. 5. The jury was also instructed that when deviate sexual conduct is charged alleging the penetration of the sex organ or anus of a person by an object, the law holds that a finger is an "object." Appellant's App. at 83, Final Instruction No. 13.

The State presented evidence that Odongo approached R.J. and asked her to have sex with him. R. J. refused, and Odongo put his arms around her from behind and began fondling her breasts. They continued walking and Odongo then put his hand down R.J.'s pants and inserted his fingers into her vagina, which continued until the end of the incident. Thus, R.J. described two distinct touchings: (1) the fondling of her breasts, and (2) the insertion of fingers into her vagina. In addition, although the State never specifically argued that the breast fondling constituted sexual battery, it did emphasize that it and the vaginal penetration were distinct acts. The State questioned R.J. as follows:

STATE: You said that he was groping you under your shirt what parts of his body – what parts of your body rather was he touching?

R.J.: My breasts.

STATE: Was this with or without your permission?

R.J.: Without.

STATE: When he had his hands down your pants and he was fingering your vagina that is putting his fingers inside your vagina was that with or without your permission?

R.J.: Without.

Tr. at 178. Thus, we conclude that Odongo has established no reasonable possibility that the jury relied on evidence that he inserted his fingers into R.J.'s vagina to support its guilty verdicts for both sexual battery and criminal deviate conduct. Odongo's convictions therefore do not violate the prohibitions against double jeopardy.

Odongo additionally claims that his right against double jeopardy was violated because the same evidence was used to establish the force required for both of his convictions. Although the force or imminent threat of force remained throughout Odongo's contact with R.J., double jeopardy was not violated. As we established above, at least one other essential element of the two convictions was not established by the same evidence. Consequently, there was no double jeopardy violation. *See Spivey*, 761 N.E.2d at 833 (holding that under actual evidence test, double jeopardy clause is not violated when evidentiary facts establishing essential elements of one offense also establish only one or even several, but not all, of essential elements of second offense).

III. SUFFICIENCY OF THE EVIDENCE

For his third assertion of error, Odongo contends that there was insufficient evidence to sustain his convictions. Particularly, he maintains that R.J.'s testimony was incredibly dubious and that the evidence of her physical examination did not support her claim of the incident.

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id.*

However, appellate courts may apply the incredible dubiousity rule to impinge upon a jury's function to judge the credibility of a witness. *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007). The incredible dubiousity doctrine applies "where a 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." *Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind. 2002). This Court has observed that application of this doctrine is rare, but, when used, the applicable standard is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Krumm v. State*, 793 N.E.2d 1170, 1177 (Ind. Ct. App. 2003).

In support of his application of this doctrine to the present case, Odongo points to R.J.'s testimony that she was in his presence for 15-20 minutes, that he never threatened her, that she told him she was not scared, that she failed to seek help from passersby, and that she was hesitant to call the police. Odongo fails to provide any argument or citation to authority to support his assertion. Instead, he merely lists the foregoing bits of testimony without any explanation or argument as to how or why they cause R.J.'s testimony to be incredibly dubious.

Nevertheless, we briefly address his claim. First, the implication from Odongo's cursory argument is that R.J.'s testimony is improbable such that no reasonable person could believe it. However, R.J. testified unequivocally regarding the details of the evening and that it was Odongo who attacked her. Further, she explained and was cross-examined regarding the testimony cited by Odongo in his brief. Second, we note that Odongo's assertion on this issue is an unmistakable invitation to assess witness credibility, which we will not do. *See Newman, supra*. Finally, Odongo has failed to establish that R.J.'s version of events ran counter to human experience. We decline to invoke the incredible dubiousity rule to impinge upon the jury's evaluation of the evidence in this case.

The remainder of Odongo's sufficiency argument concerns the results of the physical examination of R.J. He avers that these results do not corroborate R.J.'s version of events. It appears Odongo is claiming that the reference to R.J.'s wounds as

“superficial” by the SANE somehow leads to the inference that the incident did not actually occur.

Again, we are invited by Odongo to judge witness credibility, specifically R.J.’s credibility; however, we are unable to accept this invitation. *See Newman*, 677 N.E.2d at 593. It is the function of the trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). Stated another way, the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh’g denied*. Moreover, a conviction may be sustained by the uncorroborated testimony of a single witness or victim. *Baltimore v. State*, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007), *trans. denied*. Accordingly, we will not disturb the jury’s determination. The State presented sufficient evidence to sustain Odongo’s convictions.

IV. SENTENCING

Odongo challenges the trial court’s imposition of an aggregate eight year sentence. The trial court imposed eight years for Odongo’s conviction of criminal deviate conduct and one year for his conviction of sexual battery, to be served concurrently. Although nowhere does he explicitly claim that his sentence is inappropriate, Odongo cites to Indiana Appellate Rule 7(B) in his brief. Essentially, he asserts error with the trial court’s single aggravating factor and its weighing of the aggravating and mitigating factors.

We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). As long as a defendant's sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* at 490. An abuse of discretion occurs if the sentencing court's 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.* In addition, a trial court "may impose any sentence that is ... authorized by statute ... regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d).

Odongo claims that the trial court's sole aggravator that he did not take responsibility for his actions was inappropriate for two reasons: (1) there was no corroboration of R.J.'s allegations and (2) it is unclear how the trial court weighed this single aggravator with the four mitigators.

Ind. Code § 35-50-2-5 provides that a person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years. Here, Odongo received an aggregate sentence of eight years for one Class B felony and one Class D felony, two years shy of the advisory

sentence for one Class B felony. R.J. testified explicitly as to her encounter with Odongo, and the trier of fact determined that it believed R.J.'s version of events. In the face of all the evidence presented at trial as to Odongo's antics on the evening in question, he failed to accept responsibility for his actions and instead blamed the alcohol he had consumed. We find no abuse of discretion on the part of the trial court.

In addition, because the trial court, pursuant to Ind. Code § 35-38-1-7.1(d), no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot be said to have abused its discretion in failing to properly weigh such factors. *Anglemyer*, 868 N.E.2d at 491. Therefore, we need not address Odongo's claim concerning the trial court's weighing of the aggravating and mitigating factors.

Finally, the defendant has the burden of persuading the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Odongo has not carried his burden in this case.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court did not abuse its discretion in admitting the testimony of the SANE, and Odongo waived his allegation of error concerning the testimony of the police officer. Additionally, there was no double jeopardy violation, and there was evidence sufficient to sustain the convictions. Finally, we cannot say that Odongo's sentence is inappropriate. Accordingly, we affirm his convictions.

Affirmed.

ROBB, J., and BRADFORD, J., concur.