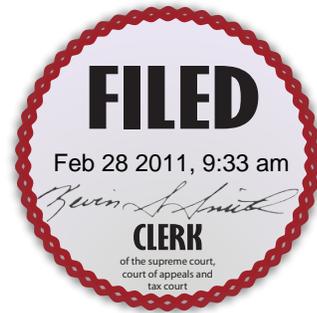


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOHN (JACK) F. CRAWFORD
Crawford & Devane
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GREGORY JACOB,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 29A02-1004-CR-584

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0812-FA-126

February 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Gregory Jacob appeals his convictions for criminal deviate conduct, as a Class A felony; sexual battery, as a Class C felony; intimidation, as a Class C felony; and criminal confinement, as a Class B felony, following a jury trial, as well as the sentences imposed.

Jacob presents the following issues for review:

1. Whether the trial court abused its discretion when it excluded a defense witness due to a violation of the separation of witnesses order.
2. Whether the court abused its discretion when it refused to admit into evidence an FBI hair analysis report.
3. Whether the trial court erred when it denied Jacob's motion for a mistrial based on the alleged violation of an order in limine.
4. Whether the court's entry of judgment of conviction for sexual battery, as a Class C felony; intimidation, as a Class C felony; and criminal confinement, as a Class B felony, violates double jeopardy.
5. Whether the sentences imposed are inappropriate in light of the nature of the offenses and Jacob's character.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

On November 26, 2007, H.P. was working in a model home in Hamilton County as an area manager for a residential development company. The model home contained a presentation area and an office in what would have been the garage of the home. Regular entry doors from the exterior into the presentation area replaced the garage door. At 7:20 in the evening, H.P. began locking the model home doors in preparation to leave for home when she heard the door to the presentation area swing open. She turned around to "greet whoever it was and a man was running at [her] with a hooded sweatshirt on, over

his head like that, and a gun up in the air.” Transcript at 114. The hood of the dark, oversized sweatshirt hung over and “completely shadowed” the man’s face. Id. at 115. Three weeks after the event, H.P. identified the man as Jacob.

H.P. screamed, and Jacob yelled, “shut up, bitch.” Id. H.P. asked Jacob not to kill her. Jacob grabbed her right arm and, with the gun in her back, moved her to the office in the back of the garage area. From there, he moved H.P. up two steps into the model home. Jacob asked about a door off the kitchen, and H.P. replied that it led to the basement. Still holding H.P.’s arm, Jacob directed her to the finished portion of the basement and then asked about a door there. H.P. told him that the door led to the unfinished part of the basement. Still armed, Jacob moved her into the unfinished room.

While standing behind H.P., Jacob ordered her to her knees. She asked him not to kill her. With his zipper open, he rubbed his penis against H.P.’s bottom over her pants. He then told her to “undo” her pants, and she complied. Jacob said, “Suck my dick,” but H.P. replied, “I can’t.” Id. at 122-23. Jacob “moved [her] from that kneeling position, facing away from him, down onto her stomach flat[.]” Id. at 119. While H.P. was lying down, Jacob inserted his fingers in her anus. H.P. said “ouch” and he stopped, and then did it again, this time putting his fingers from one hand in her anus and fingers from his other hand in her mouth. H.P. again said “ouch.” Id. at 125. Jacob also rubbed his penis against H.P. while she was lying down.

Still behind H.P., the two stood up. Jacob lifted her shirt and bra and felt her breasts. He then told her to get down, and she lay down on her back with her knees up. Jacob then straddled H.P.’s head and bent over so his head was at her feet, leaving his

genital area closest to her face. H.P. then moved to sit on the couch that was in the room. Jacob showed H.P. the gun and told her that if she moved he would “blow [her] fucking head off.” Id. at 127. Jacob left the room.

H.P. waited, listened, and called “Sir” several times before she exited the basement. When she went up to the office, she picked up her keys and salad bowl and “got into [her] car as fast as [she] possibly could.” Id. at 129. She telephoned her home, which was only two minutes from the model home. H.P.’s mother answered, and H.P. asked her to tell H.P.’s husband to meet H.P. outside when she got home. Once home, H.P. told her husband what had happened. The two then went inside, where they called the police.

When police arrived, she described the perpetrator as an African American or Hispanic male, definitely “ethnic” based on the darkness of the skin she had seen on his jaw under the hood. Id. at 131. She noted that “when he said ‘shut up, bitch,’ the word ‘bitch’ didn’t sound like a white person saying ‘bitch.’ ” Id. She also told police that she felt that she knew the perpetrator. Later she realized that his voice had sounded familiar. She also described her attacker as five feet eight inches tall and of slender build, though she later conceded that he had seemed huge to her as he ran at her at the beginning of the attack.

H.P. had met Jacob on at least four occasions when he and his girlfriend, Venus Loy, were shopping for a house. They first met in the spring of 2007, and Loy purchased a home that summer. Jacob had also brought his parents and Loy’s mother to purchase homes. And Jacob and another man had been in the model home where H.P. worked

sometime in October. On December 17, H.P. contacted police and told her that Jacob may have been her attacker.

On April 22, 2008, police executed a search warrant for “biological evidence for an Indiana State Police rape suspect kit.” Id. at 438. In execution of the warrant, paramedics drew Jacob’s blood at the Carmel Police Department. Jacob was at the Department at least two hours. While there, Jacob said he had not tried to rape anyone, but he also asked “did she see me do something to her.” Id. at 440. When asked, Jacob acknowledged that he had been at several model homes in the area. Seminal material found on H.P.’s pants from the night of the attack matched Jacob’s DNA profile.

Jacob has an identical twin brother, Jeff Jacob (“Jacob’s twin”). H.P. had never met or talked to Jacob’s twin and was unaware that Jacob had a brother. Jacob and his twin do not have identical appearances. Jacob is five feet three inches tall and weighs approximately 140 pounds. The twin is two inches taller, approximately twenty pounds heavier, and has a rounder face. In November 2007, Jacob and his twin both worked for Damar Services, which is south of Indianapolis. Jacob’s supervisor was Cindy Hodge, the twin’s live-in girlfriend. Jacob and his brother had the same type of cell phone but separate phone numbers.

Jacob was scheduled to work on the date of the attack, but Hodge clocked him in and out on that date. Co-workers had frequently complained that Jacob did not show up for work when scheduled, disappeared for long periods during his shift, or left work before his shift had ended. Loy’s home, where Jacob also lived, was a couple of minutes from the model home where H.P. was attacked.

The State charged Jacob with criminal deviate conduct, as a Class A felony; sexual battery, as a Class C felony; battery, as a Class C felony; intimidation, as a Class C felony; and criminal confinement, as a Class B felony. At the start of trial, the court granted Jacob's motion for separation of witnesses and admonished the witnesses present accordingly. Loy, a defense witness, was not in the courtroom at the time, but she learned from Jacob's lawyer that she could not be in the courtroom while testimony was being given. Loy's mother was in the courtroom on the first day of trial.

After the first day of trial, Jacob and Loy talked over the prison phone about the witnesses' testimony and the objections that had been lodged. In particular, Jacob and Loy discussed details about H.P.'s testimony. As a result, the State moved to bar Loy from testifying due to violation of the separation of witnesses order. The trial court listened to tapes of the telephone conversations. Over Jacob's objection and proffer of evidence, the trial court granted the motion and barred Loy's testimony.

At the close of evidence and following deliberations, the jury found Jacob guilty of all charges. The court entered judgment of conviction for criminal deviate conduct, as a Class A felony; sexual battery, as a Class C felony; intimidation, as a Class C felony; and criminal confinement, as a Class B felony.¹ The court sentenced Jacob to forty-five years for criminal deviate conduct, seven years for sexual battery, seven years for intimidation, and eighteen years for criminal confinement, to be served consecutively.

Jacob filed a motion to correct error. Following an evidentiary hearing, the court denied the motion. Jacob now appeals.

¹ The court did not enter judgment of conviction on battery with a deadly weapon to avoid a double jeopardy violation.

DISCUSSION AND DECISION

Issue One: Exclusion of Testimony

Jacob contends that the trial court abused its discretion when it excluded Loy's testimony for violating the separation of witnesses order. Specifically, he argues that there was no violation of the separation order and, even if a violation occurred, the sanction of excluding Loy's testimony was an abuse of discretion. We address each contention in turn.

Indiana Rule of Evidence 615, which governs separation orders, provides:

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's causes.

The purpose of a separation of witnesses order is to prevent the testimony of one witness from influencing that of another. Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995) (citation omitted), trans. denied.

Indiana Rule of Evidence 615 "sets out the circumstances in which a separation order is to be given, but it does not address the remedy for a violation." Jiosa v. State, 755 N.E.2d 605, 607 (Ind. 2001). Once a separation of witnesses order is granted, the remedy for a violation of the order is a question left to the sound discretion of the trial court. Smiley, 649 N.E.2d at 699 (citation omitted). We will not disturb the trial court's exercise of its discretion unless there is a showing of prejudice tantamount to an abuse of discretion. Id. (citation omitted).

The separate of witnesses rule, adopted in 1994, altered prior caselaw about when a court may order the separation of witnesses, but, by its silence on the topic, does not alter “prior caselaw which holds that a court may disqualify a witness for violating a separation order if the violation was caused by the connivance or fault of the party calling the witness.” Smiley, 649 N.E.2d at 699 n.5. Thus, a trial court has the power to exclude the testimony of a witness who has violated the court’s separation order. Id. at 699. But disqualification of a witness is a drastic sanction due to the severe impact it has on the defendant’s Sixth Amendment right to present witnesses on his behalf. See id. “Either absence of fault on the part of the offering party or extreme significance of the evidence renders it an abuse of discretion to exclude testimony based on an order.”² Jiosa, 755 N.E.2d at 609.

Jacob first contends that his discussion with Loy about the testimony of other witnesses did not violate the separation order. He argues that although he was present when the trial court issued the order, the order was directed to witnesses. Because Jacob did not testify at trial, he was not a witness. And Loy was not present when the court issued the order. Thus, the argument goes, the order did not apply to Jacob. We cannot agree.

At the start of trial Jacob requested a separation of witnesses order. The court granted the request from the bench, stating:

² Earlier in Jiosa the Indiana Supreme Court stated that trial courts “may exclude witnesses if the party is at fault or the testimony does not directly affect the party’s ability to present its case.” Jiosa, 755 N.E.2d at 608 (citing Rowan v. Owens, 752 F.2d 1186, 1191 (7th Cir. 1984) (emphasis added), cert. denied, 476 U.S. 1140 (1986); United States v. Gibson, 675 F.2d 825, 836 n.6 (6th Cir. 1982)), cert. denied, 459 U.S. 972 (1982). In other words, the supreme court has stated the test in both the disjunctive and the conjunctive. Erring on the side of caution, we apply the stricter of these inconsistent rules.

I think that's appropriate. I don't know, I have, and each of you are kind of responsible to assist the Court in doing that and as they check into my office, even though we're shorthanded, I know that they always tell them to stay in the hallway until somebody comes and gets them. If any of you are prospective witnesses, from this time on, you would have to remain outside the courtroom. I admonish you not to talk about your prospective testimony with anyone. After you've testified[,] again, you're under the separation of witness[es] order and you should not talk about what you have testified to with anyone. Naturally you have leave to talk to the lawyers.

Transcript at 56-57 (emphases added). Jacob did not apprise the court that a defense witness, Loy, was not in the courtroom when the court ordered the separation of witnesses. However, after the first day of trial, Jacob and Loy discussed over the phone the testimony given that day, including details of H.P.'s testimony.

Jacob's first contention is that there was no violation of the separation order because the order did not apply to him. In support, he cites United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000), which analyzes Federal Rule of Evidence 615, the federal counterpart to Indiana Evidence Rule 615. There the Fourth Circuit held that "sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party[.]" Id. at 317 (citations omitted). Clearly the counsel exception to the sequestration order furthers the counsel's purpose in representing his client. Jacob contends that the counsel exception also applies to the client. But he cites no law in support of that contention. Further, "[s]ome of the concurrences and dissents in Rhynes took the view that an attorney may not act as a 'conduit' among witnesses." Jiosa, 755 N.E.2d at 608.

In any event, Jacob consciously disregarded the separation order. He does not argue that he did not know the order applied to Loy, nor does he deny that they discussed

the testimony of other witnesses, including the victim, as it pertained to the defense theory. Instead, Jacob argues that he, as a Pakistani citizen, “cannot be expected to appreciate and understand the nuances of a witness separation order.” Appellant’s Brief at 17. But Jacob has lived in central Indiana since 1995 and graduated from an Indianapolis high school. He had been employed in his father’s jewelry store and, at the time of the offenses, worked at a facility helping disabled people. He does not claim any impediment in understanding English, and the order was clear—the court forbade witnesses from discussing their testimony with anyone. The uncontroverted evidence shows that Jacob knowingly violated the separation order by discussing trial testimony with Loy.

Jacob also argues that Loy did not know the order applied to her because she was not in the courtroom when it was issued. But at the hearing on Jacob’s motion to correct error, Loy testified that Jacob’s counsel had informed her that she was not allowed to come in the courtroom. Appellant’s Brief at 14. When asked whether it was “fair to say that [she] realized . . . that the reason [she] couldn’t come in was because one witness is not allowed to hear what another witness is saying because that might sway [her] testimony one way or the other[,]” Loy answered that such was a fair statement. Transcript at 712. The record shows that both Jacob and Loy knew about the separation order.

Jacob next contends that, even assuming the order was violated, the trial court abused its discretion when it sanctioned him by barring Loy’s testimony. Again, “[e]ither absence of fault on the part of the offering party or extreme significance of the evidence

renders it an abuse of discretion to exclude testimony based on an order.” Jiosa, 755 N.E.2d at 609. We have already determined that Jacob knowingly violated the order by discussing trial testimony with Loy. Thus, we next consider whether Loy’s testimony was of such “extreme significance” that its exclusion was an abuse of discretion. See id.

In the offer of proof Loy stated that she would have testified to the following: that she and Jacob had visited H.P. at the model home four or five times looking for a home site for Jacob’s mother; that H.P. was “on a ‘first name’ basis with [Loy and Jacob] and readily recognized them[,]” Appellant’s Brief at 19; that Jacob had become quite familiar with the layout of the model home, including the location of the basement; and that Jacob and his twin brother used the same model of cell phone and shared or exchanged phones with each other on a regular basis. We consider each of these items in turn.

We turn first to the number of times Loy and Jacob had met H.P. H.P. testified that she had met Jacob at least four times at the model home. Thus, Loy’s testimony would not have contradicted H.P.’s testimony. Next Loy would have testified that H.P. was on a first name basis with Jacob. We may reasonably assume that Jacob was not hooded and hiding his face when he visited the model home as a customer. But H.P. testified that Jacob hid his face under a large sweatshirt hood at the time of the attack and that she had eventually identified him by his voice and skin color. Thus, Loy’s testimony about H.P.’s familiarity with Jacob was not of extreme significance to Jacob’s defense.

We next consider Loy’s testimony that Jacob was familiar with the model home. Specifically, Jacob contends that Loy would have testified that he was familiar with the location of the basement in the model home. Presumably this evidence would have been

used to show that Jacob could not have been the perpetrator because the perpetrator had asked where the basement door led. But a review of Loy's testimony shows merely that Jacob had toured the model home and knew only that it had a basement. Loy's testimony at the motion to correct error hearing does not indicate the degree of Jacob's familiarity with the model home or specifically refer to his knowledge about the location of the basement door. Thus, this testimony also is not of extreme significance to the defense.

Finally, we consider Loy's testimony that Jacob and his twin occasionally exchanged phones with each other. At trial, the court admitted cell phone records showing that the cell phone registered to Jacob was in Carmel when it received calls from and made calls to Cindy Hodge³ between four o'clock and five-twenty on the afternoon of the attack; that the phone registered to Jacob had received a call within a mile of the model home forty minutes before H.P.'s attack; that the phone registered to Jacob's twin connected several times with the phone registered to Loy on the day of the attack; and that the phone registered to Jacob's twin had received calls near Camby, south of Indianapolis, roughly two hours before the attack, from a phone registered to Loy. Jacob argues that this circumstantial evidence showed that he and his twin brother "had exchanged cell phones on November 26, 2007." Id. at 11. Thus, he maintains, Loy's testimony that the brothers had identical phone models and regularly exchanged phones was extremely significant to show that Jacob's twin could have been the perpetrator.

But Loy's testimony was not the only way for Jacob to establish his defense theory based on switching phones with his twin. Henry Akoi, a co-worker of Jacob's twin,

³ Again, Hodge was Jacob's supervisor at Damar and the girlfriend of Jacob's twin.

testified that the twin was “constantly on the phone” at work, Transcript at 399. The cell records show that Akoi spoke with Jacob’s twin at the number registered to the twin on the morning of the attack. The cell records also show that the phones registered to Jacob and his twin made and received numerous calls, including calls with co-workers. If Jacob and his twin had regularly exchanged phones, there would have been several other witnesses through whom such evidence could have been entered. Moreover, H.P. testified that she spoke three or four times with Jacob at the phone number registered to him and that only Jacob had answered her calls.

In sum, the cell phone records show that the phone registered to Jacob was used within a mile of the model home less than an hour before the attack. To show that the phone was actually used by his twin, Jacob could have offered the testimony of any of the many others that he and his twin regularly spoke with on their respective cell phones or spoke with on the day of the attack. He chose to limit the admission of that evidence through Loy, but, as discussed above, he assisted her in violating the separation of witnesses order. On these facts, we cannot say that Loy’s testimony was of such extreme significance so as to render the exclusion of her testimony for violation of the order an abuse of discretion.

Issue Two: Hair Analysis

Jacob next contends that the trial court abused its discretion when it did not allow him to offer into evidence an exculpatory FBI report detailing the agency’s hair analysis test results. The decision to admit or exclude evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Davidson v. Bailey, 826 N.E.2d

80, 85 (Ind. Ct. App. 2005) (quoting Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997), aff'd on other grounds after remand, 722 N.E.2d 799 (Ind. 2000)). A decision will be reversed only for a manifest abuse of that discretion. Id. But “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.” Ind. Evid. Rule 103(A)(2).

The State argues that Jacob failed to authenticate the FBI report. Authentication is a condition precedent to admissibility. See Evid. R. 901(1). That requirement is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Id. Jacob proffered an uncertified photocopy of the FBI hair analysis report, but he designated no witnesses to authenticate the FBI hair analysis report. Nor did he show that the report was self-authenticating under Evidence Rule 902. Without any indication of its authenticity, the trial court properly refused to admit the hair analysis report. Jacob has not shown that the trial court abused its discretion when it refused to admit the FBI hair analysis report.

Nevertheless, Jacob contends that the trial court should not have excluded an FBI hair analysis report. The report contained the results of the analysis of a hair that police had collected in vacuum sweepings from the scene of the attack. The report states that the head and pubic hair samples from Jacob and H.P. as well as debris samples taken from H.P. and from the crime scene were examined microscopically. The report concludes that there was a “Caucasian pubic hair [found] in the debris” collected by the

Carmel Police Department from the scene of the attack and that that hair was “not consistent with originating from [H.P.] or Gregory Jacob” Defendant’s Exhibit A at 3.⁴

Jacob observes that the report does not indicate that samples from Jacob’s twin were tested. He then argues that the fact that the pubic hair found at the crime scene is not consistent with his own pubic hair samples or those from H.P. “suggests that it may belong to his twin brother, Jeff Jacob.” Appellant’s Brief at 21. But Jacob did not proffer any evidence to show whether the pubic hair of identical twins necessarily shares common characteristics. Thus, Jacob has not shown that this evidence was probative of his twin’s alleged perpetration of the offenses. As such, he has not shown that the trial court abused its discretion when it refused to admit the hair analysis report. See Evid. R. 402 (“Evidence which is not relevant is not admissible.”).

Issue Three: Mistrial

Jacob contends that the trial court abused its discretion when it denied his motion for a mistrial. The standard in such cases is well established:

Whether to grant or deny a motion for a mistrial is a decision left to the sound discretion of the trial court. We will reverse the trial court’s ruling only upon an abuse of that discretion. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. To prevail on appeal from the denial of a motion for a mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury’s decision rather than upon the degree of impropriety of the conduct.

⁴ The Exhibit volume in this case contains two items identified as Exhibit A. The item cited here as Exhibit A is the State’s Supplemental Response to Defendant’s Motion for Discovery, consisting of six pages that are not consecutively numbered. The citation above refers to the third of six pages.

A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement.

Stokes v. State, 919 N.E.2d 1240, 1243 (Ind. Ct. App. 2010) (citations omitted), trans. denied.

Here, Jacob filed a motion for an order in limine to preclude the admission of evidence that his DNA had been collected during a previous period of incarceration at the Department of Correction.⁵ The State agreed, instructing prosecution witnesses not to make any references to Jacob's prior incarceration, and the trial court granted Jacob's motion. Jacob contends that the State violated the trial court's order when Detective Nancy Zellers of the Carmel Police Department, while answering juror questions, mentioned that Jacob had been incarcerated.

On direct examination, Detective Zeller testified in part that she had replaced the original supervising detective in the case. She testified that she had served a warrant to collect DNA through an oral swab from Jacob's twin and that Jacob's twin had complied with the warrant in a meeting at his home in Avon. In the course of the investigation, officers twice attempted to serve a warrant to collect DNA from Jacob's twin. The first warrant sought to collect DNA from the twin via a blood draw and was served by the detective originally assigned to the case.⁶ In the last question on redirect, the State asked

⁵ Jacob's DNA was collected while he was previously incarcerated. The convictions for which he was incarcerated at that time were later vacated on a motion to correct error.

⁶ The prior warrant had been served by the former supervising detective on the case.

Detective Zellers, “[d]oes a buccal [oral] swab hurt?” and the detective answered “no.”
Transcript at 418.

On re-cross, Jacob’s counsel then questioned Detective Zeller as follows:

Q: Jeff Jacob is a suspect in this case, is he not?

A: He’s not.

Q: He’s not. Did you fill out a department case report identifying Jeffrey Jacob and Gregory Jacob as suspects in this case?

A: I did not.

Q: You did not. Okay.

Id. at 419.

Immediately following re-cross, Detective Zeller answered two juror questions:

Q: First question’s kind of a two[-]parter. What is the difference between a mouth swab and a blood sample?

A: A mouth swab involves [a] plastic scraping device, maybe three inches long that would scrape the interior of the mouth all over. A blood draw would be from a needle in a hospital by a qualified person to do that.

Q: And second part they asked why is this relevant?

A: It is relevant in that when Mr. Jacob was incarcerated referred to the fact that he and his brother—

Id. at 421. Jacob interrupted the detective’s response, objecting that the answer violated the order prohibiting mention of Jacob’s prior incarceration. Jacob then moved for a mistrial.⁷

⁷ The transcript does not indicate that the trial court ruled on Jacob’s motion for a mistrial, but we infer that the trial court denied the motion because the trial continued.

Jacob contends that the trial court abused its discretion when it denied his motion for a mistrial based on Detective Zeller's response to the second juror question. His argument, in its entirety, is as follows: "Detective Zeller[']s statement that defendant Gregory Jacob had been "incarcerated" was a direct and blatant violation of the motion in limine. Clearly, it was highly prejudicial to the defendant." Appellant's Brief at 24. Jacob has not supported his argument with cogent reasoning or any analysis that cites relevant authorities. As such, the argument is waived. See Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, Jacob's bald assertion that the detective's response was "highly prejudicial," without more, is insufficient to show that Jacob was placed in grave peril. And Jacob does not discuss the probable persuasive effect of the testimony on the jury's decision. As such, his argument must fail. See Stokes, 919 N.E.2d at 1243.

Issue Four: Double Jeopardy

We next consider Jacob's contention that his convictions for criminal deviate conduct, as a Class A felony ("Count 1"); sexual battery, as a Class C felony ("Count 2"); intimidation, as a Class C felony ("Count 4"); and criminal confinement, as a Class B felony ("Count 5"), violate double jeopardy principles. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Double jeopardy analysis involves the dual inquiries of the statutory elements test and the actual evidence test. Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32 (Ind. 1999)). The standard for evaluating an alleged double jeopardy violation is well-settled:

In Richardson v. State (1999) Ind., 717 N.E.2d 32, our Supreme Court established a two-part test for analyzing double jeopardy claims under the Indiana Constitution and concluded:

“two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, 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.” Richardson, *supra* at 49.

Thus, even if there was no double jeopardy violation in the present case based upon the essential statutory elements of the crimes of forgery and theft, a violation may still have occurred if the actual evidence presented at trial demonstrates that each offense was not established by separate and distinct facts. The 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.

Williams v. State, 892 N.E.2d 666, 668-69 (Ind. Ct. App. 2008) (some citations and quotations omitted), trans. denied.

Jacob makes two arguments under the Double Jeopardy Clause. First he contends that the “movement” alleged to be the basis for the criminal confinement conviction was part of the act of criminal deviate conduct and not a separate and distinct offense. Appellant’s Brief at 27. He also argues that the use of a deadly weapon to enhance Counts 1, 2, 4, and 5 violates double jeopardy principles. We address each contention in turn.

We first consider Jacob’s argument that the conduct underlying the criminal confinement conviction was not a separate and distinct act but, instead, was part of the criminal deviate conduct offense. To prove that Jacob had committed the offense of criminal deviate conduct, as a Class A felony, the State was required to prove beyond a

reasonable doubt that he knowingly or intentionally caused H.P. to submit to deviate sexual conduct when compelled by the threat of deadly force. See Ind. Code § 35-42-4-2(a), (b)(1). The information charged that Jacob had “knowingly caused [H.P.] to submit to deviate sexual conduct, to-wit: penetrate the anus of [H.P.] with his fingers, when [H.P.] was compelled by imminent threat of deadly force, to-wit: pointing a handgun at [H.P.]” Appellant’s App. at 17.

To prove that Jacob had committed the offense of criminal confinement, as a Class B felony, the State was required to prove beyond a reasonable doubt that Jacob knowingly confined H.P. without her consent while armed with a deadly weapon. See Ind. Code § 35-42-3-3(a)(1), (b)(2)(A). The information charged that Jacob had “knowingly confined [H.P.] without her consent, to-wit: escorted [H.P.] through a door leading to an unfinished portion of a basement; while armed with a deadly weapon, to-wit: a handgun.” Appellant’s App. at 18.

Applying the statutory elements test, the elements of one of these offenses does not also prove the elements of the other. As such, we must apply the actual elements test. Jacob argues that, “[a]ccording to the jury verdict, [he] moved [H.P.] from upstairs to the basement to perform his act of criminal deviate conduct.” Appellant’s Brief at 27. He contends that the “ ‘movement’ was part of the act of deviate conduct and not a separate and distinct offense” and that it was a “preparatory act to the crime of criminal deviate conduct.” Id. Jacob misstates the jury verdict. The State charged him with moving H.P. “through a door leading to an unfinished part of the basement[.]” Appellant’s App. at 18. Thus, the movement at issue for the offense of criminal confinement was not from the

main level of the house to the basement but, instead, was from the finished part of the basement to an unfinished room in the basement.

In any event, Jacob contends that there is a reasonable possibility the jury considered evidence of the movement into the unfinished basement room to prove criminal deviate conduct. In support, he cites Williams v. State, 889 N.E.2d 1274 (Ind. Ct. App. 2008), trans. denied. In that case, the defendant attacked K.H. from behind, beat her, and pulled down her pants and underwear. On appeal the court considered whether the convictions for attempted rape, battery, and criminal confinement violated the Indiana Double Jeopardy Clause. In light of the facts of the case, the court was “hard pressed to find a reasonable probability [sic] that the jury in this case could have concluded that [the defendant’s] actions constituting the attempted rape of K.H. did not include his attack upon and contemporaneous confinement of K.H. without her consent.”⁸ Id. at 1280.

The facts in the present case are distinguishable from those in Williams. There, the attack from behind, beating, and pulling down of the victim’s pants and underwear were indeed part of Williams’ attempt to rape K.H. Here, Jacob need not have moved H.P. into the unfinished room in the basement in order to carry out the criminal deviate conduct. He could have perpetrated that offense in the finished part of the basement or even on the main floor of the model home. Thus, the confinement necessary for the armed Jacob to commit criminal deviate conduct did not include moving H.P. from one room to another. As such, Jacob has not demonstrated a reasonable possibility that the

⁸ The court in K.H. incorrectly stated the test as requiring a reasonable probability that the jury considered the same evidence to convict on two or more offenses. Again, the test is whether there exists 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.” Williams v. State, 892 N.E.2d 666, 669 (Ind. Ct. App. 2008) (citation omitted), trans. denied.

evidentiary facts used by the jury to establish the essential elements of criminal deviate conduct offense may also have been used to establish the essential elements of criminal confinement.

We next consider Jacob's second contention, namely, that the use of a deadly weapon to enhance Counts 1, 2, 4, and 5 violates double jeopardy principles. Again, Count 1 of the charging information alleged that Jacob knowingly caused H.P. to submit to sexual deviate conduct when compelled by imminent threat of deadly force, namely, pointing a handgun at her. Count 2 of the information alleged that Jacob, while armed with a handgun, had "compelled [H.P.] to submit to touching by threat of force, to-wit: holding a handgun while Gregory Jacob rubbed his erect penis near [her] anal and vaginal area; with the intent to arouse or satisfy the sexual desires of Gregory Jacob, said act being committed while armed with a deadly weapon, to-wit; a handgun[.]" Appellant's App. at 17-18. Count 4 of the charging information alleged that Jacob, "communicated a threat to [H.P.] with the intent that [she] engage in conduct against her will, to-wit: Gregory Jacob told [H.P.] to stay in the basement or he would shoot her; and in committing said act the defendant possessed a deadly weapon, to-wit: a handgun[.]" Appellant's App. at 18. And, again, to prove Count 5, criminal confinement, the charging information alleged that Jacob, while armed with a handgun, had knowingly confined H.P. without her consent by escorting her through a door leading to an unfinished portion of a basement.

Each of these offenses was enhanced to a higher level based on the possession or use of a handgun. Jacob contends that the enhancements violate the Indiana Double

Jeopardy Clause because they are all based on the same use of a handgun. But “the double jeopardy clause is a restriction upon the courts and prosecution not to impose multiple punishment for the same offense. It does not prohibit the legislature from defining more than one offense which may be committed during the same transaction or occurrence.” Jones v. State, 180 Ind. App. 126, 387 N.E.2d 93, 95-96 (1979) (citation omitted).

It is well-established that the use of a single weapon may be used to enhance several separate and distinct offenses:

[I]n interpreting Richardson, our supreme court later held that 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. Bald v. State, 766 N.E.2d 1170, 1172 (Ind. 2002). Thus, a defendant’s use of the same weapon in the commission of separate and distinct offenses does not violate the Indiana Double Jeopardy Clause, so long as each conviction is supported by proof of at least one unique evidentiary fact not required for any other conviction. Miller [v. State], 790 N.E.2d 437, 437 (Ind. 2003)]. Miller went on to acknowledge that the repeated use of a weapon to commit multiple separate crimes is not “the very same behavior” precluding its use to separately enhance the resulting convictions. Id. at 439. Rather, the use of a “single deadly weapon during the commission of separate offenses may enhance the level of each offense.” Id. (quoting Gates v. State, 759 N.E.2d 631, 633 n. 2 (Ind.2001)).

Rodriguez v. State, 795 N.E.2d 1054, 1058 (Ind. Ct. App. 2003), trans. denied.

Here, the State charged Jacob in part with sexual battery, as a Class C felony; intimidation, as a Class C felony; and criminal confinement, as a Class B felony. Each of these charges was elevated based on the allegation that it was committed while “armed” with a handgun. But the State proved each of these charges with unique evidence not in common with the others. Specifically, the sexual battery charge was proved by evidence

that Jacob rubbed his erect penis against H.P.'s vagina and anus; the intimidation charge was proved by evidence that Jacob threatened to shoot H.P. if she left the basement; and the criminal confinement charge was proved by evidence that Jacob moved H.P. into the unfinished room in the basement. Thus, although each of these charges has in common the element that Jacob was armed with a handgun, each charge was also proved by unique evidence.

Again, “[t]he repeated use of a weapon to commit multiple separate crimes is not ‘the very same behavior’ precluding its use to separately enhance the resulting convictions.” Miller, 790 N.E.2d at 437. Rather, “the use of a ‘single deadly weapon during the commission of separate offenses may enhance the level of each offense.’ ” Id. Jacob was armed with a handgun while he committed sexual battery, intimidation, and criminal confinement in the model home. Nevertheless, each offense was separate and distinct. See id. As such, the enhancement of these offenses based on Jacob’s use of a handgun does not violate the Double Jeopardy Clause.

Jacob also raises a double jeopardy claim regarding the elevation of the criminal deviate conduct charge to a Class A felony. But that count alleged the pointing of a handgun at H.P., not merely being armed with a handgun during the commission of the offense. Just as the repeated use of the same weapon to commit separate offenses is not the “same behavior” in double jeopardy parlance, neither is being armed with a handgun during an offense synonymous with using a handgun to perpetrate an offense. Jacob has not shown that elevation of Counts 1, 2, 4, and 5 based on the carrying or use of a handgun violate the Indiana Double Jeopardy Clause.

Still, Jacob cites Curry v. State, 740 N.E.2d 162 (Ind. Ct. App. 2000), trans. denied, in support of his contention that the enhancements violate Indiana’s double jeopardy principles. In that case, the State charged Curry with attempted rape, criminal deviate conduct, and burglary. The charges of attempted rape and criminal deviate conduct refer to Curry’s actions “ ‘while using deadly force’ and while [the victim] was compelled to submit ‘by force or the imminent threat of force.’ ” Id. at 166 (internal citations omitted). And the burglary charge alleged that Curry “broke and entered [the victim’s] dwelling with the intent to engage in sexual intercourse with her while she was ‘compelled to submit by force or the imminent threat of force.’ ” Id. This court held that the enhancement of Curry’s offenses for the force used was improper because the “beating that apparently supported the enhancement of the charges of criminal deviate conduct, attempted rape, and burglary consisted of a single episode⁹ of brutality and cannot be classified as separate and distinct incidents.” Id. However, the court observed that the State had presented no evidence at trial that would have indicated to the jury that the “force” elements of the three charges were to be satisfied by distinct acts of violence.

The facts in Curry are distinguishable. Here, the State alleged and presented evidence to show separate and distinct uses of the handgun in order to support Counts 1, 2, 4, and 5. And, again, it is well-settled that the use of a handgun in the commission of separate and distinct offenses may elevate the level of each of those offenses. Miller, 790

⁹ The use of the term “single episode” in Curry refers to a protracted episode of criminal conduct. Similar to the present case, Curry considered whether the use of a seemingly common element across several counts violated double jeopardy. The court’s use of “single episode” in Curry does not refer to the limitation on sentencing found in Indiana Code Section 35-50-1-2 for offenses committed as an “episode of criminal conduct.” We address the propriety of Jacob’s sentence, and Section 35-50-1-2, in Issue Five.

N.E.2d at 437; Rodriguez, 795 N.E.2d at 1058. Further, the State presented evidence showing each offense to be a separate event, even though committed in the course of a few minutes against a single victim in a single location. Thus, the holding in Curry is inapposite. Jacob's double jeopardy contentions must fail.

In sum, as our Supreme Court first held in Spivey v. State, 761 N.E.2d 831 (Ind. 2002), "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 the second offense." Id. at 833. Here, the fact that several offenses were enhanced to a higher level based on the possession or use of a handgun does not violate double jeopardy because each of the underlying offenses was separate and distinct, and there is no possibility that the evidentiary facts used by the jury were used to establish all of the essential elements of any more than one offense. See id. Thus, Jacob's double jeopardy contention must fail.

Issue Five: Appellate Rule 7(B)

Finally, Jacob contends that his sentences are inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize [] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant

to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

With regard to his character, Jacob contends only that the trial court found a single aggravator, Jacob’s criminal history. That history includes a 1999 arrest for battery, as a Class A misdemeanor; a 2001 conviction for theft, as a Class D felony, which was later reduced to a Class A misdemeanor; two tickets for driving with a suspended license; and 2002 convictions, later vacated, for three counts of criminal deviate conduct, one count of robbery, and one count of pointing a firearm. Although Jacob’s criminal history includes only a single felony conviction, it shows that he is no stranger to the law. Jacob makes no argument regarding his character, but merely sets out his criminal history. Thus, he has not shown that his sentence is inappropriate in light of his character.

With regard to the nature of the offenses, Jacob presents a cogent analysis, but his reasoning is thin. Jacob acknowledges that the offenses are “serious,” but he contends that, “[o]ther than the discomfort of having [him] insert his fingers in the victim’s anus, there was no other physical injury to the victim.” Appellant’s Brief at 29. Jacob completely ignores the serious and lasting psychological impact on H.P. and how the offenses he perpetrated against her have affected her family and her ability to earn a

living. H.P. worked as a sales agent in a model home, often working alone. Since the attacks, the record shows that she has been unable to perform to the same level at work out of fear of being alone and, as a result, has had to take a different and lower-paying position. She has also undergone counseling to deal with the psychological damage, which has included panic attacks and anxiety, as a result of the attack.

The trial court sentenced Jacob to consecutive sentences of forty-five years for criminal deviate conduct, seven years for sexual battery, seven years for intimidation, and eighteen years for criminal confinement, for an aggregate sentence of seventy-seven years. In an attempt to persuade us to review his sentence, Jacob presents scant discussion of his character and seriously minimized the nature of the offenses he committed against H.P. Jacob has not shown why his sentence is inappropriate in light of his character or the nature of the offenses.

Although Jacob has not shown that his sentence is inappropriate, we find it necessary to review the legality of his sentence sua sponte. See Jones v. State, 775 N.E.2d 322 (Ind. Ct. App. 2002). The convictions here arise out of a single “episode of criminal conduct. See Ind. Code § 35-50-1-2(b). Indiana Code Section 35-50-1-2(c) provides, in relevant part:

The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

The limitations Section 35-50-1-2(c) imposes on consecutive sentencing do not apply between crimes of violence and those that are not crimes of violence. Johnson v. State, 749 N.E.2d 1103, 1110 (Ind. 2001).

Here, Jacob has one conviction for a crime of violence, namely, criminal deviate conduct. See Ind. Code § 35-50-1-2(a)(9). The rest of his convictions are not crimes of violence. Thus, under section 35-50-1-2(c), the aggregate sentence for sexual battery, as a Class C felony; intimidation, as a Class C felony; and criminal confinement, as a Class B felony, cannot exceed the advisory sentence for a Class A felony. See I.C. § 35-50-1-2(c). The advisory sentence for a Class A felony is thirty years, I.C. § 35-50-2-4, but Jacob's aggregate sentence for those offenses is thirty-two years. Because that part of Jacob's sentence exceeds the advisory sentence for a Class A felony, it is not authorized by law. We exercise our authority to revise his sentence to thirty years. Thus, we remand and instruct the trial court, without a hearing, to issue an order and make any other docket entries necessary to revise Jacob's sentence for criminal confinement, as a Class B felony, to sixteen years. The remainder of Jacob's sentence order remains undisturbed. Such a sentence is authorized by Indiana Code Section 35-50-1-2(c). See Johnson, 749 N.E.2d at 1110.

Affirmed in part reversed and remanded in part.

DARDEN, J., and BAILEY, J., concur.