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**IN THE
COURT OF APPEALS OF INDIANA**

SHAWN HATTERY,)
)
Appellant-Defendant,)
)
vs.) No. 43A03-1002-CR-62
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Duane G. Huffer, Judge
Cause No. 43D01-0809-FA-158

March 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Shawn Hattery appeals his convictions and sentence for Class D felony obstruction of justice, Class D felony theft, Class A felony burglary, Class C felony battery, Class A felony attempted criminal deviate conduct, two counts of Class A felony criminal deviate conduct, and three counts each of Class A felony rape, Class D felony criminal confinement, and Class D felony sexual battery. We affirm Hattery's convictions and sentence.

Issues

The restated issues before us are:

- I. whether the trial court properly admitted into evidence mugshots of Hattery and videotaped depositions of three State's witnesses;
- II. whether there is sufficient evidence to support his obstruction of justice conviction; and
- III. whether Hattery's aggregate 200-year sentence is inappropriate.

Facts

The evidence most favorable to Hattery's convictions¹ is that, sometime after falling asleep late in the evening of October 4, 2005, twenty-one year-old A.B. awoke in her bed in her apartment in Warsaw to find that someone heavy was straddling her. A.B. attempted to fight off the individual, who turned out to be Hattery, but he told her to stop

¹ Hattery's "Statement of Facts" in his brief lacks any details regarding the crimes of which he was convicted, and instead states that all of the relevant facts were related in the procedural "Statement of the Case" section of the brief. We disagree with this assertion. The details of the crimes here are highly relevant, especially with respect to Hattery's assertion that his sentence is inappropriate.

fighting and that he was just there to “take a few things.” Tr. p. 155. Hattery then bound A.B.’s arms together with duct tape. Next, he took out a knife and sliced open A.B.’s shirt, then removed her pants. A.B. continued struggling, and Hattery choked her until she lost consciousness. When A.B. regained consciousness, Hattery punched her in the face, fracturing two orbital bones. He then wrapped duct tape around A.B.’s eyes and mouth and tied her feet to the footboard of her bed.

Hattery then applied lubricant to A.B., sprayed perfume on her, and had vaginal intercourse with her. He temporarily stopped having intercourse in order to perform oral sex on A.B., then returned to having vaginal intercourse. After Hattery completed this encounter, he smoked a cigarette, and then helped himself to a drink from A.B.’s refrigerator.

Hattery returned to A.B.’s bedroom, untied her, and turned her over. He re-taped her arms tightly and re-tied her legs to the headboard. He fondled her breasts and buttocks, and also bit one of her nipples. He then had repeated vaginal and anal intercourse with A.B., and at one point removed the duct tape from her mouth and attempted to kiss her. When Hattery finished this attack, he took a shower in A.B.’s apartment, and returned to the bedroom.

Hattery untied A.B., violently turned her over, and tied her arms to the headboard and her feet to the footboard. As before, Hattery had repeated vaginal and anal intercourse with A.B. After finishing, Hattery used a cloth to attempt to wipe bodily fluids off of A.B. After Hattery left, A.B. managed to untie herself, and she immediately

sought emergency medical treatment. A physician completed a rape kit and obtained DNA samples from A.B.

These crimes went unsolved for several years, until Hattery's DNA was obtained following his incarceration for an unrelated conviction and it was found to match the DNA recovered from A.B. On September 30, 2008, the State charged Hattery with Class D felony obstruction of justice, Class D felony theft, Class A felony burglary, Class C felony battery, Class A felony attempted criminal deviate conduct, two counts of Class A felony criminal deviate conduct, and three counts each of Class A felony rape, Class D felony criminal confinement, Class D felony sexual battery, and Class D felony strangulation. The State dismissed the strangulation charge before trial because the statute creating that offense was not yet in existence in October 2005.

Also before trial, videotaped depositions were taken of three DNA experts. Two of these experts resided outside of Indiana, and the third was a pregnant woman who was expecting to deliver approximately two weeks before trial. Hattery himself was not present at the depositions, but his attorney was and had an opportunity to cross-examine the witnesses. At the outset of Hattery's jury trial on December 1, 2009, the prosecutor and defense counsel agreed on the record that the videotaped depositions would be introduced into evidence in lieu of live testimony. Defense counsel expressly stated, "I had an opportunity to cross-examine those witnesses, and I believe that Mr. Hattery's rights pursuant to the Indiana Constitution and the United States Constitution 6th Amendment were satisfied." Id. at 2.

Also during trial, some mugshots of Hattery were introduced into evidence, without objection. The jury found Hattery guilty as charged. The trial court sentenced Hattery as follows: fifty years for Class A felony burglary, thirty years for Class A felony attempted criminal deviate conduct, thirty years for each count of Class A felony criminal deviate conduct, thirty years for each count of Class A felony rape, four years for Class C felony battery, one and one-half years for each count of Class D felony criminal confinement, one and one-half years for each count of Class D felony sexual battery, one and one-half years for Class D felony obstruction of justice, and one and one-half years for Class D felony theft. The sentences were to run concurrently, except with respect to the sentences for burglary, criminal deviate conduct, and rape. This resulted in an aggregate sentence of 200 years. Hattery now appeals.

Analysis

I. Admission of Evidence

We first address Hattery's challenges to the admission of evidence, namely the videotaped depositions and the mugshots. We review a trial court's evidentiary rulings for an abuse of discretion. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if it misinterprets the law. Carpenter v. State, 786 N.E.2d 696, 703 (Ind. 2003).

Hattery, however, failed to object to introduction of either the depositions or the mugshots. Thus, we may reverse Hattery's conviction only if he has demonstrated the

existence of fundamental error. See Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), trans. denied. “The ‘fundamental error’ rule is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002). “The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule.” Purifoy, 821 N.E.2d at 412. Fundamental error requires a defendant to show greater prejudice than ordinary reversible error because no objection has been made. Id.

Hattery wholly fails to make any argument that introduction of the mugshots constituted fundamental error; in fact, he completely fails to acknowledge that no objection was made to their introduction. In the absence of any cogent argument that introduction of the mugshots constituted fundamental error, we will not address the issue further. See Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007).

With respect to the depositions, Hattery does acknowledge his trial counsel’s stipulation that they were admissible, but claims that their admission was fundamental error in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. He states in his brief, “Nonetheless, the right to confront and cross-examine a witness at trial is fundamental and cannot be waived by trial counsel.” Appellant’s Br. p. 4. In support of this statement, Hattery cites two cases: Benefield v. State, 901 N.E.2d 602 (Ind. Ct. App. 2009), and Barbera v. AIS Servs., LLC, 897 N.E.2d 485 (Ind. Ct. App. 2008). Neither of these cases support Hattery’s assertion. Barbera, of

course, is a civil case, and as might be expected it makes no mention of a criminal defendant's rights under the Sixth Amendment. As for Benefield, the opinion Hattery cites was withdrawn by this court and replaced by a subsequent opinion, found at 904 N.E.2d 239 (Ind. Ct. App. 2009), trans. denied, which does not mention the Sixth Amendment. In any event, Hattery's assertion that an attorney cannot waive a defendant's Confrontation Clause rights is flatly contradicted by the United States Supreme Court, which has said, "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." Melendez-Diaz v. Massachusetts, -- U.S. --, 129 S. Ct. 2527, 2534 n.3 (2009).

Thus, Hattery's attorney clearly was empowered to waive his confrontation rights. That being the case, we cannot conclude that such waiver resulted in fundamental error. Hattery's attorney did attend all three depositions and had the opportunity to cross-examine the witnesses. Although Hattery himself was not present at the depositions, there is no indication that he was forbidden to attend. Moreover, his attendance for the depositions of technical, scientific experts was much less crucial than it would have been for the examination of lay witnesses, in which case Hattery might have been able to provide assistance to his attorney. Also, none of the three witnesses would have been readily available to testify at trial, due either to travel distance or medical/family concerns. All of these factors lead us to conclude that introduction of the videotaped depositions was not fundamental error.

II. Sufficiency of the Evidence

Next, Hattery contends that his conviction for obstruction of justice, i.e. based on his attempt to clean his bodily fluids off of A.B., was not supported by sufficient evidence. However, the entirety of Hattery's argument on this point is supported by citation to the statute for resisting law enforcement, Indiana Code Section 35-44-3-3, and cases interpreting that statute.² Obstruction of justice is governed by a completely separate statute, Indiana Code Section 35-44-3-4, containing completely different elements. Given that Hattery has wholly failed to support his argument on this issue with any citation to relevant authority, we find it waived for lack of cogency. See Ind. Appellate Rule 46(A)(8); Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), trans. denied.

III. Sentence

Finally, we address Hattery's claim that his 200-year aggregate sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offenses.³ Although Rule 7(B) does not require us to be "extremely" deferential to a

² In fact, one of the cases Hattery cites, Graham v. State, 889 N.E.2d 1283 (Ind. Ct. App. 2008), (which Hattery incorrectly named "Grand") was vacated by our supreme court on the resisting law enforcement issue. See Graham v. State, 903 N.E.2d 963 (Ind. 2009). As with the other instance we have already noted in which Hattery cited a vacated opinion, we urge counsel to take greater care in assuring the validity of opinions that he cites to this court.

³ Hattery has failed to provide us with a copy of the presentence report prepared in his case. In any case where a defendant is challenging his or her sentence, a copy of that report should be transmitted to this court to facilitate our review of the sentence. We also would urge, if a defendant fails to include that report in his or her appendix, that the State provide it to us in an appellee's appendix. Regardless, we conclude we possess sufficient evidence from the sentencing hearing record to review the appropriateness of Hattery's sentence.

trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id.

The principal role of Rule 7(B) review “should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We “should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.” Id. Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Id. at 1224. When reviewing the appropriateness of a sentence under Rule 7(B), we may consider all aspects of the penal consequences imposed by the trial court in sentencing the defendant, including whether a portion of the sentence was suspended. Davidson v. State, 926 N.E.2d 1023, 1025 (Ind. 2010).

Hattery may not have received the theoretically maximum sentence that he could have received, given the great number of offenses with which he was charged. Nevertheless, it is a very lengthy sentence, and one that will keep him incarcerated for the rest of his life, even accounting for “good time” credit that he may accumulate. That

being the case, we will treat this case as a “maximum” sentence case. Maximum sentences generally are reserved for the worst offenses and offenders. See Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002). This refers to a general class of offenders and offenses that warrant extreme punishment, which may encompass a variety of offenses and offenders. Id.

As for the nature of the offenses, taken together, they represent a horrific set of actions that certainly fall within the general category of a “worst case” scenario. Breaking into a single woman’s apartment in the middle of the night, breaking bones in her face, and repeatedly sexually assaulting her and keeping her confined for several hours, while Hattery apparently made himself “at home” by taking a drink from her refrigerator and showering in her bathroom, are callous actions that deserve an extended period of incarceration. In our view, they represent a “nightmare” scenario for any woman.

With respect to Hattery’s character, we first observe that he demonstrated a complete lack of compassion in committing these crimes, and there is no indication that he has ever expressed the slightest bit of remorse for them, despite the existence of DNA evidence identifying him as the culprit. This lack of remorse for such heinous crimes is a valid consideration in assessing Hattery’s sentence. See Newsome v. State, 797 N.E.2d 293, 300 (Ind. Ct. App. 2003) (holding that defendant’s lack of remorse may be a valid aggravating factor in sentencing, even if defendant insisted on innocence, where there is evidence aside from uncorroborated testimony of the victim supporting defendant’s

convictions). Hattery also has a fairly extensive criminal history, beginning with two juvenile delinquency adjudications for what would be Class C felony burglary if committed by an adult. He also has an adult conviction for Class B felony burglary, and also theft and substance abuse related convictions, and apparently was out on bond for another case when he committed the present offenses. Although the current offenses were the first of any kind of a violent nature, sexual or otherwise, of which Hattery has been convicted, the sheer number of prior convictions leads us to conclude that nothing about his criminal history warrants a reduction in his sentence.

Ultimately, we conclude that Hattery's grotesque offenses—which together easily fall into the “worst” class—warrant the very lengthy sentence he has received. Nothing in his character convinces us that he should receive a lesser sentence. Hattery's aggregate 200-year sentence is not inappropriate.

Conclusion

We affirm all of Hattery's convictions and conclude that his 200-year sentence is not inappropriate. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.