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IN THE
COURT OF APPEALS OF INDIANA

JOSE SERRANO-LOPEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1005-CR-294
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles A. Wiles, Judge
Cause No. 49G22-0907-FA-67400

May 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jose Serrano-Lopez appeals from his conviction after a jury trial of one count of class A felony Rape,[1] one count of class A felony Criminal Deviate Conduct,[2] one count of class B felony Criminal Confinement,[3] one count of class C felony Battery,[4] one count of class D felony Sexual Battery,[5] two counts of class D felony Pointing a Firearm,[6] one count of class A misdemeanor Battery,[7] and one count of class A misdemeanor Carrying a Handgun Without a License.[8] Serrano-Lopez raises the following issues for our review:

> 1. Is there sufficient evidence that Serrano-Lopez possessed a handgun to support his convictions for rape and criminal deviate conduct as class A felonies?
>
> 2. Does Serrano-Lopez's conviction for class B felony criminal confinement violate double jeopardy principles?
>
> 3. Is Serrano-Lopez's sentence inappropriate?

We affirm.

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[1] Ind. Code Ann. § 35-42-4-1(b) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[2] I.C. § 35-42-4-2(b) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[3] I.C. § 35-42-3-3(b)(2) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[4] I.C. § 35-42-2-1(a)(3) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[5] I.C. § 35-42-4-8(a) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[6] Ind. Code Ann. § 35-47-4-3(b) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[7] I.C. § 35-42-2-1(a)(1) (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

[8] I.C. § 35-47-2-1 & 23 (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011).

Klarica Robles and Serrano-Lopez had a romantic relationship in 2007, which ended that year, but the two communicated regularly thereafter. On New Year's Day 2009, Robles and Serrano-Lopez had sexual intercourse. In February of 2009, Robles told Serrano-Lopez that she thought she might be pregnant even though she had a tubal ligation in 1999.

It had been approximately two months since Robles had last seen Serrano-Lopez when he telephoned her at around 10:00 a.m. on July 25, 2009. He went to Robles's house, gave her some money, drove her to Meijer to shop for baby items (which she did even though she knew she was not pregnant), and then drove her back to her home. Robles's friend, Melanie Horton, and Horton's two children were staying with her that weekend to help Robles park cars at her house for the Brickyard 400. Later that same day, Serrano-Lopez called Robles and asked her to buy some food and come to his cousin's apartment. Robles, Horton, and Horton's children bought some food and went to that apartment. While there, Robles could tell that Serrano-Lopez had been drinking and observed him drink alcohol. After approximately twenty minutes, Robles, Horton, and her children left to rent some movies.

While Robles and the others were at Blockbuster renting movies, Robles received a telephone call from Serrano-Lopez, who indicated in that call that he wanted her to return to her house as soon as possible. Robles and the others immediately returned to Robles's house where Serrano-Lopez and his brother, David, were standing by David's truck. Serrano-Lopez was upset and stated that he was having a problem with another person and Robles attempted to calm him. She refused to enter her car when Serrano-Lopez, who had a set of keys to her car, requested that she leave with him, because she knew that he had been drinking. Serrano-Lopez then pulled out a handgun and pointed it at Robles causing Robles

to be afraid. Robles again refused to enter the car and he drove off down the street before turning the vehicle around and returning to Robles's house. Robles and Horton and her children ran inside.

David attempted to prevent Serrano-Lopez from entering the front door, but he entered the house anyway and confronted Robles. He was angry, grabbed her by the hair, and struck her in the right side of her head with the butt of the handgun he was holding. When Robles asked him why he had done that, he was very angry and refused to answer her. He released her and she attempted to flee through the kitchen and out the back door. Serrano-Lopez caught her at the door, again grabbing her by the hair. He was still holding the gun and struggled with her in the kitchen. David came into the kitchen to try to separate the two, but Serrano-Lopez pushed him into the stove causing him to burn his hand.

Serrano-Lopez wrapped his arm around Robles and pointed the gun at the back of her head causing her to be afraid. She broke free and fled to the living room where Serrano-Lopez once again caught her by the hair and hit her very hard with the handgun in the left side of her head, knocking her to her knees and causing her head to bleed profusely from that wound. Robles put her hands on the wall and attempted to stand. Serrano-Lopez then ordered Robles to the bedroom and began picking her up and pushing her in that direction. He was still holding the gun at that time and Robles placed her hands on the wall to prevent him from pushing her.

David told Serrano-Lopez that police officers were in the driveway. Upon learning that, he took Robles into the kitchen, placed the handgun in a kitchen drawer, closed the drawer, and then led Robles to the bedroom, closing the door behind them. He removed his

clothes and ordered Robles to remove hers. She refused to do so, telling him that she needed to stop the bleeding from the wounds to her head. Serrano-Lopez angrily ripped off her tee shirt and removed her pants and underwear. He then forced her to perform fellatio on him against her will, afterwards engaging in sexual intercourse with her against her will. Serrano-Lopez told her that he would kill her, also telling her that if he went to jail he would have someone hurt her or kill her children. Robles was concerned about the handgun because Serrano-Lopez could have retrieved it at any time. Robles dressed in a pair of pajama bottoms and a tee shirt after the sex was over.

While Robles and Serrano-Lopez were in the bedroom, police officers called his cell phone number several times. Both spoke with the officers on the cell phone, and Robles told the officers what Serrano-Lopez instructed her to say. Robles also told the officers that she could not come outside because he would not let her go, and stated in response to the officers' questions that she had put the gun somewhere and hidden it. Serrano-Lopez did not allow Robles to leave the bedroom or the house until the officers fired a plastic projectile through the bedroom window. Robles, David, and Serrano-Lopez exited the house. Robles returned inside the house to show officers the location of the handgun. She also told the officers that Serrano-Lopez had told her what to say during the telephone calls and that he forced her to have sex with him. Robles went to the hospital where she received treatment for the two lacerations to her head, one of which required four staples to close.

At the conclusion of his trial, the jury found Serrano-Lopez guilty of class A felony criminal deviate conduct, class A felony rape, class B felony criminal confinement, class C felony battery, class D felony sexual battery, two counts of class D felony pointing a firearm,

class A misdemeanor battery, and class A misdemeanor carrying a handgun without a license. The trial court sentenced Serrano-Lopez to an aggregate sentence of sixty years. Serrano-Lopez now appeals.

1.

Serrano-Lopez challenges the sufficiency of the evidence to support his convictions for criminal deviate conduct and rape. In particular, he challenges the sufficiency of the evidence that he possessed the handgun during the sexual offenses, a factor that elevates the offenses to class A felonies.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh the evidence nor reassess witness credibility. *Henley v. State*, 881 N.E.2d 639 (Ind. 2008). We consider the evidence that supports the judgment and any reasonable inferences that can be drawn from that evidence. *Id*. We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id*.

For both criminal deviate conduct and rape, the offenses are elevated from class B felonies to class A felonies if the offenses are committed while armed with a deadly weapon. I.C. § 35-42-4-1 & 2. Serrano-Lopez argues that the State's evidence of his constructive possession of the handgun is insufficient.

In order to sustain a conviction for a class A felony, it is not necessary that the weapon be held on the victim at all times during the offense. *Taylor v. State*, 438 N.E.2d 294 (Ind. 1982). The enhancement from a class B felony to a class A felony is justifiable where the weapon was "sufficiently accessible to the defendant so as to exert a coercive influence upon

the victim during the offenses in question." *Grafe v. State*, 686 N.E.2d 890, 895 (Ind. Ct. App. 1997). In fact, our Supreme Court has held that we should look to factors such as whether there was an initial show of deadly force with the weapon, whether the defendant intended to intimidate the victim with the weapon, and whether the weapon was at least constructively possessed by the defendant at all times. *Potter v. State*, 684 N.E.2d 1127 (Ind. 1997).

In order to establish constructive possession, the State must show the defendant had the intent and capability to maintain dominion and control over the contraband. *Lampkins v. State*, 682 N.E.2d 1268 (Ind. 1997), *modified on reh'g on other grounds*, 685 N.E.2d 698 (Ind. 1997). The State must prove the defendant's knowledge of the presence of the firearm, and that knowledge may be inferred from either exclusive dominion and control over the premises containing the firearm, or from evidence of additional circumstances indicating the defendant's knowledge of the presence of the firearm. *Causey v. State*, 808 N.E.2d 139 (Ind. Ct. App. 2004). In order to prove a defendant's dominion and control over the firearm, the State may use evidence of incriminating statements by the defendant, attempted flight or furtive gestures, proximity of the firearm to the defendant, location of the firearm within the defendant's plain view, and the mingling of a firearm with other items owned by the defendant. *Id*. The State must also present evidence that the defendant was capable of exercising control over the firearm, including the ability to reduce the firearm to his personal possession or to direct its disposition or use. *Id*.

The evidence shows that Serrano-Lopez first pointed the handgun at Robles when he was trying to persuade her to get into her car outside her house. Once inside the house,

Serrano-Lopez struck Robles in the head with the butt of the gun, held the gun when Robles attempted to flee, pointed the gun to the back of Robles's head during a struggle with her in the kitchen, and again struck Robles in the head upon her recapture in the living room. Robles testified that she was placed in great fear and was intimidated by Serrano-Lopez's actions. After learning that police officers were outside, Serrano-Lopez placed the gun in a drawer in the kitchen and then closed the drawer, actions we consider as concealment more than relinquishment of the weapon, before forcing Robles into a nearby bedroom.

Furthermore, Robles testified that she was worried about the gun even after Serrano-Lopez placed it in the kitchen drawer because she knew "at any point he could have gotten up and got it." *Transcript* at 46. Serrano-Lopez told her prior to the sex offenses that "if he ever went to jail that he would have somebody hurt me or kill my children." *Id*. Serrano-Lopez argues that the facts in this case are distinguishable from the facts in *Potter* because the distance from the weapon and the place where the sex offenses occurred is farther in this case. In *Potter*, our Supreme Court held that the evidence was sufficient where the knife, which previously had been wielded by that defendant, was placed in the kitchen area of a room where the rape occurred in the victim's relatively small house. *Potter v. State*, 684 N.E.2d at 1137. Here, the gun was placed in a drawer in the kitchen and the sex offenses occurred in the bedroom, each separate rooms. We view this argument as an attempt to have this court reweigh the evidence, a task we are forbidden to do. The jury was in the best position to determine whether the gun was outside of Serrano-Lopez's dominion and control when he committed the rape and criminal deviate conduct, and concluded otherwise. The State's evidence is sufficient.

2.

Serrano-Lopez also asserts that his class B felony criminal confinement conviction violates double jeopardy principles because Robles was confined only long enough for him to commit the rape and criminal deviate conduct and thus any confinement was coextensive with those crimes. We employ a *de novo* standard of review with respect to these claims. *Goldsberry v. State*, 821 N.E.2d 447 (Ind. Ct. App. 2005).

The double jeopardy clause found in article 1, section 14 of the Indiana Constitution 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). On review, we analyze the challenged offenses under the "statutory elements test" and the "actual evidence test." *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002). Under the actual evidence test, multiple convictions are prohibited if there is "'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.'" *Id*. (quoting *Richardson v. State*, 717 N.E.2d at 53). In determining whether the trier of fact used the same evidence to establish the essential elements of each offense, it is appropriate to consider the charging information and arguments of counsel. *See Lee v. State*, 892 N.E.2d 1231 (Ind. 2008) (citing *Richardson v. State*, 717 N.E.2d 32).

The confinement conviction is based on Serrano-Lopez's holding Robles by the hair while brandishing a handgun. These acts occurred prior to the commission of the acts of rape and criminal deviate conduct against Robles and therefore, are not coextensive with them.

Double jeopardy principles are not violated when the confinement extends beyond that necessary to accomplish the sex offenses. *See Oeth v. State*, 775 N.E.2d 696 (Ind. Ct. App. 2002) (double jeopardy principles are not violated where confinement extended beyond that necessary to accomplish the rape or attempted rape); *Parks v. State*, 734 N.E.2d 694 (Ind. Ct. App. 2000) (any confinement of victim beyond that inherent in the force used to accomplish the rape constitutes a separate violation of the confinement statute). Serrano-Lopez's convictions do not violate double jeopardy principles.

3.

Serrano-Lopez contends that his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after careful consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Even if a trial court follows the appropriate procedure in arriving at its sentence, we maintain the constitutional power to revise a sentence we find inappropriate. *Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). On appeal, Serrano-Lopez bears the burden of persuading us that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867. "[R]evision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of *both* the nature of his

offenses and his character." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (emphasis in original).

The trial court sentenced Serrano-Lopez to the advisory sentence of thirty years for his class A felony criminal deviate conduct conviction, to the minimum term of twenty years for his class A felony rape conviction, to the minimum term of six years for his class B felony criminal confinement conviction, and to the advisory term of four years for his class C felony battery conviction, each to be served consecutively. He was sentenced to two years for his class D felony sexual battery conviction, to two years for each of his class D felony pointing a firearm convictions, to one year for his class A misdemeanor battery conviction, and to one year for his class A misdemeanor carrying a handgun without a license conviction, each to be served concurrently.

With respect to the nature of the offenses, Serrano-Lopez does not challenge the fact that he was convicted of serious crimes including rape and criminal deviate conduct. Although his offenses are serious, he argues that his sentence is inappropriate in light of his character.

We first address Serrano-Lopez's argument that his sentence is more severe than that imposed in cases he considers to be of equal severity. *See Reese v. State*, 939 N.E.2d 695 (Ind. Ct. App. 2011); *Zachary v. State*, 469 N.E.2d 744 (Ind. 1984). He acknowledges that he did not receive the maximum sentence that could have been imposed, but argues that given his minimal criminal history and youth, the sentence is inappropriate. We have consistently responded that we cannot approach the review of sentences by comparing the underlying offense in question with other crimes. "We should concentrate less on comparing

the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*. Furthermore, in both cases cited by Serrano-Lopez, the crimes committed were severe to be sure, but they differ in number and class of offense from those of which Serrano-Lopez was convicted. In the present case, Serrano-Lopez was convicted of two class A felonies, a class B felony, a class C felony, four class D felonies, and two class A misdemeanors. He received the advisory or minimum sentence for the first four counts, with those sentences to be served consecutively. The comparison of Serrano-Lopez's sentence with the two cases cited by him is not helpful in reviewing his sentence.

Serrano-Lopez argues that his sixty-year aggregate sentence is inappropriate given the fact that he is just twenty-two years old and had no prior criminal convictions. We note that at the time of his sentencing, Serrano-Lopez had a criminal case pending from 2007 in which he was charged with class D felony criminal recklessness, three misdemeanor charges of carrying a handgun without a license, public intoxication, and public nudity. We further note the trial court considered Serrano-Lopez's criminal history to be a mitigating factor.

Regardless of his age, Serrano-Lopez's actions reveal that he possesses a violent temper. He was angry throughout the commission of the present offenses and had been consuming alcohol. He forced himself upon Robles, while she was bleeding profusely from wounds he inflicted and beat her until she submitted to criminal deviate conduct and sexual intercourse against her will. He grabbed her hair when she tried to flee, pointed a gun at her, and told her that he would kill her, or have her and her children killed should he go to jail.

These offenses were committed by someone Robles had considered to be a friend and in the presence of children and Robles's friend. Serrano-Lopez has failed to carry his burden of persuading us that his sentence is inappropriate.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.