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FILED
Aug 28 2009, 9:21 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

ANDREW G. BOWERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 42A05-0901-CR-3
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-0605-FB-30

August 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Andrew G. Bowers appeals his conviction of and sentence for committing criminal deviate conduct[1] against S.F. Bowers raises five issues, which we restate as six: (1) whether a detective vouched for S.F.'s credibility in a manner rising to fundamental error; (2) whether the admission of certain hearsay testimony was fundamental error; (3) whether the evidence was sufficient; (4) whether the trial court abused its discretion by not recognizing several proffered mitigators; (5) whether his *Blakely* rights were violated; and (6) whether his sentence is appropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

S.F. was born in 1934. When she was six weeks old, she suffered a stroke, which caused her to have trouble walking and using her left hand. She also had polio, which compounded her problems. She is able to walk short distances using corrective shoes and a walker, but she is not able to drive. S.F. has trouble with anxiety. Her caseworker, Lynn Hecht, described her as a "very timid, very nonconfrontational" elderly woman who "talked in whispers most of the time." (Tr. at 315.)

S.F. lived with her parents until their deaths. S.F. never had a steady boyfriend, got married, or had children. After her mother died, her father had cancer and was placed in a nursing home. Because he was not able to take care of S.F., she also went to a nursing home. S.F.'s father told Rebecca Bowers, who had been S.F.'s home health aide, that he wanted S.F. to be able to live at home with someone to take care of her.

After S.F.'s father died, Rebecca took S.F. back to S.F.'s house. S.F. entered an agreement with the Bowers family by which the Bowerses would live with her and help

[1] Ind. Code § 35-42-4-2.

take care of her in exchange for ownership of the house after S.F. died. Pursuant to this agreement, Rebecca moved in with her then-husband Anthony and their children, Andrew and Bryan.

This arrangement worked smoothly for a couple years, until Andrew was about thirteen. At that time, Andrew started asking S.F. to touch his "privates." (*Id.* at 265.) This progressed to Andrew asking her to "suck" him. (*Id.*) When Andrew was thirteen or fourteen, S.F. told Andrew's parents what was happening. They called her a liar. The same day, she told them she had made it up because she knew they did not believe her and she wanted them to leave her alone. She did not tell anyone else because she was ashamed of what was happening.

On April 20, 2005, S.F. awoke to find Andrew straddling her chest. Andrew told her he "wanted a suck." (*Id.* at 263.) S.F.'s arms were under her covers and she was not able to resist Andrew. He was heavy, and she was having trouble breathing. S.F. was afraid, and she cooperated with Andrew to "get rid of him." (*Id.*) Andrew ejaculated into her mouth, which was the first time he had done so. S.F. spit it out onto her pajama top. At this time, Andrew was sixteen years old and approximately six feet tall; S.F. was seventy years old.

The next day, S.F. called Hecht and insisted that she had to meet with him immediately. Hecht met S.F. at the Senior Center, and she explained what Andrew had done the previous evening. Hecht found a safe place for S.F. to stay and then made a report to the police.

Detective Dustin Luking interviewed S.F. on April 21, 2005. S.F. told him Andrew forced her to have oral sex and said Andrew had raped her a few months earlier. Detective Luking obtained a warrant and collected S.F.'s pajamas and bedding from her home. It was determined that Andrew was the source of seminal fluid found on S.F.'s pajama top.

Rebecca and Anthony gave a different account of their conversation with S.F. regarding sexual activity between S.F. and Andrew. They were getting ready to go to a ballgame when S.F. asked to speak to them in her bedroom. S.F. told them she and Andrew were in love, had been seeing each other for several years, and she wanted to have his child. They talked to Andrew, and he denied that anything was going on. They went to the ballgame, and when they returned home, S.F. said she had made up the story to get attention.

Andrew was tried on October 8 and 9, 2008, for rape and criminal deviate conduct. The jury acquitted him of rape, but found him guilty of criminal deviate conduct. On November 7, 2008, a sentencing hearing was held. The court heard evidence that Andrew had graduated high school, was enrolled in Vincennes University, and was working for his father. The trial court found two aggravators: the victim's age and infirmity. The trial court found no mitigators and imposed a sentence of twelve years with two years suspended.

DISCUSSION AND DECISION

1. Vouching for Witness

Bowers argues Detective Luking impermissibly vouched for S.F.'s credibility. Witnesses are not permitted to give an opinion as to whether another witness has testified truthfully. Ind. Evidence Rule 704(b). Bowers did not object to the testimony that he now claims vouched for S.F.'s credibility. Therefore, he argues the error was fundamental.

> "[T]he fundamental error doctrine is extremely narrow." To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Further, the error must constitute a blatant violation of basic principles, the harm, or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.

Sandifur v. State, 815 N.E.2d 1042, 1046 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*.

Detective Luking began his description of his interview with S.F. as follows:

> She was brought to the room in a wheel chair and she had on corrective shoes and, you know, it was obvious that she was a person who had some disabilities and was kind of a soft spoken woman. I had been told beforehand that she may have some problems with some anxiety and Mr. Hecht had told me that he wasn't sure if she would be willing to sit down and talk with me or not, but she was well spoken and very forthcoming and didn't seem to have any problems talking.

(*Id*. at 346-47.) Detective Luking then described the interview and concluded by saying:

> And, you know, it was a lengthy interview. I really I . . . she was very well spoken during the interview. I've interviewed many, many people before with serious cases and I mean she gave a good interview. She was very forthcoming and it was not an easy thing to do.

(*Id*. at 353.)

We agree with the State that these portions of Detective Luking's testimony are most reasonably understood as meaning that S.F. expressed herself clearly despite Hecht's concerns, her anxiety, her soft-spoken manner, the length of the interview, and the general difficulty of giving this sort of interview. Being articulate is not the same as being credible, and we cannot say the admission of this testimony amounts to fundamental error.

Bowers also argues Detective Luking's testimony about S.F.'s rape allegations implied that he believed her:

> She said that it hurt very bad. As a matter of fact, she was somebody that was, you know, she wouldn't say. At one point or another I think Lynn Hecht described Becky as calling her a fucking liar and [S.F.] always said a four letter word liar. So, she did not curse in front of me but she . . . when she described how it hurt she says it hurt like hell. So, I mean, she was saying it hurt.

(*Id*. at 353.) We disagree that this testimony implies Detective Luking believed S.F. because she used a swear word when she normally would not do so. Instead, he was explaining that he understood S.F. to be stating that the intercourse hurt very badly because of her atypical choice to use a swear word. The admission of this testimony was not fundamental error.

2. <u>Hearsay Evidence</u>

Bowers argues Hecht's and Detective Luking's testimony about the allegations S.F. made to them was inadmissible hearsay. Acknowledging that he did not object to this testimony at trial, Bowers argues the error was fundamental.

The State argues the admission of the testimony was not fundamental error because it was cumulative of S.F.'s properly admitted testimony. Bowers notes Hecht and Detective Luking both testified that S.F. told them she thought she was going to choke to death during their last sexual encounter. Although S.F. did not specifically testify that she felt she was "choking," she testified Bowers was sitting on her chest, she was having trouble breathing, and Bowers ejaculated into her mouth while she was lying on her back.

Bowers also notes Hecht testified S.F. told him Bowers was "forcing" her to "suck his private part," (Tr. at 317), and Detective Luking testified S.F. told him that Bowers "wouldn't stop." (*Id*. at 350.) Again, S.F. did not use those exact words when testifying. However, she testified she was unable to resist Bowers, she did not agree to have oral sex, Bowers compelled her to do it, and Bowers continued until he ejaculated into her mouth. Therefore, Hecht's and Detective Luking's testimony about S.F.'s allegations essentially matched her description of those events at trial, although different words were used. The erroneous admission of evidence that is merely cumulative is not grounds for reversal.[2] *Saunders v. State*, 807 N.E.2d 122, 125-26 (Ind. Ct. App. 2004) (admission of testimony of two police officers about victim's statements to them was cumulative of victim's trial testimony and therefore not reversible error).

[2] Bowers argues the admission of this evidence was not harmless because S.F.'s testimony, by itself, was insufficient to establish that Bowers compelled her by force or threat of force to perform oral sex. As explained below, we reject that contention.

3. Sufficiency of Evidence

In reviewing the sufficiency of evidence, we do not reweigh the evidence or assess the credibility of witnesses. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002), *reh'g denied*. We consider the evidence favorable to the verdict and the reasonable inferences to be drawn therefrom. *Id*. We will affirm if there is probative evidence from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id*.

The State was required to prove Bowers knowingly or intentionally compelled S.F. to perform or submit to deviate sexual conduct by force or threat of force. Ind. Code § 35-42-4-2. Bowers argues the State failed to establish the element of compulsion by force or threat of force.

> The force employed need not be violent or physical and may be inferred from the circumstances. It is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined. This is a subjective test that looks to the victim's perception of the circumstances surrounding the incident in question. Thus, the issue is whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance.

Filice v. State, 886 N.E.2d 24, 36 (Ind. Ct. App. 2008) (citations omitted), *trans. denied*.

Bowers argues the following testimony from S.F. negates the element of force:

> Q Did you have another incident that same year with [Bowers]?
> A Yes. He . . . I was asleep and I felt something heavy on my chest and it was him. That was April, in April and he told me he wanted a suck.
> Q Okay.
> A And I did it, to satisfy him, so I could get rid of him.
> Q Is that something you wanted to do?
> A And I wanted to do it so I could get rid of him.

(Tr. at 263.)

S.F.'s statement that she wanted to get rid of Bowers must be viewed in light of her testimony that Bowers was sitting on her chest, it hurt, and she was having trouble breathing. S.F. testified her arms were pinned under her sheets and she was unable to resist Bowers. S.F. was seventy and physically infirm; Bowers was sixteen and over six feet tall. S.F. testified she had not agreed to meet Bowers, she did not agree to have oral sex, and she felt compelled to do what Bowers wanted. S.F. testified she was afraid for her safety. Looking at S.F.'s testimony as a whole, it is apparent she was not trying to get rid of Bowers merely because she was annoyed, as Bowers suggests; rather, she wanted to get rid of him because he was hurting her and restricting her breathing. Therefore, we conclude the evidence was sufficient. *See Filice*, 886 N.E.2d at 31, 37 (sufficient evidence of force where victim "came to" and found Filice straddling her and felt he was choking her); *D.B. v. State*, 842 N.E.2d 399, 402-03 (Ind. Ct. App. 2006) (sufficient evidence of force where victim awoke and found D.B. on top of her, she was not able to move, and D.B. was much bigger than victim).

4. Mitigators

Bowers argues the trial court abused its discretion by not finding as mitigators that he was sixteen at the time of the offense, he had no prior juvenile or adult history, S.F. may have initiated sexual contact with him, he completed high school and was enrolled at Vincennes University, and he was employed. It is within the trial court's discretion to determine both the existence and the weight of a mitigating circumstance. *Prowell v. State*, 787 N.E.2d 997, 1002 (Ind. Ct. App. 2003), *trans. denied*. We will find abuse of discretion only if the record contains substantial evidence of significant mitigating

circumstances. *Id*. We will not remand for reconsideration of mitigators that are highly disputable in nature, weight, or significance. *Sipple v. State*, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), *trans. denied*.

A defendant's young age may be a significant mitigating circumstance, but that is not always the case. *Smith v. State*, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), *trans. denied*. "There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). The trial court was within its discretion to place Bowers in the latter category given the evidence that Bowers took advantage of S.F. over a period of three years. Bowers argues S.F. was the one to initiate the sexual relationship, but he cites only his own testimony, which the trial court was not required to credit.[3]

Next, Bowers argues the trial court erred by not treating as a mitigator the fact that he had no prior criminal record. However, by the time of sentencing in this case, Bowers had been adjudicated a delinquent for operating a vehicle with a blood alcohol content of .08% or more and had an adult conviction of minor consumption. He committed minor consumption while he was on bond, and he violated the conditions of his probation in at least one of those cases. Therefore, the trial court would have had discretion to treat his criminal record as an aggravator. *See Field v. State*, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006) (bond and probation violations are proper aggravators), *trans. denied*; *Sauerheber v. State*, 698 N.E.2d 796, 806 (Ind. 1998) ("Criminal activity that occurs

[3] Bowers also cites his parents' testimony that S.F. told them she was in love with Bowers and wanted to have his child. They did not testify S.F. *initiated* the relationship. Moreover, S.F. directly contradicted their testimony, and the trial court was entitled to believe her.

subsequent to the offense for which one is being sentenced is a proper sentencing consideration."). By giving his record no weight, the trial court was already being more lenient than it was required to be. We cannot say it was an abuse of discretion to not give his record mitigating weight.

As to Bowers' employment, we have previously noted, "Many people are gainfully employed such that this would not require the trial court to note it as a mitigating factor or afford it the same weight as [the defendant] proposes." *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. As to Bowers' high school diploma, Bowers has not explained why this should be viewed as a significant mitigating circumstance. Just as many people are gainfully employed, many people complete high school. As noted by the trial court, Bowers will have the opportunity to earn credit toward his sentence if he continues to pursue a college education while incarcerated.

5. *Blakely*

Bowers committed his offense on April 20, 2005, when the presumptive sentencing scheme was still in effect. *See Harris v. State*, 897 N.E.2d 927, 928-29 (Ind. 2008) ("The sentencing statute in effect at the time a crime is committed governs the sentence for that crime."). Bowers was convicted of a Class B felony, which carried a presumptive sentence of 10 years and a maximum sentence of 20 years. Ind. Code § 35-50-2-5 (2004). The trial court imposed a twelve-year sentence after finding two aggravators: the victim's age and infirmity. Bowers argues the finding of these aggravators violates his rights under *Blakely v. Washington*, 542 U.S. 296 (2004). *See*

Harris, 897 N.E.2d at 928 (explaining the *Blakely* issues raised by the presumptive sentencing scheme); *see also Williams v. State*, 891 N.E.2d 621, 631 (Ind. Ct. App. 2008) (Under *Blakely*, a sentence may be enhanced based on (1) prior convictions, (2) facts found by a jury beyond a reasonable doubt, (3) facts admitted by the defendant, or (4) facts found by the court if the defendant has consented to judicial fact-finding.).

The State argues Bowers has waived this issue by not objecting to the trial court. We agree. A claim is generally waived if it is not raised in the trial court. *Smylie v. State*, 823 N.E.2d 679, 689 (Ind. 2005), *cert. denied*. Although *Smylie* rejected a similar waiver argument in cases where the issue could not have been anticipated, Bowers' sentencing hearing was held more than three years after *Smylie* held the presumptive sentencing scheme violated *Blakely*. As the issue was settled and well-known by the time of Bowers' sentencing hearing, we conclude an objection was required.

5. Appropriateness of Sentence

Bowers argues his sentence is inappropriate. We may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*. The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

With regard to his character, Bowers' arguments mirror those he made in regard to mitigators he believes the trial court should have recognized. As discussed above, these proffered mitigators are highly disputable in nature and significance. With regard to the

nature of his offense, Bowers argues he used minimal force and did not physically harm S.F. However, we agree with the trial court that this fact is more than counterbalanced by the fact that Bowers repeatedly preyed on an elderly, physically infirm woman. We cannot say his sentence is inappropriate.

Affirmed.

BAKER, C.J. and BARNES, J., concur.