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IN THE
COURT OF APPEALS OF INDIANA

ZACHARY L. HUTCHINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0810-CR-933
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 22
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0702-FA-18766

September 9, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Zachary L. Hutchinson (Hutchinson), appeals his convictions and sentence for residential entry, a Class D felony, Ind. Code § 35-43-1-1.5, and strangulation, a Class D felony, I.C. § 35-42-2-9.

We affirm.

ISSUES

Hutchinson raises two issues for our review, which we restate as the following three:

(1) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he was the individual who entered the residence and strangled the victim;

(2) Whether evidentiary errors impacted his substantial rights; and

(3) Whether his sentence was inappropriate.

FACTS AND PROCEDURAL HISTORY

Jeanie White (Grandmother) had custody of her four grandchildren, W.W., who was twelve, K.W. and S.W. who were six-year-old twins, and J.W., age four. All of the grandchildren were girls. At some point the girl's mother, Renita, began dating Hutchinson. In December of 2006, Renita was dropped off at Grandmother's house by Hutchinson. Renita introduced Hutchinson as "Zach" to the girls and Grandmother. (Transcript pp. 32, 127, 214).

In early or mid-January 2007, Renita and Hutchinson took the girls to dinner at McDonald's. When they returned, Renita and Hutchinson helped W.W. set up a MySpace

account using a computer that W.W. had just received at Christmas. Grandmother had to eventually ask Renita and Hutchinson to leave because the other girls were being unruly and needed to get prepared for bed.

On Monday, January 22, 2007, J.W. stayed at her father's house. Grandmother put the other girls to bed in routine fashion. The twins, K.W. and S.W., shared a bed in their room, and W.W. slept on the couch. Grandmother awoke that night when the dog began barking frantically at the door of the twins' room. She went to the twins' room and saw Hutchinson sitting on the floor by the twins' bed talking softly to S.W. stroking her hair with his hand. Grandmother asked, "[w]hat are you doing in my house and how did you get in here?" (Tr. p. 45). Grandmother told S.W. to go to her bedroom. Hutchinson stated that W.W. had let him in, and said that he was supposed to meet Renita there. Grandmother knew that was not true because Renita did not live at Grandmother's house and "would never have anybody meet her at my house in the middle of the night." (Tr. p. 47). Grandmother thought that Hutchinson was nervous once he got up because he was stepping from one foot to the other and talking fast. Hutchinson stated that he really liked Renita and her girls and wanted to get to know the family better. He told Grandmother that he would like to talk to her sometime and gave her his cell phone number. Grandmother gave Hutchinson her land line phone number and told him that he had to go and escorted him out the front door and locked it behind him. She was relieved once the door was locked that "he was out of there and nothing bad happened." (Tr. p. 50). Grandmother noticed that W.W. was asleep on the couch, and thought that W.W. must have been really tired to have let Hutchinson in and fall

back to sleep on the couch while he was still there. She went to bed and noticed that it was 2:15 a.m.

Grandmother fell asleep, but awoke suddenly when W.W. yelled "Nana, there is a man on top of [K.W.]. He is trying to kill her." (Tr. p. 53). Grandmother ran to the room, but by the time she got there the man had fled out the window and W.W. was holding K.W. trying to comfort her. K.W. told Grandmother, "He said my name, Nana. He called me [K.W.'s first name]." (Tr. p. 55). The man had choked K.W. so hard that "blood blisters" formed around her eyes. (Tr. p. 56).

Grandmother asked W.W. if she had let Hutchinson in earlier, but W.W. did not know what she was talking about and said she had been asleep. W.W. said that the man she saw trying to kill K.W. looked like "Zach." (Tr. p. 62). Grandmother called 911 and the police arrived and investigated.

K.W. later explained that she awoke when a man was rubbing her "thingy" the place where she "use[s] the bathroom at." (Tr. pp. 124-25). K.W. told him she had to go use the bathroom, attempting to trick the man into letting her out of the room so she could go tell Grandmother. The man responded that S.W. was in the bathroom, using S.W.'s first name. The man then started choking K.W. with one hand on her throat and one hand over her nose and mouth. K.W. noticed that the man was wearing a necklace exactly like the necklace Hutchinson wore when they went to McDonald's.

In the afternoon of Tuesday, January 23, 2007, Hutchinson called Grandmother and told her he had received a "crazy e-mail from [W.W.]." (Tr. p. 65). Hutchinson explained

that Renita had told him to come in the back window of the house, which Grandmother noted to herself conflicted with what he had said the night before. Grandmother told Hutchinson that she did not want to talk to him and she did not want to be friends and hung up the phone. Hutchinson called back several times that day, but Grandmother did not answer. After W.W. returned home from school that day, she answered one of Hutchinson's phone calls. He asked her to wipe his finger prints off the window.

Grandmother took K.W. to a pediatrician. The pediatrician noticed bruising on the middle of K.W.'s neck and sides of her neck. She also had reddish purple spots called petichiae on her face and around her eyes. Petichiae are ruptured blood vessels caused by increased pressure in the veins. The bruising on the neck and petichiae were consistent with manual strangulation.

On January 25, 2007, W.W. and K.W. were interviewed by a forensic child interviewer. At that meeting W.W. was presented a photographic lineup and she identified Hutchinson as the man who strangled K.W. and then fled. On another day, Indianapolis Metropolitan Police Officer Derrick Danner met with K.W. and showed her a photographic lineup. He asked K.W. to identify the person who choked her and she pointed to a picture of Hutchinson and said, "That's Zach." (Tr. p. 440).

On February 5, 2007, the State filed an Information charging Hutchinson with Count I, attempted murder, a Class A felony, I.C. §§ 35-42-1-1, 35-41-5-1; Count II, burglary, a Class A felony, I.C. § 35-43-2-1; Count III, residential entry, a Class D felony, I.C. § 35-43-2-1.5; and Count IV, strangulation, a Class D felony, I.C. § 35-42-2-9. On March 30, 2007,

the State added an allegation that Hutchinson had committed two prior unrelated felonies, and, therefore, his sentence should be enhanced because he was an habitual offender pursuant to I.C. § 35-50-2-8. On May 8, 2008, the State filed an amended Information alleging the same charges as the original Information, but changing the allegations for Count II, burglary, to allege that the felony which Hutchinson intended to commit when he broke and entered the home was child molesting of W.W. as opposed to murder as the original Information had alleged.

Beginning on July 22, 2008, the trial court conducted a three-day jury trial. When the State rested, Hutchinson moved for a directed verdict on the burglary charge, which the trial court granted and dismissed that charge. At the close of evidence, the jury found Hutchinson guilty of residential entry and strangulation, but not guilty of attempted murder. Hutchinson pleaded guilty to being an habitual offender without the benefit of a plea agreement.

On September 17, 2008, the trial court conducted a sentencing hearing and sentenced Hutchinson to one year for residential entry and three years for strangulation, enhanced by four and a half years for being an habitual offender. The sentences were order to be served consecutively, making Hutchinson's aggregate sentence eight and one-half years to be served in the Department of Correction.

Hutchinson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Identity*

Hutchinson argues that the State failed to present sufficient evidence to prove that he was the individual that broke and entered into Grandmother's home and strangled K.W. Specifically, Hutchinson contends that the State failed to present direct or circumstantial evidence proving that he was the individual that strangled K.W.

> Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 212-13 (Ind. Ct. App. 2007), *trans. denied* (citations omitted).

Hutchinson asks us to reweigh the evidence focusing primarily on the fact that K.W. and W.W. did not immediately say directly that the attacker was "Zack." However, that evidence was presented to the jury along with the facts that Hutchinson had come into the home at an unreasonable time earlier that night, the attacker knew the names of the children in the house, W.W. immediately recognized that the build of the attacker was similar to Hutchinson's, and K.W. noticed the attacker wore a necklace that was exactly like the necklace Hutchinson wore. Furthermore, after having time to process the traumatic events of the night, both K.W. and W.W. were confident that the man who strangled K.W. was Hutchinson and positively identified him. This evidence constitutes substantial evidence of

probative value that Hutchinson was the man who strangled K.W. Therefore, we must conclude that the State presented sufficient evidence to prove Hutchinson broke and entered the home and strangled K.W.

II. *Evidentiary Rulings*

Hutchinson next contends that the overlapping effect of numerous evidentiary errors violated his substantial rights considering that the evidence of his guilt was not overwhelming.

> We review a trial court's decision to admit or exclude evidence for an abuse of discretion. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error if the error is inconsistent with substantial justice or if a substantial right of the party is affected.

Donaldson v. State, 904 N.E.2d 294, 300 (Ind. Ct. App. 2009) (citations omitted).

Hutchinson first complains about the admission of the testimony of Jessica Irish (Irish), a witness who had interviewed K.W. and W.W. and who was introduced to the jury as a "forensic child interviewer." (Tr. p. 187). Hutchinson states that Irish "was not qualified under Indiana Evidence Rule 702(a)." (Appellant's Br. p. 15). He points out that Irish was not a certified or licensed social worker. The lack of Irish's certification or licensure as a social worker is the basis which Hutchinson relied upon to object to Irish's testimony at trial. However, "[a] witness need not be licensed in order to assert an opinion in a given field." *INS Investigations Bureau, Inc. v. Lee*, 709 N.E.2d 736, 744 (Ind. Ct. App. 1999), *trans.*

denied. Indeed, a trial court enjoys broad discretion in ruling on an expert's qualifications and in admitting opinion evidence. *Id*.

The State presented Irish as a "skilled witness" and asserted that she was qualified to testify as to opinion based on Indiana Evidence Rule 701, which provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

However, Irish's testimony repeatedly drifted close to the realm of expert opinion being based on how, in her experience, children generally remember and disclose events. That being said, Hutchinson never objected at trial that the testimony of Irish exceeded the scope of a skilled witness's permissible opinion testimony under Evidence Rule 701, and does not articulate that argument on appeal.[1] Therefore, we conclude that he has not demonstrated that the trial court abused its discretion by permitting Irish to testify as a skilled witness.

Hutchinson also contends that certain testimony by Irish violated Indiana Evidence Rule 403; however, he does not take the time to explain why. Therefore, we conclude that his contention is not supported by cogent reasoning and is waived pursuant to Indiana Appellate Rule 46(A)(8)(a).

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[1] Hutchinson requested "a continuing objection under 401, 402, 701, 702, and 703." (Tr. p. 188). However, we conclude that simply uttering section numbers that correspond with evidence rules falls well short of the requirement that an objection must be supported by a statement of the reason that is "full and comprehensive." *Coates v. State*, 650 N.E.2d 58, 61 (Ind. Ct. App. 1995), *trans. denied*. Moreover, the reason stated earlier for Hutchinson's objection was "insufficient foundation." (Tr. p. 187). Lack of proper foundation is different from objecting that a 'skilled witness' is giving opinion testimony that exceeds the scope of testimony that may be given by a skilled witness. "A defendant may not raise one ground for objection at trial and argue a different ground on appeal." *Small v. State*, 736 N.E.2d 742, 747 (Ind. 2000).

Furthermore, Hutchinson contends that the "relevance of [Irish's] testimony other than to bolster the shaky 'identifications' of [K.W.] and [W.W.] is not apparent." (Appellant's Br. p. 16). We disagree. First, we note that Indiana Evidence Rule 401 defines "Relevant Evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Therefore, testimony bolstering another witness's identification would be relevant testimony. However, Hutchinson's argument misses the mark. Hutchinson may be attempting to address the proposition that "[n]o witness . . . is competent to testify that another witness is or is not telling the truth." *Stewart v. State*, 555 N.E.2d 121, 125 (Ind. 1990) (abrogated on other grounds by *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992)). However, Irish never testified as to whether K.W. and W.W. were telling the truth when identifying Hutchinson. Irish testified as to how children, in her experience, recollect and disclose events. Irish never testified as to whether K.W. or W.W. identified Hutchinson in a credible and believable manner. Altogether, Hutchinson has failed to convince us that the trial court abused its discretion by admitting the testimony of Irish.

Next, Hutchinson complains about a statement made by Indianapolis Metropolitan Police Officer Jeff Good (Officer Good). Officer Good stated that he went to the house to "assist in a sex crime investigation." (Tr. p. 285). Hutchinson moved for a mistrial contending that "the obvious implication in the juror's minds may be that there are other sex crime charges against Mr. Hutchinson." (Tr. p. 291-292). We fail to see why that would be the "obvious implication" because K.W. testified that she awoke when Hutchinson was

rubbing her thingy, referring to her vaginal area, and Hutchinson was charged with burglary based upon his alleged intention to commit child molesting. Therefore, Hutchinson has failed to demonstrate any error on the part of the trial court by refusing to grant a mistrial due to Officer Good's comment.

Additionally, Hutchinson complains about statements made by the State during closing arguments, wherein it stated that he had targeted W.W. despite the fact that Count II had been dismissed prior to closing arguments. However, Hutchinson fails to direct our attention to any contemporaneous objection which he made to the State's final argument. The failure to object to an alleged improper prosecutorial remark results in waiver. *Robinson v. State*, 724 N.E.2d 628, 639 (Ind. Ct. App. 2000), *trans. denied*.

Hutchinson also complains that "[t]he sexual theme continued when Detective Danner said he looked for Mr. Hutchinson at the 'Classy Chassis,' a strip club." (Appellant's Br. p. 19). He states that the evidence was admitted over his "objection as to relevance and prejudice." (Appellant's Br. p. 19). However, Hutchinson does not make any effort to explain why we should now conclude that the evidence was improperly admitted. Therefore, we conclude that he has failed to make a cogent argument with respect to this contention and it is waived pursuant to Indiana Appellate Rule 46(A)(8)(a).

Finally, Hutchinson contends the testimony of Indianapolis Metropolitan Police Officer Gene Donovan (Officer Donovan), which explained that Hutchinson resisted arrest, was improper evidence that compounded the other evidence which he alleges was improperly admitted. However, Hutchinson does not explain why this evidence was improper; his

argument just assumes that it was. Therefore, we conclude that Hutchinson has waived this claim as well. *See* App. R. 46(A)(8)(a).

In sum, Hutchinson has failed to effectively demonstrate that any of the trial court's evidentiary decisions were in error. For that reason, we conclude that the trial court's evidentiary decisions did not affect Hutchinson's substantial rights.

III. *Sentencing*

Hutchinson contends that his sentence is inappropriate in light of the nature of his offenses and his character. Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Where a defendant asks us to exercise our appropriateness review, the burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other considerations that come to light in a given case. *Id*.

As we explained above, Hutchinson received an aggregate four year sentence for residential entry and strangulation, enhanced by four and one-half years for being an habitual offender. The aggregate sentence which he received prior to the enhancement for being an habitual offender is the maximum possible sentence he could have been given since his convictions resulted from a single episode of criminal conduct. I.C. § 35-50-1-2(c).[2] Additionally, the enhancement which Hutchinson received for being an habitual offender was the maximum enhancement he could have received. I.C. § 35-50-2-8.[3]

Reviewing the nature of the offenses, Hutchinson broke into a home where a Grandmother was residing with four young girls. He climbed into bed with a six-year-old girl, rubbed her vaginal area, and then strangled her, choking her hard enough to cause blood vessels in her face to hemorrhage.

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[2] Indiana Code section 35-50-1-2(c) provides in pertinent part,

> [E]xcept for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, 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.

Residential entry and strangulation are each Class D felonies (I.C. §§ 35-43-2-1.5 and 35-42-2-9), and the advisory sentence for a Class C felony is four years (I.C. § 35-50-2-6).

[3] Indiana Code section 35-50-2-8(h) limits the enhancement of a sentence for being an habitual offender to no "more than three (3) times the advisory sentence for the underlying offense." Since the underlying offense was a Class D felony, which carries a one and one-half year advisory sentence, the maximum possible enhancement was four and one-half years.

As for Hutchinson's character, he had accumulated an extensive criminal history by the time of sentencing, despite the fact that he was only twenty-four years old. As a juvenile, he received findings of true that he had committed what would have been battery as a Class C felony and theft as a Class D felony if he were an adult. In 2002, he was convicted of robbery as a Class C felony. In 2003, he was convicted of theft as a Class D felony, with judgment entered as a Class A misdemeanor, and possession of marijuana as a Class A misdemeanor. Later in 2003, he was convicted again of theft as a Class D felony, criminal mischief as a Class A misdemeanor, and resisting law enforcement, as a Class D felony. In 2004, he was convicted of robbery as a Class B felony. In 2005, he was convicted of battery as a Class B misdemeanor. In 2008, he was convicted of residential entry as a Class D felony.

Therefore, we conclude that Hutchinson committed a heinous crime that could have easily escalated to the permanent injury or death of a six-year-old girl. His criminal history demonstrates that he is a violent individual with little to no respect for the laws of society. Altogether, Hutchinson has not demonstrated that his sentence is inappropriate considering the nature of his offenses and character.

CONCLUSION

Based on the foregoing, we conclude that the State presented evidence sufficient to prove beyond a reasonable doubt that Hutchinson committed residential entry and

strangulation, his substantial rights were not affected by evidentiary errors, and his sentence is not inappropriate.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.