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ATTORNEY FOR APPELLANT:

JENNIFER M. LUKEMEYER
Voyles Zahn Paul Hogan & Merriman
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RYAN D. JOHANNINGSMEIER
Deputy Attorney General
Indianapolis, Indiana

FILED
Oct 07 2011, 10:10 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

BANE ELLIOTT,[1]	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-1008-CR-566
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0905-FA-10

October 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

[1] A discrepancy exists regarding the spelling of the Appellant's last name. Certain appellate filings list his name as "Elliot." However, based on the spelling used in the trial court filings and personal correspondence directed to him, we have chosen to spell his name "Elliott."

Case Summary

When Bane Elliott's twelve-year-old daughter had several girlfriends over to spend the night, he decided to join the fun. He jumped on the trampoline with the girls and told them scary stories. When all the other girls fell asleep, he molested thirteen-year-old D.B., kissing her mouth and breasts, inserting his finger into her vagina, and performing oral sex on her. D.B. reported the molestation to her mother the next day.

The State charged Elliott with five counts of child molesting, and a jury convicted him on four counts. The trial court sentenced him to forty-year concurrent terms on the two most serious counts, with thirty-five years to be served in prison and five years of probation. Elliott now appeals, claiming that the trial court gave defective jury instructions, abused its discretion in considering sentencing factors, and imposed an inappropriate sentence. We affirm his convictions but remand with instructions to revise his sentence to thirty-five years, with thirty years executed and five years suspended to probation.

Facts and Procedural History

On October 25, 2008, forty-one-year-old Elliott drove his twelve-year-old daughter and four of her friends to a Halloween party. While the girls were at the party, Elliott took his wife and underage son to a bar. Although Elliott drank alcohol, he was not intoxicated. Following the Halloween party, the girls had a sleepover at the Elliott home. Late that night, after putting his inebriated wife and son to bed, Elliott decided to socialize with the girls. He set up a trampoline outside his daughter's window, and he and the girls jumped out the window onto the trampoline. When his daughter and one other girl fell asleep in another

room, Elliott lay on his daughter's bed and told scary stories to three of her friends. At one point, Elliott offered alcohol to thirteen-year-old D.B. When the other two girls fell asleep, Elliott began kissing D.B. and telling her that she was "hot." He kissed her breast and vagina and inserted his finger and tongue into her vagina. She later claimed that he also made her touch his erect penis. Elliott warned D.B. not to tell anyone, but she reported the incident to her mother the next day. Physical examinations and DNA testing confirmed her report that she had been molested.

On April 22, 2009, the State charged Elliott with two counts of class A felony child molesting (Count I—deviate sexual conduct involving Elliott's penetration of D.B.'s sex organ with his finger, and Count II—deviate sexual conduct involving Elliott's mouth and D.B.'s sex organ) and three counts of class C felony child molesting (Count III—fondling by kissing D.B., Count IV—fondling by touching D.B.'s breast or buttocks, and Count V—fondling by having D.B. touch his penis). Following his June 15, 2010 trial, a jury convicted him on Counts I through IV and acquitted him on Count V. On July 13, 2010, the trial court sentenced Elliott to two concurrent forty-year terms for the class A felony counts, with thirty-five years executed and five years suspended to probation. Without explanation, the trial court did not enter sentence on the two class C felony convictions. Elliott now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Jury Instructions

Elliott first claims that the trial court erred in giving certain jury instructions. The

decision to give a jury instruction lies within the trial court's discretion, and we review such a decision for an abuse of that discretion. *Alexander v. State*, 819 N.E.2d 533, 540 (Ind. Ct. App. 2004). Instructions are to be read together as a whole, and we will not reverse for an instructional error unless the instructions, as a whole, mislead the jury. *Buckner v. State*, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). Thus, in conducting our review, we consider whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. *Alexander*, 819 N.E.2d at 540.

Elliott's argument centers on the final "elements instructions," which he claims are legally deficient because they fail to incorporate the specific acts that he is alleged to have committed. Thus, he argues that there is no assurance that the jury convicted him based on the specific acts charged rather than on random uncharged acts. The two final elements instructions[2] covering Counts I and II state,

> The crime of child molesting charged in Count I [Count II] is defined by statute as follows:
>
> A person at least twenty-one (21) years of age, who performs or submits to deviate sexual conduct, with a child under fourteen (14) years of age, commits child molesting, a Class A felony.
>
> Before you may convict the Defendant, the State must have proved each of the following elements:
>
> 1. The Defendant
> 2. knowingly
> a. performed or submitted to deviate sexual conduct
> b. with [D.B.]
> 3. when [D.B.] was a child under fourteen (14) years of age.
> 4. when elements 1 through 3 took place the Defendant was at least twenty-one years of age[.]
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.

[2] The final instructions, as presented in the record, are not numbered.

> If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of child molesting, a Class A felony, filed in Count I [Count II].

Appellant's App. at 111-12.[3]

For Counts III through V, the final elements instructions state,

> The crime of child molesting charged in Count III [Count IV, Count V] is defined by statute as follows:
>
> A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.
>
> Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The Defendant:
> 2. knowingly
> a. performed any fondling or touching of [D.B.]
> b. with the intent to arouse or satisfy the sexual desires of [D.B.]
>
> or Bane Elliott
>
> 3. when [D.B.] was a child under fourteen (14) years of age.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of child molesting, a Class C felony, charged in Count III [Count IV, Count V].

Id. at 113-15.

Essentially, Elliott claims that the foregoing instructions are fatally generic because they do not list the specific act that he is alleged to have committed against D.B. in each count, i.e., Count I, "deviate sexual conduct by penetrating D.B.'s sex organ with his finger;" Count II, "deviate sexual conduct involving his mouth and D.B.'s sex organ"; Count III,

[3] Notably, other final instructions provided definitions of terms such as "deviate sexual conduct," "knowingly," and "reasonable doubt." Appellant's App. at 116-17.

"fondling or touching by kissing D.B.," etc. Thus, he argues that due to the generic wording of the instructions, the jury easily could have been misled and either convicted him of the wrong act or convicted him of some unspecified, uncharged act.

To preserve this issue for appeal, Elliott was required to object at the time the challenged instructions were given. *See Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011) (stating that a defendant who fails to object to an instruction at trial waives any challenge to that instruction on appeal). At trial, Elliott objected to the final elements instructions pertaining to Counts III, IV, and V, but not to the elements instructions pertaining to Counts I and II. Therefore, he has waived any error concerning the Count I and Count II elements instructions.[4]

With respect to Counts III and IV, Elliott asserts that the final elements instructions were fatally generic because they did not delineate which specific type of fondling pertained

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[4] Elliott's counsel objected as follows:

> And then I understand now that you are giving the instructions regarding three counts—counts three, four and five. That there is no differentiation between the elements of these three counts where in count three they say that he kissed her you don't instruct the jury that you—that they have to find that they [sic] kissed her. In count four where he said fondling the breast or buttocks you don't instruct the jury. That count four is related to fondling the breast or buttocks and then in count five where they say penis you don't tell the jury there's any difference between counts three, four and five so this will allow the jury to take one act potentially and find him guilty of three separate offenses and that—to my mind is just inviting confusion and inviting error. But if that's the way the prosecutor and you want to do it I just want to show it over my strenuous objection.

Tr. at 477-78. We are unpersuaded by Elliott's argument that his subsequent blanket statement that "I object to all of them" is sufficiently specific to avoid waiver, since the statement was made in the context of discussing other instructions. *Id*. at 479-80.

to which count.[5] At the end of Elliott's trial, the trial court gave the following final instruction: "You are to consider all of the instructions both preliminary and final together. Do not single out any certain sentence or any individual point or instruction and ignore the others." Appellant's App. at 110. The trial court provided the jury with copies of both the preliminary and final instructions to take to the deliberation room. Preliminary Instruction No. 4 defined class A felony and class C felony child molesting, and Preliminary Instruction No. 3 laid out all five counts from the charging information, separately specifying Elliott's alleged act against D.B. in each count.

In *Bridges v. State*, 835 N.E.2d 482, 483-84 (Ind. 2005), our supreme court held that where the jury had heard a preliminary instruction the day before and had been provided with that instruction in its deliberation notebook, the trial court's omission of that instruction during the reading of the final instructions did not amount to reversible error. Although Elliott correctly argues that the preliminary instructions were insufficient as elements instructions because they did not break down each count element by element, we conclude that the preliminary instructions were sufficiently specific to cover the alleged gaps in the challenged final elements instructions, i.e., the specific act that corresponded to each count. Thus, the preliminary and final instructions, taken together, were sufficient to apprise the jury

[5] Elliott cites as support *Evans v. State*, 571 N.E.2d 1231, 1235 (Ind. 1991). However, we find *Evans* distinguishable because there the challenged instruction was found to be fatally defective due to its omission of an essential element of the offense. Here, the challenged final instructions contain all the elements of the offense but do not specify which act of fondling applies to which count.

of the separate acts charged in each count.[6] Finally, to the extent Elliott argues that the instructions might have misled the jury into convicting him for uncharged acts against another victim, we note that each of the challenged final elements instructions contains the name of only one victim: D.B. In sum, as to Counts III and IV, Elliott has failed to establish an abuse of discretion in the giving the final elements instructions.

II. Sentencing

Elliott contends that the trial court abused its discretion in sentencing him and also asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B). We address each contention in turn. Sentencing decisions are within the trial court's discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. "So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion." *Id*. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*. (citations and quotation marks omitted).

A. Aggravating and Mitigating Circumstances

Elliott claims that the trial court abused its discretion in applying certain aggravating and mitigating circumstances at sentencing. A trial court may impose any sentence that is authorized by Indiana's Constitution and statutes regardless of the presence or absence of

[6] Although Elliott's three-day trial lasted longer than the one-day trial in *Bridges*, it was not so lengthy that the jury was likely to have forgotten the preliminary instructions, especially when the court had given them hard copies of the preliminary instructions for use during deliberations. Moreover, the jury demonstrated its ability to differentiate among the counts by rendering split verdicts, i.e., guilty on Counts I through IV and not guilty on Count V.

aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d). If the trial court finds the existence of aggravating or mitigating circumstances, then it is required to give a statement of its reasons for selecting the sentence that it imposes. *Anglemyer*, 868 N.E.2d at 490. One of the ways that a trial court may abuse its discretion is by failing to consider aggravating or mitigating factors that are clearly supported by the record and advanced for consideration during sentencing. *Id*. at 490-91.

The jury convicted Elliott of two class A felonies and two class C felonies. Although the trial court entered judgment of conviction on each of the four counts, it did not impose sentence on the two class C felony convictions. Instead, it imposed concurrent forty-year sentences on the two class A felony convictions, with thirty-five years executed and five years suspended to probation. The statutory sentencing range for a class A felony is twenty to fifty years, with a thirty-year advisory term. Ind. Code § 35-50-2-4.

The trial court found two mitigating circumstances: Elliott's military service and his supportive family. Elliott's first argument centers not on any mitigating factors that were overlooked, but on what he characterizes as the trial court's failure to place "enough" "import" upon his strong family support system.[7] Appellant's Br. at 13-14. Essentially, this amounts to a challenge to the weight given to this mitigating factor. However, the trial court is no longer obligated to weigh mitigating and aggravating factors when imposing a sentence. *Anglemyer*, 868 N.E.2d at 491. As such, the amount of mitigating emphasis the trial court

[7] At sentencing, the trial court cited Elliott's family support as a mitigator, describing it as "extensive." Tr. at 660. Likewise, the sentencing order lists "support of family and friends" as a mitigating factor. Appellant's App. at 27.

placed on Elliott's family support is not reviewable for an abuse of discretion.

The trial court found four aggravating circumstances: Elliott's criminal history, his illegal drug use, his failure to take responsibility for his actions, and the victim's recommendation. The evidence clearly supports the use of his criminal history and drug use as aggravating factors. To the extent Elliott focuses on the weight assigned to these factors, we reiterate that the amount of weight placed on each factor is not reviewable for an abuse of discretion. *Anglemyer*, 868 N.E.2d at 491. Elliott's failure to take responsibility or show remorse was consistent with his unwavering claim of innocence. However, our supreme court has stated that a lack of remorse "may be available as an aggravating circumstance even where a defendant has pled not guilty." *Fredrick v. State*, 755 N.E.2d 1078, 1084 (Ind. 2001). While we recognize the logic of Elliott's argument on this point, we are bound by our supreme court's precedent, unless or until they reconsider their position on this issue.

Elliott is correct in claiming that the trial court may not use the victim's recommendation as an aggravating factor. Although a recommendation "may properly assist the court in determining the sentence to be imposed[,]" such recommendations "do not constitute mitigating or aggravating circumstances of the customary sort." *Serino v. State*, 798 N.E.2d 852, 858 (Ind. 2003). A recommendation is an opinion, not a fact, and as such, it cannot properly be deemed an aggravating circumstance used to enhance a defendant's sentence. This is not to say that victim impact, such as physical and mental harm, may not be considered at sentencing. Indiana Code Section 35-38-1-7.1(a)(1) includes "harm, injury, loss, or damage suffered by the victim" first among the list of aggravators. However, such

measurable factual impact is different from a victim's opinion concerning the length of her assailant's sentence. Nevertheless, given our resolution of Elliott's inappropriateness challenge below, we need not remand for a reconsideration of aggravating and mitigating circumstances.

B. Appropriateness of Sentence

Finally, Elliott challenges the appropriateness of his sentence pursuant to Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." When a defendant requests appellate review and revision of his sentence, we have the power to affirm, reduce, or increase the sentence. *Akard v. State*, 937 N.E.2d 811, 813 (Ind. 2010). Our review should focus on the aggregate sentence rather than its consecutive or concurrent nature, number of counts, or length of the sentence on any individual count. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). In conducting our review, we do not look to see whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is "inappropriate." *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer*, 868 N.E.2d at 490; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In considering the nature of a defendant's offense, "the advisory sentence is the starting point the Legislature has selected as an appropriate sentence." *Anglemyer*, 868

N.E.2d at 494. Elliott's offenses are loathsome, as indicated by the severity of their felony status. The jury found him guilty of four distinct sexual acts against D.B. while she was a guest in his home. D.B. suffered not only emotional grief, but also physical injury, as indicated by her medical exam.

Family support notwithstanding, the record shows Elliott to be a person of unsavory character. His criminal record, while not extensive, involves offenses against children. At least two of his three convictions for contributing to the delinquency of a minor involve providing alcohol to young females. Here, he offered D.B. alcohol before he molested her. Thus, to the extent his history suggests a pattern of using alcohol to groom young females, it is worthy of some sentence enhancement beyond the advisory term. Moreover, in the instant case, he violated his position of trust by preying upon his daughter's friend who was visiting his home for a teenage sleepover.

As stated, Elliott's criminal record and drug use are valid factors that reflect poorly on his character. However, he has no prior felony convictions, and the extent of his drug use was undetermined, as documented only by his class C misdemeanor conviction for operating a vehicle with a controlled substance and his admission of occasional drug use. He served honorably in the military and has a supportive family. Based on the foregoing, we conclude that he has met his burden of establishing that his forty-year sentence is inappropriate. Consequently, pursuant to Appellate Rule 7(B), we remand with instructions to revise his sentence to thirty-five years, with thirty to be executed and five suspended to probation.

Affirmed in part and remanded in part.

BAILEY, J., and MATHIAS, J., concur.