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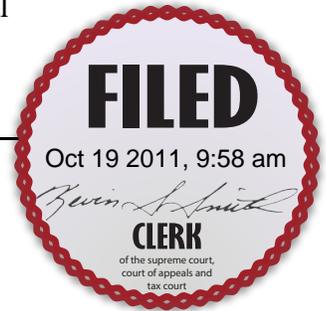
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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN LEGG,)

Appellant-Defendant,)

vs.)

No. 49A02-1102-CR-76)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-1006-FB-46872

October 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Keith Legg (Legg), appeals his convictions for Count I, rape, a Class B felony, Ind. Code § 35-42-5-1; Count II, criminal deviate conduct, a Class B Felony, I.C. § 35-42-4-2; and Count III, criminal confinement, a Class D felony, I.C. § 35-42-3-3.

We affirm.

ISSUES

Legg raises the following issues, which we restate as follows:

- (1) Whether the evidence was sufficient to convict Legg beyond a reasonable doubt;
- (2) Whether the trial court abused its discretion by ordering Legg to serve consecutive sentences; and
- (3) Whether Legg's sentence is appropriate.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the judgment are as follows. On June 12, 2010, M.H. arrived at her home around 11 p.m. to find Legg chatting with M.H.'s father on the family's front porch. M.H.'s father is disabled and sits in a wheelchair. M.H. knew Legg by his nickname "Calvin" and as a neighborhood acquaintance. Legg gave M.H. a sip of alcohol and put his arm around her. M.H. removed Legg's arm and went to sit next to her father. Legg said that his father had some property in his possession which had been stolen from M.H. and her father, and offered to return it. Legg asked M.H. to go with him to Legg's

father's nearby house to get the stolen property. After expressing reluctance, and at her father's urging, M.H. agreed to go with Legg. Legg told M.H. and her father that he had just moved into an apartment next to his father's house. Before they left, M.H.'s father gave Legg a sheet to cover a bare window in Legg's apartment as well as a trash bag to protect the stolen goods from the rain.

Proceeding on foot, Legg first took M.H. past Legg's father's house. Legg looked in a window and told M.H. that his father was asleep. Legg told M.H. that he would come back later to get the stolen property and bring it to M.H.'s house. Legg told M.H. that he wanted to go by his apartment to drop off the sheet and the trash bag. Legg produced a key to his apartment and they walked to Legg's apartment together.

When they arrived, Legg's house was dark inside, but illuminated by electric signs across the street. Legg put the sheet and the trash bag on the floor on his way to the bathroom. M.H. told Legg to hurry up so she could return home. Legg emerged from the bathroom with his shirt off, and told M.H., "[l]ets stay here for a couple of minutes; let's do it." (Transcript p. 85). M.H. refused, said that she wanted to go home, and turned toward the front door.

Upon touching the doorknob, Legg grabbed M.H.'s left forearm to pull M.H. toward him. Legg began kissing M.H. who told Legg that she wanted to go home. Legg told M.H. to relax and that "it wouldn't take long." (Tr. p. 86). Legg and M.H. struggled while Legg pulled up M.H.'s shirt. Legg succeeded in getting M.H.'s shirt up long enough to put his mouth on M.H.'s nipple. M.H. repeatedly told Legg no and tried to pull her shirt down.

Legg then attempted to pull down M.H.'s pants and M.H. threw her body to the ground in an effort to keep her pants on. After pulling her pants off, Legg held her arms and performed oral sex on M.H. M.H. tried to get away from Legg and asked Legg to stop. Legg told M.H. not to be scared and that it would take only "a couple seconds." (Tr. p. 91). Legg then climbed on top of M.H. and inserted his penis into M.H.'s vagina. M.H. tried to pull away from Legg, told him to stop and that she wanted to go home.

After ejaculating inside M.H.'s vagina, Legg let M.H. get up. M.H. put her pants back on, unlocked the front door, and began to walk home. Legg followed M.H. and told her that he was going to the liquor store, that he wanted to have sex with M.H. again, and that he wanted to stay the night at M.H.'s home. Legg departed and M.H. continued walking home until she ran into a friend on a porch. M.H. waived the friend over. M.H. was crying and barely able to speak. M.H. told her friend that Legg had touched her. The friend asked if Legg had raped her, and M.H. said yes. M.H. and her friend went to tell M.H.'s father, and the friend called the police using M.H.'s cell phone.

Detective Michelle Floyd (Detective Floyd) of the Indianapolis Metropolitan Police Department arrived to interview M.H. M.H. told Detective Floyd that Legg had raped her and Legg was later taken into custody. Detective Floyd arranged for M.H. to go to the hospital where two sexual assault nurse examiners administered a rape examination. While the nurses found no evidence of bite-marks, M.H. complained of pain and had small abrasions in her vaginal area. Detective Floyd later met with Legg, who gave a voluntary statement. Legg admitted to having oral sex and intercourse with M.H., but insisted that both

acts were consensual.

On June 14, 2010, Legg was charged with Count I, rape, a Class B felony, Ind. Code § 35-42-5-1; Count II, criminal deviate conduct, a Class B felony, I.C. § 35-42-4-2; and Count III, criminal confinement, a Class D felony, I.C. § 35-42-3-3. On January 10, 2010, a jury trial was held. On January 11, 2010, the jury found Legg guilty on all Counts. On January 21, 2011, the trial court held a sentencing hearing. The trial court merged the conviction for the Class D felony criminal confinement into the Class B felony rape conviction. After hearing evidence regarding applicable aggravators and mitigators, the trial court sentenced as follows:

Just the one thing, the one area that really neither side touched on that got to me a little bit was it seemed to be a premeditated act. It did seem to be a reason to get [M.H.] to go somewhere where the act took place, which is clearly an aggravator. I think [Legg's] criminal history kind of splits in the middle. I see, obviously, a significant criminal history in the sense that many arrests, not for major things but lesser things that are a burden on society, let there be no doubt, but it does seem to have trickled off. His hay day seems, for criminal activity, seems to have been in the '90s until this event, which is the most serious thing he's ever done and he took to it late in life. [Legg] took to drugs late in life. Why he picked up the habit of cocaine at the age of 40 or whenever he did, is beyond me. It didn't seem like a time to start picking up bad habits, but you did.

I understand what the State argued concerning [M.H.], and I appreciate where she's coming from. She won't view any man the same way, and I guess in that sense you've ruined it for all of us [—] any man who commits acts like this do [—] that you can't trust men ever fully, because she trusted you and you were the one person she couldn't afford to trust.

I think that your age is to some extent a mitigator in the sense that you are older. It should not detract from the nature of the crime though, so overall, I guess I view this a little bit differently in that I am aggravating in the sense that they're crimes of violence so I will stack them, but in so stacking I'm issuing a sentence that I think is appropriate under the circumstances.

And I do fall to closer in the State's realm of procedure here, and I think that's going to allow you a chance to work on your GED or work on things to try to reduce this sentence, but it's a sentence that I think is appropriate again under the circumstances, and that is a 14-year sentence, all of it to be executed at the Department of Correction[]. All right? I think the State has weighed everything and they could have requested much more, but they didn't, and your attorney has made a good argument today to keep it closer to the advisory [sentence], but I find that 14 years is appropriate. I'm going to execute it on [seven — seven] years on each [C]ount. They will run consecutive to one another, so [seven] years on Count One and [seven] years on Count Two. Count Two is consecutive to Count One.

(Tr. pp. 395-96).

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

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Legg argues that there was insufficient evidence beyond a reasonable doubt to support his convictions for rape and criminal confinement. Our standard of review for sufficiency of the evidence claims is well-established. We do not reweigh the evidence or judge the credibility of the witness. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. Only that evidence which is most favorable to the verdict as well as reasonable inferences drawn therefrom will be considered. *Id.* at 213. We will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* We will reverse only if reasonable persons could not form inferences for each material element of the crime. *Id.*

In order to convict Legg of rape, the State was required to prove beyond a reasonable doubt that Legg knowingly or intentionally had sexual intercourse with M.H. when M.H. was

compelled by force or imminent threat of force. I.C. § 35-42-4-1(a). To convict Legg of criminal deviate conduct, the State was required to prove beyond a reasonable doubt that Legg knowing or intentionally caused M.H. to perform or submit to deviate sexual conduct when M.H. was compelled by force or imminent threat of force. I.C. § 35-42-4-2(a). Deviate sexual conduct is defined in relevant part as an act involving a sex organ of one person and the mouth or anus of another person. I.C. § 35-41-1-9(1).¹

We note that Legg admitted to both intercourse and deviate sexual conduct with M.H. Thus, the sole issue is whether or not the evidence was sufficient to prove that M.H.'s participation in such acts was compelled by Legg's use force or the imminent threat of force. Legg points to both the evidence as well as evidentiary deficiencies to infer a lack of force or M.H.'s consent. First, Legg points to M.H.'s body type. Specifically, Legg argues that M.H. possessed a body of exceptional size such that the act of intercourse required M.H.'s cooperation to be possible, and infers that no force could have been used to compel M.H. to participate in either sexual act. Legg cites to testimony by the nurses regarding the difficulty of performing a vaginal scan on M.H. – one nurse was required to hold M.H.'s stomach to one side while the other nurse inserted a speculum to obtain a sample. Legg also notes that the nurses found M.H.'s clothes to be without damage, that M.H. had no bite marks or other indicia of injury, and that the nurses were unable to attribute M.H.'s injuries to Legg or to M.H.'s sexual encounter with a different person prior to meeting Legg.

From these factual premises, Legg asks us to infer that M.H. could not have been

¹ Legg did not argue sufficiency of the evidence regarding his conviction for criminal confinement.

compelled to do both sexual acts; rather, M.H. consented to them. However, none of the foregoing necessarily proves a lack of compulsion or the existence of consent. Compulsion by force or the threat of force is determined in light of the victim's perspective. *Tobias v. State*, 666 N.E.2d 68, 72 (Ind. 1996). M.H. testified that she was compelled by force to submit to sexual acts to which she never gave her consent. Even if M.H.'s cooperation was required, that does not mean that M.H. consented or that M.H. wasn't compelled by force or the imminent threat of force to engage in sexual acts with Legg. Here, Legg is merely asking us to reweigh the evidence and witness credibility, which we may not do on appeal. *Perez*, 872 N.E.2d at 212-13. Testimonial evidence and evidence of M.H.'s injuries are sufficient to sustain Legg's conviction. Therefore, we conclude that Legg has not shown the existence of insufficient evidence to disturb his convictions for rape and criminal deviate conduct.

II. *Consecutive Sentences*

Legg argues that the trial court abused its discretion in ordering Legg to serve consecutive sentences rather than enhanced, concurrent sentences. The trial court has discretion to impose consecutive sentences. I.C. § 35-50-1-2; *Owens v. State*, 916 N.E.2d 913, 917 (Ind. Ct. App. 2009). A minimum of one aggravating circumstance is required before imposing consecutive sentences. *Owens*, 916 N.E.2d at 917. Further, the trial court must provide "reasonably detailed reasons or circumstances" to impose a particular sentence. *Anglemyer v. State*, 868 N.E. 2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. To determine the trial court's findings, we may examine the trial court's sentencing

Accordingly, we do not discuss it here.

comments. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

Legg argues that the trial court abused its discretion when imposing consecutive sentences by basing its decision on the fact that Legg had committed crimes of violence, yet did not explain why this justified consecutive rather than enhanced, concurrent sentences. Legg directs us to cases decided under the presumptive sentencing scheme to illustrate that the trial court is still required under the current advisory sentencing scheme to justify its decision to impose consecutive sentences. *See, e.g., Monroe v. State*, 886 N.E.2d 578, 580 (Ind. 2008) (finding that the trial court offered no explanation of circumstances justifying consecutive sentences imposed under prior presumptive sentencing scheme); *Owens*, 916 N.E.2d at 917 (explicitly referring to *Monroe*'s requirements while evaluating a sentence issued under the advisory sentencing scheme). Here, Legg contends that the trial court's bald recitation that Legg's crimes were crimes of violence is insufficient to provide the required justification.

We find Legg's argument irrelevant because the trial court sufficiently announced its justification for imposing consecutive sentences. Instead of merely reciting that "they're crimes of violence so I will stack them," the record shows that the trial court engaged in a thoughtful evaluation of the aggravating and mitigating circumstances in light of Legg's commission of crimes of violence. (Tr. p. 396). First, the trial court found premeditation of Legg's crimes of violence as an aggravating circumstance. Next, the trial court considered Legg's criminal history and drug use in light of his commission of crimes of violence. The trial court then weighed the impact of Legg's crimes of violence upon M.H. Finally, the trial

court considered Legg's age in light of his crimes of violence. To contend that the trial court merely incanted "crimes of violence" when ordering consecutive sentences, unduly abstracts from the trial court's sentencing statement. Accordingly, we find that the trial court adequately provided detailed reasons and justifications for the imposition of Legg's consecutive sentences and did not abuse its discretion.

III. *Appropriateness of Legg's Sentence*

Indiana Appellate Rule 7(B) enables appellate review of the appropriateness of a sentence authorized by statute. After due consideration of the trial court's decision, if we find that the sentence is inappropriate in light of the nature of the offenses and the character of the offender, Rule 7(B) permits revision of that sentence. *Anglemyer*, 868 N.E. 2d at 491.

A defendant has the burden to persuade the appellate court of the inappropriateness of the sentence. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

To review the nature of the offenses, we consider the advisory sentence for each crime as the starting point to determine appropriateness. *Id.* at 1081. Legg has been convicted of two Class B felonies and one Class D felony, though the Class D felony was merged into the Class B felony. A sentence for a Class B felony ranges from six to twenty years, with an advisory sentence of 10 years. I.C. § 35-50-2-5. A sentence for a Class D felony ranges from six months to three years, with an advisory sentence of one and a half years. I.C. § 35-50-2-7(a). Legg was sentenced to an aggregate of 14 years, far less than the aggregate sentence if the advisory sentences were imposed for each crime.

Legg's description of the crimes themselves is unconvincing. Legg argues that his

crimes were “less egregious than the ‘typical’ [r]ape or [c]riminal [d]eviate [c]onduct offenses.” (Appellant’s Br. p. 15). In particular, Legg contends that his crimes lacked egregiousness because M.H.’s injuries were limited in scope, his crime was limited in duration, and he intended to meet M.H. afterwards. Accepting Legg’s argument would trivialize the crimes Legg committed as well as the impact on the victim and her father. Although Legg apologized for his offenses, when viewed against Legg’s premeditation and Legg’s insistence despite M.H.’s protests, we find that more than a simple misunderstanding occurred. Thus, Legg’s sentence is not inappropriate in light of the nature of his crimes.

Turning to Legg’s character, we conclude that Legg’s character is a sufficient basis to sustain his sentence. Legg argues that rape and criminal deviant conduct are not related to his prior criminal history, yet we find Legg’s attempt to trivialize his criminal history unconvincing. Legg’s prior criminal history involves convictions for battery, disorderly conduct, auto theft, criminal conversion, receiving stolen property, and resisting law enforcement, along with a number of prior arrests as an adult. Legg received suspended sentences of varying lengths and has been on probation three times, with one revocation. Even though the trial court found that Legg’s criminal history was a neutral factor in determining Legg’s sentence, that does not mean it is insignificant for our purposes. Legg’s criminal history, in sum, does not convince us that Legg’s character renders his sentence inappropriate. We decline Legg’s invitation to disturb his sentence on the basis of inappropriateness.

CONCLUSION

We conclude that the evidence was sufficient to convict Legg for rape, criminal deviant conduct, and criminal confinement. We also conclude that the trial court did not abuse its discretion by imposing consecutive sentences and that Legg's sentence is not inappropriate.

Affirmed.

NAJAM, J. and MAY, J. concur