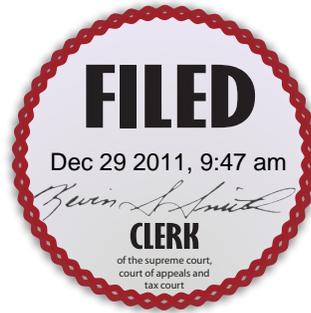


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN W. SAWYER,)
)
Appellant-Defendant,)
)
vs.) No. 48A02-1105-CR-454
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph R. Pyle III, Judge
Cause No. 48C01-0910-FC-602

December 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

John W. Sawyer (“Sawyer”) appeals following his convictions for Battery, as a Class C felony;¹ Strangulation, a Class D felony;² Intimidation, as a Class D felony;³ Resisting Law Enforcement, as a Class A misdemeanor;⁴ and Cruelty to a Law Enforcement Animal, as a Class A misdemeanor.⁵ We affirm in part and vacate in part.

Issues

Sawyer presents the following issues for our review:

- I. Whether sufficient evidence supports his conviction for Resisting Law Enforcement;
- II. Whether double jeopardy principles prohibit his convictions for Resisting Law Enforcement and Battery on a Law Enforcement Animal;
- III. Whether the trial court abused its discretion by admitting hearsay testimony of an unavailable witness;
- IV. Whether the trial court abused its discretion by admitting certain evidentiary exhibits;
- V. Whether the trial court abused its discretion by not finding Sawyer’s prior military service to be a mitigating factor in sentencing; and
- VI. Whether his sentence is inappropriate given his character and the nature of his offense.

¹ Ind. Code § 35-42-2-1(a)(3).

² I.C. § 35-42-2-9.

³ I.C. § 35-45-2-1(b)(1)(A).

⁴ I.C. § 35-44-3-3(a)(1).

⁵ I.C. § 35-46-3-11(a).

Facts and Procedural History

On October 25, 2009, Shalonda Smith (“Smith”) went to a group home in Anderson, Indiana, to visit her friend, Christopher Peoples (“Peoples”). Peoples lived in the home, as did Sawyer and others. At some point during Smith’s visit, she encountered Sawyer in the downstairs common area of the house. Sawyer was drunk and said to Smith, “You know I want you. I haven’t been without [sic] a woman in so many months. I need you.” Tr. 53. Smith rejected Sawyer’s advances and told him that she did not like him. Sawyer then went to the kitchen, obtained a knife, and placed it against Smith’s hip and neck and told her that if she would not sleep with him, he would kill her. Sawyer also choked her and cut her finger as she attempted to get away from him.

Smith went upstairs to Peoples’s room and Sawyer followed. Sawyer kicked in the door to the room, grabbed Smith by the neck, threw her down, and choked her while Smith begged for her life. Sawyer then took Smith by the neck and dragged her to his room, where he said, “You’re gonna sleep with me.” Tr. 66.

At some point, Peoples confronted Sawyer. Smith ran behind Peoples for protection, and Peoples told Sawyer that he could not hit her while he was around. Sawyer, wielding a knife, responded by saying, “Well boy, you about to die.” Tr. 96. The three eventually ended up outside, where Sawyer attacked Peoples as Peoples called the police. Peoples fended off Sawyer with a tree branch and Smith stayed behind Peoples for protection. During Sawyer’s attack, Sawyer told Peoples that he wanted to kill him.

The entire incident lasted fifteen minutes, Sawyer used two different knives,⁶ and Smith sustained two different cuts on her fingers, bruises on her neck, and a scratch behind her ear. The police arrived and ordered Sawyer to show his hands and go to the ground. Sawyer did not comply and kept moving his hands toward his pockets. After Sawyer continued to disobey the officers' commands, the police eventually released a law enforcement dog on Sawyer. Sawyer repeatedly punched the dog in the head and face in retaliation, but ultimately relented and was taken into custody.

Sawyer was charged with Battery with a Deadly Weapon, a Class C felony; Criminal Confinement, as a Class C felony;⁷ two counts of Intimidation, as Class D felonies; Strangulation, a Class D felony; Resisting Law Enforcement, as a Class A misdemeanor; and Battery on a Law Enforcement Animal, as a Class A misdemeanor. A jury trial was held on January 18, 2010 and January 20, 2010. At the trial's conclusion, the jury found Sawyer guilty of Battery with a Deadly Weapon, Strangulation, one count of Intimidation, Resisting Law Enforcement, and Battery on a Law Enforcement Animal. The jury found him not guilty of Criminal Confinement and the other count of Intimidation.⁸

The court held a sentencing hearing on April 11, 2011, and after hearing argument of counsel, found Sawyer's criminal history and the fact that he committed the offenses while on probation as aggravating factors. Sawyer was sentenced to eight years imprisonment for

⁶ Sometime during the incident Sawyer switched from the small knife he retrieved in the kitchen to a larger knife.

⁷ I.C. § 35-42-3-3.

⁸ Specifically, Sawyer was found not guilty of Intimidation of Smith, but guilty of Intimidation of Peoples.

Battery, three years for Strangulation, three years for Intimidation, one year for Resisting Law Enforcement, and one year for Battery on a Law Enforcement Animal, all executed at the Department of Correction. The court ordered his sentences to be served concurrently, for an aggregate sentence of eight years. Sawyer now appeals.

Discussion and Decision

Sufficiency of the Evidence and Double Jeopardy

Sawyer argues that insufficient evidence supports his conviction for Resisting Law Enforcement. He also maintains that double jeopardy principles under the Indiana Constitution prohibit his convictions for both Resisting Law Enforcement and Battery on a Police Animal. The State concedes that Sawyer's convictions for both crimes violate double jeopardy principles. We therefore need not address Sawyer's sufficiency argument and vacate his conviction for Resisting Law Enforcement.

Testimony of Christopher Peoples

At Sawyer's trial, the court allowed the State to read into evidence Peoples's prior testimony on the events in this case that he gave at Sawyer's probation revocation hearing. This was done in lieu of Peoples's live testimony because Peoples was determined to be unavailable. Sawyer argues that this constitutes reversible error because it violated his federal constitutional right to confront the witnesses against him.⁹ We disagree.

⁹ Sawyer also argues that the reading of Peoples's prior testimony violated his Indiana constitutional right to meet witnesses face to face. "[M]erely ensuring that a defendant's right to cross-examine the witnesses is scrupulously honored does not guarantee that the requirements of Indiana's Confrontation Clause are met." Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991). However, Sawyer failed to present this challenge at trial

The admission of evidence is within the sound discretion of the trial court. Guy v. State, 755 N.E.2d 248, 252 (Ind. Ct. App. 2001), trans. denied. We will not reverse a trial court’s decision on whether to admit certain evidence absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. Id. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances. Tolliver v. State, 922 N.E.2d 1272, 1278 (Ind. Ct. App. 2010), trans. denied.

In determining the admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court’s ruling and unrefuted evidence in the defendant’s favor. Guy, 755 N.E.2d at 252. Even if the decision to admit evidence was an abuse of discretion, we will not reverse if the admission of evidence was harmless error. Tolliver, 922 N.E.2d at 1278. Error is harmless if “the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.” Id. (quoting Cook v. State, 734 N.E.2d 563, 569 (Ind. 2000)).

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him[.]” The Fourteenth Amendment makes this right of confrontation obligatory upon the

because his objections to the introduction of Peoples’s prior testimony concerned his ability to confront and cross-examine and he made no additional argument regarding the Indiana Constitutional right to meet witnesses face to face. Sawyer’s argument that he was entitled to meet Sawyer face to face is therefore waived. See Cavens v. Zaberdac, 849 N.E.2d 526, 533 (Ind. 2006) (“Issues not raised at the trial court are waived on appeal”). “In order to properly preserve an issue for appeal, a party must, at a minimum, ‘show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.’” Id. at 533 (quoting Endres v. Ind. State Police, 809 N.E.2d 320, 322 (Ind. 2004)).

states. Howard v. State, 853 N.E.2d 461, 464-65 (Ind. 2006) (citing Pointer v. Texas, 380 U.S. 400, 406 (1965) and Brady v. State, 575 N.E.2d 981, 985 (Ind. 1991)). The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine witnesses against him. Id. The right to adequate and effective cross-examination is fundamental and essential to a fair trial. Id. It includes the right to ask pointed and relevant questions in an attempt to undermine the opposition's case, and the opportunity to test a witness's memory, perception, and truthfulness. Id. The admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination. Id. (citing Crawford v. Washington, 541 U.S. 36 (2004)).

Sawyer argues that he lacked a prior opportunity to cross-examine Peoples. In particular, he contends that his prior cross-examination of Peoples at the probation revocation hearing was not meaningful because a probation revocation hearing, as a civil matter, does not have the same evidentiary burden as a criminal trial. See Cox. v. State, 706 N.E.2d 547, 551 (Ind. 1999) (“A probation hearing is civil in nature and the State need only prove the alleged violations by a preponderance of the evidence”). He also argues that he did not have adequate time to prepare for the probation revocation hearing.

The Confrontation Clause does not guarantee “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Jarrell v. State, 852 N.E.2d 1022, 1027 (Ind. Ct. App. 2006) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).

The right to cross-examination is satisfied if the defendant has the opportunity to bring out such matters as a witness's bias, lack of care and attentiveness, poor eyesight, or even bad memory. Id. “[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.” Id. (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality opinion of Powell, J.)). “Normally the right to confront one’s accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses.” Id. (quoting Ritchie, 480 U.S. at 53).

Sawyer was fully able to and did cross-examine Peoples at the probation revocation hearing. He asked Peoples questions regarding how long he had lived at the group home, what the nature of his relationship was with Smith, what time Smith arrived at the group home on October 25, 2009, and what time the police arrived. Sawyer’s attorney also questioned Peoples about his observations of the events. He makes no argument that the probation court denied him wide latitude to question Peoples. Regardless of the evidentiary burden, Sawyer’s goal at the probation revocation hearing was the same as it would have been at trial—to discredit Peoples’s account of the events. We therefore find no abuse of discretion in the decision to admit Peoples’s prior testimony into evidence.¹⁰

¹⁰ We further observe that even if the trial court had abused its discretion, the error would be harmless because Peoples’s testimony was cumulative of Smith’s testimony. Tolliver, 922 N.E.2d at 1278.

Admission of Certain Evidentiary Exhibits

Photographs

Sawyer next argues that the trial court abused its discretion by admitting into evidence State's Exhibits 13 and 14, which are two photographs both displaying a sheet with what appears to be a droplet of blood on it. He maintains that the photographs were not relevant to his trial because the State did not establish that the red spot on the sheet depicted in the photograph was in fact blood from Smith, Sawyer, or Peoples.

Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of photographic evidence only for an abuse of discretion. Corbett v. State, 764 N.E.2d 622, 627 (Ind. 2002) (citing Swingley v. State, 739 N.E.2d 132, 133 (Ind. 2000)). As a general rule, photographs are admissible as demonstrative evidence if they illustrate a matter about which a witness has been permitted to testify. Timberlake v. State, 679 N.E.2d 1337, 1341 (Ind. Ct. App. 1997). The proponent of the evidence must first authenticate the photograph. Id. The sponsoring witness must establish that the photograph is a true and accurate representation of the things that it is intended to portray. Id. The photograph must also be relevant. Id. "Relevant evidence" means 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." Ind. Evid. R. 401. A photograph is relevant if it depicts a scene that a witness would be permitted to describe verbally. Timberlake, 679 N.E.2d at 1341. Relevant evidence is generally admissible; evidence that is not relevant is not admissible. Ind. Evid.

R. 402.

The State admitted the photographs through Anderson Police Department Officer Donovan Baysinger, (“Officer Baysinger”), who was the crime scene technician responsible for taking photographs and collecting evidence. As the crime scene technician, Officer Baysinger would be permitted to describe the scene verbally. Officer Baysinger testified that both Exhibit 13 and Exhibit 14 were true and accurate depictions of what he saw in the room that night. A red spot on the bed appearing to be blood makes it more probable that Smith had been cut, as she had previously testified. That the spot was never shown to be blood was an issue of weight for the jury. We therefore conclude that the pictures were relevant and that the trial court did not abuse its discretion by admitting them into evidence. Any other claimed error concerning the photographs’ admission is harmless because they were merely cumulative of other evidence introduced at trial. Tolliver, 922 N.E.2d at 1278.

Knife

Sawyer also challenges the trial court’s decision to allow the admission of State’s Exhibit 26, a knife allegedly used by Sawyer and collected by Officer Baysinger at the crime scene. In particular, Sawyer argues that the State failed to lay an adequate foundation for the knife’s admission because the label on the bag that contained the knife at trial indicated that the knife was collected on October 24, 2009, and the events in question were alleged to have occurred on October 25, 2009. Sawyer cites to no authority in support of this argument, however, and therefore waives our review of it. See Shepherd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (“It is well settled that we will not consider an appellant’s assertion on

appeal when he has failed to present cogent argument supported by authority and references to the record as required by the rules”).

Sawyer’s waiver notwithstanding, we cannot agree that the State failed to lay a proper foundation for the knife’s admission. As best we can tell, Sawyer’s argument is based upon a challenge to the chain of custody. After Sawyer objected at trial, an inaudible discussion between counsel and the court was held at the bench, after which the court overruled Sawyer’s objection by stating that “[c]hain of custody doesn’t have to be perfect but the witness testified that this is the item that he collected at the time of . . . his arrival at the scene so . . . objection overruled.” Tr. 143.

Under the chain of custody doctrine, adequate foundation is laid where the continuous whereabouts of an exhibit are shown from the time it came into possession of the police. Espinoza v. State, 859 N.E.2d 375, 382 (Ind. Ct. App. 2006). An adequate foundation establishing a continuous chain of custody is established if the State accounts for the evidence at each stage from its acquisition, testing, and introduction at trial. Id. The State must give reasonable assurances that the evidence remained in an undisturbed condition. Id. However, the State need not establish a perfect chain of custody, and once the State strongly suggests the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. Id.

Leaving aside the fact that the date on the knife’s bag was before, and not after, the knife was apparently collected, we note that when an exhibit is non-fungible, such as a knife, the exhibit is not subject to the high degree of scrutiny that must be applied to fungible items.

Trotter v. State, 559 N.E.2d 585, 591 (Ind. 1990). “When an item is readily identifiable, such as a knife, it may be admitted based upon the testimony of the witness that it is recognized and in a substantially unchanged state.” Id. At trial, Officer Baysinger identified Exhibit 26 as a knife that he collected on October 25, 2009. He further stated that it was in the same or similar condition as when he collected it. Before Officer Baysinger bagged the evidence, he photographed it and the State introduced that photograph into evidence without objection from Sawyer. After Officer Baysinger photographed and bagged the evidence, he took it to the police station and put it in the evidence locker. This testimony more than adequately establishes a proper chain of custody for the knife. The trial court did not abuse its discretion by admitting it into evidence.

Sentencing

Upon conviction of a Class C felony, Sawyer faced a sentencing range of two years to eight years, with the advisory sentence being four years. See I.C. § 35-50-2-6. Upon conviction of two Class D felonies, he faced, for each offense, a sentencing range of six months to three years, with the advisory sentence being one and one-half years. See I.C. § 35-50-2-7. Upon conviction of a Class A misdemeanor, he faced a sentence of up to one year. See I.C. § 35-50-3-2. Sawyer received the maximum possible sentence for each of his offenses, but because the court ordered he serve his sentence concurrently, his aggregate sentence is eight years. He presents two sentencing challenges, first arguing that the trial court abused its discretion by ignoring evidence of a mitigating circumstance, and, second, arguing that his sentence is inappropriate.

Military Service

Sawyer first contends that the trial court failed to identify his prior military service as a significant mitigating factor clearly supported by the record. He did not, however, advance this as a mitigator at sentencing. “If the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal.” Henley v. State, 881 N.E.2d 639, 651 (Ind. 2008) (quoting Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000)). Nevertheless, we observe that Sawyer’s military service was brief, lasting a little over three years, and remote, occurring over forty years ago from 1965 to 1968, and find no error in the trial court’s decision not to identify it as a mitigating factor. See Anglemeyer v. State, 875 N.E.2d 218, 220-21 (Ind. 2007) (“[A]n allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant”).

Review under Appellate Rule 7(B)

Sawyer also maintains that his sentence is inappropriate in light of the nature of his offense and his character, and urges us to revise his sentence downward under Indiana Appellate Rule 7(B). In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if,

after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

Our supreme court more recently stated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to “leaven the outliers.” Id. at 1225. “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 myriad other factors that come to light in a given case.” Id. at 1224.

As for the nature of his offense, when Smith refused to have sex with Sawyer, he sliced her twice with a knife, strangled her more than once, pursued her when she tried to escape, ignored her pleas for her life, and dragged her from room to room. When Peoples intervened to help Smith, Sawyer threatened his life with a knife and attacked him in such a way that Peoples had to fend him off with a tree branch. When the police arrived, Sawyer disobeyed their commands, leading to a dangerous armed standoff. Sawyer repeatedly punched the canine officer deployed to apprehend him.

Regarding Sawyer’s character, Sawyer’s pre-sentence investigation report lists an extensive criminal history. He has forty arrests and twenty-four convictions, six of which are felony convictions. He has been granted and then violated probation on several occasions.

He has also been placed in community corrections and other alternative sentence programs, but has eventually ended up in the Department of Correction. Sawyer was on probation when he committed the instant offenses.

In light of the nature of Sawyer's offense and his character, we cannot say that his sentence is inappropriate and therefore decline his invitation to revise his sentence downward.

Conclusion

Sawyer's conviction for both Resisting Law Enforcement and Battery on a Police Animal violate double jeopardy principles, and we therefore vacate his conviction for Resisting Law Enforcement. We affirm all of his other convictions. The trial court did not abuse its discretion by allowing the State to read into evidence Peoples's prior testimony because Sawyer had a prior opportunity to meaningfully cross examine Peoples. Nor did the trial court abuse its discretion by admitting the State's Exhibits 13, 14, and 26. Sawyer's military history is not so significant that the trial court abused its sentencing discretion by not identifying it as a mitigating factor, and Sawyer's sentence is not inappropriate in light of his character and the nature of his offense.

Affirmed in part, vacated in part.

BAKER, J., and DARDEN, J., concur.