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ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

ROBERT WHITESIDE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0612-CR-1164

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0605-FB-91513

July 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Robert Whiteside appeals his conviction for Criminal Deviate Conduct, as a Class B felony, following a bench trial. Whiteside raises two issues for our review:

1. Whether the State presented sufficient evidence that his victim was unaware of his act.

2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

C.H. and T.D. met as first-year college students at the University of Indianapolis. In May of 2006, T.D. moved into C.H.'s apartment. On May 19, Whiteside, T.D.'s stepfather, arrived at C.H.'s apartment to take T.D. to some bars. Before leaving the apartment, Whiteside "hung out" with C.H., her boyfriend Jose Orozco, and his brother Jorge Cano for about half an hour. Appellant's Brief at 3. While Whiteside and T.D. were gone, Jose fell asleep, and C.H. and Jorge drank alcohol while watching television.

Around 3:30 the next morning, Whiteside and T.D. returned to C.H.'s apartment. They were noticeably intoxicated. Shortly thereafter, T.D. and Jorge left to get more soda to make mixed drinks. C.H. and Whiteside remained in the kitchen. Whiteside repeatedly told C.H. "how beautiful [she] was and how gorgeous [she] was[,] and he kept trying to give [her] . . . half[-]hugs." Transcript at 26. C.H. "felt very uncomfortable with him." Id.

After T.D. and Jorge returned, everyone consumed more alcohol. T.D. and Jorge then went into the living room and started wrestling. Shortly thereafter, C.H. started to

wrestle with T.D. Whiteside then "jumped on top of" C.H. "and started throwing [her] around." Id. at 29. T.D. noticed that her stepfather was acting "a little too friendly" to C.H. Id. at 202. C.H. was uncomfortable wrestling with Whiteside, so she stopped and went to her bedroom. In her room, she told Jose that she "wasn't feeling comfortable, that [Whiteside] had been hitting on [her]." Id. at 31.

Later that morning, T.D. began vomiting and asked Whiteside to get C.H. for her. Whiteside entered the darkened bedroom and put his hand on C.H.'s chest, although C.H. did "not think it was on purpose." Id. at 32. At about 6:30 a.m., Jose awoke and found Whiteside in the bedroom "staring [C.H.] down." Id. at 160. Whiteside was standing at C.H.'s side of the bed. When Jose left for work around 8:00 a.m., Whiteside was in a living room chair.

At some point thereafter, C.H. dreamed that someone was performing oral sex on her. C.H. "was rolling around pushing . . . him or whoever it was off." Id. at 32. C.H. "wasn't in a deep sleep anymore, like you know how you wake up and you kind of know what's going on but you're not fully awake." Id. at 34. In "rolling around," C.H. "snapped out of it" and felt a man's tongue and mouth on her vagina. Id. at 33-34. C.H. pulled her covers off of her and found Whiteside in her bed. Whiteside told C.H. that he "thought you were my wife." Id. at 35.

On May 22, the State charged Whiteside with criminal deviate conduct, as a Class B felony. On November 9, following a bench trial in which C.H. testified, the court found Whiteside guilty as charged and sentenced him to the advisory sentence[1] of ten

[1] Although the trial court referred to Whiteside's sentence as "the presumptive sentence," transcript at 255, Whiteside committed his crime under the advisory sentencing scheme and therefore

years. The court found Whiteside's criminal history to be an aggravating circumstance, but found that that aggravator was balanced by the mitigating circumstance that this was "unlikely to occur again." Id. at 255. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Awareness

Whiteside first contends that the State did not present sufficient evidence to support his conviction. Specifically, Whiteside maintains that the State did not sufficiently show that C.H. was "unaware" of his act of oral sex on her. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Nolan v. State, 863 N.E.2d 398, 402 (Ind. Ct. App. 2007), trans. denied. We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove criminal deviate conduct as charged, the State was required to show that Whiteside "knowingly or intentionally cause[d] another person to . . . submit to deviate sexual conduct when[] . . . the other person [was] unaware that the conduct [was] occurring." Ind. Code § 35-42-4-2(a)(2) (2004). Oral sex is defined as "deviate sexual conduct" by statute. See I.C. § 35-41-1-9(1). And we recently held that "our focus in addressing whether a victim was 'unaware' involves looking at the facts favorable to the

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those statutes apply, see, e.g., Gutermuth v. State, No. 10S01-0608-CR-306, ___ N.E.2d ___ (Ind. June 20, 2007).

[judgment] to determine if the victim was capable of voluntarily giving consent to the actor." Nolan, 863 N.E.2d at 403.

Here, the facts support the court's finding that C.H. was unaware of Whiteside's act. It is undisputed that C.H. was asleep when Whiteside first engaged her in her bed. And shortly after Whiteside engaged her, C.H. described her mental state as no longer being "in a deep sleep . . . [but] like . . . you wake up and you kind of know what's going on but you're not fully awake." Transcript at 34. The evidence also shows that C.H. gave no verbal or other consent to Whiteside at any point, indicating a lack of awareness on her part as to the situation. See Nolan, 863 N.E.2d at 403. However, despite the lack of express consent and that C.H. was asleep, Whiteside began performing oral sex on C.H. Whiteside cites no evidence to support the position that C.H. was fully aware at any point prior to her waking to find Whiteside in her bed. On those facts, we cannot say that C.H. was capable of voluntarily giving Whiteside her consent. Therefore, the court did not err when it found that she was unaware during Whiteside's act of oral sex. See id.[2]

Issue Two: Inappropriate Sentence

Whiteside also contends that his sentence of ten years, the advisory sentence for a Class B felony, is inappropriate in light of the nature of the offense and his character.[3] Specifically, Whiteside notes that "this crime was not particularly heinous," that he "accepted responsibility for his actions and was extremely remorseful," and that his

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[2] Insofar as Whiteside's argument on appeal is that "unaware" is equivalent to "unconscious," we expressly rejected that argument in Nolan. See Nolan, 863 N.E.2d at 402. And to the extent that Whiteside requests this court to depart from or overturn Nolan, we decline to do so.

[3] Whiteside does not challenge whether the trial court abused its discretion in sentencing him. See Anglemyer v. State, No. 43S05-0606-CR-230, ___ N.E.2d ___, slip op. at 9-11 (Ind. June 26, 2007).

criminal history is too remote to have an impact on his sentence. Appellant's Brief at 13-14. We cannot agree.

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 imposed by the trial court." Anglemyer v. State, No. 43S05-0606-CR-230, ___ N.E.2d ___, slip op. at 11 (Ind. June 26, 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, ___ N.E.2d at ___, slip op. at 15 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Here, the trial court recognized the nature of Whiteside's offense as a mitigator.[4] Specifically, the court found that the unique circumstances of Whiteside's offense were such that it was "unlikely to occur again." Id. at 255. But the trial court then found his criminal history aggravating. The trial court stated: "[The] [c]onviction [on a robbery charge in Iowa in 1987] was almost twenty years ago, but what concerns me is three, if not four[,] parole or work violations. Weighing the aggravation versus the mitigation, I find that the presumptive [sic] sentence of ten years is appropriate." Id. That is, the trial

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[4] The trial court did not consider Whiteside's statements of remorse. Likewise, we do not consider those statements.

court did not give substantial weight to the robbery conviction, but, rather, it was most primarily concerned with Whiteside's repeated parole or work release violations. Whiteside does not challenge the court's consideration of those violations. On the facts before us, we cannot say that the advisory sentence is inappropriate in light of the nature of the offense or Whiteside's character.

Affirmed.

RILEY, J., and BARNES, J., concur.