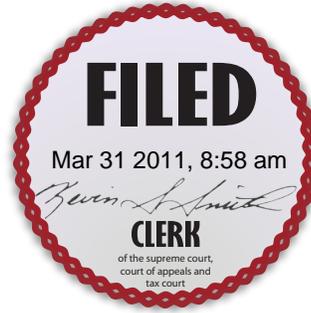


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

THEODORE T. SCHWARTZ,)

Appellant-Defendant,)

vs.)

No. 02A05-1010-CR-714

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIORCOURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0910-FA-60

March 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Theodore Schwartz appeals his 100-year-sentence for Class A felony rape, two counts of Class A felony criminal deviate conduct, Class A felony burglary, Class A felony robbery, Class B felony criminal confinement, Class D felony strangulation, and Class D felony auto theft. We affirm.

Issues

Schwartz raises two issues, which we restate as:

- I. whether the trial court abused its discretion when it sentenced him; and
- II. whether his sentence is inappropriate.

Facts¹

On August 19, 2009, Schwartz escaped from the Berne Police Station. He went to J.H.'s house in Allen County where he had previously done restoration work on her barn. Schwartz parked the car he was driving behind J.H.'s barn and broke into her house. When J.H. returned home from work at 6:15 p.m., she unlocked the door, and Schwartz accosted her. Schwartz grabbed J.H. and told her to give him money. J.H. told Schwartz her money was in her car, and he led her outside. J.H. gave Schwartz the money from her purse. When Schwartz tried to get J.H. to go back inside, a struggle ensued. Schwartz

¹ Our recitation of facts is based on the allegations contained in the probable cause affidavit. Schwartz did not include a transcript of the guilty plea hearing or a complete copy of the presentence investigation report ("PSI") in the record on appeal. Given Schwartz's challenge to his sentence and argument that the trial court considered facts not supported by the record when sentencing him, these documents are critical to our review of his appeal. Nevertheless, because the State provided us with a complete copy of the PSI, which Schwartz admitted was factually accurate at the sentencing hearing, we are able to address his claims.

struck J.H. in the face, causing her head to go through the glass window. He also placed his hands on J.H.'s throat, causing her to momentarily stop breathing.

Schwartz forced J.H. back into the house, retrieved a knife from the kitchen, and forced her upstairs. Schwartz cut off some of J.H.'s clothing with the knife, fondled her, forced her to perform oral sex on him, and performed oral sex on her. Schwartz also forced J.H. to have intercourse with him. At one point, Schwartz put a pillow over J.H.'s head and tied a bandana around her mouth to keep her from screaming. J.H. believed she was going to die. After the sexual assault, Schwartz attempted to tie up J.H. with a belt and the reins from a horse bridle. He also tried to lock her in a closet.

In the meantime, J.H.'s mother, who lived nearby, saw the strange car parked behind the barn and J.H. struggling outside. J.H.'s mother investigated and sought help from neighbors, who called police. When police arrived, Schwartz jumped out of a second story window, stole J.H.'s car, and fled. Schwartz was eventually apprehended in Wells County.

On October 8, 2009, the State charged Schwartz with Class A felony rape, two counts of Class A felony criminal deviate conduct, Class A felony burglary, Class A felony robbery, Class B felony criminal confinement, Class C felony battery, Class C felony forgery, Class D felony strangulation, Class D felony auto theft, Class D felony receiving stolen auto parts, Class B felony dealing in methamphetamine, Class D felony possession of methamphetamine, Class D felony possession of reagents with intent to manufacture, and Class D felony possession of a controlled substance.

On August 20, 2010, Schwartz pled guilty to rape, two counts of criminal deviate conduct, burglary, robbery, criminal confinement, battery, strangulation, and auto theft. After a hearing, at which Schwartz, several of Schwartz's family members, J.H., J.H.'s mother, J.H.'s friend, and J.H.'s cousin gave statements, the trial court sentenced Schwartz to 100 years.

In issuing Schwartz's sentence, the trial court considered his guilty plea to be mitigating and considered Schwartz's criminal history to be neither a mitigator nor a significant aggravator. The trial court rejected Schwartz's argument that his methamphetamine use was a mitigator. The trial court reasoned that Schwartz had a history of substance abuse and that his claim that he lacked knowledge of what he was doing because of his drug use lacked credibility. The trial court considered the nature of the offenses, the number of different offenses, the brutality, and the injury suffered by J.H. as aggravating.

The trial court categorized the offenses into two groups: the property-related offenses and the sex offenses. For the property-related offenses, the trial court sentenced Schwartz to fifty years each for the burglary and robbery convictions and one and a half years for the auto theft conviction. The trial court ordered these sentences to be served concurrently for a total sentence of fifty years. For the sex offenses, the trial court sentenced Schwartz to fifty years on each of the Class A felony convictions, ten years on the criminal confinement conviction, and one and a half years on the strangulation conviction and ordered these sentences to be served concurrently for a total sentence of

fifty years.² The trial court then ordered the sentences on the two groups of offenses to be served consecutively for a total sentence of 100 years. At the conclusion of the sentencing hearing, the remaining charges were dismissed. Schwartz now appeals.

Analysis

I. Abuse of Discretion

Schwartz argues that the trial court abused its discretion when it sentenced him. We evaluate a sentence under the current “advisory” sentencing scheme pursuant to Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh’g by Anglemyer v. State, 875 N.E.2d 218 (Ind. 2007). The trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Anglemyer, 868 N.E.2d at 491. The reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. The weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id.

Schwartz claims the trial court abused its discretion because it relied on facts not supported by the record when it issued the sentence. See Anglemyer, 868 N.E.2d at 490 (explaining that an abuse of discretion occurs when “entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons . . .”).

² The trial court merged the battery charge into the strangulation charge. Although the judgment of conviction groups the offenses slightly differently, both the sentence announced at the sentencing hearing and the judgment of conviction categorize the offenses into two consecutive groups, totaling 100 years.

Specifically, he argues there is no evidence from which the trial court could conclude he was laying in wait for J.H.

At the sentencing hearing, Schwartz stated that his methamphetamine use changed him into someone who did not care about anything, distorted his thinking, prevented him from knowing the difference between right and wrong, and drove him to the “very brink of insanity.” Tr. p. 6. In rejecting Schwartz’s methamphetamine addiction as a mitigator, the trial court explained that the crime was not the work of a “deranged addict” and that Schwartz was not “mentally disabled” by drugs.³ Id. at 48. The trial court observed that this was not “a classic drug addiction burglary where you run in, you grab the stereo equipment and what ever else is saleable and run out and sell it so you can trade for drugs.” Id. at 47. In support of this conclusion, the trial court relied on the fact that Schwartz was sitting inside the door waiting for J.H. to come home, that Schwartz had worked on her property for twelve weeks during the previous year and knew her habits, and that he concealed his car and stole her car.

Schwartz claims that there is no evidence he was waiting in the home for J.H. to return. To the contrary, the probable cause affidavit indicates that, when J.H. unlocked the door and entered her house, there was a man hiding behind a door on the stairs that led to her basement. From this, the trial court could infer that Schwartz was waiting for J.H., not just that she interrupted him mid-robbery.

³ Although the trial court’s analysis appears to be in the context of whether it considered Schwartz’s methamphetamine addiction as a mitigator, we believe it is also relevant to its consideration of the nature and circumstances of the offense. The trial court described the crimes as “horrible, horrible conduct and horrible treatment and torture of this lady, who employed you and spoke highly of you and your family and your family business.” Tr. 46.

Schwartz also claims that, although the evidence shows he worked on J.H.'s property, nothing in the record indicated he knew J.H.'s habits. To the contrary, we believe this is a reasonable inference to be drawn from the undisputed evidence that Schwartz had worked on J.H.'s property for at least twelve weeks over the course of the previous year.

Finally, Schwartz argues that he concealed his car because he was on the run after escaping from the Berne police station and he intended to break into J.H.'s home to steal things, not because his attack on J.H. was premeditated. Although Schwartz's explanations are plausible, they do not establish that the trial court abused its discretion in drawing its own conclusion based on the concealment of the car. Because the trial court's rationale is based on reasonable inferences drawn from the evidence, Schwartz has not established that the trial court abused its discretion.

We also address another argument, which Schwartz makes in the inappropriateness section of his brief. Schwartz contends, "there is nothing that justifies a maximum sentence for each category with consecutive terms. . . . Schwartz contends there are no aggravating circumstances other than the Court's conclusion about Schwartz having been lying in wait for the victim." Appellant's Br. p. 11. Schwartz does not acknowledge that the trial court specifically stated, "in terms of aggravating circumstances, and that would be the nature of the offense and the number of different offenses and the brutality and the injury suffered by this lady constitute aggravating circumstances" Tr. p. 50.

On appeal, the State contends the trial court properly considered the nature and circumstances of the offense as an aggravator. In his reply brief, Schwartz claims injuries suffered by J.H. and the fear she felt were elements of the elevated classes of the various offenses. This argument, however, is waived for failing to raise it in his principal brief, in which he only challenged the sufficiency of the evidence used to support the trial court's reasoning, not the propriety of the various aggravators. See French v. State, 778 N.E.2d 816, 825-26 (Ind. 2002). Without more, Schwartz has not established that the trial court abused its discretion by imposing "maximum" or consecutive sentences based on the aggravating circumstances it announced.

II. Inappropriateness

Schwartz also argues his sentence is inappropriate in light of the nature of the offenses and the character of the offender. Indiana Appellate Rule 7(B) permits us to revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offenses and the character of the offender. When considering whether a sentence is inappropriate, we need not be "extremely" deferential to a trial court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The principal role of Rule 7(B) review “should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We “should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.” Id.

Regarding the nature of the offenses, Schwartz argues the “tragic events” were an episode of criminal conduct and the sentences should not have been ordered to run consecutively.⁴ Appellant’s Br. p. 10. We are not persuaded by this argument.

Schwartz, after escaping from a police station, went to J.H.’s house, where he had performed restoration work for a significant period of time during the previous year. Schwartz concealed his car and broke into J.H.’s house. When J.H. returned home, Schwartz was hiding behind a door. Schwartz demanded money, which J.H. retrieved from her car. Schwartz then attempted to get J.H. back into her house, the two struggled, and Schwartz choked J.H. and pushed her in the face, causing her head to break a window. Schwartz took a knife from J.H.’s kitchen and used it to remove some of her clothing. Schwartz then sexually assaulted J.H. During the assault, Schwartz put a pillow over J.H.’s head and tied a bandana around her mouth to prevent her from

⁴ Schwartz does not acknowledge Indiana Code Section 35-50-1-2(c), which provides that, except for crimes of violence, the total of consecutive terms of imprisonment for felony convictions arising out of an episode of criminal conduct are capped at the advisory sentence for a felony one class higher than the most serious of the felonies for which the person has been convicted. Schwartz’s convictions for rape, criminal deviate conduct, Class A felony robbery, and Class A felony burglary are included in the list of “crimes of violence.” See Ind. Code § 35-50-1-2(a). Thus, the consecutive sentences are not prohibited by statute.

screaming. After the assault, Schwartz attempted to tie up J.H. and lock her in a closet. Police were summoned by J.H.'s eighty-four-year-old mother, and when they arrived, Schwartz jumped out of a second-story window, stole J.H.'s car, and fled. Even Schwartz described his conduct as "a very cruel, cowardice and disgusting thing." Tr. p. 5. Nothing about the nature of the offenses warrants the reduction of the 100-year sentence.

As for his character, we are mindful that Schwartz pled guilty and accepted responsibility for his crimes. His guilty plea notwithstanding, we believe his methamphetamine addiction does not bode well for his character. Schwartz seems to have battled substance abuse issues for a significant period of time. Despite his family's attempts at intervention and substance abuse treatment in 2007, Schwartz continued to abuse methamphetamine. Although we recognize that addiction is not easily overcome, it was directly intertwined with Schwartz's commission of these offenses.

We also find Schwartz's criminal history to be troubling. He has two felony convictions and six misdemeanor convictions, beginning in 1991. When Schwartz committed these offenses, he was out on bond. At the time the PSI was prepared, Schwartz had several felony charges pending in two other counties. Schwartz's criminal history shows an ongoing inability to conduct himself in accordance with the law. Based on the nature of the offenses and the character of the offender, we conclude that Schwartz's 100-year sentence is appropriate.

Conclusion

Schwartz has not established that the trial court abused its discretion when it sentenced him, and his 100-year sentence is not inappropriate. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.