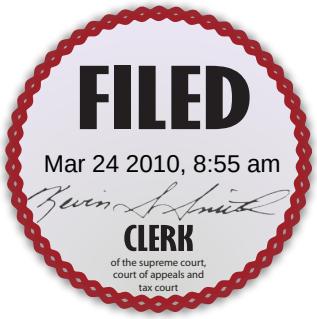

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IN THE
COURT OF APPEALS OF INDIANA

JONATHON GIBSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0908-CR-820
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0808-FB-197584

March 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jonathan Gibson appeals his convictions and sentence for Class B felony rape and Class B felony criminal deviate conduct. We affirm.

Issues

The issues before us are:

I. whether there is sufficient evidence to support Gibson's convictions; and

II. whether Gibson's twelve-year sentence is inappropriate.

Facts

The evidence most favorable to the convictions reveals that Gibson was involved in a romantic relationship with C.V. from November 2007 to February 2008. In July 2008, C.V. saw Gibson at his place of work by chance, and they decided to start dating again. They had consensual sex once at the end of July.

On the evening of Friday, August 1, 2008, C.V. and Gibson went out to dinner. Although C.V. had driven separately to the restaurant, she agreed to go to Gibson's car to smoke a cigarette after dinner. Gibson then drove his car to a nearby, more secluded movie theater parking lot. The two began kissing, with C.V.'s consent. Then, however, Gibson began attempting to kiss C.V.'s breasts, and she said she did not want "to go any further." Tr. p. 43. She explained that she was not comfortable with the public location, and that she wanted their relationship to proceed more slowly than it had the first time. Nevertheless, Gibson continued his advances, eventually removing her pants and

inserting his fingers into her vagina. He then began rubbing her vagina with his penis, and finally had sexual intercourse with her. C.V. was unable to move during the sexual encounter because Gibson was placing his weight upon her. C.V. was crying during the incident and told Gibson to "please stop," but he did not do so until he ejaculated. Id. at 47. Gibson then told C.V. he was sorry he had made her cry and that "it would never happen again." Id. at 61. C.V. did not report the incident to police until Monday, August 4, 2008, when her supervisor at work noticed her crying and took her to a police station.

On August 21, 2008, the State charged Gibson with Class B felony rape, Class B felony criminal deviate conduct, and Class D felony sexual battery. After a jury trial held on July 27-28, 2009, Gibson was found guilty. However, the trial court did not enter a judgment of conviction for the sexual battery count. The trial court sentenced Gibson to twelve years for the rape and criminal deviate conduct convictions, suspended six years of each sentence, and ordered them served concurrently. Gibson now appeals.

Analysis

I. Sufficiency of the Evidence

Gibson first challenges the sufficiency of the evidence supporting his convictions. When we review the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. When confronted with conflicting

evidence, we must consider it in a light most favorable to the conviction. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

Gibson's argument rests in part on the assertion that C.V.'s testimony was "incredibly dubious." "Within the narrow limits of the 'incredible dubiosity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We may reverse a conviction if a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence. Id. This is appropriate only in the event of inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Id. "Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." Id.

In order to convict Gibson of rape and criminal deviate conduct as charged, the State was required to prove that he knowingly or intentionally had sexual intercourse with C.V. and caused her to submit to deviate sexual conduct when she was compelled to do so by force or imminent threat of force. See Ind. Code §§ 35-42-4-1(a)(1), 35-42-4-2(a)(1). Gibson seems to be arguing in part that C.V.'s testimony that he forced her to have sex against her will was "incredibly dubious" when viewed in the context of their relationship, which had included consensual sex on previous occasions. We flatly reject the notion that prior acts of consensual sex between the parties renders "incredibly dubious" C.V.'s testimony that the sex act on August 1, 2008, was not consensual.

Evidence of prior consensual sex clearly was relevant and something for the jury to consider in weighing C.V.'s testimony. See Baker v. State, 750 N.E.2d 781, 787 (Ind. 2001) (citing Indiana Evidence Rule 412(a)(1)). The jury believed C.V.'s testimony that she did not consent to sex on this occasion; it was her prerogative to do so, and we will not second-guess the jury's determination. Moreover, we observe that "the only consent that is a defense [to rape or criminal deviate conduct] is the consent that immediately precedes the sexual conduct;" it is consent at that point in time, and not at any other time, that is determinative. See Tyson v. State, 619 N.E.2d 276, 286 (Ind. Ct. App. 1993) (emphasis added), trans. denied.

Gibson also contends there is insufficient evidence of force or compulsion, based on a posting C.V. made to her Myspace page in December 2007 while she and Gibson were dating, and which Gibson had read. The post is entitled "A true boyfriend?" and says things such as, "When she pushes you or hit's [sic] you (Grab her and dont [sic] let go)," and "When she pull's [sic] away (Pull her back)." Ex. A. We are paraphrasing here, but Gibson seems to be arguing that having read this description of C.V.'s idea of a "true boyfriend," he was led to believe that her saying no to sex on August 1, 2008, was actually more of an invitation for him to proceed. We cannot say that the Myspace posting, which was made nearly nine months earlier and was vaguely worded, somehow gave Gibson permission to continue his sexual advances toward C.V. after she asked him to stop. Cliché-ridden as it may be, "no means no" applies in this situation. Gibson used force to have sex with C.V. when he applied his body weight to her, thus preventing her

from moving and confining her in the back of the car. There is sufficient evidence to support Gibson's convictions.

II. Sentence

Gibson also argues that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B) in light of his character and the nature of the offense. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. 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 offense, we acknowledge that Gibson and C.V. had a previous consensual sexual relationship. However, every rape is heinous, and while Gibson immediately evidenced his regret for his conduct, the fact remains that he took the ultimate advantage of a woman who trusted him.

As for Gibson's character, it is far from spotless. As a juvenile, Gibson was found to have committed Class A misdemeanor conversion. As an adult, he has convictions for Class A misdemeanor operating while intoxicated, Class A misdemeanor driving while suspended, Class D felony operating while intoxicated, and two counts of Class D felony possession of a controlled substance. He has violated probation on several occasions, and was on probation when he committed the instant offenses. "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, and number of prior offenses in relation to the current offense." Rutherford, 866 N.E.2d at 874. It is true that Gibson's prior convictions are primarily for substance-related offenses and not violent or sex offenses, and there is no indication substance abuse played any role in this case. However, the sheer number of Gibson's prior convictions, which all occurred during the past decade and included three felonies, the multiple probation violations, and the fact that he was still on probation when he committed the current offenses weighs heavily against him. In light of this criminal history, we cannot say that a sentence for both offenses of two years above the advisory, served concurrently, is inappropriate.[1]

Conclusion

There is sufficient evidence to support Gibson's convictions, and his sentence is not inappropriate. We affirm.

[1] Running the sentences concurrently may have been required. In the context of child molestation, we previously have directed that multiple sentences for related sex acts perpetrated against one victim in close proximity in time be served concurrently rather than consecutively. See Kien v. State, 782 N.E.2d 398, 416 (Ind. Ct. App. 2003), trans. denied.

Affirmed.

MATHIAS, J., and BROWN, J., concur.