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IN THE
COURT OF APPEALS OF INDIANA

KENNEDY E. BUTLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-0908-CR-481
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Kelli E. Fink, Magistrate
Cause No. 82C01-0807-FB-781

June 4, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kennedy E. Butler appeals after he was convicted of Rape,[1] a class B felony, and admitted to being a Habitual Offender.[2] Butler argues that there is insufficient evidence supporting the rape conviction, that the trial court considered an improper aggravating factor, and that the aggregate forty-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character. Finding that there is sufficient evidence supporting the conviction, that the trial court did not consider an improper aggravator, and that the sentence is not inappropriate, we affirm.

FACTS

E.D. is a twenty-eight-year-old woman with an I.Q. between fifty and fifty-eight. She was diagnosed with mild to moderate mental retardation in preschool, was taught functional life skills in her school's special education program, and reads below a second grade level. She works at Long John Silver's clearing tables, taking out the trash, filling the condiments stand, and taking orders to the tables. Butler also worked at Long John Silver's and lived a few houses down the street from E.D., who lived with her parents.

On July 11, 2008, E.D. returned home from work and ate lunch in her backyard. Butler stopped to talk to E.D., who invited Butler inside her home to look at her doll collection, which was in her bedroom. Butler told E.D. to take off her clothes and lie face down on her bed. Butler then "put his privates in her behind and made it hurt and bleed," and E.D. told Butler that it was "bad" and she tried to kick him. Tr. p. 627. E.D.

[1] Ind. Code § 35-42-4-1(a)(3).

[2] Ind. Code § 35-50-2-8.

told Butler that she did not want to have sex with him, saying, "[g]o away, get up," and "[g]et off me," but Butler did not comply. Id. at 291. Eventually, E.D.'s father returned home, Butler left, and E.D. later told her mother what had happened. E.D. was taken to the hospital, where a doctor and nurse performed an examination that revealed a vaginal abrasion and tear that had caused E.D. to bleed.

On July 25, 2008, the State charged Butler with class B felony rape and class B felony criminal deviate conduct, and on March 4, 2009, the State added a habitual offender enhancement. Following a jury trial, on June 24, 2009, the jury found Butler guilty of class B felony rape and not guilty of class B felony criminal deviate conduct. Butler later admitted to being a habitual offender.

At Butler's July 22, 2009, sentencing hearing, the trial court found the following aggravating factors: (1) because Butler worked with E.D., he had an extra opportunity to observe her and take advantage of her "predicament," id. at 898; (2) the offense took place inside E.D.'s home; and (3) Butler's criminal history. The only mitigator found by the trial court was Butler's decision to admit to being a habitual offender. The trial court imposed a sentence of fifteen years for the rape conviction and enhanced the sentence by twenty-five years for being a habitual offender, for an aggregate sentence of forty years imprisonment. Butler now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Butler first argues that there is insufficient evidence supporting his conviction for class B felony rape. In reviewing the sufficiency of the evidence supporting a conviction, we neither reweigh the evidence nor assess witness credibility, instead considering only the evidence favorable to the verdict and the reasonable inferences that may be drawn therefrom. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). The uncorroborated testimony of a single witness is sufficient to support a conviction. Thompson v. State, 612 N.E.2d 1094, 1098 (Ind. Ct. App. 1993). We will affirm the conviction unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

To convict Butler of class B felony rape as charged, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally had sexual intercourse with a person who is so mentally disabled or deficient that consent cannot be given. I.C. § 35-42-4-1(a)(3). Butler argues that the State failed to establish that E.D. was so mentally disabled that she was unable to consent and, even if she was unable of consenting, that he was aware of that fact.

Capacity to consent "presupposes an intelligence capable of understanding the act [of sexual intercourse], its nature, and possible consequences." Stafford v. State, 455 N.E.2d 402, 406 (Ind. Ct. App. 1983). Here, the record reveals that E.D. has an I.Q. of fifty to fifty-eight, which is considered mild to moderate mental retardation. She reads

below a second grade level, has a childlike vocabulary, and lives with her parents. Although she completed twelve years of schooling, it was in a special education program that taught "functional life skills," tr. p. 335-36, and she was given a Certificate of Attendance rather than a diploma upon finishing the program. E.D. is able to work outside the home, but her employment is limited to clearing tables, taking out the trash, filling the condiments stand, and taking food out to the tables. She is not permitted to cook or run the cash register. E.D. was trained to ride the bus by herself by a coach, who took E.D. to the bus stop and rode with her for a period of time, then following her by car until she was capable of completing the task by herself.

E.D. is capable of completing tasks that could be completed by a child. For example, she can ride her bike, dress herself, be by herself for a few hours at a time, ride the bus, watch television, and put together jigsaw puzzles. She cannot cook by herself, read, write, or do anything above basic math. For her safety, E.D. is not permitted to answer the phone, swim alone, or let anyone into the house when she is by herself. We find that this evidence is sufficient to support the State's contention that E.D. was mentally disabled to an extent that she was incapable of understanding the act of sexual intercourse, its nature, and possible consequences. In other words, the evidence is sufficient to support the State's allegation that E.D. was incapable of consenting to sexual intercourse.

Turning next to Butler's argument that the evidence did not establish that he knew that E.D. was incapable of consenting, the record reveals that when Butler was initially

confronted by a police officer about the incident, Butler told the officer that "I didn't even do nothing, they are trying to send me to jail over some retarded ass girl." Tr. p. 416. He continued, "[w]hy would I want some f*ckin' retarded girl," and also stated, "[t]hey are trying to say that I raped some forty year old retarded girl." Id. Butler later attempted to retract those statements, saying, "[s]he's not retarded and has a nice personality." Id. In subsequent interviews, Butler claimed that he knew that E.D. was slow but did not know that she was mentally disabled.

The record also reveals that Sherry Titler, the manager at Long John Silver's, had a conversation with Butler about E.D. Titler had specifically told Butler not to offer E.D. a ride to and from work because it was not a "good idea," id. at 560, and also testified that E.D. was a common subject of workplace conversation because it was easy to observe her limitations. In addition to observing E.D. at work, Butler was able to observe her from his home because they lived in the same neighborhood and she walked past his home to the bus stop every day.

We find that it was reasonable for the jury to infer from Butler's statements, Titler's testimony, and the evidence establishing that Butler had ample opportunities to observe E.D. at work and at home that Butler was aware of E.D.'s significant mental disability. Butler's arguments to the contrary amount to a request that we reweigh the evidence and assess witness credibility, which we may not do when evaluating the sufficiency of the evidence supporting a conviction. In short, we find that the evidence was sufficient to support the State's allegation that Butler knew that E.D. was incapable

of consenting to the act of sexual intercourse and that the evidence was sufficient, as a whole, to support his conviction for class B felony rape.

II. Sentencing

A. Aggravating Factor

Butler first argues that the trial court considered an improper aggravating factor in sentencing him. We review sentencing decisions for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on rehearing, 875 N.E.2d 218 (2007) A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. 868 N.E.2d at 490-91.

According to Butler, the trial court erred as a matter of law by finding an aggravator that is an element of the underlying offense of which he was convicted. Initially, we observe that, under the current advisory sentencing scheme, a material element of a crime may also form an aggravating circumstance to support an enhanced sentence under certain circumstances. See Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008) (holding that "[a]nother rule established early on in this field provides that a material element of a crime may not also form an aggravating circumstance to support an enhanced sentence. For the same reasons we stated above, based on the 2005 statutory changes, this is no longer an inappropriate double enhancement") (internal citations omitted).

In any event, we cannot agree with the way in which Butler characterizes this aggravator. The trial court described the aggravator about which Butler complains as follows: ". . . [Y]ou were, Mr. Butler, employed with the victim, and I think well aware of her condition and her circumstances, and because of that I find that you had an extra opportunity to see her in her predicament, and then took advantage of that predicament." Tr. p. 898. Butler argues that this aggravator amounts to a statement that he knew that E.D. was mentally disabled and unable to consent, which is an element of the underlying offense.

It is well established that "the nature and circumstances of the crime as well as the manner in which the crime is committed" is a valid aggravating factor. Anglemyer, 868 N.E.2d at 492. It is apparent that the trial court here considered the nature and circumstances of this crime—namely, the fact that Butler had a close connection to E.D. through work and home, had every opportunity to observe her vulnerability, and took advantage of his knowledge and opportunity to rape her—as an aggravator. Inasmuch as it is well established that this is a permissible aggravator, we do not find that the trial court abused its discretion in this regard.

Even, however, if we were to assume solely for the sake of argument that this aggravator was improper, it would not change the result herein. If we eliminated that aggravator, the other two—the fact that the offense took place inside E.D.'s home and Butler's substantial criminal history—would remain. Indeed, Butler's criminal history, standing alone, would support the sentence imposed by the trial court. Ultimately,

therefore, even if we accepted Butler's argument regarding the disputed aggravator, we would affirm the sentence imposed by the trial court.

B. Appropriateness

Finally, Butler argues that the aggregate forty-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Butler was convicted of a class B felony, which has a sentencing range of six to twenty years, with an advisory sentence of ten years. I.C. § 35-50-2-5. The trial court imposed a fifteen-year sentence for this conviction, which is more than the advisory but less than the maximum term. Additionally, Butler admitted to being a habitual offender, for which the trial court could have enhanced the underlying sentence by ten to thirty years. I.C. § 35-50-2-8. The trial court chose to enhance the sentence by twenty-five years, for an aggregate sentence of forty years imprisonment.

Turning first to the nature of the offense, Butler lived down the street from E.D., who walked past his home every day to go to her bus stop. He also worked with her, where it was well known that she was mentally disabled. His manager cautioned Butler that it would be a bad idea for him to offer E.D. rides to and from work. Butler believed E.D. to be "retarded." Tr. p. 416. He approached her when she was home alone. She

invited him to come into her bedroom to view her doll collection. He took advantage of the opportunity and his knowledge that she was extraordinarily vulnerable, ordered her to take off her clothes and lie face down on the bed, forcibly raped her, ignored her kicks and pleas to stop, tearing her vaginal tissue and causing her to bleed. We do not find the nature of the offense to aid Butler's appropriateness argument.

As for Butler's character, the record reveals that he has a substantial criminal history. His first contacts with the criminal justice system occurred in 1982, when he was adjudicated a juvenile delinquent for three counts of mail theft. His first adult conviction occurred in 1984, for class A misdemeanor conversion. Since 1985, Butler has been convicted of four felonies, including burglary and forgery, and seven misdemeanors. Butler has had probation revoked three times. While he has not been convicted of a sexual offense before now, he has been convicted of crimes of violence, including battery on a law enforcement officer and domestic battery.

Butler's long criminal history establishes his unwillingness to comply with the rule of law, his disrespect for his fellow citizens, and his unwillingness or inability to take advantages of the prior chances afforded him to reform his behavior. Under these circumstances, we do not find the aggregate forty-year sentence to be inappropriate in light of the nature of the offense and his character.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.