ATTORNEY FOR APPELLANT:

MARIELENA DUERRING
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

DILLION YAKYM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-1005-CR-347
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Jerome Frese, Judge
Cause No. 71D03-0901-FA-7

December 8, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Dillion Yakym appeals the forty-year sentence that was imposed following his conviction for Rape,[1] a class A felony. Specifically, Yakym argues that the trial court considered improper aggravating factors and that the sentence is inappropriate in light of the nature of the offense and his character.

The State cross-appeals, arguing that the trial court erred by not ordering the sentence in this case to be served consecutively to the sentence for a prior conviction for which Yakym was on probation at the time he committed the instant offense. Finding that the trial court did not consider improper aggravating factors, that the sentence is not inappropriate, but that the sentence must be served consecutively to the sentence for the prior conviction, we affirm and remand for the imposition of consecutive sentences.

FACTS

On January 12, 2009, Yakym was staying at a motel in Roseland after being released from jail. F.S. was staying at the same motel, where she was resting after a debilitating episode of Crohn's disease, while her mother watched her children. That night, Yakym walked down the hallways of the motel knocking on doors until he came to the room where F.S. was staying for the night.

When Yakym knocked on her door, he identified himself as motel security, entered the room, and struck F.S. repeatedly. Yakym grabbed F.S. and forced her to engage in sexual activities with him, including sexual intercourse. Afterwards, Yakym continued to beat F.S. and struck her with the telephone with such force that the handle

[1] Ind. Code § 35-42-4-1(b).

broke off. Yakym threatened that if F.S. did not do exactly what he wanted, he would kill her. At some point, Yakym forced F.S. into another room in the motel that was adjacent to the room where some of his acquaintances were staying. F.S. sustained numerous bruises and suffered extreme pain as the result of this attack.

On January 30, 2009, the State charged Yakym with Count I, class A felony criminal deviate conduct, Count II, class A felony rape, Count III, class C felony criminal confinement, and Count IV, class C felony battery. Yakym's jury trial commenced on February 1, 2010. After the jury had been selected, but before the presentation of evidence, the parties entered into a plea agreement under which Yakym agreed to plead guilty to class A felony rape. In exchange, the State moved to dismiss the remaining counts and sentencing was left to the discretion of the trial court. The trial court accepted the plea agreement.

The trial court held a sentencing hearing on April 5, 2010. The trial court concluded that the violence used "to subjugate the victim" was an aggravating factor. Tr. p. 37. Additionally, the trial court considered Yakym's three juvenile dispositions for battery to be an aggravating factor, particularly in light of the violent nature of the instant offense. Moreover, the trial court noted the particular circumstances of the crime. Specifically, the trial observed that Yakym had posed as a security officer to gain entrance into the F.S.'s motel room and that he had threatened and beaten her.

Although the trial court recognized that Yakym had not been raised with the proper guidance, it concluded that the aggravating factors outweighed the mitigating factor and it sentenced Yakym to forty years imprisonment. Yakym now appeals.

DISCUSSION AND DECISION

I. Improper Aggravating Factors

Yakym contends that the trial court considered improper aggravating factors, namely, the impact of the crime on the victim and the nature of the crime. Initially, we observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 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. Id. at 490-91.

Yakym directs us to McElroy v. State, 865 N.E.2d 584 (Ind. 2007), to support his argument that the trial court improperly considered the impact of the crime on the victim. In McElroy, our Supreme Court explained that "[i]t is settled law that where '[t]here is nothing in the record to indicate that the impact on the families and victims in this case was different than the impact on families and victims which usually occur in such crimes,' this separate aggravator is improper." Id. at 590 (quoting Mitchem v. State, 685 N.E.2d 671, 680 (Ind. 1997)). Nevertheless, the McElroy Court concluded that the trial court did not find the victim impact to be a separate aggravator, but rather, "part of the

court's explanation of why the offense was particularly 'heinous' and 'horrendous' in nature." Id. (quoting tr. p. 89-90). And because the trial court may properly consider the particularized circumstances of the nature of offense, the trial court "did not abuse its discretion in weighing the impact upon the victims and their families as part of the nature and circumstances of the offense." Id.

In this case, the trial court stated in part:

> Bruises, contusions, those can be dealt with relatively quickly. Those physical things can disappear in a matter of days or certainly a week or two. But the tearing up of the fabric of the soul may never be mendable. And that's what's so terrible about this event. It was the circumstances of a woman being a guest in a motel where she had paid for a secure room to have somebody pretending to be law enforcement in order to break her soul is just – it is profound.

Sentencing Tr. p. 44-45. As in McElroy, we read this as the weight the trial court gave to the nature and circumstances of the offense. And because the trial court may properly consider the nature and circumstances of the offense, 865 N.E.2d at 590, this argument must fail.

II. Inappropriate Sentence

Yakym argues that his forty-year sentence is inappropriate in light of the nature of the offense and his character pursuant to Rule 7(B). When 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).

In the instant case, Yakym was sentenced to forty years imprisonment for class A felony rape. The sentencing range for a class A felony is between twenty years and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4. Accordingly, Yakym was sentenced to ten years more the advisory sentence but ten years less than the maximum sentence.

As for the nature of the offense, Yakym gained entry to a motel room where F.S. was resting from an attack caused by Crohn's Disease, which is a debilitating illness. Yakym gained entry through deceit by posing as a security officer. Once inside the room, Yakym beat F.S., raped her, and then continued to beat her. Yakym used a telephone handle to beat F.S. and struck her with such force that it broke in half. Yakym terrorized F.S., threatening to kill her if she did not do exactly what he wanted and forcing her into a different room of the motel. We agree with the trial court that this crime is the "terror of any woman anywhere in this country who goes to a motel," and "[i]t's just outrageous." Sentencing Tr. p. 43.

As for Yakym's character, he has had three juvenile dispositions for battery, which we find telling in light of the violent nature of the instant offense. Furthermore, Yakym was on probation at the time he committed the present offense, and his probation was subject to revocation at the time that he was sentenced in the present offense. Moreover, although Yakym presents his substance abuse problem in mitigation of his crime, we do not view it as such. Indeed, it shows that Yakym has illegally used alcohol and other illicit substances for much of his young life. In short, Yakym has demonstrated that he

has no respect for the rule of law or other citizens. Consequently, in light of the nature of the offense and Yakym's character, we cannot say that his forty-year sentence is inappropriate.

III. Cross-Appeal

Finally, the State cross-appeals, arguing that the trial court erred by not ordering the sentence in this case to run consecutively to the sentence imposed for a prior conviction for which Yakym was on probation at the time he committed the present offense. Indiana Code section 35-50-1-2(d) provides, in relevant part, that "[i]f, after being arrested for one (1) crime, a person commits another crime . . . before the date the person is discharged from probation . . . the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed." (emphasis added).

Here, as stated above, Yakym was on probation for an offense at the time he committed the instant offense and a probation revocation hearing was to be conducted following his sentencing in the present case. And pursuant to Indiana Code section 35-50-1-2(d), Yakym's sentence in the present case must be served consecutively to his sentence for the prior conviction. Therefore, the trial court should have ordered the sentence in this case to be served consecutively to the sentence for the prior conviction, and we remand for the imposition of consecutive sentences. See Mata v. State, 866 N.E.2d 346, 349 (Ind. Ct. App. 2007) (remanding cause to trial court for imposition of

consecutive sentences where the defendant had his probation revoked for a prior offense because he was convicted for an offense that he committed while on probation).

The judgment of the trial court is affirmed and remanded for imposition of consecutive sentences.

FRIEDLANDER, J., and VAIDIK, J., concur.