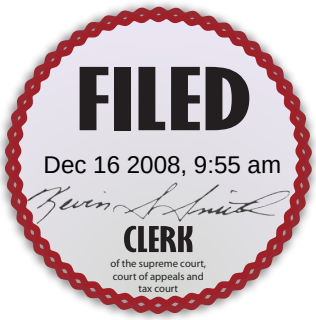

ATTORNEY FOR APPELLANT:

MATTHEW D. ANGLEMEYER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JERRY BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 5
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0705-FA-97638

December 16, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jerry Brown (Brown), appeals his convictions and sentence for criminal deviate conduct, as a Class A felony, Ind. Code § 35-42-4-2; burglary, as a Class B felony, I.C. § 35-43-2-1; two counts of battery, as Class A misdemeanors, I.C. § 35-42-2-1(a)(1); two counts of battery, as Class D felonies, I.C. § 35-42-2-1(a)(2); criminal confinement, as a Class D felony, I.C. § 35-42-3-3; attempted robbery, as a Class B felony, I.C. §§ 35-42-5-1 and 35-41-5-1; and two counts of criminal confinement, as Class B felonies, I.C. § 35-42-3-3(b)(2).

We affirm in part, reverse in part, and remand with instructions.

STATEMENT OF THE ISSUES

Brown raises two issues on appeal, which we restate as follows:

(1) Whether the evidence presented by the State was sufficient to prove beyond a reasonable doubt that Brown committed burglary, as a Class B felony, criminal confinement, as a Class B felony, and battery, as a Class D felony;

(2) Whether Brown's sentence is inappropriate when the nature of his offenses and his character are considered.

Additionally, Brown asks us to determine whether the trial court's oral sentencing statement or the written abstract of judgment should control whether his sentence for Count XII, criminal confinement, as a Class B felony, should be served consecutively or concurrently. However, we do not address that issue because the State concedes that the

abstract of judgment correctly represents the intention of the trial court in this case; Brown's sentence for Count XII is to be served concurrently.

FACTS AND PROCEDURAL HISTORY

Early on the morning of May 30, 2007, sixteen-year-old R.P. arose from bed and walked into the living room where his eleven-year-old brother, J.P., eighteen-year-old sister, I.P., and her seven-week-old daughter were sleeping at a home on East 40th Place in Indianapolis, Indiana. R.P. sat down to watch television and noticed Brown looking in the window. R.P. prepared to go outside to see what was going on and heard a knock at the door. He answered the door and Brown was standing there wearing a green shirt and blue boxer shorts and socks, but not pants or shoes.

Brown told R.P. that he had been bitten by the neighbor's dog and hit by a car and asked R.P. to call 911. R.P. saw redness on Brown's leg. Brown also asked for a light for his cigarette. R.P. decided to go get the lighter for Brown and tried to shut the door before stepping away, but Brown's foot stopped him from doing so. R.P. let go of the door and went to his bedroom to get a cigarette lighter. When he returned Brown was standing in the living room, and the door was opened wider than R.P. had left it. R.P. handed Brown the lighter, and then Brown hit R.P. in the face multiple times. R.P. fell back into a glass cabinet.

I.P. screamed that she was going to call 911. She went for the phone that was in the living room, and Brown began attacking her. Brown banged I.P.'s head "against the glass cabinet and the wall" and kicked and repeatedly punched her. (Transcript p. 29). During this

time, R.P. got his little brother and the baby and went into the kitchen. I.P. then hit Brown in the head with the phone and went into the kitchen herself. Brown followed, and began pacing in an angry manner.

Brown reached underneath his shirt, held his hand there, and stated that he had a gun. R.P. reached at Brown's arm and said, "I know you don't have [a gun]." (Tr. p. 32). Brown then grabbed a knife off of the kitchen table. Brown paced and complained about how he had been treated, and, after twenty or thirty minutes, he ordered I.P. and R.P. to go to the living room. J.P. and the baby remained in the kitchen. Brown told R.P. to grab a chair and place it in the doorway between the kitchen and the living room and told I.P. to take off her clothes. I.P. said no, and Brown replied, "give me all your money then." (Tr. p. 39). I.P. said she did not have any money, and Brown said, "take it off, just take it off then." (Tr. p. 40). He told I.P. that if she did not take off her clothes, he was going to kill her brothers and her daughter. I.P. decided to let Brown do what he wanted, but asked him to wear a condom.

I.P. got a condom and gave it to Brown. Brown pulled down his boxer shorts and put on the condom with some difficulty because he was still holding the knife. He pulled I.P.'s shorts down, turned her around, put the knife at her throat, and forced his penis into I.P.'s anus. After about five minutes, a loud bang came from the front door. Brown ran away through the kitchen and out of the back door of the home. Indianapolis Metropolitan Police Department officers entered the front door and R.P. and I.P. told them that Brown had fled out the back door. Other officers had taken up position at the back of the home. Officer Mark Rutter saw Brown run out the back of the house and climb over a fence. Officers

Coldman and Thomas apprehended Brown in the neighbor's yard. Brown was still wearing the condom when he was apprehended. After the officers had taken Brown to a squad car and sat him down, Brown kicked Officer Wood in the thigh area.

Police officers took photographs of I.P., R.P., and J.P. I.P. had abrasions on her face and neck and red marks on her arms and legs. R.P. had a bloodied nose, swollen eye, and abrasions on his hands. J.P. had a mark from being hit on his torso. Additionally, I.P. was taken to Wishard Memorial Hospital and analyzed by a sexual assault examiner. I.P. had an abrasion on her anus and tearing inside of her anus, consistent with forced sexual intercourse.

On June 1, 2007, the State filed an Information charging Brown with fourteen counts. Count I, criminal deviate conduct, as a Class A felony, I.C. § 35-42-4-2, alleged that Brown forced I.P. to submit to deviate sexual conduct.[1] Count II, burglary, as a Class A felony, I.C. § 35-42-2-1, alleged that Brown broke and entered with the intent to commit rape. Count III, battery, as a Class A misdemeanor, I.C. § 35-42-2-1(a)(1), alleged that Brown punched R.P. in the mouth. Count IV, battery, as a Class D felony, I.C. § 35-42-2-1(a)(2), alleged that Brown punched J.P. in the ribs. Count V, battery, as a Class A misdemeanor, I.C. § 35-42-2-1(a)(1), alleged that Brown punched I.P. in the head. Count VI, criminal confinement, as a Class C felony, I.C. § 35-42-3-3(b)(1), alleged that Brown removed J.P. from the living room to the kitchen by force or threat of force. Count VII, criminal confinement, as a Class D felony, I.C. § 35-42-3-3(a), alleged that Brown removed I.P. from the living room to the

[1] For the sake of brevity, we have paraphrased the allegations as stated in the Information for each charged offense.

kitchen by force or threat of force. Count VIII, criminal confinement, as a Class D felony, I.C. § 35-42-3-3(a), alleged that Brown removed R.P. from the living room to the kitchen by force or threat of force. Count IX, attempted robbery, as a Class B felony, I.C. §§ 35-42-5-1 and 35-41-5-1, alleged that Brown showed R.P., I.P., and J.P. a knife and demanded money. Count X, criminal confinement, as a Class B felony, I.C. § 35-42-3-3(b)(2), alleged that Brown put J.P. on the floor of the kitchen at knifepoint. Count XI, criminal confinement, as a Class B felony, I.C. § 35-42-3-3(b)(2), alleged that Brown, while armed with a knife, removed R.P. from the kitchen to an area next to the living room. Count XII, criminal confinement, as a Class B felony, I.C. § 35-42-3-3(b)(2), alleged that Brown, while armed with a knife, removed I.P. from the kitchen to the living room. Count XIII, resisting law enforcement, as a Class A misdemeanor, I.C. § 35-44-3-3, alleged that Brown fled from Officer Coldman. And Count XIV, battery, as a Class D felony, I.C. § 35-42-2-1(a)(2), alleged that Brown kicked Officer Wood and caused pain.

On February 25 and 26, 2008, the trial court conducted a bench trial. At the close of evidence, the trial court found Brown guilty of Counts I, II, III, IV, V, VIII, IX, XI, XII, and XIV. On March 6, 2008, the trial court conducted a sentencing hearing where it found Brown's criminal history and prior probation violations to be minor aggravating factors. The trial court also found that the fact that Brown was carrying out a plan as he committed the crime was an aggravating factor, but did not explain the significance given to that factor. And finally, the trial court found that there were minor victims and witnesses to Brown's crimes, that he was aware of that fact, and concluded that this was a "huge aggravating

factor." (Tr. p. 432). The trial court sentenced Brown to forty years for Count I, criminal deviate conduct, a Class A felony; fifteen years for Count II, burglary, as a Class B felony, to be served consecutively with Count I;[2] one year for Count III, battery, as a Class A misdemeanor, to be served concurrently; two years for Count IV, battery, as a Class D felony, to be served concurrently; one year for Count V, battery, as a Class A misdemeanor, to be served concurrently; two years for Count VIII, criminal confinement, as a Class D felony, to be served concurrently; fifteen years for Count IX, attempted robbery, as a Class B felony, to be served consecutively with Count II; fifteen years on Count XI, criminal confinement, as a Class B felony, to be served consecutively with Count IX; fifteen years for Count XII, criminal confinement, as a Class B felony, to be served concurrently; and two years for Count XIV, battery, as a Class D felony, to be served consecutively, for a total executed sentence of eighty-seven years.

Brown now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Brown contends that the State presented insufficient evidence to sustain his convictions for Count II, burglary, as a Class B felony; Count XI, criminal confinement, as a

[2] Despite the fact that the trial court found Brown "guilty as charged" for Count II on February 26, 2008, the trial court reduced Brown's conviction for Count II to burglary, as a Class B felony. (Tr. p. 392). The trial court noted the State's failure to allege the element of bodily injury as required to commit burglary as a Class A felony. I.C. § 35-42-2-1(a)(2). The State has not challenged this action by the trial court, and we conclude that such an adjustment of Brown's conviction falls within the trial court's wide discretion to correct error. *See* Ind. Trial Rule 59(J)(3) (granting trial courts the ability to "[a]lter, amend, modify or correct judgment."). Nevertheless, the abstract of judgment still shows that Brown was convicted of burglary, as a Class A felony, and this needs to be fixed on remand.

Class B felony; and Count XIV, battery, as a Class D felony. Our standard of review with regard to sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

A. *Burglary*

In order to prove that Brown committed burglary, as a Class B felony, the State was required to prove that Brown broke and entered the home of the victims while having the intent to commit a felony inside of the home. I.C. § 35-43-2-1. Brown contends that the State presented no evidence that he was "breaking" when he entered the home of the victims, or that he had intent to commit a felony while entering the home.

For purposes of proving burglary, "breaking" is established even when the slightest force is used to gain unauthorized entry. *Trice v. State*, 490 N.E.2d 757, 758-59 (Ind. 1986). Our supreme court has explained that "[o]pening an unlocked door, raising an unlocked window or pushing a door which is slightly ajar constitutes 'breaking.'" *Goolsby v. State*, 517 N.E.2d 54, 57 (Ind. 1987). In *Goolsby*, a witness testified that she had opened an attic window approximately one foot to air out a room. *Id*. Later she noticed that the window had been opened wider. *Id*. Our supreme court determined that this evidence was sufficient to

permit the jury to infer that the defendant had broken into the house by crawling through the window. *Id*.

Here, R.P. testified that he attempted to shut the door, but could not because Brown blocked the door with his foot. R.P. then left to retrieve a cigarette lighter, and upon his return, the door was open wider than he had left it, and Brown was standing in the living room. We conclude that this evidence was sufficient to support the trial court's conclusion that Brown broke into the house.

Moving on to the element of intent to commit a felony, some fact in evidence must point to an intent to commit a specific felony. *Cash v. State*, 557 N.E.2d 1023, 1024 (Ind. 1990). "The evidence does not need to be insurmountable, but it must provide a solid basis to support a reasonable inference that the defendant intended to commit the underlying felony." *Id*. The requisite intent to commit burglary typically can be inferred from the subsequent conduct of the individual inside the premises or by the manner in which the crime was committed. *Smith v. State*, 671 N.E.2d 910, 912-13 (Ind. Ct. App. 1996).

Here, the trial court concluded that the specific felony Brown intended to commit when he broke and entered the victims' house was rape. R.P witnessed Brown peeping in the window of the room where I.P. was sleeping. He came to the door of the house without his pants. After roughing up the occupants for a while, Brown anally raped I.P. at knife point. We conclude that this is sufficient evidence to support the trial court's conclusion that Brown intended to commit rape when he broke and entered the victim's house.

B. *Criminal Confinement*

Additionally, Brown challenges the sufficiency of the State's evidence to prove that he committed criminal confinement. Specifically, he challenges his conviction for Count XI, criminal confinement, as a Class B felony, which was based on the allegation that Brown, while armed with a knife, removed R.P. from the kitchen to the living room.

Brown argues that the evidence was insufficient to prove that he "removed" R.P. beyond a reasonable doubt. He cites R.P.'s testimony that his movement from the kitchen to the living room was "a little bit [involuntary]," but then states that R.P. unequivocally admitted that his movement from the kitchen to the living room was "voluntary." (Appellant's Br. p. 22 (citing Tr. p. 145)).

In order to convict Brown of criminal confinement, as a Class B felony, the State was required to prove beyond a reasonable doubt that Brown knowingly or intentionally confined or removed R.P. by fraud, enticement, force, or threat of force, from one place to another, while armed with a deadly weapon. I.C. § 35-42-3-3. The State alleged in Count XI only that Brown "remove[d]" R.P. for one of the improper reasons listed in the criminal confinement statute, so we need not consider whether Brown confined R.P. here. (Appellant's App. p. 30). The word "remove," as used in the statute, means that it is unlawful to cause another person to move from a place or location for specified improper reasons. *Brown v. State*, 868 N.E.2d 464, 468 (Ind. 2007).

The evidence most favorable to the verdict was that Brown had hit R.P. in the face multiple times and attacked his sister, causing R.P. and his siblings to flee to the kitchen for

their safety. Brown then followed R.P. and others into the kitchen, grabbed a knife, and told R.P. and his sister to go into the living room. It is true that R.P. characterized his movement from the kitchen to the living room as "voluntary" when being cross examined by Brown's attorney, and we cannot speculate as to what R.P. meant. (Tr. p. 146). Nevertheless, it is apparent that R.P.'s compliance with Brown's request was due to the fact that Brown had just terrorized him and his siblings, and was wielding a knife. Therefore, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Brown, by force or threat of force, and while armed with a deadly weapon, caused R.P. to move from the kitchen to the living room.

C. *Battery*

Brown argues that the State presented insufficient evidence to sustain his conviction for Count XIV, battery, as a Class D felony. Specifically, Brown contends that the State failed to present any evidence of bodily injury.

The State alleged in Count XIV that Brown kicked Officer Wood, while Officer Wood "was engaged in the execution of his official duty, which resulted in bodily injury, that is: pain, to [Officer] Wood." (Appellant's App. p. 31). Indiana Code section 35-42-2-1(a)(2)(A), provides:

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
>
> * * *
>
> (2) a Class D felony if it results in bodily injury to:

> (A) a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of the officer's official duty.

Brown argues that the State presented no evidence of bodily injury. He is correct. Officer Wood did not testify. Witnesses testified that Brown kicked or kicked at Officer Wood, but no witness testified that they witnessed any reaction from Officer Wood that would signify he experienced pain. Officer Mark Rutter testified that he saw Officer Wood "move back," but agreed when pressed by Brown's counsel that this was "to perhaps not get kicked." (Tr. p. 263). Altogether, the State presented no evidence that Officer Wood incurred bodily injury when battered by Brown, and we must reverse the conviction of Brown for Count XIV, battery as a Class D felony.

That being said, "[w]hen a conviction is reversed because of insufficient evidence, we may remand for the trial court to enter a judgment of conviction upon a lesser-included offense if the evidence is sufficient to support the lesser offense." *Weideman v. State*, 890 N.E.2d 28, 33 (Ind. Ct. App. 2008). In Count XIV, the State alleged the facts required to convict Brown of battery against a law enforcement officer, as a Class A misdemeanor. *See* I.C. § 35-42-2-1(a)(1)(B). Officer Scott testified that he saw Brown kick Officer Wood, which would be sufficient evidence to convict Brown of battery against a law enforcement officer, as a Class A misdemeanor. By entering a judgment finding Brown guilty of Count XIV, battery as a Class D felony, the trial court necessarily found the testimony to be credible. Therefore, we remand for the trial court to enter a conviction for Brown's act of

battering Officer Wood, as a Class A misdemeanor, and for the trial court to resentence Brown accordingly.

II. *Appropriateness of Brown's Sentence*

Finally, Brown argues that his sentence is inappropriate when the nature of his offenses and character are considered. Indiana Appellate Rule 7(B) permits us to revise a sentence if after due consideration of the trial court's decision, we find "that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. *Id.*

Here, Brown's aggregate sentence was for eighty-seven years to be served in the Department of Correction. We have reversed Brown's conviction for Count XIV, battery as a Class D felony, for which the trial court had sentenced him to two years, to be served consecutively. On remand, we have instructed the trial court to impose a conviction for a Class A misdemeanor on that count, and therefore his eighty-seven year aggregate sentence will be slightly reduced on remand.

Brown was convicted of ten crimes for his actions on May 30, 2007. Brown's crimes involved beating up and confining children and anally raping a young mother while her younger brother was sitting in the same room, and even younger brother and baby were in an

adjacent room. These facts speak both to the nature of the offenses and Brown's character. Without further analysis, we conclude that Brown's sentence of eighty-seven years is not inappropriate. Therefore, his sentence after remand will also not be inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to convict Brown of burglary and criminal confinement. However, the State did not present evidence of bodily injury to sustain Brown's conviction for Count XIV, battery, as a Class D felony. Nevertheless, we remand with instructions for the trial court to enter a conviction for battery against a law enforcement officer, as a Class A misdemeanor, on Count XIV because that crime was factually included in the State's allegation and sufficient evidence was presented to sustain that conviction. Additionally, the abstract of judgment should be fixed upon remand to accurately reflect the trial court's judgment of conviction on Count II, burglary, as a Class B felony. Finally, we do not find Brown's sentence to be inappropriate when the nature of his offenses and character are considered.

Affirmed in part, reversed in part, and remanded.

DARDEN, J., and VAIDIK, J., concur.