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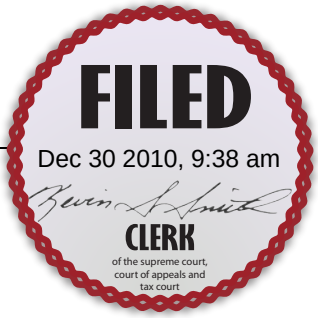

IN THE COURT OF APPEALS OF INDIANA

HEZEKIAH COLBERT,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 32A04-1004-CR-259
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie LeMay-Luken, Judge
Cause No. 32D05-0908-FA-1

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Hezekiah Colbert ("Colbert") was convicted in Hendricks Superior Court of Class A felony attempted murder, Class A felony burglary, and found to be an habitual offender. Colbert appeals and argues: (1) that the trial court erred in admitting evidence regarding an internet search for directions from Colbert's house to the victim's house, and (2) that his aggregate sentence of ninety years is inappropriate. We affirm.

Facts and Procedural History

At the time relevant to this appeal, Jarrod Wilson ("Jarrod") and Misty Wilson ("Misty") had been married, divorced, and re-married. In the summer of 2008, they had been married for seven years, but by the following summer, they were estranged. Misty had started a romantic relationship with her high school boyfriend, Colbert. Jarrod moved out of the marital residence on Murray Street in Indianapolis and began to live at his parents' home on Sycamore Street in Brownsburg, Indiana. Colbert then moved in with Misty and her children. Although Misty and Colbert had discussed the prospect of marriage, she later informed Colbert that she wanted to reunite her family and return to her husband Jarrod. After learning this, Colbert said that he would kill Jarrod, and began to wear in his waistband a butcher knife that he had taken from Misty's house. In August of 2009, Jarrod went to Misty's home to help her repair plumbing, and met Colbert at the house.

On August 28, 2009, three days after Colbert threatened to kill Jarrod, Misty saw Colbert carrying the butcher knife. That same day, Jarrod returned from work to his parents' house. While on the computer, he received an instant message from Colbert, who was using Misty's account. The message stated, "Ha ha, nice try. She's playing

both of us." Tr. p. 404. Jarrod did not respond, but did inform Misty about the message. Jarrod then opened the garage door in anticipation of his parents' return home, and fell asleep on the living room couch.

Jarrod awoke as Colbert was stabbing him. Colbert wrapped his arm around Jarrod from behind, held him down, and stabbed him repeatedly in the side and chest. Jarrod broke free from Colbert and ran to the other side of the table in front of the couch and "[g]ot a good look" at Colbert, who was only a few feet away. He saw the knife Colbert was holding, which he recognized as a butcher knife from Misty's house, and also noticed that Colbert had a tattoo on his neck. Jarrod managed to escape to a neighbor's house, where the neighbor called the police and an ambulance. Jarrod was taken to Wishard hospital in Indianapolis, where he underwent emergency surgery to repair his injuries, which included wounds to his chest, abdomen, stomach, and diaphragm. Jarrod lost over one liter of blood and has suffered from long-term loss of feeling in his fingers. Jarrod told the police investigating the stabbing that Colbert was his attacker. When the police went to Colbert's residence, he crashed his van into a neighbor's garage while attempting to flee.

The State subsequently charged Colbert with Class A felony attempted murder, Class A felony burglary, Class B felony aggravated battery, and Class C felony battery. The State also alleged that Colbert was an habitual offender. During the jury trial, the State called as a witness Sergeant Jennifer Barnes ("Sgt. Barnes"), who worked for the cyber crimes unit of the Indiana State Police. Sgt. Barnes testified that she conducted a forensic search of the computer at Misty's home and found evidence that someone had

used the Yahoo! maps website to look for directions from Misty's house, where Colbert had been staying, to Jarrod's parents' house, where Jarrod was attacked. Colbert objected to this testimony on hearsay grounds, but the trial court overruled his objection.

The jury ultimately found Colbert guilty as charged and found him to be an habitual offender. At the sentencing hearing, the trial court vacated Colbert's convictions for aggravated battery and battery, and reduced the burglary conviction from a Class A felony to a Class C felony, all on double jeopardy grounds. The court then concluded that the aggravating factors outweighed the mitigating factors and sentenced Colbert to forty-eight years for the attempted murder conviction, enhanced by thirty years for the habitual offender determination, and to a consecutive twelve years for the burglary conviction, for an aggregate sentence of ninety years. Colbert now appeals.

I. Hearsay Evidence

Colbert first claims that the trial court erred when it overruled his objection to Sgt. Barnes' testimony to the effect that someone had used Misty's computer to search for directions from Misty's house, where Colbert had been staying, to Jarrod's parents' house, where Colbert attacked Jarrod. Colbert claims that the evidence regarding the online search for directions was inadmissible hearsay.

We begin by observing that the admission of evidence is within the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. Boatner v. State, 934 N.E.2d 184, 186 (Ind. Ct. App. 2010) (citing Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008)). The trial court abuses its discretion if

its decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. Id.

Hearsay is defined by Indiana Evidence Rule 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See also Boatner, 934 N.E.2d at 186 ("Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted."). Hearsay evidence is, as a general rule, inadmissible. Ind. Evidence Rule 802; Boatner, 934 N.E.2d at 186.

Colbert argues that the evidence regarding the computer search is hearsay, just as if someone had asked for directions from a clerk at a gas station. Colbert's argument does not go to the specific directions that were given by the online mapping service; in fact, it appears that neither specific directions nor a map was discovered during the search of the computer. Rather, what the search revealed was a "cookie"[1] from the Yahoo! maps website indicating that someone had looked up directions from Misty's house to Jarrod's parents' house. According to Colbert, whoever looked up the directions had to enter specific data into the web page. Accordingly, he argues that "[t]he specific addresses that were entered are out-of-court statements made by someone other than the declarant testifying at trial." Using his gas-station clerk analogy, Colbert argues, "If a . . . [clerk] had testified that an unidentified person called and requested directions from

[11] In internet terms, a "cookie" is a "message[] that web servers pass to your web browser when you visit Internet sites. . . . Cookies are most commonly used to track web site activity. When you visit some sites, the server gives you a cookie that acts as your identification card." *What are cookies?*, Indiana University, University Information Technology Services Knowledge Base (Dec. 7, 2010), http://kb.iu.edu/data/agwm.html.

Colbert's address to the victim's address, that testimony would be an out-of-court statement for the purposes of Indiana Evidence Rule 801." Appellant's Br. p. 9.

We need not address this interesting and complicated issue. "Errors in the admission of evidence are to be disregarded as harmless unless they affect the defendant's substantial rights." Rogers, 897 N.E.2d at 961 (citing Ind. Trial Rule 61; Ind. Evidence Rule 103(a)). An error will be deemed harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Ind. Appellate Rule 66(A); Rogers, 897 N.E.2d at 961.

The evidence at issue here simply informed the jury that someone used Misty's computer, which the State argued was Colbert himself, to look up directions to Jarrod's parents' house. However, the State also presented evidence that Colbert had threatened to kill Jarrod and had started to carry a butcher knife. More importantly, Jarrod testified that he was "one hundred percent certain" that Colbert was the person who stabbed him. Jarrod saw Colbert only a few days before the stabbing and "[g]ot a good look" at him again during the attack. Tr. p. 409. Jarrod was able to see Colbert's tattoo on his neck and recognized the knife used in the attack. Under these facts and circumstances, we conclude that any error in the admission of the evidence regarding the online search for directions was harmless. See Rogers, 897 N.E.2d at 961 (any error in admission of evidence that defendant had been seen with a knife prior to murder for which defendant was convicted was harmless in light of the testimony of three eyewitnesses who saw the defendant stab the victim in the neck).

II. Appellate Rule 7(B)

Colbert also claims that the sentence imposed by the trial court is inappropriate. As set forth above, the trial court sentenced Colbert to forty-eight years for the attempted murder conviction, enhanced by thirty years for the habitual offender determination, and to a consecutive twelve years for the burglary conviction, for an aggregate sentence of ninety years. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise authorized by statute if, "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we have the power to review and revise sentences, "[t]he principal role of appellate 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). It is on the basis of Appellate Rule 7(B) alone that a criminal defendant may now challenge his sentence "where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). It is the defendant's burden on appeal to persuade the reviewing court that the sentence imposed by the trial court is inappropriate. Id. at 494.

Considering the nature of the offense, we agree with the State that Colbert's crime was worthy of an enhanced sentence. Colbert attacked Jarrod as he was sleeping and

repeatedly stabbed him. The attack caused extensive injuries that required Jarrod to undergo emergency surgery and caused long-term internal injuries and loss of feeling in his fingers. Jarrod now requires therapy, and the attack affected Jarrod's relationship with his eldest daughter, who "thinks this was okay. . . . Talking about it being okay to kill out of love." Tr. p. 1492. As a result of his injuries, Jarrod accumulated over $65,000 in medical bills. We further note that Colbert's attack was not an unplanned crime of passion; instead, he threatened to kill Jarrod, began to carry a butcher knife, and then drove from Indianapolis to Brownsburg, sneaked into a home, and attacked his girlfriend's husband in an attempt to prevent them from reuniting. And when the police went to apprehend him, Colbert attempted to flee in a motor vehicle.

The nature of the offender also supports the sentence imposed by the trial court. Colbert is no stranger to the criminal justice system. He has numerous arrests, and convictions that include five felonies and two misdemeanors. His criminal history includes convictions for theft, escape, burglary, pointing a firearm, carrying a weapon with intent to injure, and perjury. Colbert has been given the grace of probation in the past, only to have his probation revoked. Indeed, he was on probation in Oklahoma at the time he committed the instant offenses. Although Colbert claims to suffer from fetal alcohol syndrome and Adams-Oliver Syndrome, neither of these diagnoses were supported with any evidence other than Colbert's self-serving statements in the presentence investigation report. After giving due consideration to the trial court's sentencing decision, and in light of the nature of the offense and the character of the

offender, we cannot say that Colbert has met his burden of demonstrating that his ninety-year aggregate sentence is inappropriate.

Finally, Colbert notes the rule that "[t]he maximum possible sentences are generally most appropriate for the worst offenders. Wells v. State, 904 N.E.2d 265, 274 (Ind. Ct. App. 2009), trans. denied (citing Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002)). Colbert claims that he did not lie in wait, commit the crime in the presence of children, or torture his victim. But the rule regarding maximum sentences is "not an invitation to determine whether a worse offender could be imagined, as it is always possible to identify or hypothesize a significantly more despicable scenario, regardless of the nature of any particular offense and offender." Id. More importantly, Colbert acknowledges that the trial court did not impose the maximum possible sentences. Instead, he was sentenced to forty-eight years for Class A felony attempted murder, whereas the maximum possible is fifty years. See Ind. Code § 35-50-2-4. And he was sentenced to twelve years for Class B felony burglary, whereas the maximum sentence is twenty years. See Ind. Code § 35-50-2-5. Simply said, the "worst offender/worst offenses" analysis is unavailing to Colbert.

Conclusion

Any error in the admission of the evidence regarding the online search for directions to the victim's home was harmless. And considering the nature of the offense and the character of the offender, we are unable to say that Colbert's ninety-year sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.