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IN THE
COURT OF APPEALS OF INDIANA

BRIAN K. BRANTLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-1102-CR-158
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No. 18C01-1007-FB-17

November 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Brian K. Brantley appeals his convictions for two counts of criminal deviate conduct, each as a Class B felony; battery, as a Class C felony; two counts of intimidation, each as a Class D felony; battery, as a Class A misdemeanor; and battery, as a Class B misdemeanor. Brantley raises the following three issues for our review:

1. Whether he invoked his right to counsel during a custodial interrogation.

2. Whether he validly consented to a search of his apartment.

3. Whether the trial court abused its discretion when it admitted into evidence certain statements of the officer who conducted the custodial interrogation.

We affirm.

FACTS AND PROCEDURAL HISTORY

For about a month in late 2007, R.J. dated Brantley. About three years later, on July 5, 2010, R.J. went to a neighbor's apartment. Upon entering, Brantley appeared and told her he lived there. He then grabbed R.J.'s hair and pulled her into the apartment and locked the door behind her. As R.J. backed away, Brantley punched her in the face, knocking her onto his bed. Brantley continued to beat R.J. and, while doing so, he asked if she knew why he was doing it. She said, "because I left you." Transcript at 51. Brantley responded, "that's right. You've hurt me for three years. You've cheated on me for the last three years. And I knew fate would bring you back to my door." Id. Brantley then removed his belt and began beating R.J. with both ends of it.

During the course of the attack, Brantley ordered R.J. to perform oral sex on him. R.J. initially refused but complied after further beating. Brantley then ordered R.J. to

remove her clothes, and he raped her. Afterwards, R.J. told Brantley that she had to leave to take care of her granddaughter. Brantley told her "he would let [her] leave, but [she] would have to come back whenever he said . . . or he would do the same things to [her] girls." Id. at 53.

R.J. returned to Brantley's apartment the next day. Brantley told her that he loved her and he knew that she loved him and he knew fate would bring them back together. Brantley then told her that "he wouldn't beat [R.J.] always, just when [she] needed it, and [R.J.] would let him know when [she] needed it." Id. at 54. Brantley later "smacked [R.J.] a couple of times," which "hurt." Id. And when R.J. left, Brantley again told her to come back the next day or he would "[go] after [her] daughters." Id.

Upon her return to Brantley's apartment the next day, R.J. told Brantley that she was not in love with him, that they were not going to be a couple, and that this was not fate. While saying these things, Brantley "just kept looking at [R.J.]" Id. at 58. R.J. then finished her drink, and Brantley punched her in the side of her face. Brantley punched R.J. repeatedly and beat her with his belt again. He compelled R.J. to perform oral sex on him. After Brantley's assault, R.J. could barely walk and knew she needed to go to the hospital. And when she went to leave the next morning, Brantley told her "to forget [her daughters. If [she told] anybody he did this . . . he was going to kill [her] granddaughter." Id. at 59.

Upon leaving Brantley's apartment, R.J. had a friend take her to the hospital. She had two black eyes, a broken nose, and bruises on her head, neck, and body. The hospital informed local authorities, and Muncie Police Detective Ryan Winningham both spoke

with R.J. at the hospital and observed her injuries. R.J. allowed Detective Winningham to record voice mails Brantley had left for her in which he had indicated that he was sorry for threatening R.J.'s daughters and granddaughter. R.J. also allowed Detective Winningham to record a phone conversation she had with Brantley in which they discussed his attacks.

On July 12, Detective Winningham arrested Brantley. Detective Winningham read Brantley his Miranda rights, and Brantley signed a waiver of his rights form. During the ensuing custodial interrogation, which was recorded, Detective Winningham engaged Brantley in the following conversation:

> Q [by Detective Winningham] [W]hat happened on this?
>
> A [by Brantley] Well, if I get a lawyer, if I talk to a lawyer first and then explain to him—because I might explain to you and then y'all might arrest me. And if [I] explain to him, he might understand and explain it to you to where you can understand and I won't be arrested. You know what I mean? And I can—
>
> Q Well, I'm telling you right now whether you tell me now or not, you're being arrested.
>
> A Okay.
>
> Q Do you understand that? You're being arrested for rape causing serious injury, do you understand this?
>
> A Okay.
>
> Q So do you want to tell me actually what happened that day?
>
> A Um, I didn't—I didn't rape her. . . .
>
> * * *
>
> Q So what do you do with her then?

A I didn't rape her, but I did, you know, hit her.

Q What did you hit her with?

A A belt and my fist.

* * *

Q How many times did you hit her with the belt?

A I can't—I don't know. But I didn't—I hit her though. You know, I hit her with the belt and I hit her with my fist. I'm not going to lie to you, I hit her with the belt and I hit her with the fist. But this is what she gets into.

Q Did she ask for it that night?

A Yeah. Yeah. . . .

* * *

Q You threatened her daughters.

A Yeah.

Q You threatened her granddaughters—

A Yeah.

Q Why did you do that?

A Because . . . like I said, . . . she's into that. . . .

* * *

Q Why—but why did you threaten her kids and the grandkid. You tried to kill her.

A Yeah, I did. I did. I did. And if you listen to the phone records . . . .

Q Yeah, you apologized to her for saying that stuff.

A Yeah, and I apologized to her yesterday or today on the message too.

Q Yeah, I understand that.

A Yeah, because you know, like I told her I cannot do that to her, and I told her if she don't want to be with me, then—

Q You know . . . she does not like to give oral sex. Why did you force her to give oral sex to you?

A Because I thought she was just playing . . . .

Id. at 138-40, 144-46. Later in the interrogation, the following exchange occurred:

Q [Y]ou know why she called? Because she almost died. And it wasn't [her] that called. The hospital called.

A Sir, I need my lawyer right now. I need my lawyer right now. . . .

Q So you're done being mister big guy to her, right?

A Yeah. Yeah. . . .

Q Hey she's scared to death that you're going to show up at her house because she's seen you walking in front of her house.

* * *

A Okay. I promise you; I give you my word on this you don't have to worry about me messing with [her] no more. You don't have to worry about that.

Q Alright man.

A I'm serious about that.

Q Alright.

A I'm trying to work, and I'm trying to do the right thing man. . . .

Id. at 148-49. Brantley then again acknowledged that he had had sex with R.J. on each of the three days she came to his apartment.

Detective Winningham visited Brantley at the jail on July 15, three days later. Detective Winningham again read Brantley his Miranda rights and the rights waiver form Brantley had signed prior to the custodial interrogation. Detective Winningham then asked Brantley for consent to search his apartment, and Brantley signed a consent form. In the ensuing search of Brantley's apartment, Detective Winningham seized Brantley's belt and took several photographs of the apartment, which included photographs of blood-stained bed sheets.

On July 16, the State charged Brantley with ten counts. On December 29, 2010, Brantley filed a motion to suppress his statements during the custodial interrogation and to redact certain statements made by Detective Winningham during that interrogation. The court held a hearing on Brantley's motion on January 6, 2011. At that hearing, Brantley's counsel clarified that Brantley had invoked his right to counsel when Brantley stated:

> if I get a lawyer, if I talk to a lawyer first and then explain to him—because I might explain to you and then y'all might arrest me. And if [I] explain to him, he might understand and explain it to you to where you can understand and I won't be arrested. You know what I mean?

Id. at 21; 138-39. The State argued that this comment was not an unequivocal invocation of the right to counsel. The trial court agreed and denied the motion to suppress. In relevant part, the court also denied Brantley's motion to redact Detective Winningham's statements.[1]

At Brantley's ensuing trial, his defense counsel objected to the State's admission of the recorded custodial interrogation. According to Brantley's counsel: "I would

[1] The trial court granted the motion to redact in part. The redacted statements are not relevant to our discussion in this appeal.

object to the admission of these exhibits on the grounds stated in my Motion to Suppress. I don't believe that there was a knowing and intelligent waiver of his right to counsel in this matter. I think he did request counsel and that that request was ignored." Id. at 131. The court overruled Brantley's objections "for those reasons" described in the court's order on the motion to suppress. Id. at 132.

Also during his trial, Brantley's counsel renewed his objection to redact portions of the custodial interrogation, which the trial court denied. And Brantley's counsel objected to the admission of the photographs taken in and belt seized from his apartment on the ground that he did not validly give his consent for Detective Winningham to search his apartment. The trial court overruled the objection.

The jury found Brantley guilty of two counts of criminal deviate conduct, each as a Class B felony; battery, as a Class C felony; two counts of intimidation, each as a Class D felony; battery, as a Class A misdemeanor; and battery, as a Class B misdemeanor. The trial court entered its judgments of conviction and ordered Brantley to serve an aggregate executed term of twenty-four and one-half years. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Each of Brantley's arguments on appeal questions the trial court's decision to admit certain evidence at his trial. Our standard of review of a trial court's findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Issue One: Invocation of the Right to Counsel

Brantley first contends that the trial court erroneously concluded that he had not properly invoked his right to counsel during his custodial interrogation. On this issue, Brantley for the first time on appeal identifies two different instances in which he alleges he invoked his right to counsel. According to Brantley:

> [Brantley] first made the following statement ["the first alleged invocation"]:
>
> > "Well if I get a lawyer, if I talk to a lawyer first and then explain to him—because I might explain to you and then y'all might arrest me. And if [I] explain to him, he might understand and explain it to you to where you can understand and I won't be arrested. You know what I mean? I can—"
>
> At a later point in his videotaped statement, Brantley stated the following ["the second alleged invocation"]:
>
> > "Sir, I need my lawyer right now. I need my lawyer right now. I would not mess with that child, you know. I would not threaten her. I would not bother her no more, you know what I mean?"

Appellant's Br. at 5 (quoting Transcript at 138-39, 148).

Insofar as Brantley contends on appeal that the second alleged invocation is grounds for reversal, he is mistaken. In neither his motion to suppress nor his objection at trial did he argue that suppression of the evidence was appropriate in light of the second alleged invocation. Rather, this is a new theory raised for the first time on appeal. As such, it is waived and we do not consider it. See Johnson v. Parkview Health Sys., 801 N.E.2d 1281, 1287-88 (Ind. Ct. App. 2004), trans. denied. We note, however, that nearly all of Brantley's incriminating statements occurred well before he made the second alleged invocation.

Brantley also argues that the first alleged invocation should have ceased the custodial interrogation. As this court has recognized:

> When an accused is subjected to custodial interrogation, the State may not use statements stemming from the interrogation unless it demonstrates the use of procedural safeguards to secure the accused's privilege against self-incrimination. Davies v. State, 730 N.E.2d 726, 733 (Ind. Ct. App. 2000) (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)), trans. denied. The Miranda warnings apply only to custodial interrogation because they are meant to overcome the inherently coercive and police[-]dominated atmosphere of custodial interrogation. Id. When a subject is in custody, Miranda requires that he be informed of the right to the presence and advice of counsel during custodial interrogation by the police, of the right to remain silent, and that any statement he makes may be used as evidence against him. Wright v. State, 766 N.E.2d 1223, 1229 (Ind. Ct. App. 2002).
>
> Even if the accused has been advised of his rights and has validly waived them, if he invokes the right to counsel, the police must cease questioning until an attorney has been made available or until the accused initiates further conversation with the police. Sauerheber v. State, 698 N.E.2d 796, 801 (Ind. 1998) (citing Edwards v. Arizona, 451 U.S. 477 (1981)). We determine whether an accused has asserted the right to counsel on an objective standard. Id. (citing Davis v. United States, 512 U.S. 452 (1994)). Invocation of this right requires, at a minimum, some statement that can be reasonably construed as an expression of a desire for the assistance of an attorney. Id. at 803 (noting that police have no duty to cease questioning when an equivocal request for an attorney has been made). "The level of clarity required to meet the reasonableness standard is sufficient clarity such that a 'reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' " Taylor v. State, 689 N.E.2d 699, 703 (Ind. 1997) (quoting Davis, 512 U.S. at 462).
>
> > It is not enough that the defendant might be invoking his rights; the request must be unambiguous . . . . Davis established as a matter of Fifth Amendment law that police have no duty to cease questioning when an equivocal request for counsel is made. Nor are they required to ask clarifying questions to determine whether the suspect actually wants a lawyer.
>
> Id.

Collins v. State, 873 N.E.2d at 155-56 (Ind. Ct. App. 2007), trans. denied.

The first alleged invocation was not an unequivocal and unambiguous request for counsel. Rather, Brantley merely acknowledged that an attorney might present his story in a more favorable legal framework than he could for himself. As the State puts it, Brantley was merely "thinking out loud." Appellee's Br. at 12. A reasonable police officer in Detective Winningham's circumstances would not have understood Brantley's comment to be a request for an attorney, and Detective Winningham had no duty "to ask clarifying questions" of Brantley in that regard. See Collins, 873 N.E.2d at 156 (quoting Taylor, 689 N.E.2d at 703). Accordingly, the trial court did not abuse its discretion when it overruled Brantley's objection to the State's admission of his recorded custodial interrogation.

Issue Two: Consent to Search

Brantley next argues that he did not validly give his consent for Detective Winningham to search his apartment. In his one-paragraph appellate argument, Brantley states that "the consent to search was signed when [Detective] Winningh[am] was questioning Brantley, at a time when no questioning should have been in progress." Appellant's Br. at 7. Although unclear, it appears that Brantley's argument is that his alleged invocations of the right to counsel during the custodial interrogation prevented Detective Winningham from asking Brantley to sign the consent to search form three days after the custodial interrogation.

Brantley's argument is not supported by the law. As our supreme court has explained:

> Under Miranda when a person in custody asks to be represented by counsel he is not subject to further interrogation by the authorities until counsel has

> been made available to him. . . . Further, interrogation includes "any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." A consent to search is not a self-incriminating statement, and therefore a request to search does not amount to interrogation. United States v. Saadeh, 61 F.3d 510, 515 (7th Cir. 1995); United States v. Smith, 3 F.3d 1088, 1098 (7th Cir. 1993).

Joyner v. State, 736 N.E.2d 232, 242 (Ind. 2000) (some citations and quotations omitted; second emphasis added). Accordingly, Detective Winningham's request for Brantley's consent to search the apartment is outside the scope of Brantley's alleged invocation of counsel, and any such invocation has no effect on the legitimacy of Brantley's consent to search. Thus, the trial court did not abuse its discretion when it overruled Brantley's objection to the admissibility of the evidence seized from his apartment.

Issue Three: Motion to Redact

Finally, Brantley asserts that the trial court abused its discretion when it overruled his objection to certain statements made by Detective Winningham during the custodial interrogation. In particular, Brantley contends that the following statements by Detective Winningham were inappropriate "assertions of fact" and "inadmissible hearsay": "Okay. Well, I got called out to the emergency room on Thursday the 8th, July 8, on somebody who was beat up pretty bad"; "That is what I'm talking about. That is wrong."; "Do you understand, you took it too far"; and "So you and I are both in agreement, you took it too far?" Appellant's Br. at 7-8 (quoting Transcript at 138, 144-46).

There is no reversible error on this issue. It is well established that a claim of error in the admission or exclusion of evidence will not prevail on appeal " 'unless a substantial right of the party is affected.' " Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005)

(quoting Evid. R. 103(a)). That is, even if the trial court errs in admitting or excluding evidence, this court will not reverse the defendant's conviction if the error is harmless. See Fleener v. State, 656 N.E.2d 1140, 1141-42 (Ind. 1995). An error is harmless when the probable impact of the erroneously admitted or excluded evidence on the jury, in light of all the evidence presented, is sufficiently minor so as not to affect the defendant's substantial rights. Id. at 1142.

Here, R.J. testified extensively as to the events on the dates in question. Brantley's own statements during the custodial interrogation were properly admitted into evidence. And the State's photographs from Brantley's apartment, as well as Brantley's belt, were also properly admitted into evidence. In light of all the evidence presented, the probable impact of Detective Winningham's statements during the custodial interrogation was sufficiently minor so as to not affect Brantley's substantial rights. Hence, any error in the admission of this evidence the trial court may have made is harmless.

In sum, we affirm Brantley's convictions.

Affirmed.

RILEY, J., and MAY, J., concur.