ATTORNEY FOR APPELLANT:

DANIEL M. GROVE
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM JACKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0705-CR-291
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen Bowers, Judge
Cause No. 20D02-0601-FA-4

November 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

William Jackson was convicted of Class A felony rape while armed with a deadly weapon and Class B felony burglary. He appeals the trial court's exclusion of evidence regarding the fidelity of the victim's husband and the admission of evidence regarding the effect of the rape on the victim's life. He also appeals his sentence. We affirm.

Issues

Jackson raises three issues, which we restate as:

I. whether the trial court abused its discretion by preventing questions regarding the victim's husband's fidelity;

II. whether the trial court properly allowed the victim to testify about the effect of the rape on her life; and

III. whether his forty-year sentence is appropriate.

Facts

In the early morning hours of September 5, 2001, Jackson used a lawn chair to climb up to and break in the kitchen window of S.E.'s home. S.E. was in her bed with her three-year-old son, and her husband was sleeping on a couch in another room. S.E. awoke to find Jackson in her bed. He placed a knife against her arm. She was about four months pregnant at the time and told him this. Jackson first attempted to perform oral sex on S.E., but she would not open her legs. Jackson attempted anal sex, but S.E. cried in pain. Jackson then raped S.E. vaginally. After observing the child in bed next to them, Jackson moved S.E. to the floor of the room. During the rape, Jackson told S.E. that he knew where she worked, and that he sometimes followed her to work and watched her

return home. He also told S.E. that he sees her husband leave the house at night to go to another woman's house. He continued to rape her until he ejaculated.

Jackson told S.E. not to wake her husband or move from the bed until the clock beside the bed read 2:16 a.m. He told her not to contact police and threatened that she would have one less child if she did. S.E. waited for a short time after Jackson left the room until she got up to wake her husband and call the police.

Paramedics transported S.E. to the emergency room. A physician and nurse examined her and administered a rape kit. DNA analysis determined that Jackson was a match to the fluids found in S.E.'s vaginal wash, vaginal-cervical swab, rectal swab, external genital swab, and underwear. The DNA analyst found that in the absence of an identical twin, "William E.W. Jackson is the source of the DNA to a reasonable degree of scientific certainty." Ex. 8.

On February 8, 2005, the State charged Jackson with Class A felony rape while armed with a deadly weapon and Class B felony burglary. Jackson elected to represent himself at trial, and the trial court appointed stand-by counsel. A jury found Jackson guilty of both counts on March 15, 2007. On April 9, 2007, the trial court sentenced Jackson to forty years for the Class A felony rape conviction, but did not impose a sentence for the burglary conviction. This appeal followed.

Analysis

I. Fidelity of Victim's Husband

The trial court prevented Jackson from a line of questioning regarding the fidelity and sexual history of the victim's husband. Specifically, Jackson asked the victim,

"Ma'am do you believe your husband was promiscuous?" Tr. p. 281. The State objected on relevancy grounds, and the trial court sustained the objection. Jackson did not make an offer of proof at that time. An offer of proof should "convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling" and preserve the issue for appellate review. State v. Wilson, 836 N.E.2d 407, 409 (Ind. Ct. App. 2005). Jackson did not offer any explanation as to why this line of questioning would be relevant. Nor did Jackson did make any further attempt to question S.E. on the matter or introduce other related evidence. By failing to make an offer of proof, he did not properly preserve this issue for appeal and the issue is waived. Ind. Evidence Rule 103(a)(2); Dylak v. State, 850 N.E.2d 401, 408 (Ind. Ct. App. 2006), trans. denied. His failure is not excused because he was proceeding pro se. See Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 816 (Ind. Ct. App. 2005) (noting that litigants who proceed pro se are held to the same established rules of procedure as trained legal counsel).

Waiver notwithstanding, we find that any evidence sought by Jackson regarding the victim's husband's alleged infidelity was irrelevant and properly excluded. A trial court has broad discretion in ruling on the admissibility of evidence. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. We will reverse a ruling only for an abuse of discretion. Id. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Evid. R. 402. Jackson contends that the victim's husband's sexual history is relevant because it could have demonstrated that Jackson was not the rapist. To support this contention, Jackson

submits the theory that the victim's husband could have somehow spread Jackson's DNA into S.E's body, presuming he and Jackson had intercourse with the same other, unidentified woman in a proximate time frame. This theory is wholly unsupported by any scientific or other evidence and defies common sense. Jackson contends "the fact of the affair would have provided the jury an explanation of how Jackson's DNA came to be inside S.E.'s vagina by manner or means other than Jackson raping her." Appellant's Br. pp. 8-9. Even if this theory would explain the DNA's presence inside the victim's vagina, the other areas where Jackson's DNA was identified are not accounted for. The Indiana State Police analysis, admitted as Exhibit 8, identified Jackson's DNA not only in S.E.'s vagina but also on her external genitalia, rectum, and underwear. This theory is not worthy of any credibility. Jackson's line of questioning sought irrelevant evidence, and the trial court did not abuse its discretion in ending it.

II. Victim's Testimony Regarding the Effect of the Rape

Jackson contends that S.E.'s testimony about the effect the rape has had on her life was so prejudicial it constituted fundamental error and violated his right to due process and a fair trial. The State asked S.E. to explain how the rape affected her life. Her answer to the question revealed that since the rape, S.E. divorced, lost her job, suffered financial difficulty, and suffered severe emotional and psychological trauma. Jackson did not object to this question, to the answer, or make a motion to have the testimony stricken. Failure to object to the introduction of evidence waives appellate review of any claim that the admission was in error. Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003).

Jackson contends he is entitled an exception to this waiver rule because S.E.'s testimony was so prejudicial that it constituted fundamental error. Fundamental error is an error that is so prejudicial it makes a fair trial impossible or blatantly violates basic principles of due process by creating an undeniable and substantial potential for harm. Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002). Jackson contends the highly prejudicial nature of S.E.'s testimony violated his Fourteenth Amendment right to due process and a fair trial. Although we agree that the testimony elicited from S.E. may have been improper, it does not rise to the level of fundamental error, and we find that its admission does not merit reversal.

Our supreme court has determined that errors in the admission of evidence are harmless when the conviction is supported by substantial evidence of guilt and there is not a substantial likelihood that the erroneously admitted evidence contributed to the jury's verdict. Cook v. State, 734 N.E.2d 563, 569 (Ind. 2000). We find that any error in admitting the testimony of S.E. is harmless. At trial, the State presented evidence that Jackson's DNA was found in and on the victim. Jackson, acting pro se, asked S.E. "listening to me now speaking to you, do I sound like your perpetrator?" Tr. p. 259. S.E. responded that his voice was exactly the same and the grammar and words he used were very similar. Evidence that Jackson was staying with a relative in S.E.'s neighborhood at the time of the rape also was introduced.

Given these facts, we find that any error in the admission of S.E.'s testimony regarding the effect of the rape on her life was harmless. "[E]vidence admitted in violation of Evidence Rules 402, 403, or 404 will not require a conviction to be reversed

if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights." Ind. Trial Rule 61; Houser v. State, 823 N.E.2d 693, 698 (Ind. 2005) (internal quotations omitted).

III. Sentence

Jackson contends his forty-year sentence is inappropriate under Indiana Appellate Rule 7(B) in light of the nature of the offense and his character. Specifically, Jackson contends the trial court should not have enhanced the presumptive sentence.[1] The presumptive sentence for Class A felony was thirty years, and twenty years could be added if aggravating circumstances are present. Ind. Code § 35-50-2-4 (2001). The trial court added ten years, finding that Jackson's criminal history of similar offenses was an aggravating circumstance that outweighed the mitigating circumstance of his age, sixteen at the time of the offense.

Jackson does not challenge the trial court's finding or non-finding of aggravators and mitigators and application of the same; instead he contends the sentence is inappropriate in light of the nature of the offense and his character. We thus proceed to consider whether his sentence is appropriate under Rule 7(B). Under this rule, a defendant has the burden to persuade the court that his or her sentence has met the inappropriateness standard of review. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

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[1] This crime occurred in 2001, before the sentencing statutes became advisory. Because "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime," Gutermuth v. State, 868 N.E.2d 427, 431 n. 4 (Ind. 2007), we address Jackson's sentence under the presumptive sentencing scheme.

The nature of Jackson's crimes against S.E. are particularly disturbing. Jackson entered S.E.'s home the middle of the night and raped her while her three-year-old son slept in the bed. S.E. was four months pregnant at the time. During the rape, he tormented her with his knowledge of the details of her daily life. When he left, Jackson threatened the life of her children if she were to tell police. There is nothing before this court to indicate Jackson's character merits a lessened sentence. In fact, he has a criminal history consisting of convictions for rape, burglary, and kidnapping as a juvenile in Ohio. Jackson has not persuaded this court that his forty-year sentence is inappropriate.

Conclusion

We affirm the trial court's decision to disallow a line of questioning regarding the fidelity of the victim's husband. We also find that the admission of the victim's testimony regarding the effect the rape had on her life was harmless error and does not merit reversal. Finally, the forty-year sentence is appropriate. We affirm the conviction and sentence.

Affirmed.

KIRSCH, J., and ROBB, J., concur.