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IN THE
COURT OF APPEALS OF INDIANA

DAVID MICHAEL JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0611-CR-999
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause Nos. 48D01-0506-FC-175 and 48D01-0508-FD-239

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

David Michael Jones appeals his convictions for Criminal Confinement, as a Class B felony; Intimidation, as a Class D felony; Battery, as a Class B misdemeanor; and his adjudication as an habitual offender following a jury trial. He presents the following dispositive issues for our review:

1. Whether the trial court erred when it permitted the State to amend the criminal confinement charge after the omnibus date.

2. Whether the trial court erred when it permitted the State to amend the intimidation charge after the omnibus date.

3. Whether the State presented sufficient evidence to support his criminal confinement and intimidation convictions.

4. Whether the trial court abused its discretion when it refused to tender Jones' final instruction on the element of serious bodily injury.

5. Whether the trial court abused its discretion when it precluded proffered medical evidence.

6. Whether the trial court erred when it reduced his battery conviction from a Class C felony.

7. Whether the trial court abused its discretion when it permitted evidence of his prior bad acts.

8. Whether the trial court erred when it instructed the jury regarding the element of removal to support the confinement conviction.

9. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 13, 2005, Jones was living with Connie Scott in Anderson. When an argument ensued on that date, Scott asked Jones to leave the residence. Jones refused,

and he physically assaulted Scott while they were in the garage. Jones choked Scott and caused her to lose consciousness. When Scott woke up, she was inside the house. Jones was still there, and she told him that she needed to go to the hospital. But he told her, "[Y]ou ain't going nowhere." Transcript at 166. Jones also stated, "[Y]ou seen how fast that happened, . . . I can do it again and not leave a track and no one will ever see you again." Id. Eventually, Scott got in her car and drove away. Scott was calling the police to report the incident when Jones pulled up behind her in his car. She told him that she had called the police, and he drove away.

Approximately two months later, on August 17, 2005, several people, including Jones, were at Scott's house. At some point, Scott asked Jones to leave, but he refused. Jones then asked Scott to go to a store to get him some medication, and she refused. Jones became angry and told Scott that he would not leave until she got him the medication. Jones then said, "[D]on't think that I won't kill you and your cousin." Id. at 172. Jones was "violent and cussing and screaming" at Scott. Id. Scott left and called the police, who subsequently arrested Jones.

In Cause No. 48D01-0506-FC-175 ("FC-175"), regarding the incidents on June 13, the State charged Jones with battery. And in Cause No. 48D01-0508-FD-239 ("FD-239"), regarding the incidents on August 17, the State charged him with intimidation and being an habitual offender.

On October 27, 2005, nine days after the omnibus date, the State moved to amend the information in FC-175 to add a charge of criminal confinement, as a Class B felony, and an habitual offender allegation. The trial court granted the amendment without first

holding a hearing. On January 10, 2006, the State moved to amend the intimidation charge in FD-239 to add the language "or engage in conduct against her will."[1] The trial court permitted the amendment.

On June 12, 2006, the trial court consolidated the two cases for purposes of trial. Jones moved to dismiss the amended intimidation charge. The trial court denied that motion. On the first day of trial, on September 6, the State moved to amend the information regarding the criminal confinement charge. The original information alleged in relevant part that Jones' confinement of Scott resulted in her unconsciousness. As amended, the charge alleged that the confinement resulted in Scott's unconsciousness "and/or extreme pain." Appellant's App. at 108. The trial court permitted the amendment over Jones' objection.

On September 8, the State moved the trial court to admit a tape recording of a 911 call that led to Jones' 2003 conviction for residential entry. Scott was also the victim of that crime. The State sought admission of that evidence "to show the relationship between the parties and motive." Id. at 379. The trial court allowed the evidence over Jones' objection.

The jury found Jones guilty of criminal confinement, as a Class B felony; battery, as a Class C felony; intimidation, as a Class D felony; and found him to be an habitual offender. The trial court sentenced Jones to twenty years for the Class B felony conviction (criminal confinement), enhanced by twenty-five years on the habitual offender adjudication; eight years for the Class C felony conviction (battery); and three

[1] The original information alleged that Jones placed Scott in fear of retaliation for a prior lawful act. As amended, the information alleged that Jones either placed Scott in fear of retaliation for a prior lawful act or forced her to engage in conduct against her will.

years for the Class D felony conviction (intimidation). The trial court ordered that the sentences would run concurrently, for an aggregate sentence of forty-five years. But on November 9, the trial court, sua sponte, issued an order reducing the battery conviction to a Class B misdemeanor and reducing the sentence on that count to six months. The aggregate sentence was unchanged. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Amendment of Criminal Confinement Charge

Jones first contends that the trial court erred when it permitted the State to amend the information regarding the criminal confinement charge twice after the omnibus date had passed. Our Supreme Court recently addressed the issue of the timeliness of amendments to a charging information in Fajardo v. State, 859 N.E.2d 1201, 1203-07 (Ind. 2007):

> A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information. Such amendments are governed by Indiana Code § 35-34-1-5. Subsection (a) permits an amendment at any time "because of any immaterial defect," and it lists nine examples, including "(9) any other defect which does not prejudice the substantial rights of the defendant." Similarly, subsection (c) permits "at any time before, during, or after the trial, . . . an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant." Id. (emphasis added). In contrast, subsection (b) expressly limits the time for certain other amendments:
>
> > (b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:
> >
> > > (1) thirty (30) days if the defendant is charged with a felony; or

(2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date. . . .

Ind. Code § 35-34-1-5(b). . . .

This statutory language thus conditions the permissibility for amending a charging information upon whether the amendment falls into one of three classifications: (1) amendments correcting an immaterial defect, which may be made at any time, and in the case of an unenumerated immaterial defect, only if it does not prejudice the defendant's substantial rights; (2) amendments to matters of form, for which the statute is inconsistent, subsection (b) permitting them only prior to a prescribed period before the omnibus date, and subsection (c) permitting them at any time but requiring that they do not prejudice the substantial rights of the defendant; and (3) amendments to matters of substance, which are permitted only if made more than thirty days before the omnibus date for felonies, and more than fifteen days in advance for misdemeanors. See Haak v. State, 695 N.E.2d 944, 951 (Ind. 1998).

* * *

Subsection 5(b) presently prohibits any amendment as to matters of substance unless made thirty days before the omnibus date for felonies and fifteen days before the omnibus date for misdemeanors. The statutory prerequisite requiring that an amendment not prejudice the substantial rights of the defendant applies only to amendments of certain immaterial defects under subsection 5(a)(9), and to amendments related to a defect, imperfection, or omission in form as provided in subsection 5(c). But as to an amendment relating to matters of substance, the statute is clear: the only prerequisite is that it must be filed the specified number of days before the omnibus date, pursuant to subsection 5(b). See Haak, 695 N.E.2d at 951.

Therefore, the first step in evaluating the permissibility of amending an indictment or information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. As noted above, an amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime. [McIntyre v. State, 717 N.E.2d 114, 125-26 (Ind. 1999)]; Haak, 695 N.E.2d at 951.

(Footnotes omitted, emphases added).[2]

Here, because the State's first amendment to the information added a separate offense, namely, the criminal confinement charge, the amendment was a matter of substance. See id. And the amendment was filed after the omnibus date. Therefore, the amendment was made in violation of Indiana Code Section 35-34-1-5(b).

While Jones argues on appeal that his criminal confinement conviction should be vacated due to that statutory violation, he did not object to the amendment on the same grounds to the trial court. Indeed, the only objection Jones made to the State's first amendment was in his motion to dismiss filed on September 6, 2006. In that motion, Jones asked the trial court to reduce his criminal confinement charge to a Class D felony because Scott's alleged injuries "were not due to any confinement." Appellant's App. at 112. The motion was silent regarding the untimeliness of the amendment and the lack of a hearing on the amendment.[3] Moreover, while his motion was labeled a "motion to dismiss," the only relief sought was a reduction in the charge. It is well settled that a party cannot raise one ground for objection to the trial court and raise a different ground on appeal. Cherrone v. State, 726 N.E.2d 251, 255 n.1 (Ind. 2000). The issue is waived. See Absher v. State, 866 N.E.2d 350, 356 (Ind. Ct. App. 2007) (holding defendant did not object to trial court and waived issue of untimely substantive amendment to information). Further, to preserve a claim that the trial court erred when it allowed an information to be

[2] After Fajardo was decided, the General Assembly amended Indiana Code Section 35-34-1-5 so that a charging information may be amended at any time prior to trial as to either form or substance, so long as such amendment does not prejudice the substantial rights of the defendant. See P.L. 178-2007 § 1 (emergency eff. May 8, 2007). However, because Jones committed his offenses before the legislature amended the statute, our review is based on the old statute.

[3] Jones does not direct us to any other objections made to this challenged amendment.

amended, a defendant must object to the request to amend and, if the objection is overruled, seek a continuance to prepare his defense in light of the change. Haak, 695 N.E.2d at 951 n.5. This issue is also waived because Jones did not seek a continuance.

The State sought to amend the criminal confinement charge a second time on the first day of trial, and the trial court permitted the amendment over Jones' objection. As amended, the charge alleged that Jones' confinement of Scott resulted in serious bodily injury to her, "to-wit: unconsciousness and/or extreme pain." Appellant's App. at 108. The original charge only alleged unconsciousness. The following colloquy occurred prior to trial:

> STATE: I need to make a motion to amend Count II [criminal confinement]. Count I [battery] says unconsciousness and/or extreme pain. That should also say that for Count II.
>
> DEFENSE COUNSEL: And Judge, I'll make some record on that. I'd like to object to that. This case has been around here for fourteen (14) months and we're just now amending Count II on the day of trial.
>
> STATE: The only thing I can make, [sic] it's a scrivener's error. That was supposed to be done. Apparently it was not.
>
> COURT: I guess we can beat up on the people in [the Prosecutor's] office for not catching this before today. But over your objection, I'm going to admit that because clearly Mr. Jones is on notice from Count I that the State is prepared to show unconsciousness and/or extreme pain as its aggravator for bodily injury, serious bodily injury. You know that from Count I. Count II simply drops off that "and/or extreme pain." So that amendment is permitted. . . .

Transcript at 31.

On appeal, Jones contends that the amendment "was done to change the theory or theories of the State's case, and it allowed the State to improperly choose, and allocate, at its discretion, 'unconsciousness' or 'extreme pain' between the battery charge and the

confinement charge, in an attempt to avoid issues of double enhancement that Jones had raised." Brief of Appellant at 21. But Jones does not support that contention with cogent argument or citation to authority. As such, the issue is waived. See Ind. Appellate Rule 46(A)(8)(a).

Jones also contends that the amendment on the day of trial was substantive and was, therefore, untimely as a matter of law. But an amendment is of substance only if it is essential to a valid charge of the crime. McIntyre, 717 N.E.2d at 126. Because the addition of the alternate language, "and/or severe pain," is not essential to a valid charge of criminal confinement, the amendment was one of form and not of substance. See id.

Indiana Code Section 35-34-1-5(d) provides that before permitting an amendment regarding a matter of form, the trial court "shall give all parties adequate notice of the intended amendment and an opportunity to be heard." Further, the trial court "shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense." Id.

Jones contends that he was denied adequate notice and that the trial court erred when it denied his motion to continue the trial. But, while Jones moved for a continuance, he did not move for a continuance based on the amended information.[4] Because Jones did not move for a continuance based on the amended information, the issue is waived. See Haak, 695 N.E.2d at 951 n.5.

Regardless, the trial court found that because the battery charge already included both unconsciousness and/or extreme pain as the possible bases for enhancing the offense

[4] Defense counsel asked the trial court for a continuance based on his perceived inability to adequately prepare for trial. In moving the trial court for a continuance, defense counsel did not mention any of the amendments to the information. See Appellant's App. at 73-77.

to a Class C felony, Jones was on adequate notice "that the State is prepared to show unconsciousness and/or extreme pain as its aggravator for . . . serious bodily injury." Transcript at 31. And the trial court permitted the amendment over Jones' objection. On appeal, Jones has not demonstrated that he was prejudiced by the amendment.[5]

Issue Two: Amendment of Intimidation Charge

Jones next contends that the trial court erred when it permitted the State to amend the intimidation charge after the omnibus date. The original information alleged in relevant part that Jones "did communicate a threat to commit a forcible felony to Connie S. Scott, with the intent that [she] be placed in fear of retaliation for a prior lawful act." Appellant's App. at 387. The amended information alleged in relevant part that Jones "communicated a threat to commit a forcible felony to Connie S. Scott with the intent that [she] either be placed in fear of retaliation for a prior lawful act or engage in conduct against her will." Id. at 389.

Our Supreme Court has observed that the criminal confinement statute, Indiana Code Section 35-42-3-3, "framed in the disjunctive, includes two distinct types of criminal confinement by encompassing both confinement by non-consensual restraint in place and confinement by removal." Kelly v. State, 535 N.E.2d 140, 140 (Ind. 1989). Quoting Addis v. State, 404 N.E.2d 59, 60 (Ind. Ct. App. 1980), the court reasoned, "'Clearly different acts and elements are required to be proven in each section, and the defensive posture would not be the same under the respective sections since the prosecution would necessarily proceed under different theories and proof.'" Id. at 141.

[5] Jones asserts various other grounds for error on appeal which he did not assert to the trial court. Again, a party cannot raise one ground for objection to the trial court and raise a different ground on appeal. Cherrone, 726 N.E.2d at 255 n.1.

Accordingly, our Supreme Court held that "the statutory sections [of the criminal confinement statute] define two separate criminal offenses." Id. at 141.

The intimidation statute is likewise framed in the disjunctive. The elements of proof necessary to show what Jones' intent was in communicating the alleged threat are dissimilar. Following the reasoning in Kelly, we conclude that the State's amendment here, adding the disjunctive "or engage in conduct against her will," is a matter of substance. However, Jones did not move for a continuance after the trial court granted the amendment over his objection. As such, the issue is waived. See Haak, 695 N.E.2d at 951 n.5.

Issue Three: Sufficiency of the Evidence

Jones next contends that the evidence is not sufficient to support his convictions for criminal confinement, as a Class B felony, and intimidation, as a Class D felony. We address each contention in turn. With regard to the criminal confinement conviction, Jones maintains that the State "failed to elicit any evidence that the victim's injuries were serious enough or of such lasting effect to meet the definition of serious bodily injury" to support enhancement of the charge to a Class B felony. Brief of Appellant at 28. We cannot agree.

When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could

conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove criminal confinement, as a Class B felony, the State was required to prove that Jones knowingly or intentionally removed Scott by force from one place to another, which resulted in serious bodily injury to Scott, namely, unconsciousness and/or extreme pain. Again, the only element Jones challenges on appeal is proof of serious bodily injury. Indiana Code Section 35-41-1-25 defines "serious bodily injury" in relevant part as "bodily injury that creates a substantial risk of death or that causes: . . . unconsciousness . . . [or] extreme pain." (Emphases added). Here, at trial, Scott testified as follows:

> A: He just ran up to me and attacked, and the next thing I knew I was inside the house.
>
> Q: Did he say anything to you after he had grabbed you, if you remember?
>
> A: I don't remember, I just remember him running towards me.
>
> Q: Where did he put his . . . hands?
>
> A: He was like us facing this way and he came like, he had both his hands like this.
>
> Q: Around your neck?
>
> A: Yeah. And then I came to. I was in the house.
>
> Q: When you say came to, were you unconscious? Did you pass out?
>
> A: Yeah. Because I was outside and when I came [to], I was inside in the utility room.
>
> * * *

Q: When you came to, what do you remember?

A: I was hurting right here below my chest. Right here. But I guess that's where he was squeezing me. The first thing that came to my mind was I thought he was squeezing me real tight because that was hurting real bad. And then when like I started coughing and I realized that he had choked me and I . . . said, why did you do that for?

Transcript at 164-65. That evidence that Jones caused Scott to lose consciousness in forcefully removing her from one place to another is sufficient to prove criminal confinement, as a Class B felony. Jones' contention on appeal amounts to a request that we reweigh the evidence, which we will not do.[6]

To prove intimidation, as a Class D felony, the State was required to prove that Jones communicated a threat to commit a forcible felony to Scott with the intent that Scott be placed in fear of retaliation for a prior lawful act or engage in conduct against her will. During trial, Scott testified in relevant part as follows:

A: [Jones and I] were arguing and I asked him to leave. And he said no he wasn't leaving until I go get his prescription and car. And I said no, I'm not doing it.

Q: Did he say anything else?

A: Yes. He said don't think that . . . I won't kill you and your cousin.

Transcript at 172. Thus, the evidence shows that Jones' threat to kill Scott came on the heels of her refusal to pick up his prescription, which is sufficient to prove intimidation, as a Class D felony.

[6] In particular, we reject Jones' characterization of Scott's unconsciousness as "momentary." The evidence shows that Scott was unconscious long enough for Jones to move her from outside to inside the house. And Scott was coughing and experienced pain when she regained consciousness. That evidence satisfies the serious bodily injury prong of the offense.

Still, Jones contends that his "actual words" were "words of anger as part of an argument and were disconnected from a threat for a specific prior act or to get Scott to do something against her will." Brief of Appellant at 46. We cannot agree. Again, Jones' contention on appeal amounts to a request that we reweigh the evidence, which we will not do. The evidence is sufficient to support his intimidation conviction.[7]

Issue Four: Jury Instruction on Serious Bodily Injury

Jones contends that the trial court abused its discretion when it refused to tender his proffered final instruction on the serious bodily injury element of his criminal confinement charge. The manner of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for an abuse of discretion. Mayes v. State, 744 N.E.2d 390, 394 (Ind. Ct. App. 2001). To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. Id. When determining whether a trial court erroneously gave or refused to give a tendered instruction, we consider the following: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. Id.

Jones' proffered instruction stated that "momentary unconsciousness without more does not necessitate a finding of serious bodily injury[,]" quoting from this court's

[7] Jones also contends that the information alleging intimidation was insufficiently specific to put him on notice of the charge against him. The proper method of challenging deficiencies in a charging information is to file a motion to dismiss no later than twenty days before the omnibus date. Higgins v. State, 690 N.E.2d 311, 314 (Ind. Ct. App. 1997). Failure to challenge timely an allegedly defective charging information results in waiver unless fundamental error has occurred. Id. Jones did not timely challenge the information here, nor does he allege fundamental error. The issue is waived.

opinion in Ricks v. State, 446 N.E.2d 648, 650 (Ind. Ct. App. 1983).[8] Transcript at 667. Subsequent cases citing to Ricks have taken that statement to mean that whether bodily injury is "serious" is a matter of degree and therefore a question reserved for the factfinder. See, e.g., Hill v. State, 592 N.E.2d 1229, 1231 (Ind. 1992). While Jones' proffered instruction is taken straight out of Ricks, we think "the law" of that case is more accurately stated in Hill.

Regardless, we cannot say that the evidence clearly supported giving that instruction. Again, the evidence showed that Scott was unconscious during the time it took Jones to move her from outside the house to inside the house. Whether that degree of unconsciousness is enough to satisfy the definition of serious bodily injury is for the factfinder. See Hill, 592 N.E.2d at 1231. Jones' proffered instruction assumes that Scott's unconsciousness was "momentary" and, thus, invades the province of the jury. The trial court did not abuse its discretion when it denied the instruction.[9]

Issue Five: Proffered Evidence

Jones contends that the trial court abused its discretion when it precluded evidence that when Scott saw her physician two days after the choking incident, she did not report any injuries related to that incident. In particular, Jones made an offer of proof whereby Dr. Phil Foley testified that during Scott's visit on June 15, 2005, she did not mention any injuries sustained in the June 13, 2005, incident. Jones sought to present that testimony

[8] We remind Jones' appellate counsel that Indiana Rule of Appellate Procedure 46(A)(e) provides that "[w]hen error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto."

[9] The trial court permitted Jones to quote the language in Ricks during his closing statement.

to the jury to show that "Scott's injuries were not lasting and thus were not serious bodily injuries, as alleged." Brief of Appellant at 38.

A trial court has broad discretion in ruling on the admissibility of evidence. Fentress v. State, 863 N.E.2d 420, 422-23 (Ind. Ct. App. 2007). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. Id. at 423. An abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances. Vandivier v. State, 822 N.E.2d 1047, 1052-53 (Ind. Ct. App. 2005), trans. denied. When reviewing a trial court's decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the trial court's decision. Id. at 1053.

Here, none of the evidence presented showed that the pain Scott experienced from the choking incident lasted for more than one day. Indeed, Scott did not even ask to be taken to the hospital for medical treatment after the police arrived. As such, Dr. Foley's proffered testimony that Scott did not report any injuries two days after the incident was merely cumulative of other evidence. Even assuming error in the preclusion of the evidence, that error was harmless. See Allen v. State, 787 N.E.2d 473, 479 (Ind. Ct. App. 2003) (noting where wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error), trans. denied.

Issue Six: Double Jeopardy

Jones contends that the trial court erred when it reduced his battery conviction to a Class B misdemeanor to avoid violating double jeopardy principles. Jones maintains that the trial court should have reduced his criminal confinement conviction from a Class B

felony to a Class D felony instead. In support of that contention, Jones asserts that the battery caused Scott's injuries, not the criminal confinement.

When two convictions are found to contravene double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. Richardson v. State, 717 N.E.2d 32, 54 (Ind. 1999). Here, the trial court properly eliminated the violation when it reduced Jones' battery conviction to a Class B misdemeanor. Jones' contention on appeal that Scott's bodily injuries did not stem from the criminal confinement is not well taken. Indeed, Scott was unconscious during her removal from outside to inside the house. Jones has not demonstrated any error.

Issue Seven: Prior Bad Acts

Jones contends that the trial court abused its discretion when it admitted into evidence a recording of a 911 telephone call Scott had made in 2003 when Jones forced his way into her house. Again, a trial court has broad discretion in ruling on the admissibility of evidence. Fentress, 863 N.E.2d at 422-23. Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. Id. at 423. An abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances. Vandivier, 822 N.E.2d at 1052-53. When reviewing a trial court's decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the trial court's decision. Id. at 1053.

Jones maintains that the 911 tape violates Indiana Rule of Evidence 404(b), which prohibits evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. Such evidence may be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id. The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. Rhodes v. State, 771 N.E.2d 1246, 1251 (Ind. Ct. App. 2002), trans. denied.

This court has held that evidence of prior physical altercations between parties is admissible to prove lack of mistake or accident. Goldsberry v. State, 821 N.E.2d 447, 456 (Ind. Ct. App. 2005) (citing Iqbal v. State, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004)). In Iqbal, we observed, "[n]umerous cases have held that where a relationship between parties is characterized by frequent conflict, evidence of the defendant's prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for committing the crime." 805 N.E.2d at 408. Further, we held that evidence of prior bad acts showing the nature of the relationship between a defendant and his victim is relevant even where the defendant does not specifically advance a contrary defense. See id. at 408. Here, after Scott testified on cross-examination that she continued to spend time with Jones after the June 13, 2005, incident, the State sought to introduce the 911 tape to show that their relationship was rife with conflict. We hold that that evidence was relevant. See id.

And applying the balancing test under Indiana Evidence Rule 403, we hold that the probative value of the evidence outweighs the prejudicial effect. The evidence regarding the nature of Scott's relationship with Jones created some confusion among the jurors, two of whom submitted questions wanting to know why Scott stayed in the relationship. The trial court observed that the jurors "were very eager to ask the question by the waving of their hands and so forth[.]" Transcript at 401. So the 911 tape was probative. And the prejudicial impact could not have been that great given the other evidence of Jones' prior bad acts against Scott, such as trying to talk her out of testifying against him at trial, and the other evidence corroborating Scott's testimony. See Goldsberry, 821 N.E.2d at 456 (holding evidence of prior bad acts admissible under Rule 403 where defendant claimed self-defense and given physical evidence of defendant's guilt). The trial court did not abuse its discretion when it admitted into evidence the 911 tape.

Issue Eight: Jury Instruction on Removal

Jones next contends that the trial court erred when it instructed the jury that "'[d]ragging' a victim from one place to another may be sufficient to establish the element of removal." Appellant's App. at 333. Generally, the manner of instructing a jury lies within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. Powell v. State, 769 N.E.2d 1128, 1132 (Ind. 2002). Here, however, the record does not demonstrate that Jones objected to the challenged jury instruction or tendered his own instruction.[10] A defendant waives a claim

[10] In his Reply Brief, Jones "submits he did not agree to the instruction." Reply Brief at 15. But he does not direct us to any portion of the record on appeal showing that he objected to the instruction.

of error in instructing the jury if he fails to object and tender a competing instruction at trial, unless the error constitutes fundamental error. Wrinkles v. State, 690 N.E.2d 1156, 1171 (Ind. 1997), cert. denied, 525 U.S. 861 (1998). Jones does not allege fundamental error. The issue is waived.

Issue Nine: Sentence

Finally, Jones contends that his sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 142 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Here, Jones' sole argument is that the nature of the offenses do not justify the forty-five-year sentence. In particular, he avers that Scott's injuries were insignificant. But Jones strangled Scott and rendered her unconscious. In addition, Jones threatened to kill Scott after she refused to run an errand for him. We cannot agree with Jones'

characterization of the nature of the offenses. Further, Jones makes no attempt to argue his good character. Indeed, his criminal history dates back to 1978 and includes eleven felony convictions and ten misdemeanor convictions. That criminal history, without more, justifies the aggregate forty-five-year sentence. Jones has not demonstrated that the sentence is inappropriate in light of the nature of the offenses and his character.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.