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IN THE
COURT OF APPEALS OF INDIANA

JAMES HIBBARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0605-CR-384
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Judge Pro Tempore
Cause No. 49G01-0511-FB-200340

December 5, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

James Nathan Hibbard appeals his conviction for invasion of privacy and the imposition of consecutive sentences for attempted rape, criminal deviate conduct and invasion of privacy.

We affirm.

ISSUES

1. Whether the trial court erred in denying Hibbard's motion for a directed verdict upon the invasion of privacy charge.

2. Whether the sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On July 18, 2005, the Marion Superior Court issued an ex parte order for protection on behalf of B.H. and against Hibbard. The order enjoined Hibbard from threatening to commit or committing acts of violence against B.H, prohibited Hibbard from harassing, annoying, telephoning, contacting or communicating with B.H., and ordered Hibbard to stay away from B.H.'s residence. Despite the protective order, B.H. allowed Hibbard to see her children "because he [wa]s their uncle." (Tr. 135).

On November 19, 2005, Terri Brunning went to B.H.'s house to visit B.H.'s children, who were Brunning's niece and nephew.[1] While Terri was waiting for B.H. to

[1] The children's father was Terri's deceased brother.

come home, Hibbard and Richard "Richie" Chandler arrived at the house.[2] Although B.H. was not home, Hibbard and Richie went in the house and Terri followed.

Subsequently, B.H., her six-year-old son and Kimberly Vaught, B.H.'s roommate, arrived home. When B.H. walked in the house, she saw Hibbard and asked him, "'What the hell are you doing here?'" (Tr. 48). B.H. was "surprised" to see Hibbard because she had a protective order against him. (Tr. 73). B.H. "asked [Hibbard] to leave and he said no." (Tr. 142). Hibbard told B.H. that he did not "care about a restraining order." (Tr. 93).

Hibbard started walking toward B.H. and when he got close to her, grabbed her "in a bear hug," preventing her from moving. (Tr. 77). Hibbard tried to kiss B.H., but she turned her head and told him "that he needed to leave." (Tr. 78). Hibbard then shoved B.H. against the kitchen counter and started grabbing her buttocks, breasts and crotch. Hibbard then "wrapped his arms around [B.H.] and proceeded to push [her]" into the bathroom. (Tr. 82). Hibbard "slammed [B.H.] up on the bathroom sink," and "was trying to hold [her] arms down, and with the other hand, trying to pull [her] pants down." (Tr. 82-83). Hibbard "was trying to kiss [B.H]" and "at one point he pulled his penis out and was trying to pull the front of [B.H.'s] pants down." (Tr. 83). Hibbard "tried to put his penis in [B.H.'s] vagina," despite B.H. "fighting him . . . telling him no" and "[p]lease don't do this." (Tr. 84). Hibbard also "[p]ushed [B.H.'s] head . . . [t]owards his penis." (Tr. 95). Hibbard then "turned [her] around and laid [her] face down, slammed [her] face

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[2] Hibbard, Terri and Richie were cousins. At some point between July and November of 2005, Hibbard married a cousin of B.H.

down on the sink, and put [her] arms behind [her] back," twisting her wrists. (Tr. 84). Hibbard then "stuck . . . his finger . . . in [B.H.'s] vagina, . . . moving it in and out," which hurt B.H. (Tr. 85-86). Hibbard then "stuck his finger . . . in [B.H.'s] butt, . . . moving it in and out really fast, really hard," which hurt "a lot." (Tr. 86).

B.H.'s son then tried to open the bathroom door, saying, "I want mommy. I want mommy." (Tr. 89). Hibbard told him they would "be out in a minute . . . ." (Tr. 89). B.H. "tried to drop . . . down again to stay on the floor," but Hibbard "picked [her] up and put [her] over the bathtub," with her knees on the floor. (Tr. 89). Hibbard "tried sticking his fingers in [B.H.'s] vagina again" and penetrated B.H.'s vagina with "just the . . . head" of his penis. (Tr. 91). Hibbard again "put [B.H.] back up on the sink, and was holding [her] arms back" when B.H. heard her son "screaming . . . Nate's hurting my mommy, Uncle Nate's hurting my mommy, I want my mommy." (Tr. 91-92).

Terri heard B.H.'s son "yelling, 'Uncle Nate, let my mommy up,'" and "'Uncle Nate, let my mommy out of the bathroom.'" (Tr. 51). Terri then told Kimberly that "something [wa]s going on in the bathroom," and Kimberly went to find out what was happening. (Tr. 54). When Kimberly got to the bathroom, she heard B.H. screaming. Kimberly opened the bathroom door and said she needed to use the bathroom, giving B.H. time to "pull [her] pants back up" and shove Hibbard out of the bathroom. (Tr. 92). B.H. told Hibbard to "leave now." (Tr. 92). Hibbard "went out [the] back door," but when B.H. tried to shut the door, Hibbard grabbed her arm and took her to a shed in the back yard. Hibbard "shoved [B.H.] on to [a] chair" and tried to kiss her. (Tr. 98). Richie then came to the back door and asked whether B.H. was okay. Hibbard "put his hand on

[B.H.'s] throat . . . tight" and told her to tell Richie she was okay or he would "F'in' choke [her]." (Tr. 99, 100). After Richie yelled at Hibbard to leave, Hibbard "went to chase Richie." (Tr. 101). Afraid that Hibbard was going to go back in the house, B.H. "got in between them and pushed [Hibbard] back and [she] ran in the house and shut the door . . . ." (Tr. 101). B.H. then locked all the doors and telephoned the police.

The State charged Hibbard with Count I, attempted rape as a class B felony, Count II, criminal deviate conduct as a class B felony, Count III, criminal deviate conduct as a class B felony, Count IV, sexual battery as a class D felony, Count V, criminal confinement as a class D felony, Count VI, residential entry, a class D felony, Count VII, intimidation as a class A misdemeanor, and Count VIII, invasion of privacy as a class A misdemeanor. The trial court held a jury trial on March 20-21, 2006. At the conclusion of the State's case-in-chief, Hibbard moved for a directed verdict upon Count VI, residential entry, and Count VIII, invasion of privacy. The trial court granted a directed verdict as to Count VI but denied it as to Count VIII. The jury found Hibbard guilty of all remaining counts.

The trial court ordered a pre-sentence investigation report ("PSI"). According to the PSI, Hibbard had convictions for the following: 1) possession of marijuana as a class A misdemeanor in 1996; 2) residential entry as a class A misdemeanor in 1998; 3) operating a vehicle while intoxicated as a class A misdemeanor in 1999; 4) operating a vehicle while intoxicated causing death as a class B felony in 2001; and 5) failure to stop at an accident resulting in damage as a class B misdemeanor in 2005. Also according to

the PSI, Hibbard was on probation when he committed the current offenses and two prior probations had been revoked in 1999 and 2001.

During the sentencing hearing on April 12, 2006, the trial court found the following:

> I find as aggravating that you have a history of criminal or delinquent activity . . . . I find as aggravating that your Probation was revoked two times in the past . . . . I would note that you . . . were on probation . . . at the time you committed this crime. I also note . . . that you continue[d] drinking even after being convicted and serving a sentence for killing someone, because of your alcohol use. So, I don't find it at all mitigating that most of your criminal history is because of your drinking . . . . I find no mitigating circumstances . . . . I find the aggravating circumstances outweigh the mitigation . . . .

(Tr. 425-26). The trial court merged Count V with Count I and sentenced Hibbard to twenty years on Count I, ten years on Count II, ten years on Count III, two years on Count IV, one year on Count VII, and one year on Count VIII. The trial court ordered that the sentences on Counts I, II and VIII be served consecutively and the remaining sentences be served concurrent with Counts I, II and VIII. Thus, Hibbard received a total executed sentence of thirty-one years.

DECISION

1. Directed Verdict

Hibbard asserts that the trial court erred in denying his motion for a directed verdict upon the invasion of privacy charge. The denial of a motion for a directed verdict cannot be in error if the evidence is sufficient to support a conviction on appeal. *Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). Our standard of review for sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the

credibility of witnesses. *Snyder v. State*, 655 N.E.2d 1238, 1240 (Ind. Ct. App. 1995). We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom, and if there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id.*

Hibbard argues that the State failed to prove the elements of invasion of privacy under Indiana Code section 35-46-1-15.1, which provides that a person who knowingly or intentionally violates a protective order or ex parte protective order commits invasion of privacy. Specifically, Hibbard maintains that the State did not demonstrate that he had notice of the protective order.

Officer Tiffany Woods, a detective with the Indianapolis Police Department, testified that while investigating the events of November 19, 2005, she confirmed that the protective order had been served. Furthermore, both B.H. and Kimberly testified that when B.H. first encountered Hibbard, he told her that he did not care about the restraining order.

We find the evidence is sufficient for the trial court to have denied the motion for a directed verdict and permitted the jury to decide whether Hibbard knowingly violated a protective order. Hibbard's argument to the contrary amounts to an invitation to reweigh the evidence, which we will not do. Because we find the evidence sufficient to support Hibbard's conviction, we find that the trial court did not err in denying his motion for a directed verdict.

Hibbard also contends that B.H.'s behavior—allowing Hibbard to visit her children—was inconsistent with the protective order. He therefore maintains that he

could not have "know[n] what restrictions [were] upon him . . . when the behavior of [B.H.] demonstrate[d] a willingness to disregard those restrictions." Hibbard's Br. 7. We disagree.

Officer Woods testified that Hibbard had been served with the protective order, which enjoined him from "committing acts of domestic or family violence, stalking, or a sex offense against" B.H. (State's Ex. 1). Thus, Hibbard knew the restrictions upon him. Furthermore, Indiana Code section 34-26-5-11 provides that "[i]f a respondent is excluded from the residence of a petitioner or ordered to stay away from a petitioner, an invitation by the petitioner to do so does not waive or nullify an order for protection." Thus, we find Hibbard's argument is without merit.

2. Sentence

Hibbard next asserts that the imposition of consecutive sentences is inappropriate pursuant to Indiana Appellate Rule 7(B). Hibbard requests that we impose an executed sentence of twenty years.

We review a trial court's sentencing decision for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied*, *cert. denied*, No. 06-248, 2006 WL 2415754 (Oct. 30, 2006). "The trial court's sentencing discretion includes determining whether to increase the sentence, to impose consecutive sentences on multiple convictions, or both." *Id.* The trial court must find at least one aggravating circumstance before imposing consecutive sentences. *Id.* "If a trial court imposes consecutive sentences, when not required to do so by statute, this court will examine the record to insure that the trial court adequately explained its reasons for selecting the

sentence imposed." *Id.* "Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender." *Gornick v. State*, 832 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), *trans. denied*.

In this case, the trial court found Hibbard's extensive criminal history, his past probation violations and the fact that he was on probation when he committed the current offenses to be aggravating circumstances. We agree and find no abuse of discretion in imposing consecutive sentences.

As to Hibbard's character, he had several prior convictions. As to the nature of the offense, Hibbard brutally attacked B.H. in her home, with her six-year-old son present. Accordingly, we find that Hibbard's sentence is not inappropriate.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.