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IN THE
COURT OF APPEALS OF INDIANA

ADRIAN LOTAKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0604-CR-145
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0509-FB-00123

November 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Adrian Lotaki appeals his conviction for criminal deviate conduct and his seventeen-year cumulative sentence for that conviction and his conviction for residential entry. Finding that there is sufficient evidence to support Lotaki's conviction for criminal deviate conduct and that Lotaki's sentence is not inappropriate, we affirm the judgment of the trial court.

Facts and Procedural History

Lotaki has lived with K.C. in the past and is the father of K.C.'s two-year-old daughter. In the early morning hours of September 18, 2005, Lotaki and a friend went to K.C.'s apartment, where K.C. and her daughter were sleeping. Lotaki knocked on the door but there was no response, so he forced the locked door open to enter the apartment. Lotaki went to K.C.'s bedroom, woke her up, and told her that he had kicked the door open. After inspecting the door, K.C. asked Lotaki to leave but he insisted on staying there with his friend. K.C. acquiesced, and when she went to her bedroom, Lotaki followed her.

Once in the bedroom, Lotaki pushed K.C. onto the bed and demanded anal sex. K.C. cried and pled with Lotaki to stop, but he did not. Rather, he called her names and threatened to hit or kill her if she refused. According to K.C., Lotaki has hit and threatened her many times in the past. As such, she complied with Lotaki's demand. Lotaki forced K.C. to have both vaginal and anal sex with him. Afterwards, K.C. lay in bed and pretended to be asleep until Lotaki fell asleep, and then she took some clothes and her daughter and went to her mother's house.

K.C. then went to the hospital to be examined. Elizabeth Simeri ("Simeri"), a certified sexual assault nurse examiner, examined her. According to Simeri, K.C.'s demeanor when she arrived at the hospital was consistent with that of a victim of a sexual assault. Simeri also discovered that K.C. was bleeding from the anus, which is consistent with anal intercourse. At the hospital, K.C. reported the incident to police, who then went to K.C.'s apartment and arrested Lotaki, whom they found sleeping naked in K.C.'s bed.

The State charged Lotaki with criminal deviate conduct as a Class B felony[1] and residential entry, a Class D felony.[2] At trial, Lotaki admitted that he had anal intercourse with K.C. but claimed that it was consensual. The State also introduced into evidence a letter that Lotaki sent while in jail to the friend who had been at K.C.'s apartment with him. Lotaki wrote, in pertinent part:

> Bad news. This B**** is really going to testify. Peep game, I wrote a letter to the b**** and told her I ain't gone be mad at her if she call the prosicutor and say she want to drop the charges. She's a grimy b**** so I had my sister read it to her. I guess the b**** done talk to the prosicutor and said she'll be there. All I can say is she better pray to god I get convicted and they give me life. Cause you know I do this little ten years, its on! I might even get less, thats the max. F*** it, pull the Gijad cuz whack her. Nah I'm just f***** with you. But on the real you should call Jenny and tell her to take care of it [] you know pop up at her work sit at her table give her a firm warning, s*** like that. See I know if I was out on bond this s*** would not be going down.

State's Ex. 26 (multiple misspellings in original). Lotaki also suggested to his friend what to say in court if called to testify. *Id.*

[1] Ind. Code § 35-42-4-2.

[2] Ind. Code § 35-43-2-1.5.

The jury found Lotaki guilty as charged. In sentencing Lotaki, the trial court identified Lotaki's criminal history as an aggravating circumstance but found no mitigating circumstances. The court sentenced Lotaki to fifteen years for the Class B felony criminal deviate conduct conviction and two years for the Class D felony residential entry conviction. Citing the sole aggravator, the trial court ordered that the sentences be served consecutively, for a total executed sentence of seventeen years with credit for 115 days served. Lotaki now appeals.

Discussion and Decision

On appeal, Lotaki raises two issues. He contends that the evidence is insufficient to support his conviction for criminal deviate conduct. He also argues that the trial court imposed an inappropriate sentence. We address each issue in turn.

I. Sufficiency of the Evidence

Lotaki first claims that the evidence presented at trial is insufficient to support his conviction for criminal deviate conduct. "Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects the jury's exclusive province to weigh conflicting evidence." *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (internal quotations omitted). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* In order to prove that Lotaki committed criminal deviate conduct as charged in the information, the State was

required to prove that Lotaki knowingly caused K.C. to submit to anal intercourse by using force or the threat of force. Appellant's App. p. 24; *see also* Ind. Code § 35-42-4-2. Lotaki argues that the State failed to do this. We cannot agree.

K.C. testified that when she told Lotaki to stop, Lotaki told her "to shut up and if [she] didn't shut up he was going to hit [her]." Tr. p. 276. K.C. also testified that Lotaki said he would hit her or kill her if she did not keep quiet. *Id*. at 277. In addition, Simeri, the nurse examiner, testified that K.C.'s demeanor after the incident was consistent with that of a victim of a sexual assault. Despite this testimony, Lotaki urges that "he believed the act was consensual." Appellant's App. p. 7. Essentially, Lotaki asks that we believe him instead of K.C. and Simeri. It is the jury's province, not ours, to determine the credibility of witnesses and weigh conflicting evidence. *McHenry*, 820 N.E.2d at 126. Simeri's testimony notwithstanding, the uncorroborated testimony of the victim is sufficient to sustain a criminal conviction. *Johnson v. State*, 837 N.E.2d 209, 214 (Ind. Ct. App. 2005), *trans. denied*. There is sufficient evidence to support Lotaki's conviction for criminal deviate conduct, and we will not reweigh that evidence.

II. Sentence

Lotaki also contends that his sentence is inappropriate in light of the nature of his offenses and his character. Indiana Rule of Appellate Procedure 7(B) states: "The Court may revise a sentence 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 appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the

trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*. After due consideration of the trial court's decision, we cannot say that Lotaki's sentence is inappropriate.

Regarding the nature of his offenses, we note that the facts of this case are particularly disturbing. In the middle of the night, Lotaki went to K.C.'s apartment, where he knew K.C. and their two-year-old daughter were sleeping, kicked down the door, and then forced K.C. to submit to anal sex by threatening to hit or kill her if she did not. We add that Lotaki should have known that his threats would be effective given his previous violence toward K.C.

As to Lotaki's character, we first note that his criminal history is significant. The trial court cited Lotaki's juvenile adjudications for battery and two counts of intimidation (Class D felonies if committed by an adult), as well as the fact that he failed house arrest following those adjudications. As an adult, Lotaki committed battery as a Class A misdemeanor on two separate occasions in 2002. In 2003, he committed theft, a Class D felony, then violated the terms of his placement with Riverside Community Corrections. Most relevant for our purposes, in 2004, Lotaki was convicted of Class A misdemeanor domestic battery after an attack on K.C. Finally, later in 2004, Lotaki was convicted of criminal trespass as a Class A misdemeanor. Lotaki's juvenile adjudications for battery and two counts of intimidation and his adult convictions for two counts of battery and one count of domestic battery involving K.C. bear a close relation to his instant

conviction for criminal deviate conduct, and his adult convictions for theft and criminal trespass, like his instant conviction for residential entry, evidence a lack of respect for the property of others. Despite his repeated run-ins with the law, Lotaki has not been deterred from criminal conduct. Also highly relevant to Lotaki's character is the letter he penned while in jail, in which he wrote, "All I can say is she better pray to god I get convicted and they give me life. Cause you know I do this little ten years, its on!" State's Ex. 26.

Lotaki also argues that his sentence is inappropriate because of his young age. He was twenty-two when he committed the instant offenses. Initially, we note that because Lotaki never made this claim to the trial court, he has waived it for purposes of appellate review. *See Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) ("A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal."). Waiver notwithstanding, Lotaki's argument still fails. As the Indiana Supreme Court has stated, "There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000); *see also Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999) ("At eighteen, [defendant] is beyond the age at which the law commands special treatment by virtue of youth."). Though Lotaki was relatively young at the time of the instant offenses, his sentence is not inappropriate in light of his significant criminal history, detailed above.

Finally, Lotaki claims that the trial court abused its discretion in ordering consecutive sentences. The determination of whether to impose consecutive or

concurrent sentences is entirely at the discretion of the trial judge so long as the trial court does not exceed the combined statutory maximums. *Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006). In support of his argument, Lotaki refers us to this Court's decision in *Kien v. State*, 782 N.E.2d 398 (Ind. Ct. App. 2003), *reh'g denied*, *trans. denied*. In that case, we held that it was inappropriate to order consecutive sentences for two convictions of child molesting by sexual intercourse because the evidence was "subject to an inference that the acts may have taken place in close proximity in time." *Id*. at 416. Lotaki apparently contends that because his two offenses were "related in time and place," Appellant's Br. p. 13, the sentences should not run consecutively. However, *Kien* does not stand for the proposition that sentences for offenses that take place in close proximity in time *must* run concurrently. Rather, the Court in *Kien* found consecutive sentences inappropriate because of the relationship between the two offenses—both sex acts with the same victim. Here, Lotaki committed two very distinct crimes—one against property, one against a person. The trial court did not abuse its discretion in ordering consecutive sentences.

Lotaki has failed to persuade us that his seventeen-year sentence is inappropriate.

Affirmed.

BAKER, J., and CRONE, J., concur.