MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Dennis M. Toops,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 6, 2022

Court of Appeals Case No. 21A-CR-1348

Appeal from the Cass Circuit Court

The Honorable Stephen R. Kitts, II, Judge

Trial Court Cause No. 09C01-1903-F3-7

Najam, Judge.

Statement of the Case

[1] Dennis M. Toops appeals his convictions for attempted rape, as a Level 3 felony, and criminal confinement, as a Level 4 felony. Toops raises two issues for our review, which we restate as the following three issues:

1. Whether the State presented sufficient evidence to support Toops' conviction for Level 3 felony attempted rape.

2. Whether Toops' conviction for Level 4 felony criminal confinement, a crime that did not exist at the time he committed the offenses here, must be reduced to Level 5 felony criminal confinement.

3. Whether the trial court abused its discretion when it sentenced Toops.

[2] We affirm Toops' conviction for attempted rape and his sentence for that conviction, but we reverse his conviction for Level 4 felony criminal confinement and remand with instructions to reduce that conviction to a Level 5 felony and resentence Toops accordingly. On remand, the trial court is also directed to vacate Toops' conviction for Level 6 felony domestic battery.[1]

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[1] The trial court entered judgment of conviction against Toops for domestic battery, as a Level 6 felony. However, at sentencing the court stated that that conviction "merge[d]" with Toops' conviction for criminal confinement. Tr. Vol. 3 p. 163. The trial court did not further explain its rationale for the "merge[r]" of the two convictions, but the court did not impose any sentence on the domestic battery conviction.

We have consistently instructed our trial courts that, if they enter a judgment of conviction on a jury's guilty verdict for multiple offenses, "then simply merging the offenses" at sentencing "is insufficient" and vacating the lesser offense "is required" in order to remedy any double jeopardy concerns. *Kovats v. State*, 982 N.E.2d

Facts and Procedural History[2]

[3] In the late evening of March 17, 2019, K.J. drove to Toops' house. Toops was K.J.'s boyfriend, and Toops' minor daughter, A.T., was asleep in her upstairs room when K.J. arrived. When K.J. entered the house, she observed that Toops was "drunk" and "slurring his words" and "[r]anting about things." Tr. Vol. 2 at 27.

[4] As the evening wore on, Toops "progressively just kept getting more angry." *Id.* at 28. K.J. said she "was going to leave," and Toops responded, "what are [you] going to do, drive up around the corner and go to Ronnie Lowe's house?" *Id.* at 29. Ronnie Lowe was a mutual male friend. Toops had accused K.J. of infidelity in the past. To prove she was not cheating on him, K.J. stayed with Toops. Sometime thereafter, the two went to bed and had consensual sex.

[5] Later, K.J. awoke in Toops' bed to Toops "trying to shove [her] head down onto his penis." *Id.* at 34. K.J. said, "[p]lease don't do this" and "please stop." *Id.* at 35. Toops then "spun [K.J.] around to where he was standing up" by the bed and "started slapping" K.J. *Id.* She repeated her request that he "please

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409, 414-15 (Ind. Ct. App. 2013). We surmise—as does the State, *see* Appellee's Br. at 6—that the trial court's purported "merge[r]" here was based on double jeopardy concerns as the court did not enter any sentence at all on the domestic battery conviction. We therefore remand this issue to the trial court with instructions that it vacate Toops' conviction for domestic battery, as a Level 6 felony.

[2] Toops has filed three versions of an Appellant's Appendix, yet he has not specified in his briefing which version he relies on. Unless otherwise stated in this decision, our references are to his last-filed (February 2022) version.

stop." *Id.* at 36. Toops "hit [her] again" and tried to get on top of her, but K.J. "rolled off the end of the bed to get away from him." *Id.* at 37.

[6] K.J. tried to put on her clothes, but Toops "lunged across the bed at" her, and she "ran to the front door and . . . tried to get out." *Id.* But she was able to open the front door "[o]nly part way" before Toops came up behind her and "slammed the door closed so [she] couldn't get out." *Id.* at 37-38. Toops then turned K.J. around to face him. He hit her "all over [her] body," both slapping her and "kneeing" her. *Id.* at 38-39. K.J. again asked Toops to "please stop. Your daughter's upstairs." *Id.* at 40. Toops did not stop, however. K.J. twice yelled for A.T., but A.T. did not respond. *Id.*

[7] After K.J. yelled for A.T., Toops "punched [K.J.] in [her] face." *Id.* at 42. The punch "broke [K.J.'s] nose," which "started bleeding instantly." *Id.* Toops then started "flipping [K.J.] off" and saying, "f*** you, what are [you] going to do, go to Ronnie's house[?]" *Id.* The "whole time that he's doing these things," Toops is also "slapping [K.J.]," "hitting" her, "kneeing" her, "biting" her, and "choking" her. *Id.*

[8] Meanwhile, K.J. was trying to catch the blood from her nose in her hands, and Toops eventually told her to go to the bathroom. There, Toops continued verbally and physically attacking K.J. He punched her in the stomach and "knocked the wind out of [her]." *Id.* He grabbed her by the throat and held her "against the wall." *Id.* at 46. When he let her go, she "ran into the laundry room," which was adjacent to the bathroom. *Id.* at 47. Toops followed her, and

she ran back into the bathroom and grabbed a hold of the towel rack. Toops grabbed K.J. by her hair and pulled her backwards, and as she was falling back the towel rack came off the wall and K.J. swung it backwards over her head at Toops. He then knocked her down on the floor on her hands and knees and placed "his weight on [her] so [she] can't get up." *Id.* at 49. Toops then "shove[d K.J.'s] head in the floor" and attempted to penetrate her anus with his penis. K.J. said, "please don't. Out of everything you've done tonight, please don't do this." *Id.* at 51. Toops responded, "you'll either get this . . . or I'm going to punch you in the face." *Id.* K.J. then said, "you could at least go to the bedroom and get the lube so it doesn't hurt." *Id.* at 52. Toops then left K.J. and went to the bedroom. Once he left K.J. alone, she fled the house, got to her car, and drove to the Cass County Sheriff's Department. *Id.* at 54.

[9] At the Sheriff's Department, Deputy Nicholas Bowyer observed K.J. in the parking lot in her vehicle nearly completely naked. He observed markings around her neck and red spots in her eyes, which he believed to be evidence of possible strangulation. Deputy Bowyer obtained clothing for K.J. and had her transported to the emergency room at Logansport Memorial Hospital. There, Dr. Dori Ditty examined K.J. and observed "dried blood all over her face, on her extremities. She had evidence of bruising, swelling to her eyelid, swelling to her nose, deformity to her nose." *Id.* at 128. Dr. Ditty ordered a CAT scan, the results of which showed that K.J. had a broken nose. A test of DNA collected from K.J.'s anus revealed the presence of male DNA, and a test of DNA collected off of her back revealed DNA that was "17 billion times more likely"

to have come from K.J. and Toops than from K.J. and another person. *Id.* at 177.

[10] On March 18, the State charged Toops with rape, as a Level 3 felony; criminal confinement, as a Level 3 felony; and domestic battery, as a Level 5 felony. The State later amended the rape allegation to attempted rape, as a Level 1 felony.

[11] In May 2021, the court held Toops' jury trial. K.J. testified against him. Deputy Bowyer and Dr. Ditty also testified. A.T. testified that she did not hear anything unusual on the night in question. And Toops testified that he and K.J. had had consensual sex and then a disagreement that got physical before the two agreed to "get intimate again," at which point K.J. left. Tr. Vol. 3 at 38. At the conclusion of the trial, the jury found Toops guilty of attempted rape, as a Level 3 felony; criminal confinement, as a Level 4 felony; and domestic battery, as a Level 6 felony.

[12] Following a sentencing hearing, the trial court found "the harm suffered by the victim," that the evidence was "greater than the elements necessary to prove the commission of the offense," Toops' criminal history, and the commission of the offense in the presence of a minor as aggravating circumstances. *Id.* at 162. As mitigating circumstances, the court found that Toops was "likely to respond affirmatively to probation," that Toops' imprisonment would result in a hardship to A.T., Toops' "family history," and "the remoteness of the prior history." *Id.* The court then sentenced Toops to an aggregate term of fourteen years, with two years suspended to probation. This appeal ensued.

Discussion and Decision

Issue One: Sufficiency of the Evidence for Attempted Rape

[13] On appeal, Toops first asserts that the State failed to present sufficient evidence that he committed attempted rape, as a Level 3 felony. For sufficiency-of-the-evidence challenges, we consider only probative evidence and reasonable inferences therefrom that support the judgment of the trier of fact. *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). We will neither reweigh evidence nor judge witness credibility. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* To show that Toops committed attempted rape, as a Level 3 felony, the State was required to show beyond a reasonable doubt that Toops knowingly or intentionally attempted to cause K.J. to perform or submit to other sexual conduct (i.e., oral or anal sex) when K.J. was compelled by force or imminent threat of force. *See* Ind. Code § 35-42-4-1(a)(1) (2018).

[14] According to Toops, "there was an abundance of causes for reasonable doubt." Appellant's Br. at 7. In particular, Toops relies on substantial excerpts from his own trial testimony as well as A.T.'s testimony that she heard nothing unusual on the night in question. Emphasizing his own evidence, Toops then asserts that the jury's conclusions to the contrary are based only on speculation.

[15] Toops' argument on appeal is merely a request for this Court to reweigh the evidence, which we will not do. K.J. testified at length and in detail about Toops' physical and verbal attack on her that night. Her version of events was

corroborated at least in part by the testimony of Deputy Bowyer and the testimony of Dr. Ditty. Her testimony was also corroborated by a test of DNA collected from K.J.'s anus and back shortly after the attempted rape; the test of the anal swab showed the presence of male DNA, and the test of the back swab showed a substantial probability of Toops' DNA. Further, it is well established that "the uncorroborated testimony of the victim is sufficient to sustain a conviction." *Smith v. State*, 163 N.E.3d 925, 929 (Ind. Ct. App. 2021).

[16] The State presented sufficient evidence to support Toops' conviction for Level 3 felony attempted rape, and we will not reweigh that evidence. We affirm his conviction.

Issue Two: Level 4 Felony Criminal Confinement

[17] Toops also asserts that the State presented insufficient evidence to support his conviction for Level 4 felony criminal confinement. We agree with Toops that this conviction must be reversed, although we cannot agree with Toops' reasoning.

[18] Here, the date of the charged offenses is March 17 or 18, 2019. At that time, Indiana Code section 35-42-3-3 (2018) provided in relevant part as follows:

> (a) A person who knowingly or intentionally confines another person without the other person's consent commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Level 6 felony.
>
> (b) The offense of criminal confinement defined in subsection (a) is:

(1) a Level 5 felony if:

> (A) the person confined is less than fourteen (14) years of age and is not the confining person's child;
>
> (B) it is committed by using a vehicle; or
>
> (C) *it results in bodily injury to a person other than the confining person*;

(2) a Level 3 felony if it:

> (A) is committed while armed with a deadly weapon;
>
> (B) *results in serious bodily injury to a person other than the confining person*; or
>
> (C) is committed on an aircraft . . . .

(Emphases added.) The State charged Toops for Level 3 felony criminal confinement under section 35-42-3-3(b)(2)(B). *See* Appellant's App. Vol. 2 at 30, 168.

[19] Following Toops' commission of the offenses, effective July 1, 2019, our General Assembly amended section 35-42-3-3. Pub. L. 40-2019 § 11 (eff. July 1, 2019) ("the 2019 amendment"). The 2019 amendment added a Level 4 felony offense that did not previously exist, namely, that criminal confinement is elevated from a Level 6 felony to "a Level 4 felony if it results in moderate

bodily injury to a person other than the confining person." Ind. Code § 35-42-3-3(b)(2) (2019).

[20] The jury found Toops not guilty of the charged Level 3 felony but instead guilty of the Level 4 felony created by the 2019 amendment. Although not challenged by Toops on appeal, "[i]t is beyond dispute that penal statutes in effect at the time of an offense are controlling." *M.H. v. State*, ___ N.E.3d ___, 2022 WL 729088, at *4 (Ind. Ct. App. Mar. 11, 2022) (citing *Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996) ("One of our well established rules of criminal law is that the controlling law is that which is in effect at the time the crime is committed.")), *trans. pending*. To retroactively apply the 2019 amendment here "would imperil [the defendant's] right to be free from *ex post facto* laws." *Id.*; *see also Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). Accordingly, Toops' conviction for Level 4 felony criminal confinement, an offense that only existed after the date of Toops' crimes, cannot stand.

[21] Looking instead to the statute in effect at the time of Toops' crimes, it is clear that the jury rejected the State's evidence of the "serious bodily injury" required for the charged Level 3 felony under section 35-42-3-3(b)(2)(B) (2018). But it is equally clear that the jury found as a matter of fact that the State presented some evidence of bodily injury, as the jury could not have found Toops guilty of the erroneous Level 4 felony otherwise. *See* I.C. § 35-42-3-3(b)(2) (2019) (requiring the evidence to show "moderate bodily injury"). Thus, we conclude that the facts found by the jury, as applied to the statute in effect at the time of Toops offenses, requires reducing his conviction from the charged Level 3

felony to a Level 5 felony. Again, under the proper version of the statute, the offense of criminal confinement is a Level 5 felony, as relevant here, if the offense "results in bodily injury to a person other than the confining person." I.C. § 35-42-3-3(b)(1)(C) (2018). And the Level 5 felony offense is plainly a lesser-included offense to the charged Level 3 felony offense on these facts.

[22] Thus, we now turn to Toops' sufficiency argument for this issue. In his argument, Toops asserts that the State failed to show that K.J.'s injuries occurred as "a result of an act in furtherance of criminal confinement." Appellant's Br. at 15. The State concedes that it was "required to show . . . that the injuries K.J. sustained" were "in furtherance of her confinement or occurred during the course . . . thereof" but asserts that it met that burden. Appellee's Br. at 24-25. We agree with the State.

[23] K.J. testified that, as she initially attempted to flee Toops' residence out of the front door, he came up behind her, slammed the door shut, turned her around, and held her against the door by her throat. He then proceeded to repeatedly strike her, both with his hand and with his knee, and he punched her in the face, breaking her nose. Although additional evidence might also have supported Level 5 felony criminal confinement, we agree with the State that that evidence by itself was sufficient to prove the offense.

[24] In sum, we reverse Toops' conviction for Level 4 felony criminal confinement, as that offense did not exist at the time of Toops' crimes. Considering the jury's verdict as applied to the criminal confinement statute in effect at the time of the

offenses, we conclude that the jury's verdict must be reduced to a Level 5 felony offense. And considering Toops' sufficiency argument for the Level 5 felony offense, we conclude that the State presented sufficient evidence to support that conviction.

Issue Three: Sentencing

[25] Last, Toops asserts that the trial court abused its discretion when it sentenced him.[3] We initially note that the trial court ordered Toops' sentence for his criminal confinement conviction to run concurrent with his sentence for attempted rape. Therefore, our reduction of his criminal confinement conviction to a Level 5 felony in Issue Two above does not affect Toops' aggregate sentence or his argument that the trial court abused its discretion when it sentenced him.

[26] As our Supreme Court has made clear:

> We have long held that a trial judge's sentencing decisions are reviewed under an abuse of discretion standard. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.

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[3] Although Toops includes language from our case law applying Indiana Appellate Rule 7(B) in this part of his brief, the substance of his argument on appeal is that the trial court abused its discretion when it sentenced him, not that his sentence is inappropriate under Rule 7(B). We limit our review of his argument on appeal accordingly.

McCain v. State, 148 N.E.3d 977, 981 (Ind. 2020) (cleaned up). Further:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind.), *clarified on other grounds on reh'g*, 875 N.E.2d 218 (2017).

[27] A person who commits a Level 3 felony shall be imprisoned for a fixed term between six and twenty years, with an advisory sentence of ten years. I.C. § 35-50-2-5 (2018). Here, the trial court sentenced Toops to fourteen years on his Level 3 felony conviction, with two years suspended to probation.

[28] Toops first asserts that the trial court abused its discretion when it sentenced him because the court "did not state reasons why each [of the identified] factor[s] was aggravating or mitigating[,] nor did the trial court balance the factors to determine whether the aggravating factors" outweighed the mitigating factors. Appellant's Br. at 25. We understand Toops' argument here to be that the trial court's sentencing statement was insufficiently detailed. And we cannot agree.

[29] The trial court must provide a "reasonably detailed recitation of [its] reasons for imposing a particular sentence." *Anglemyer*, 868 N.E.2d at 490. Such recitations

"facilitate meaningful appellate review" of the court's judgment. *Buchanan v. State*, 767 N.E.2d 967, 971 (Ind. 2002). Here, the trial court expressly identified both aggravating circumstances and mitigating circumstances. It further entered a sentence above the advisory sentence, making clear by implication that it found the aggravators to outweigh the mitigators. Thus, it is reasonably clear to this Court why the trial court entered the sentence that it entered, and Toops' argument that the trial court's sentencing statement was insufficiently detailed must fail.

[30] Still, Toops also argues that the mitigating circumstances of the remoteness of his criminal history and his law-abiding life since his last conviction and the hardship that his incarceration will have on his daughter "weigh[] in favor of Toops." Appellant's Br. at 26. The trial court considered these mitigating circumstances and weighed them, and the weight assigned to them by the trial court is not subject to appellate review. *Anglemyer*, 868 N.E.2d at 491.

[31] Toops also argues that his childhood was full of conflict between his parents, and he himself has succumbed to alcoholism and sought treatment "for the emotional scars of his childhood." Appellant's Br. at 30. Insofar as Toops' argument here is that the trial court abused its discretion by not considering these purported mitigating circumstances, we are not persuaded that these proffered mitigators were significant and required the trial court to account for them. *See Anglemyer*, 868 N.E.2d at 490-91. Thus, we cannot say the trial court abused its discretion when it sentenced Toops to fourteen years with two years suspended.

Conclusion

[32] In sum, we affirm Toops' conviction for Level 3 felony attempted rape and his sentence on that conviction. However, we reverse his conviction for Level 4 felony criminal confinement and remand with instructions for the trial court to reduce that conviction to Level 5 felony criminal confinement and resentence Toops on that conviction, with Toops' revised sentence on the Level 5 felony conviction to run concurrently with his sentence for the Level 3 felony attempted rape conviction. We also instruct the trial court on remand to vacate Toops' conviction for Level 6 felony domestic battery.

[33] Affirmed in part, reversed in part, and remanded with instructions.

Bradford, C.J., and Bailey, J., concur.