

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Ian Forbes,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 20, 2023

Court of Appeals Case No.  
22A-CR-1060

Appeal from the Marion Superior  
Court

The Honorable Angela Dow  
Davis, Judge

Trial Court Cause No.  
49D27-2003-F3-12742

**Memorandum Decision by Judge Brown**  
Judges Bailey and Weissmann concur.

**Brown, Judge.**

- [1] Ian Forbes appeals his convictions and sentence for rape as a level 3 felony and criminal confinement as a level 5 felony. On cross-appeal, the State asserts Count II, rape by other sexual conduct, should be reinstated because the trial court erroneously merged it with Count I, rape by sexual intercourse. We affirm and remand.

### ***Facts and Procedural History***

- [2] In 2012, Forbes and S.H. began a relationship which resulted in two children. On March 9, 2019, S.H. rented an Airbnb in Broad Ripple. At some point, Forbes and S.H. talked with a woman “by the name of Emily to meet up and possibly have a threesome.” Transcript Volume III at 121. Forbes and S.H. arrived at the Airbnb, unpacked, and went to a bar to meet Emily. S.H. expected just to meet Emily and possibly have “sexual intercourse with her later that evening.” *Id.* at 123. S.H. “didn’t want to do it other than the fact that [she] wanted to save [her] relationship.” *Id.* at 124.
- [3] At the bar, the mood was “[v]ery jovial,” and Forbes and S.H. were “getting to know” Emily. *Id.* Forbes’s demeanor was “pretty good” and he “was expecting everything to happen.” *Id.* After they had one or two drinks, Forbes, S.H., and Emily went to the Airbnb and chatted. Emily eventually said that she was not comfortable “doing anything further that evening but that she would like to meet again” and left between 11:00 p.m. and midnight. *Id.* at 126.
- [4] Forbes became upset “about things not going the way . . . he wanted them to go.” *Id.* at 127. He acted frustrated and angry and asked S.H. “to text [Emily]

and see if she would be willing to come back.” *Id.* at 128. S.H. was nervous, knew Forbes was angry, and thought “if I . . . don’t get this to happen, it’s not going to be good.” *Id.* S.H. told Forbes that Emily was unable to return but that she would love to meet the following weekend. Forbes grew angrier, yelled, and his faced turned red. S.H. became scared.

[5] S.H. told Forbes “it’s not going to happen.” *Id.* at 129. Forbes lunged at S.H. and began hitting her face, and S.H. felt a sharp pain. S.H. attempted to back away, but Forbes pulled her by her hair and dragged her towards him while her “hair was being ripped out.” *Id.* at 131. She “tried to get away and kind of push away from him,” and Forbes bent her fingers back “to get control.” *Id.* After he gained control, he struck her “at least one more time” in her face and said: “If the threesome doesn’t happen, then I’m still getting sex.” *Id.* at 132. He then dragged her by her hair into a bedroom. S.H. thought: “I need to do this even though I don’t want to otherwise he’s going to hurt me worse.” *Id.* at 133.

[6] S.H. removed her clothes. Forbes pushed her down onto the bed, removed his pants, and placed his hands on her shoulders so S.H. could not move and was “pushed out facedown into the mattress.” *Id.* at 135. S.H. was still crying, and Forbes angrily mumbled and forced his penis into her vagina. He then penetrated her anus with his penis and forced her to give him oral sex. He then penetrated her either anally or vaginally and ejaculated inside of her.

[7] S.H. put on her leggings and coat and asked Forbes for permission to go have a cigarette. Forbes said he did not care, and S.H. opened the back door, stood in the doorway, and smoked a cigarette. While she was smoking, Forbes started angrily yelling for her. S.H. thought about running outside but “it was super late at night” and she “had nothing on.” *Id.* at 142. S.H. observed a basement door directly behind the backdoor, went down the stairs, and covered herself with “a bunch of stuff . . . so it looked like [she] was a pile of laundry and hid.” *Id.* S.H. heard Forbes upstairs stomping, yelling, and pacing through the house. She fell asleep in the basement.

[8] Around 3:00 or 3:30 a.m., S.H. awoke and went upstairs to see if Forbes had left or calmed down. Forbes was asleep on the sofa in the living room. S.H. looked for her shirt, shoes, and bra, so she could become fully clothed, but could not find her belongings. She tiptoed through the house, found her phone on the floor right next to the sofa, grabbed it, and went into the bedroom. She closed the bedroom door, which did not have a lock, and took the bookshelf “and kind of shimmied it up underneath it so he couldn’t get in or turn the doorknob.” *Id.* at 145. She also unlocked the window in the bedroom because it would be her only other exit.

[9] In the morning, S.H. shook Forbes to wake him up and said: “Hey, we’ve got to get up for the kids. We have to go pick them up it’s time to make [sic] up.” *Id.* at 147. Forbes woke up groggily and looked at her with “blank anger.” *Id.* S.H. ran into the bedroom, closed the door, and placed the bookshelf behind it. She told Forbes to calm down and: “We’ve got to go get the kids. Just chill out,

please.” *Id.* at 148. He yelled and started beating on the door so hard that it cracked the frame of the door. S.H. lifted the screen in the window, jumped out, ran, hid at a school behind some stairs, and called her mother. While she waited, she heard Forbes’s car, which had a muffler leak, passing on the roads near the school and Forbes yelling her name. S.H.’s mother picked her up, and S.H. picked up her children and went to her parents’ home. S.H. received voicemails and text messages from Forbes that were “very mean, threatening, [and] calling [her] names like b---- again.” *Id.* at 160. S.H. debated whether to report the case because Forbes had “basically threatened [her] life . . . and the life of [her] family.” *Id.* The following day, S.H. called law enforcement.

[10] On March 30, 2020, the State charged Forbes with: Count I, rape as a level 3 felony; Count II, rape as a level 3 felony; Count III, criminal confinement as a level 5 felony; Count IV, strangulation as a level 6 felony; and Count V, battery resulting in bodily injury as a class A misdemeanor. Count I alleged that Forbes “did knowingly or intentionally have sexual intercourse with [S.H.] when [S.H.] was compelled by force or the imminent threat of force.” Appellant’s Appendix Volume II at 41. Count II alleged that Forbes “did knowingly or intentionally have other sexual conduct (as defined in I.C. 35-31.5-2-221.5) with [S.H.] when [S.H.] was compelled by force or the imminent threat of force.” *Id.*

[11] On March 15, 2022, the court held a jury trial. The State presented the testimony of multiple witnesses including S.H., S.H.’s mother, and the sexual assault nurse examiner. After the State rested, Forbes testified that he had six

or seven beers that evening and was “[i]nebriated but in control.” Transcript Volume IV at 116. He stated that he and S.H. had vaginal, anal, and oral sex. He also stated that S.H. did not try to force him away and he did not hear her express that she did not want to continue. He testified that he told S.H. he wanted to break up, she started crying, screaming, and slapping him, and he shoved her away. He also stated they argued in the morning. He testified that he became concerned when S.H. went into the room and he tried to break down the door and discovered she was not in the room and the window was open. He stated he started looking for her because she had been “talking kind of crazy.” *Id.* at 132. He indicated he filed a paternity suit on January 27, 2020, to gain “access to the kids through the courts.” *Id.* at 135. He also testified that he was desperate to see his children.

[12] The jury found Forbes guilty of Counts I, II, III, and V, and not guilty of Count IV. The court stated: “I will enter judgment of conviction for Count I, II, III and V. I and II may have to merge. And so we’ll talk about that at the time of sentencing. If they do, I will vacate one of the counts.” *Id.* at 188. The prosecutor said: “That’s fine Your Honor. And I just want to double-check everything and – before the Court does that.” *Id.* The court stated: “I won’t do anything. I’m entering judgment of conviction right now. And then we will come back for sentencing.” *Id.* at 189. The prosecutor said: “Not to say that we have an argument on that, Your Honor. I just want to double-check it.” *Id.*

[13] On April 18, 2022, the court held a sentencing hearing at which the prosecutor referenced cause number 34D03-2104-CM-1249 (“Cause No. 1249”) and

indicated it was providing copies to the court for the pretrial violations. Forbes's counsel stated "these . . . appear to be allegations from a case that's pending" and objected "to this being used for purposes of this sentencing hearing." *Id.* at 198. The prosecutor stated: "Your Honor, we're asking the Court to consider as far as being penalized twice for the same offense, but I'm asking the Court to consider it regarding his ability to comply with the conditions of pretrial release for this case." *Id.* After some discussion, the court stated: "Just for the limited purpose that he was on pretrial release. I'm not going to use it – obviously he hasn't been convicted of that. And so the Court will only consider it in terms of that he was on pretrial release when he got arrested." *Id.* at 199.

[14] The following exchange occurred:

[Prosecutor]: Your Honor, prior to any argument from the parties, I think the Court was going to give a ruling on whether or not it was going to merge for sentencing, I think it was Counts I and II. If the Court would move on that.

THE COURT: Let me look at that. Court will merge I and II.

[Prosecutor]: We would defer to the Court.

THE COURT: Yeah. So Count I and Count II will merge and the sentences will run concurrently.

*Id.* at 199. The prosecutor later argued:

[W]e're asking that specifically the Count I and Count II, to get, at least the minimum 12 years. If not more. Knowing that those counts merged, and the advisory is 9. We think that, you know,

the max is 16. But I think if we're anywhere between the levels of the 12 and the 16 years, that is what is justified here.

*Id.* at 201.

[15] The court found the facts of the case “particularly egregious.” *Id.* at 204. It observed that “every single time [Forbes had] been given probation or home detention, [he had] violated.” *Id.* It stated that it had placed Forbes on pretrial release, he “exactly did the thing that the Court didn’t want [him] to do,” he “at least admitted to the officer when [he] got arrested there that [he was] passed out drunk for two and a half days and that ended up in an arrest,” and it found “that to be [an] aggravator.” *Id.* at 204-205. The court stated: “I find that – and they – under the guise of they wouldn’t go get heroin for you. You were not leaving [sic] a law-abiding life.” *Id.* at 205. It found that S.H. had to run out in the middle of Broad Ripple, hide from Forbes without shoes, and have her mother pick her up as an aggravator. The court observed Forbes had previously violated probation, “[t]he time that you had a public intox, and you continued to drink for years afterwards,” and “this [was] not the first time of violence that you’ve had toward her” and stated: “I find that that is an aggravating” circumstance. *Id.* It also found that “the harm, injury, loss or damage suffered to the victim was significant and greater than necessary to prove the commission of the offense.” *Id.* The court stated: “I merged Counts I and II, but the jury found you guilty of both of them. The Court will take that into consideration.” *Id.* It observed that Forbes “didn’t refrain from getting into trouble with a new girlfriend with facts eerily similar to this.” *Id.* at 206. It also



stated: “Court’s going to sentence you on Count I and Count II to 15 years.”  
*Id.*

- [16] In its order, the court sentenced Forbes to fifteen years with three years suspended for Count I, three years for Count III, and one year for Count V. The court ordered that the sentence for Count I be served concurrent with Counts III and V.

### *Discussion*

#### I.

- [17] The first issue is whether the evidence is sufficient to sustain Forbes’s convictions for rape and criminal confinement. Forbes argues that S.H.’s testimony was not reliable probative evidence. He asserts his testimony and S.H.’s testimony “made clear that ongoing custody issues were present following the fight between [him] and S.H., giving S.H. motivation to follow through with the charges against” him. Appellant’s Brief at 17.
- [18] When reviewing a challenge to sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. *Leonard v. State*, 80 N.E.3d 878, 882 (Ind. 2017). We consider only the evidence and the reasonable inferences supporting the verdict. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

[19] At the time of the offense, Ind. Code § 35-42-4-1(a)(1) provided that “a person who knowingly or intentionally has sexual intercourse with another person . . . when . . . the other person is compelled by force or imminent threat of force . . . commits rape, a Level 3 felony.”<sup>1</sup> Count I alleged that Forbes “did knowingly or intentionally have sexual intercourse with [S.H.] when [S.H.] was compelled by force or the imminent threat of force.” Appellant’s Appendix Volume II at 41.

[20] At the time of the offense, Ind. Code § 35-42-3-3 provided that “[a] person who knowingly or intentionally confines another person without the other person’s consent commits criminal confinement” and “[t]he offense of criminal confinement . . . is . . . a Level 5 felony if . . . it results in bodily injury to a person other than the confining person.”<sup>2</sup> Count III alleged that Forbes “did knowingly confine [S.H.] without the consent of [S.H.], said act resulting in bodily injury to [S.H.], to-wit, pain and/or bruising and/or lacerations.” Appellant’s Appendix Volume II at 41-42.

[21] The record reveals that S.H. testified that she attempted to back away, but Forbes pulled her by her hair and dragged her towards him while her “hair was being ripped out.” Transcript Volume III at 131. She “tried to get away and kind of push away from him,” and Forbes bent her fingers back “to get

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<sup>1</sup> Subsequently amended by Pub. L. No. 78-2022, § 8 (eff. July 1, 2022); Pub. L. No. 92-2022, § 1 (eff. July 1, 2022); Pub. L. No. 105-2022, § 27 (eff. July 1, 2022).

<sup>2</sup> Subsequently amended by Pub. L. No. 40-2019, § 11 (eff. July 1, 2019).

control.” *Id.* She testified that, after he gained control, he struck her “at least one more time” in her face and dragged her by her hair into a bedroom. *Id.* at 132. When asked if she wanted Forbes to penetrate her vaginally or anally, she answered: “Absolutely not.” *Id.* at 137. She also testified that she was crying. On redirect examination, the prosecutor asked S.H. about a conversation she had with a detective and stated: “in the context of that whole conversation where you’re talking about forceful, anal and vaginal penetration, plus power play during oral sex . . . what are you trying to describe, what are you trying to explain to the detective?” *Id.* at 207. She answered: “He raped me.” *Id.* She also testified that she did not consent. The State introduced and the court admitted photographs of S.H.’s injuries. S.H. described her injuries including a swollen hand, bruising, a cut, a broken lip, and bite marks. S.H.’s mother described S.H.’s demeanor during the phone call as terrified and that when she picked her up S.H. was “just haggared [sic] and, you know, messy hair, no shoes, and just, you know, obviously crying.” *Id.* at 231. She also described S.H.’s injuries as including a bald spot on her scalp, a bruise, and marks on her face. The sexual assault nurse examiner testified that S.H.’s injuries included an abrasion, redness, and tenderness to the back of the head, the left side of the neck, and the corner of her right eye, recent bruising under the chin, an abrasion, bruising, and tenderness to the right shoulder, tenderness and patterned bruising to the left shoulder, and pain, swelling, and bruising to certain fingers. Based upon the record, we conclude that evidence of probative value was presented from which a reasonable jury could find beyond a reasonable doubt that Forbes was guilty of rape and criminal confinement.

## II.

- [22] The next issue is whether the trial court abused its discretion in sentencing Forbes. Forbes cites *Miller v. State*, 709 N.E.2d 48 (Ind. Ct. App. 1999), and asserts the trial court went beyond considering the existence of the arrest and assessing its impact on his ability to follow rules and used the specific allegations contained in the pending case as an aggravating circumstance. He also asserts “[t]he trial court used the presence of Count I and Count II to enhance [his] sentence as to Count I, even though it explicitly stated that the two counts needed to merge.” Appellant’s Brief at 15.
- [23] We review the sentence for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. 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.” *Id.* A trial court abuses its discretion if it: (1) fails “to enter a sentencing statement at all;” (2) enters “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;” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” *Id.* at 490-491. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Id.* at 491.

The relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. *Id.* Generally, a single aggravator is sufficient to support an enhanced sentence. *See Trusley v. State*, 829 N.E.2d 923, 927 (Ind. 2005).

[24] With respect to Forbes's argument involving allegations of domestic violence occurring while he was out on bond, we note that Ind. Code § 35-38-1-7.1 provides: "In determining what sentence to impose for a crime, the court may consider the following aggravating circumstances . . . [t]he person has recently violated the conditions of any probation, parole, pardon, community corrections placement, or pretrial release granted to the person." The presentence investigation report ("PSI") stated:

On or about 4/12/2021[, Forbes] was charged with Domestic Battery (MA) under [Cause No. 1249] for an event that allegedly occurred on 4/9/2021 in Howard County, Indiana. Mr. Forbes is currently being held in the Howard County Jail with a \$10,000 cash bond.

Appellant's Appendix Volume III at 66. The PSI indicated Forbes reported his last long-term relationship was with R.L., they were together for eighteen months, and their relationship ended in 2021 prior to his arrest for the instant offense. It also noted that R.L. was the alleged victim under Cause No. 1249.

[25] In *Miller*, which is cited by Forbes, we found that the trial court erred by using facts surrounding a subsequent arrest as an aggravating factor. 709 N.E.2d at 50. Specifically, the trial court noted the amount of cocaine and a cutting agent

found in Miller’s possession at the time of his arrest and stated in the sentencing order that the large quantity of cocaine in Miller’s possession led the judge to believe that Miller intended to deal the drugs. *Id.* This Court found this was an improper consideration, as the charges of dealing were dropped in exchange for Miller’s plea of guilty on the possession charge. *Id.* We also observed that the facts involved in the subsequent arrest were not proven, nor did Miller admit to any of those facts. *Id.* We concluded that the trial court erred by considering the facts surrounding the subsequent arrest as an aggravator. *Id.*

[26] While the trial court observed that Forbes “didn’t refrain from getting into trouble with a new girlfriend with facts eerily similar to this,” the PSI indicates that the charge under Cause No. 1249 was for domestic battery. Transcript Volume IV at 206. Moreover, unlike in *Miller*, the trial court here stated that it considered Cause No. 1249 “[j]ust for the limited purpose that he was on pretrial release. I’m not going to use it – obviously he hasn’t been convicted of that. And so the Court will only consider it in terms of that he was on pretrial release when he got arrested.” *Id.* at 199. We cannot say that the trial court abused its discretion.

[27] To the extent Forbes argues that “[i]t was improper for the trial court to enhance [his] sentence based on a count that was merged due to double jeopardy concerns,”<sup>3</sup> we note that Forbes does not cite to authority for the

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<sup>3</sup> Forbes notes that the trial court “did not state why it merged Count I and II, but it is assumed that it was for double jeopardy concerns.” Appellant’s Brief at 15, 15 n.7.

argument that a trial court cannot consider the facts related to a count that was merged. He does not contest that he had anal intercourse with S.H., the act upon which Count II was based. We note that a trial court can consider the nature and circumstances of the crime. The court observed that the facts were “particularly egregious.” Transcript Volume IV at 204. Further, the court did not specifically find the facts of Count II to be an aggravator as it merely stated: “I merged Counts I and II, but the jury found you guilty of both of them. The Court will take that into consideration.” *Id.* at 205. We cannot say that the trial court abused its discretion, and we can say with confidence that the court would have imposed the same sentence given the remaining aggravators including the aggravator that the harm, injury, loss, or damage suffered by S.H. was greater than necessary to prove the commission of the offense.

### III.

[28] On cross-appeal, the State argues that Count II, rape by other sexual conduct, should be reinstated because the trial court erroneously merged it with Count I, rape by sexual intercourse. The State has the authority under Ind. Code § 35-38-4-2 to cross-appeal a trial court’s merger of two counts on double jeopardy grounds because it presents a pure question of law. *See Wilcoxson v. State*, 132 N.E.3d 27, 32 & n.4 (Ind. Ct. App. 2019) (citing *State v. Monticello Devs., Inc.*, 527 N.E.2d 1111 (Ind. 1988)), *trans. denied*. While the trial court mentioned merging Count II into Count I, it actually entered judgment of conviction on both counts and ordered the sentences to run concurrently. Specifically, after the jury found Forbes guilty of Counts I and II, the court

stated: “I will enter judgment of conviction for Count I, II, III, and V,” and “I’m entering judgment of conviction right now.” Transcript Volume IV at 188-189. At the sentencing hearing, the court stated: “Court’s going to sentence you on Count I and Count II to 15 years.” *Id.* at 206. The imposition of concurrent sentences indicates that the trial court did not vacate the conviction for Count II. We remand with instructions to correct the sentencing order and abstract of judgment to note the concurrent sentence on Count II.

[29] For the foregoing reasons, we affirm Forbes’s convictions and sentence and remand to correct the sentencing order and abstract of judgment.

[30] Affirmed and remanded.

Bailey, J., and Weissmann, J., concur.