

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Nathaniel Jerome Asbury,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

June 28, 2021

Court of Appeals Case No.
20A-CR-2338

Appeal from the Lake Superior
Court

The Honorable Samuel L. Cappas,
Judge

Trial Court Cause No.
45G04-1807-F1-16

Brown, Judge.

[1] Nathaniel Jerome Asbury appeals his sentence for rape as level 1 felony and burglary as a level 2 felony and claims his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] Alexis L. participated in a plan with Asbury, Isiah Barboza, and Elias Costello to rob the home of her stepmother, L.L. She drew a map of the house to show the men its floorplan, where the different rooms were located, and where certain items such as a camera, money, and jewelry would be located and gave them a key to the front door. On July 16, 2018, Alexis drove Asbury, Barboza, and Costello to L.L.'s house. Alexis's family shared their locations with each other using their phones, and Alexis knew that most likely her sister F.H. and sixteen-year-old brother A.H. were at the house at the time. F.H. was asleep on the couch in the living room, and A.H. was asleep upstairs in his bedroom.

[3] Alexis stayed outside in a back alley, and Asbury and the other two men entered the house. Asbury carried a shotgun wrapped in a pair of jeans into the house and wore gloves and a knit hat with the eyes cut out which was pulled completely over his head. The men surrounded F.H. and covered her head with a pillow. Asbury pointed the shotgun at F.H. while the other men separated to burglarize the home. The men returned to the living room and assaulted F.H. Costello groped her breasts, smacked her on the buttocks, and held her down. Asbury forced F.H. to perform oral sex on him and raped her vaginally. Barboza also raped F.H. The men took turns holding the shotgun. Meanwhile, A.H. called L.L. from his bedroom, and L.L. observed the men in her house and the assault on F.H. by means of a home security camera and

called the police. The police arrived at the house, F.H. ran out the front door, and the police apprehended Asbury at the scene.

[4] The State charged Asbury as amended with: Count I, rape as a level 1 felony¹; Count II, rape as a level 1 felony; Count III, burglary as a level 2 felony²; Count IV, armed robbery as a level 3 felony; Count V, criminal confinement as a level 3 felony; Count VI, intimidation as a level 5 felony; Count VII, pointing a firearm as a level 6 felony; Count VIII, resisting law enforcement as a class A misdemeanor; Count IX, rape as a level 3 felony; Count X, rape as a level 3 felony; Count XI, burglary as a level 4 felony; Count XII, criminal confinement as a level 6 felony; and Count XIII, residential entry as a level 6 felony, and it alleged he used a firearm in the commission of Count V.

[5] On October 9, 2020, a Stipulated Plea and Agreement was filed which provided that Asbury would plead guilty to Counts I and III, the State would dismiss the remaining counts, the parties were free to argue their respective positions as to sentencing and they agreed there would be a cap of sixty years and a floor of twenty years on the total sentence. The plea agreement included an attached Stipulated Factual Basis, which provided in part that the three men took turns

¹ Count I alleged that Asbury “did knowingly or intentionally have sexual intercourse or other sexual conduct with F.H., to wit: vaginal penetration, when F.H. was compelled by force or the imminent threat of force” and Asbury “was armed with a deadly weapon, to wit: a shotgun.” Appellant’s Appendix Volume II at 75.

² Count III alleged that Asbury “did break and enter the building or structure of L.L. to wit: a house, with the intent to commit theft therein while armed with a deadly weapon, to wit: a shotgun.” Appellant’s Appendix Volume II at 75.

holding the shotgun while Asbury forced F.H. to perform oral sex on him and raped her vaginally while threatening to shoot her and Barboza also vaginally raped F.H.

[6] On October 14, 2020, Asbury pled guilty to Counts I and III pursuant to the plea agreement. On November 20, 2020, the court held a sentencing hearing at which it heard testimony from F.H., A.H., and L.L. The court also watched and listened to the recording from L.L.'s home.

[7] F.H. testified “the fact this all happened because of my sister, broke me emotionally and spiritually,” she was diagnosed with post-traumatic stress disorder and gastrointestinal reflux disorder, she lost a lot of weight, she will never be okay, and she faces extensive psychological issues. Transcript Volume II at 19-20. She testified, “[w]hen I was held down on the couch, the only thing that I could think of was my little brother A.H.” and “I told myself over and over again, if I heard a gunshot from upstairs that I was 100 percent going to die with him.” *Id.* at 20. She testified her post-traumatic stress disorder caused her to be hospitalized and sedated and she lost count of the number of panic attacks she had in the prior two and one-half years. She testified that she was traumatized, that “having a gun to my head not knowing if I was going to live or die will stick with me for the rest of my life,” and she will continue to need therapy and medications. *Id.* at 21.

[8] A.H. testified regarding the impact of the home invasion and assault on F.H. and the entire family and that F.H. was betrayed by her own family. L.L.

testified regarding F.H. and A.H.'s issues with anxiety. She testified that she left F.H. and A.H. at home asleep when she went to work, it was their home and they felt safe, the four perpetrators took that safe feeling of home away from them, and she did not understand why they decided to rob the house where Alexis had grown up. She testified that she believed the surveillance camera saved her children's lives, and that watching her daughter be raped with a shotgun to her head will always haunt her.

[9] Asbury apologized to the court, the victims, and their family and stated that he took full responsibility for his actions, "I cannot put into words how sorry I am that will honestly represent my sorrow to you F.H. and the family," and "I really apologize for all the everlasting trauma." *Id.* at 140. The court stated: "You're remorseful and have accepted responsibility. With everyone today, I would say you sounded the most remorseful today." *Id.* at 144. The court stated "[t]he victim was begging not to be harmed," "[s]he was sobbing, crying, whimpering while the two of you repeatedly raped her," "[y]ou had complete disregard for her humanity and dignity, and you treated her like a piece of meat." *Id.* at 149.

[10] The court sentenced Asbury to thirty-five years for his conviction for rape as a level 1 felony under Count I and twenty-five years for his conviction for burglary as a level 2 felony under Count III and ordered that the sentences be served consecutively.

Discussion

- [11] The issue is whether Asbury’s sentence is inappropriate in light of the nature of his offenses and character. Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).
- [12] Asbury acknowledges the aggravated nature of his offenses but argues that he had no prior history of violence and received the maximum sentence allowed under the terms of his plea agreement. He contends that his sole prior conviction was for a misdemeanor criminal trespass in 2016 and that “[t]his lack of a violent history demonstrates that [his] conduct here, while heinous, was in fact an aberration of his character rather than part of any identifiable pattern of conduct.” Appellant’s Brief at 8. He argues that he took responsibility by pleading guilty to the top two counts for which he was charged, the State dismissed the lesser included offenses stemming from the same conduct, and he expressed sincere remorse. He asserts “[c]oupling [his] lack of a violent background with his evident remorse for his actions in this matter demonstrates that the offenses here are not in line with [his] true character.” *Id.* at 9. He requests that this Court exercise its authority and “reduce his sentence to a split term, contemplating Department of Corrections, Lake County Community Corrections, and probation components.” *Id.*

[13] Ind. Code § 35-50-2-4 provides a person who commits a level 1 felony shall be imprisoned for a fixed term of between twenty and forty years with the advisory sentence being thirty years. Ind. Code § 35-50-2-4.5 provides a person who commits a level 2 felony shall be imprisoned for a fixed term of between ten and thirty years with the advisory sentence being seventeen and one-half years.

[14] Our review of the nature of the offenses reveals that Asbury, Barboza, and Costello entered L.L.'s house while Alexis waited outside with the intent to steal property and that he carried a shotgun wrapped in a pair of jeans and wore gloves and a knit hat pulled completely over his head. Asbury pointed the shotgun at F.H. while the other men separated to burglarize the home. Asbury forced F.H. to perform oral sex on him and raped her vaginally. The men took turns holding the shotgun. The court stated that F.H. almost suffocated. The court stated that it had watched and listened to the recording, F.H. "was begging not to be harmed," she "was sobbing, crying, whimpering" while Asbury raped her, and he "had complete disregard for her humanity and dignity." Transcript Volume II at 149. L.L. watched the assault in real time through the surveillance camera, and A.H. was locked inside his room throughout the prolonged assault. As a result of the home invasion and assault, F.H. and A.H. were traumatized and suffer from anxiety. F.H. has suffered from post-traumatic stress disorder and gastrointestinal reflux disorder, lost weight, was hospitalized and sedated, and has suffered panic attacks.

[15] Our review of Asbury's character reveals that he pled guilty to rape and burglary under Counts I and III pursuant to a plea agreement which provided

for a maximum aggregate sentence of sixty years and that the remaining counts against him were dismissed. The court found that he was caught on tape committing the crime, the odds of him prevailing at a trial were extremely remote, and the only reasonable thing for him to do was to plead guilty to minimize his punishment. Asbury expressed remorse at sentencing which the court found to be sincere. According to the presentence investigation report (“PSI”), Asbury was born in March 1997 and had a conviction for criminal trespass as a misdemeanor in May 2016 for which he was sentenced to 180 days suspended to probation. The PSI further states that probation filed a petition in April 2017, “Petition granted. 180 days LCJ,” and probation was closed unsatisfactorily in February 2018. Appellant’s Appendix Volume II at 137. It also states Asbury was arrested on May 18, 2016, charged with disorderly conduct and resisting law enforcement as misdemeanors, he received “180 days LCJ, suspended . . . 6 months prosecution deferred, 40 hours community service,” he “violated deferment with instant offense,” probation was closed unsatisfactorily, and the cause was dismissed with prejudice. *Id.*

[16] The PSI also states: “During the defendant’s time in the Lake County Jail, he has had several jail write-ups. The defendant has had 5 rule violations, 5 room violations, 1 inmate fight, 1 lock down violation, 1 smoke violation, and one suicide precaution.” *Id.* at 136. At sentencing, the court heard testimony that Asbury was implicated or being investigated for a burglary which occurred on July 8, 2018, and which also involved Costello and Barboza. It also heard testimony regarding Asbury and Costello making arrangements to smuggle

contraband into the jail and a hole which had been cut in the lower portion of a window in Costello's cell. The PSI indicates that Asbury reported he had been associated with a street gang in Illinois for all of his life. It provides that he completed the eleventh grade, was suspended for fighting while attending school, obtained a general equivalency diploma in Illinois in 2015, and was in the process of enrollment at Lincoln University at the time of his arrest. He was not employed at the time of the offenses and his last employment was with a staffing service as a laborer from 2017 until 2018. With respect to substance abuse, the PSI states Asbury first tried marijuana at age twelve, used it daily, and last used it the day of his arrest; he began consuming alcohol at age sixteen, consumed it at least twice weekly, and last consumed alcohol on the day of the offenses; he began using Xanax once a week at age nineteen and last used it the day of his arrest; and he has never enrolled in any substance abuse treatment. The PSI also provides that Asbury's overall risk assessment score using the Indiana Risk Assessment System places him in the very high risk to reoffend category.

[17] After due consideration, and in light of the heinous nature of the offenses, we conclude that Asbury has not sustained his burden of establishing that his sentence for rape as a level 1 felony and burglary as a level 2 felony is inappropriate in light of the nature of the offenses and his character.

[18] For the foregoing reasons, we affirm Asbury's sentence.

[19] Affirmed.

Bradford, C.J., and Mathias, J., concur.