

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James Miske, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 29, 2021

Court of Appeals Case No.
20A-CR-1893

Appeal from the Tippecanoe
Circuit Court

The Honorable Sean M. Persin,
Judge

Trial Court Cause No.
79C01-1401-FA-1

Crone, Judge.

Case Summary

- [1] James Miske, Jr., appeals the eighty-four-year aggregate sentence imposed by the trial court, upon resentencing after remand, for his convictions of class A felony rape, two counts of class B felony criminal deviate conduct, class C felony criminal confinement, class D felony intimidation, and class A misdemeanor resisting law enforcement. He contends that his revised sentence is inappropriate in light of the nature of his offenses and his character. Finding that he has not met his burden to demonstrate that his sentence is inappropriate, we affirm.

Facts and Procedural History

- [2] The facts underlying Miske's convictions, as recited by another panel of this Court in a prior appeal, follow:

Miske was engaged to V.P. Miske and V.P. shared a home in Lafayette, where they lived with V.P.'s four children: three of these were V.P.'s children from prior relationships, and the fourth child had been fathered by Miske.

On January 3, 2014, Miske and V.P. argued about finances and parenting the children. During the argument, Miske grabbed V.P.'s arm with enough force that V.P. was bruised; Miske also scratched her and pushed her to the floor. By the end of the argument, V.P. stated that she no longer wished to be engaged to Miske, Miske agreed that he would move out, and the two went to sleep in separate rooms.

The following day, Miske left for work in the morning. During the morning, Miske became agitated and asked for permission to

leave work. He did so with the intent to find someplace to live after moving out of the house he shared with V.P.

By around 2:30 on the afternoon of January 4, Miske had decided to visit the Frankfort home of Gregory Linder (“Linder”), an acquaintance of Miske and a longtime friend of V.P. Linder was in his garage, and he and Miske spent several hours talking and drinking beer and mixed drinks. Miske told Linder that he was “done” with V.P. and that the relationship was “pretty much over.” Miske was angry and repeatedly raised his voice during the conversation, occasionally “marching around” and “hollering.”

During the conversation, Miske expressed his anger about the behavior of V.P.’s eldest daughter. He also expressed suspicion that V.P. had not been faithful in the relationship, mentioning a specific individual whom Linder and V.P. shared as a common friend; Linder tried to reassure Miske that he should not be concerned about V.P.’s fidelity. At least once, Miske mentioned his military training and stated that he enjoyed hurting people, and stated several times that he was “a demon.” Miske also stated several times that “he felt like putting his hands on” V.P.

At around 6:30, Linder had become concerned for his own safety in light of Miske’s behavior. Linder suggested that Miske leave, “take a chill pill[,]” calm down, and sleep in his truck that night. Miske asked Linder for money; Linder gave Miske a few lottery scratch-off tickets and told him to leave.

From Linder’s home, Miske drove to a bar in Lafayette, Ace’s Pub. Miske spent several hours at the pub, but was eventually asked to leave. Miske drove back to the home he had been sharing with V.P.

Miske arrived at the home in the early morning hours of January 5, 2014. V.P. had put the couple's infant daughter to sleep, and two older children were also asleep. V.P. was awake on the living room couch watching television when Miske arrived.

Miske entered the home and came into the living room, and pulled up a beanbag chair next to V.P.'s couch. V.P. smelled alcohol and cigarettes on Miske, but did not respond to his entrance. Miske got up from the chair and began to walk to the bedroom he had shared with V.P. He asked V.P. to have sex with him, but she refused. Miske said he would find sex elsewhere, and went into the bedroom to use his computer.

After twenty or thirty minutes, Miske came out of the bedroom, grabbed V.P. by her hair, and pulled her off the couch and onto the floor. Miske, a former Marine who stood six-feet, three-inches tall, then began choking the five-feet, three-inches-tall V.P. Miske sat on top of V.P. while pressing his hands around her neck, and demanded to know about "David," the friend V.P. and Linder had in common. V.P. asked Miske to stop and tried to tell him that she could not breathe, but Miske's choking restricted her airflow.

Miske's yelling eventually awoke V.P.'s son, who came out to see what was happening. V.P. asked Miske to stop because the child was watching, but Miske continued to yell and throw V.P. around. Miske twice pulled V.P. off the floor by her hair, threw her around so that her head hit a wall, and at one point brought his arm down across the bridge of her nose. Miske choked V.P. multiple times, holding her on the ground while doing so. V.P. thought she was going to die, and asked Miske to stop several times. V.P. told Miske that she was afraid he would kill her, and said she would do whatever he wanted.

At some point, Miske stopped choking V.P. and dragged her to the bedroom, still pulling on her hair. Miske told V.P. to take off his boots, and then told V.P. to remove his pants and to perform oral sex on him. Miske was still holding V.P.'s hair, and forced her head down toward his penis.

Miske next told V.P. to remove her pants and made her get on all-fours on the bed. Miske briefly engaged in vaginal intercourse with V.P. He then began to engage in anal intercourse with V.P., even as she "begged him not to." V.P. complied with Miske's demands because she was afraid, even as she asked him to stop and told him that it caused her pain. While engaging in these acts, Miske told V.P. that "this if [sic] for Mr. Meyers," referring to the mutual friend of V.P. and Linder.

Miske proceeded to force V.P. to perform oral sex, vaginal sex, and anal sex with him twice more. During this, Miske continued to hold V.P.'s hair, and said "a lot of messed up things." Eventually, Miske ejaculated and stopped engaging in sexual conduct with V.P.

After this, Miske and V.P. each sat on opposite ends of the bed from one another. V.P. was crying, while Miske said he knew she would contact police and that he would not kill her; Miske then said he was going to pray "because he was getting ready to kill [V.P.]." V.P. told Miske that she would not call police; Miske then said she could call and he would not do anything to her, but that he would not "go down without a fight."

V.P. begged Miske to go to sleep. Once V.P. was sure Miske was asleep, she went back into the living room, grabbed her phone, and called police.

At around 4:30 a.m., Lafayette Police Officer Amanda Deckard ("Officer Deckard") was the first officer to arrive at the home; a

second officer, Officer Stansfield, arrived soon after. Officer Deckard spoke with V.P. and, based upon this discussion, informed Officer Stansfield that they would arrest Miske, who was still asleep in the bedroom.

Officers Deckard and Stansfield entered the bedroom where Miske was sleeping, turned on the lights, and attempted to wake Miske, informing him numerous times that they were from the Lafayette Police Department. Miske gradually awoke, and began fighting with the two police officers, eventually pinning one of his arms underneath his body.

As this struggle occurred, Tippecanoe County Sheriff's Deputy Randy Martin ("Deputy Martin") arrived at the home. As he got out of the car, he heard shouting coming from inside the house and, when he entered the home, found Miske struggling with Officers Deckard and Stansfield. Deputy Martin used his Taser device to administer a drive stun directly to Miske's body; Miske ceased struggling, and was arrested.

After Miske was arrested, Officer Deckard transported V.P. to a local hospital. There, V.P. was examined by Diane Robinson ("Robinson"), a sexual assault nurse-examiner. Robinson determined that V.P. had suffered injuries to her neck consistent with strangulation, as well as bruising to her cervix consistent with blunt-force trauma and injury to her anus. When V.P. brushed her hair, a chunk of hair fell off her head. Robinson concluded that the injuries V.P. had sustained were consistent with having been a victim of sexual assault.

Miske v. State, No. 79A02-1409-CR-619, 2015WL2329120, slip op. at *1-4 (Ind. Ct. App. May 15, 2015) (citations omitted) (*Miske I*), *trans. denied*.

- [3] On January 10, 2014, the State charged Miske with nine criminal counts including class A felony rape, two counts of class A felony criminal deviate conduct, class C felony criminal confinement, class D felony intimidation, class D felony strangulation, class D felony domestic battery, class A misdemeanor battery, and class A misdemeanor resisting law enforcement. Following a trial, the jury found Miske guilty of all counts and the trial court imposed an aggregate sentence of 145 years. Miske’s convictions and sentence were affirmed on direct appeal in a memorandum decision. Among other things, the majority concluded that the 145-year sentence imposed by the trial court was not inappropriate pursuant to Indiana Appellate Rule 7(B). *See id.* at *11. Judge Riley dissented in part, recommending that Miske’s sentence be reduced to an aggregate sentence of fifty-five years. *Id.* Transfer was sought and denied by our supreme court. *Miske v. State*, 37 N.E.3d 493 (Ind. Sept. 3, 2015).
- [4] On March 8, 2016, Miske filed a petition for post-conviction relief. The post-conviction court denied his petition on April 29, 2019. Miske again appealed to this Court arguing, among other things, that he received ineffective assistance of appellate counsel due to his counsel’s failure to raise certain common law double jeopardy claims on direct appeal. The panel that considered the appeal subsequently issued a published opinion granting him post-conviction relief. Specifically, the panel concluded that the multiple class A felony enhancements “violated the common law double jeopardy ‘enhancement’ formulation” and therefore remanded the case to the trial court with instructions to “vacate two of the Class A felony convictions, enter judgment of conviction as Class B

felonies, and sentence Miske for the two Class B felonies accordingly.” *Miske v. State*, 142 N.E.3d 439, 456 (Ind. Ct. App. 2020) (footnote omitted) (*Miske II*).

The panel further concluded that Miske’s convictions for battery, domestic battery, and strangulation were impermissible under Indiana’s common law double jeopardy rules. *Id.* Because “there is no less serious form of these convictions that would eliminate the violation,” the panel reversed and remanded “with instructions that these convictions and corresponding sentences be vacated.” *Id.* (citation omitted).

[5] Upon remand, the trial court followed these instructions and vacated the two class A felony criminal deviate conduct convictions, entered judgment of conviction for those crimes as class B felonies, and vacated the battery, domestic battery, and strangulation convictions and sentences. The trial court resentenced Miske on the six remaining convictions on September 4, 2020. The trial court resentenced Miske to fifteen years for each class B felony count and reaffirmed the prior imposed (and upheld on appeal) consecutive sentences on the other counts. Accordingly, the trial court imposed consecutive sentences of forty-five years for class A felony rape, fifteen years for each class B felony criminal deviate conduct count, six years for class C felony criminal confinement, two years for class D felony intimidation, and one year for class A misdemeanor resisting law enforcement, for a revised aggregate sentence of eighty-four years. This appeal ensued.

Discussion and Decision

- [6] Miske asks that we reduce his revised sentence pursuant to Indiana Appellate Rule 7(B), which states that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” “Sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Indeed, “appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.” *Id.* at 1225. In conducting our review, our principal role is to leaven the outliers. *Foutch v. State*, 53 N.E.3d 577, 580 (Ind. Ct. App. 2016). We do “not look to see whether the defendant’s sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is ‘inappropriate.’” *Id.* at 581 (quoting *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied* (2014)). “Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case.” *McFall v. State*, 71 N.E.3d 383, 390 (Ind. Ct. App. 2017). The defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016).
- [7] As for the nature of the offense, the advisory sentence is the starting point that the legislature has selected as an appropriate sentence for the crime committed.

Fuller v. State, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a class A felony is between twenty and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4. The sentencing range for a class B felony is between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. A person who commits a class C felony shall be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6. The sentencing range for a class D felony is between six months and three years, with the advisory sentence being one and one-half years. Ind. Code § 35-50-2-7. And finally, a person who commits a class A misdemeanor faces a fixed term of not more than one year. Ind. Code § 35-50-3-2. The trial court here imposed a revised aggregate sentence of eighty-four years. We emphasize that, in sum, the revised sentence imposed by the trial court, while exceeding the consecutive advisory terms for the remaining crimes, was still a full eighteen years shy of what the maximum aggregate sentence could have been for these convictions.

[8] In requesting appellate reduction of his sentence, Miske argues that the nature of his offenses, specifically his sexually violent offenses, does not warrant consecutive sentences on those counts because only a single victim was involved, and the “egregious nature” of those offenses has already been “accounted for by our legislature when devising an extraordinarily harsh sentencing range for a Class A felony.” Appellant’s Br. at 13. Our supreme court has indeed acknowledged that “[w]hether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive

sentences if for no other reason than to preserve potential deterrence of subsequent offenses.” *Horton v. State*, 949 N.E.2d 346, 348 (Ind. 2011).

However, the court has further explained that “additional criminal activity directed to the same victim should not be free of consequences” and that “the nature of the crime can certainly be significant.” *Id.* In sum, “[a]ll of these circumstances must be balanced in view of the fact that the legislature has already built into its sentencing range the consequences to victims, moral revulsion, and other factors inherent in the crime.” *Id.*

[9] The record demonstrates that after arriving home intoxicated, Miske pulled V.P. off the couch by her hair, choked her, threw her against the wall, and hit her across the bridge of her nose. He then confined, raped, sodomized, and forced V.P. to perform oral sex upon him. He committed the sexually violent acts repeatedly, at least two more times each, until he finally ejaculated. V.P. suffered an eye hemorrhage, bruising to her neck, face and arm, a cervical hemorrhage, and rectal bleeding. She also suffered hair loss as a result of Miske picking her up and dragging her by her hair. After these crimes, V.P. had to cope with anxiety, humiliation, sleeplessness, and feeling unsafe. We disagree with Miske’s postulation that the sentencing range for a single class A felony adequately accounts for the contemptible nature of these offenses.

[10] Moreover, although technically the case, we do not consider Miske’s offenses to be single-victim crimes under the circumstances presented. Some of Miske’s violent conduct occurred in the sight of one of V.P.’s children, and two of her children overheard the entire episode—including listening to their mother

begging Miske not to kill her. In her victim's impact statement, V.P. indicated that Miske's offenses had negatively affected her children. One child began displaying extraordinarily violent behavior in daycare settings after the incident. The abhorrent consequences to these children are certainly circumstances that the legislature has not already built into its sentencing range for a single class A felony. The trial court, upon remand, was well within its discretion to order consecutive sentences for Miske's sexually violent crimes, as well as his other crimes, when fashioning its revised sentence.

[11] Succinctly put, while Miske's offenses may not be among the worst of the worst, they are certainly egregious, warranting sentences above the advisory terms set forth by our legislature and also providing sufficient basis for the trial court to order consecutive sentences. Miske has not met his burden to demonstrate that the aggregate sentence imposed by the trial court is inappropriate in light of the nature of his offenses.

[12] As for Miske's character, we reiterate what has already been said by a majority panel of this Court when considering the same:

[W]e recognize, as did the trial court, that Miske served in the U.S. Marine Corps and remained generally well-employed as a welder. We also note Miske's difficult childhood, including placement in facility-based foster care because of his mother's drug addictions, his mental health issues, and his role helping to support V.P.'s children and a child of his own from a prior relationship in South Carolina.

However, before, during, and after his discharge from the Marine Corps, and during his youth, Miske accumulated an extensive history of juvenile and adult criminal offenses. Beginning at age thirteen, while a minor living in Indiana, Miske was adjudicated a delinquent for acts that, if prosecuted as an adult, constituted Battery and Theft. As an adult, in 2006 and 2007, Miske was convicted of a series of misdemeanors in North Carolina, including several convictions for Assault, as well as Driving While Intoxicated and other traffic-related offenses; one of the Assault convictions was upon a woman, and a no-contact order was entered against Miske in that case.

After he returned to Indiana, Miske was convicted of Strangulation and Public Intoxication. Upon being convicted of Strangulation, Miske was placed on probation, but violated his probation by committing the instant offenses. During the pendency of this case, Miske acted contrary to a no-contact order put into place by the trial court and attempted to make telephone contact with V.P. multiple times on May 23, 2014. Miske also had his father contact V.P. with an apparent offer to plead guilty if she allowed Miske to say goodbye to the children. Miske also illegally used alcohol and drugs, including underage drinking and engaging in marijuana use; he admitted to the latter of these during trial in this case, and tested positive for marijuana use during the pendency of prior criminal proceedings.

Miske I, at *10-11. We agree with the prior majority panel that Miske's behavior, including his criminal history involving violence toward women,

reflects poorly on his character, and he has not convinced us that sentence reduction is warranted.¹

[13] Miske directs us to our colleague’s dissenting opinion in his prior appeal in which she concluded that, based upon his military service and “the continuous nature of the rape and criminal deviate conduct,” concurrent sentences on those crimes would be “more appropriate.” *Miske I*, at *11 (Riley, J., dissenting in part). However, we reiterate that our appellate role is not to determine if another sentence might be more appropriate. Rather, our role is to determine whether the sentence chosen by the trial court is inappropriate. *See Foutch*, 53 N.E.3d at 581. Indeed, appellate revision pursuant to Indiana Appellate Rule 7(B) is reserved for only “rare and exceptional” cases. *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam). This is not one of those cases. We affirm the sentence imposed by the trial court.

[14] Affirmed.

Riley, J., and Mathias, J., concur.

¹ Miske argues that that he demonstrated sincere remorse for his crimes at the resentencing hearing that should reflect positively on his character. Specifically, he explained to the trial court that he gained new-found clarity about his behavior after observing the “Me Too” movement on television, and he regretted not pleading guilty to his crimes because V.P. deserved the “validation” that all sexual assault victims seek. Resent. Tr. at 65-66. Miske also highlighted to the trial court his recent volunteerism and community service during his incarceration as being indicative of his ability to rehabilitate. The trial court was clearly not persuaded by Miske’s self-serving statements and neither are we.