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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY A. STRAIT,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 71A03-1009-CR-536
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0911-FC-292

April 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a jury trial, Timothy Strait was convicted of child molesting as a Class C felony, domestic battery as a Class D felony, and criminal confinement as a Class D felony for which judgment was entered as a Class A misdemeanor. Strait appeals his convictions and sentence, arguing that the evidence is insufficient to support the convictions, the trial court erred in failing to give his tendered jury instructions, and the trial court imposed an inappropriate sentence of six years for child molesting consecutive to the six-month concurrent sentences for the other convictions. Concluding sufficient evidence supports each of Strait's convictions, the trial court did not abuse its discretion in refusing his tendered jury instructions, and his sentence is not inappropriate, we affirm.

Facts and Procedural History

On November 8, 2009, Strait and his wife, K.S., were living in a one-bedroom apartment in South Bend. K.S.'s daughter from a previous marriage, eleven-year-old A.V., was staying with K.S. and Strait for the weekend as part of K.S.'s overnight visitation, which she exercised regularly every other weekend and during the summer and school vacations. During her visits, A.V. usually slept on the couch in the apartment's living room.

Around 2:30 a.m., Strait, K.S., and A.V. returned home from grocery shopping. A.V. changed into pajamas and K.S. went to bed in the bedroom. A.V. laid on the couch in the living room with a blanket, while Strait laid on the love seat in the living room watching television. Strait told K.S. he was going to stay awake to watch television until 3:00 a.m.

After K.S. laid in bed for between fifteen and thirty minutes, around 3:05 to 3:15 a.m., she got up to go to the bathroom, which was shared with tenants of other apartments and located off the hallway of the apartment building. On her way to the bathroom, K.S. came into the living room and saw Strait laying on top of A.V., face to face, on the couch. The television was still on, and K.S. saw that A.V.'s pajama pants and underwear were down around her knees and her genital area was exposed. Strait "jumped off the couch real quick." Transcript at 233. He said he and A.V. were wrestling and tickling each other, but when K.S. asked why he would be tickling A.V. at 3:00 a.m., he did not respond. Meanwhile, A.V. "looked terrified"; she "shut down" and said nothing. Id. at 234.

Strait and K.S. argued. Strait told K.S. he was going to leave for Arizona and started packing his clothing, but K.S. stopped him from leaving.[1] K.S. went to the bedroom to get her keys and phone to call the police, and Strait followed her. As she was reaching for her coat containing her keys and phone, she told Strait she was going to leave the apartment and go to a friend's place. Strait then grabbed her coat with her keys and phone and hid them. K.S. testified that due to Strait hiding her keys and phone, she "couldn't leave." Id. at 235. K.S. also testified that she would not leave without taking A.V. with her.

Strait and K.S., continuing to argue, went into the living room. K.S. testified Strait pushed her and she "fell over the love seat and onto the floor," causing her pain. Id. at 234-35. A.V. was still on the couch at the time and looked scared.

[1] K.S. testified that she wanted Strait to remain at the apartment so he could be arrested. Tr. at 256.

The commotion woke the landlord, Mr. Kroll, and he came upstairs to the apartment. Strait opened the door but did not let Kroll inside the apartment. At that time, K.S. was in the bathroom off the hallway of the building; the bathroom door was adjacent to the door of K.S. and Strait's apartment. When K.S. opened the bathroom door to speak with Kroll, Strait was "standing right there" in the threshold of the apartment door. Id. at 236, 278-79. Kroll asked K.S. if everything was okay and she responded that it was. K.S. testified that she did not ask Kroll to call the police because she was afraid that if he did so, Strait would leave and would not be apprehended.

K.S. also testified that throughout the night, Strait followed her whenever she got up from bed to go to the bathroom or get cigarettes, and that Strait insisted she sleep in bed with him rather than on the living room couch. K.S. testified that Strait told her she "wasn't going anywhere." Id. at 237.

Eventually Strait fell asleep, and K.S. left the apartment with A.V. between 11:00 and 11:30 a.m. and walked across the street to a restaurant to call a friend. Police officers were called to the apartment, and as they arrived, Strait attempted to leave but was arrested. The officers returned K.S. her keys and phone and eventually took K.S. and A.V. to a hospital where A.V. was examined for evidence of sexual assault.

K.S. additionally testified that Strait was wearing that night, including when he was on top of A.V., a pair of blue shorts, more particularly described as swimming trunks, with a Velcro fly in the crotch area. The shorts were later found atop a pile of clothing in the apartment. Forensic testing of a portion of the shorts near the front fly revealed the presence of A.V.'s DNA.

The State charged Strait with criminal confinement of A.V. as a Class C felony, criminal confinement of K.S. as a Class D felony, child molesting as a Class C felony, and domestic battery of K.S. as a Class D felony. The case proceeded to a jury trial where K.S. testified but A.V. did not. The trial court refused to give Strait's tendered jury instructions 3 and 4, which stated:

> If the evidence merely tends to establish a suspicion of guilt or the mere opportunity to commit the charged act, it is clearly insufficient to sustain a conviction.

Appendix of Appellant-Defendant at 64 (Defense Instruction 3).

> In connection with your evaluation of the credibility of the witnesses, you should specifically consider evidence of resentment or anger which some State's witnesses may have towards the Accused.
>
> Evidence that a witness is biased, prejudiced or hostile toward the Accused requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.

Id. at 65 (Defense Instruction 4).

The jury found Strait not guilty of confinement of A.V. but guilty of the remaining counts. The trial court entered judgments of conviction, including for confinement of K.S. as a Class A misdemeanor. Following a sentencing hearing, the trial court sentenced Strait as follows: six months each on the confinement and domestic battery counts, to be served concurrent with each other, and six years for Class C felony child molesting, to be served consecutive to the other counts, for a total sentence of six and one-half years in prison. Strait now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing the sufficiency of the evidence to support a conviction, we neither reweigh the evidence nor judge the credibility of witnesses. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). When confronted with conflicting evidence, we consider it in a light most favorable to the conviction. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We must affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

B. Child Molesting

To convict Strait of child molesting as a Class C felony, the State was required to prove beyond a reasonable doubt that Strait performed or submitted to "any fondling or touching" with A.V., a child under age fourteen, with the intent to arouse or satisfy his or A.V.'s sexual desires. Ind. Code § 35-42-4-3(b); see App. of Appellant-Defendant at 142. "The intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000).

The State presented several pieces of circumstantial evidence that together support a reasonable inference Strait touched A.V. with the intent to arouse or satisfy his or the child's sexual desires. First and most importantly, A.V.'s pants and underwear were

pulled down to her knees, exposing her genital area, when K.S. found Strait face to face with and on top of A.V. Second, Strait's attempted explanation that he and A.V. were innocently wrestling and tickling each other was belied by the demeanor of A.V., who was silent and appeared to K.S. to be terrified. Third, the incident occurred in the middle of the night, with Strait appearing to take advantage of a time and place when he was alone with A.V. after K.S. had gone to bed. Fourth, and importantly, A.V.'s DNA was found on the front fly area of the shorts Strait was wearing at the time. While some of these facts taken individually might be susceptible of an innocent explanation, taken together they are sufficient to support a reasonable inference that Strait molested A.V. by rubbing his body, including his covered genitals, against her exposed genitals with the intent to arouse or satisfy sexual desires. Thus, Strait's sufficiency challenge to this conviction fails.

C. Domestic Battery

To convict Strait of domestic battery as a Class D felony, the State was required to prove beyond a reasonable doubt that Strait knowingly or intentionally touched K.S., his wife, in a rude, insolent, or angry manner, resulting in bodily injury, and did so in the presence of A.V., a child under age sixteen, knowing A.V. was present and might be able to see or hear the offense. See Ind. Code § 35-42-2-1.3(a), (b)(2); App. of Appellant-Defendant at 142-43. "Bodily injury" is defined as "any impairment of physical condition, including physical pain." Ind. Code § 35-41-1-4.

K.S. testified that while she and Strait were arguing in the living room, he pushed her and she fell to the floor, causing her pain. This happened while A.V. was also in the living room and thus could see or hear the offense. Strait points to his own contrary

testimony that K.S. stepped on an ashtray and fell; however, this argument calls for our assessment of K.S.'s and Strait's credibility, which we may not do. The evidence is sufficient to support Strait's conviction of domestic battery.

D. Criminal Confinement

To convict Strait of criminal confinement of K.S. as charged in the information, the State was required to prove beyond a reasonable doubt that Strait knowingly confined K.S. without her consent. See Ind. Code § 35-42-3-3(a)(1); App. of Appellant-Defendant at 142. To "confine" is defined as "to substantially interfere with the liberty of a person." Ind. Code § 35-42-3-1. The charging information alleged Strait knowingly confined K.S. "by refusing to allow her to leave the apartment." App. of Appellant-Defendant at 142.

Criminal confinement is defined by statute as:

> (a) A person who knowingly or intentionally:
> (1) confines another person without the other person's consent; or
> (2) removes another person, by fraud, enticement, force, or threat of force,[2] from one (1) place to another;
> commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Class D felony.
> (b) The offense of criminal confinement . . . is:
> (1) a Class C felony if:
> (A) the person confined or removed is less than fourteen (14) years of age and is not the confining or removing 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 or removing person; and
> (2) a Class B 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 or removing person; or
> (C) is committed on an aircraft.

[2] Our supreme court has narrowed this phrase of the statute, on grounds of otherwise unconstitutional vagueness, to exclude the words "by fraud, enticement," leaving in place its proscription against knowingly or intentionally removing another person by force or threat of force from one place to another. Brown v. State, 868 N.E.2d 464, 469 (Ind. 2007).

Ind. Code § 35-42-3-3. The language of the charging information in this case makes clear Strait was charged under subsection (a)(1) of the statute. Thus, the State did not need to prove any of the additional elements required under the other subsections, such as bodily injury (subsection (b)(1)(C)), a deadly weapon (subsection (b)(2)(A)), or use of force or the threat of force (subsection (a)(2)).

K.S. testified that after she told Strait of her intent to leave the apartment, Strait hid her keys and cellular phone, followed her about the apartment and whenever she went into the bathroom, and told her she was not free to leave. K.S. testified that due to Strait's actions, she "couldn't leave." Tr. at 235. Strait argues that insofar as the bathroom was not inside the apartment but was off of the apartment building hallway, K.S. made a voluntary decision to return to the apartment from the bathroom and therefore she was not confined. However, K.S. testified that Strait followed her every time she went into the bathroom, from which the jury could reasonably infer she returned to the apartment under compulsion by Strait. With Strait in possession of her keys and phone, K.S.'s physical liberty was substantially constrained because had she managed to leave the premises, Strait could have locked her out of the apartment in the middle of the night with no means of transportation and no way of calling for help. In addition, A.V., her dependent, was still inside the apartment and K.S. testified that she would not leave without A.V.

Strait also argues that the evidence showed Strait wished to leave the apartment but was prevented from doing so by K.S. While K.S. initially prevented Strait from packing his bag and leaving, the evidence favorable to the verdict supports a reasonable and not inconsistent inference that Strait thereafter abandoned his attempt to leave and

instead decided to prevent K.S. from leaving or calling the police. It was within the jury's province, but is not within ours on appeal, to weigh the evidence or judge K.S.'s credibility to conclude otherwise. We conclude the State presented sufficient evidence to support Strait's conviction for knowingly confining K.S. without her consent.

II. Jury Instructions

A. Standard of Review

The proper instruction of the jury rests within the sound discretion of the trial court and is reviewed on appeal for an abuse of discretion. Gravens v. State, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005), trans. denied. "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003), cert. denied, 540 U.S. 1150 (2004). In reviewing a trial court's decision to give or refuse a tendered jury instruction, we consider (1) whether the instruction correctly states the law, (2) whether the record contains evidence to support giving the instruction, and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Gravens, 836 N.E.2d at 493.

B. Refusal of Tendered Instructions

Strait argues the trial court abused its discretion by refusing to give his tendered jury instruction regarding mere suspicion and opportunity to commit a crime. Strait's proposed instruction number 3 stated:

> If the evidence merely tends to establish a suspicion of guilt or the mere opportunity to commit the charged act, it is clearly insufficient to sustain a conviction.

App. of Appellant-Defendant at 64. In support of this instruction, Strait cited Manlove v. State, 250 Ind. 70, 232 N.E.2d 874 (1968), Freeman v. State, 458 N.E.2d 694 (Ind. Ct. App. 1984), and McMahel v. State, 609 N.E.2d 1175 (Ind. Ct. App. 1993). However, both the language of Strait's proposed instruction and the above cases from which it derives concern the sufficiency of evidence when a conviction is challenged on appeal. None of these cases address the proper instruction of the jury or imply that the language used in the appellate opinion is proper to include in a jury instruction. As our supreme court has observed, the mere fact that certain language is used in an appellate opinion to help the appellate court reach its conclusion does not make it proper language for instructing the jury. Ludy v. State, 784 N.E.2d 459, 462 (Ind. 2003). Further, our supreme court, distinguishing between the function of appellate courts in reviewing whether a conviction is supported, and the function of juries in determining in the first instance whether the State proved the charged crime beyond a reasonable doubt, has held that statements of the law concerning the sufficiency standard of review may be improper for inclusion in jury instructions. Id. at 460-61 (holding it is error to give an instruction stating "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt").

Strait's proposed instruction derived from appellate opinions expressing the sufficiency standard of review and thus had the potential to confuse the jury, which was not reviewing a conviction. The jury's function of weighing the evidence and determining whether the State proved the charged crimes beyond a reasonable doubt was

properly covered by the instruction the trial court did give concerning the burden of proof:

> If, after your deliberation at the end of the trial you have a reasonable doubt concerning the defendant's guilt as to any or all charges, you must find him not guilty as to that charge or those charges.
>
> A reasonable doubt is a fair, actual, and logical doubt. It's a doubt based upon reason and common sense and not a doubt based upon imagination, speculation, or guesses.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced. There are very few things in this world that we can know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If based on your consideration of all of the evidence you are convinced beyond a reasonable doubt that the defendant is guilty of the crimes charged, you may find him guilty. If on the other hand you find that the evidence has not removed every reasonable doubt as to his guilt, you must give him the benefit of that doubt and find him not guilty.
>
> Proof beyond a reasonable doubt is that degree of proof required to convince a reasonable, prudent person of the truth of a proposition with such force that it can be acted upon without hesitation in his or her most important affairs when there is no compulsion upon the person to act at all. Speculations and guesses are exercises of the imagination, not of reason. They cannot be substituted for reason in evaluating the evidence.

Tr. at 655-56. For these reasons, the trial court did not abuse its discretion in refusing to give Strait's tendered instruction number 3.

Strait also argues the trial court abused its discretion by refusing to give his tendered instruction regarding witness credibility. Strait's proposed instruction number 4 stated:

> In connection with your evaluation of the credibility of the witnesses, you should specifically consider evidence of resentment or anger which some State's witnesses may have towards the Accused.
>
> Evidence that a witness is biased, prejudiced or hostile toward the Accused requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.

App. of Appellant-Defendant at 65. Strait argues this instruction was supported by evidence that K.S. was immediately angry with him, may have hit him, and wanted him arrested. However, Indiana courts have "long . . . disapproved" instructions that "unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case." Ham v. State, 826 N.E.2d 640, 641-42 (Ind. 2005). In Ham, our supreme court held it is error to instruct a jury that a driver's refusal to submit to a chemical breath test may be considered evidence of intoxication, reasoning that a trial court should not highlight such an evidentiary fact but should instead allow the parties' attorneys to argue its implications. Id. at 642. Our supreme court has also stated that "an instruction directed to the testimony of one witness erroneously invades the province of the jury when the instruction intimates an opinion on the credibility of a witness or the weight to be given to his testimony." Pope v. State, 737 N.E.2d 374, 378 (Ind. 2000) (quotation omitted). Consistent with these principles, the trial court refused Strait's instruction that focused solely on the credibility of K.S., but permitted Strait's counsel to argue in closing that the jury should consider K.S.'s bias and hostility toward Strait in evaluating her testimony.

The concept of a witness's bias affecting credibility was adequately and more properly covered by the instruction the trial court did give, which was as follows:

> You are the only judges of the weight of both the physical evidence and the testimony, the believability or credibility, of each of the witnesses. In considering the testimony of a witness, including the testimony of the defendant who is a competent witness in his own behalf, you may take into account the witness's ability and opportunity to observe those things he or she testified to, the witness's memory, manner, and conduct while testifying, any interest the witness may have in this case, any bias the witness may have for or against any party to this suit, any relationship with other witnesses or interested parties, and the reasonableness of the witness's testimony when viewed with all of the other evidence in the case.

> The credibility of the defendant's testimony should be evaluated by you according to the same criteria that you use for any other witness.

Tr. at 657; see also Abbott v. State, 535 N.E.2d 1169, 1172 (Ind. 1989) (stating a similar instruction "fully instructed" the jury on the credibility of witnesses, and it was not error to refuse defendant's tendered instruction that the testimony of an accomplice should be closely scrutinized). Therefore, the trial court did not abuse its discretion in refusing to give Strait's tendered instruction number 4.

III. Sentence

Strait argues his sentence is inappropriate in light of the nature of his offenses and his character.[3] Indiana Appellate Rule 7(B) provides that this court may revise a sentence if we find, "after due consideration of the trial court's decision," that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

Initially we note that the trial court gave Strait the benefit of misdemeanor sentencing for his criminal confinement conviction. The trial court imposed six-month sentences for the confinement and domestic battery convictions, to run concurrent with each other but consecutive to a six-year sentence for child molesting, for a total sentence of six and one-half years in prison. The advisory sentence for Class C felony child

[3] One paragraph of Strait's brief appears to challenge the trial court's finding of aggravating circumstances, but Strait cites no authority in this regard and does not specifically argue the trial court abused its discretion in sentencing him. We limit our review accordingly.

molesting is four years, with a minimum of two and a maximum of eight years. See Ind. Code § 35-50-2-6.

Regarding the nature of the offenses, we note they involved two victims, K.S. and A.V. The existence of multiple victims suggests the appropriateness of consecutive sentencing "to vindicate the fact that there were separate harms and separate acts against more than one person." Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003).

A.V.'s age of eleven is not significant because the definition of child molesting requires a victim under age fourteen. However, testimony at trial showed that A.V. has a learning disability and has difficulty trusting others. As A.V.'s stepfather, Strait knew she was "not very trusting at first," but testified he and A.V. developed a trusting "father/daughter relationship" and she started to call him "Dad." Tr. at 536. That Strait chose to take advantage of a child who was particularly vulnerable and who had grown to trust him increases the gravity of his offense.

As for Strait's character, he has a criminal history of two prior felony convictions and five prior misdemeanor convictions. His prior misdemeanor convictions for domestic violence (twice), violation of a domestic injunction, and assault are related in nature to the domestic battery and confinement offenses in the present case. The only evidence that Strait points to regarding his character – his difficult childhood and history of drug usage since childhood – is not significantly favorable to his current challenge especially because he is now forty years old. Strait has failed to persuade us that his moderately enhanced sentence of six and one-half years in prison is inappropriate.

Conclusion

The evidence is sufficient to support each of Strait's convictions, and the trial court did not abuse its discretion in refusing his tendered jury instructions. Further, Strait's six and one-half year sentence is not inappropriate. Strait's convictions and sentence are accordingly affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.