

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.

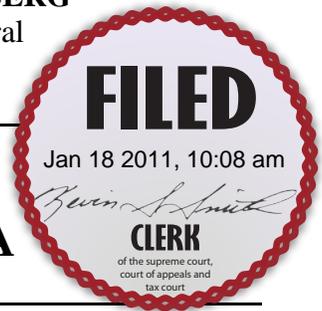
ATTORNEY FOR APPELLANT:

JOSEPH M. CLEARY
Collignon & Dietrick
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

DESMOND PARKS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-1003-CR-174

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G22-0908-FB-072173

January 18, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Desmond Parks appeals his conviction for Class D felony domestic battery. Parks contends that the evidence is insufficient to support his conviction and that the trial court erred by denying his motion for discharge under Indiana Criminal Rule 4(B). Concluding that the evidence is sufficient and that the trial court did not err by denying his motion for discharge, we affirm.

Facts and Procedural History

One evening in August 2009, Parks and his girlfriend Michelle Bowman were arguing about Parks wanting to leave the house. Bowman then discovered twenty dollars missing from her purse and demanded that he return the money to her. Their argument escalated when Parks grabbed her by the throat, pushed her up against the refrigerator, and held a large kitchen knife to her throat. Bowman had difficulty breathing. Parks threatened to kill her multiple times. When one of their children walked into the kitchen and said something, Parks released Bowman. Bowman attempted to leave through both the back and front doors, but Parks told her he would hit her if she tried to leave. Bowman locked herself in the bathroom and called 911. She told the operator that Parks dug his finger into her throat and choked her, held a knife up to her throat, and threatened to kill her. She identified herself as Michelle Bowman and her attacker as her boyfriend Desmond Parks.

Officer Gabriel Cuevas of the Indianapolis Metropolitan Police Department arrived about a minute after he was dispatched. He observed Bowman crying, shaking, and “in a high emotional state.” Tr. p. 89. Bowman told Officer Cuevas that Parks

grabbed her by the throat, pushed her up against the refrigerator, held a large kitchen knife to her throat, and released her only when one of their children walked into the kitchen and said something. Parks was later arrested when he returned to the house.

The State charged Parks with Class B felony criminal confinement, Ind. Code § 35-42-3-3, Class D felony domestic battery, *id.* § 35-42-2-1.3, and Class D felony strangulation, *id.* § 35-42-2-9. At the initial hearing, Parks entered a preliminary plea of not guilty. The trial court set the case for trial on October 22, 2009, and ordered Parks to have no contact with Bowman. Parks filed a motion for speedy trial pursuant to Indiana Criminal Rule 4(B)(1), requesting that he be tried within seventy days. The trial court granted the motion and noted Parks's speedy trial deadline of November 10, 2009.

Three days before the scheduled trial date, Parks filed a motion to exclude Bowman's testimony, stating that Bowman failed to appear for two scheduled depositions and that her taped statements were necessary to prepare for the defense. Two days before the scheduled trial date, the State filed a motion to continue, stating that it recently discovered that Parks, in violation of the court's no-contact order, had made over 175 phone calls to Bowman totaling over 50 hours in length. The same day, the State also filed a request for a hearing on forfeiture by wrongdoing. In the request, the State claimed that "within the calls [Parks] discusses procuring [Bowman]'s non attendance at any hearing or deposition related to the case." Appellant's App. p. 41. The State therefore asserted that Parks had "forfeited the right to confront and cross-exam the victim, Michelle Bowman, in this case and all statements made by Ms. Bowman to other

witnesses, should be admitted as substantive evidence against [Parks].” *Id.* The trial court set all these motions for a hearing the day before the scheduled trial date.

At the hearing, the State brought records printed off the Marion County Jail phone system showing that over 900 calls had been attempted to Bowman’s cell phone and that over 175 calls were completed. The State had burned the completed calls onto CDs, but because they amounted to over 50 hours, it had yet to listen to all of them. Regarding the calls it had been able to listen to, the State represented that: (1) the parties referred to each other as “D,” “Des,” and “Michelle,” (2) the parties talked about each of Parks’s and Bowman’s children, (3) the caller said he would request a speedy trial (a couple of weeks after this call, Parks requested a speedy trial), and (4) the caller asked “Michelle” not to go to court. The State explained that because the hearing was set so quickly, it was unable to subpoena Buzz Michael, the person who maintains the inmate phone records of the Marion County Jail, to lay a foundation for the calls. The trial court granted the State’s motion to continue the trial over Parks’s objection and charged it to the defense. The court scheduled a hearing on the remaining issues and noted it would reconsider its decision charging the continuance to Parks depending on the evidence presented at that hearing.

Multiple hearings – October 30, November 12, and November 13 – were held on the remaining issues because the State’s witnesses were not available to testify. Michael, although subpoenaed, failed to show up at the October 30 hearing. The classification clerk for the Marion County Sheriff’s Department, however, testified that Parks was housed in cellblock 4-J from August 13 to October 21. Over Parks’s speedy trial

objection, the trial court bifurcated the hearing and set it for November 12 to allow the State to procure Michael's attendance.

Michael testified at the November 12 hearing that all inmates' calls are monitored, recorded, and kept digitally at a data center. He further testified that when recorded calls transferred to a CD are played on a computer, a web interface shows the cellblock of the inmate caller, the number that was dialed, and the date and time of the call. Comparing the police report and reports generated by the data center, Michael testified that phone calls were dialed from cellblock 4-J to a number listed in the police report as Bowman's number. The State moved to admit two CDs containing these recorded phone calls. Parks objected to the lack of foundation linking him to the calls since other inmates in that cellblock may have had access to the phones and to the lack of any authentication of the voices in the calls. The State responded that it believed it had presented enough evidence for purposes of the hearing to show a link between the phone calls, Parks, and Bowman, and that Parks's objection would go to the weight of the evidence and not admissibility. The court admitted the CDs over objection.

Some of the phone calls were played in court. The State noted for the court particular calls which it believed were probative of the identities of the parties to the calls and of whether Parks had procured Bowman's absence. Although the State had intended for Officer Cuevas to verify Bowman's voice on the calls, Officer Cuevas had to leave the hearing before he could testify. Over Parks's continuing speedy trial objection, the trial court set another hearing for the next day so that Officer Cuevas could testify.

Officer Cuevas did not appear for the November 13 hearing. The trial court, however, granted the State's motion for forfeiture by wrongdoing:

[T]he Court has, subsequent to the hearing yesterday, reviewed all of [the] exhibits that have been admitted, has listened to all of the tapes. The Court has absolutely no doubt that the person initiat[ing] those calls is Mr. Parks in violation of the Court's No Contact Order that was issued on August 18, 2009, and bears his signature, and the Court having reviewed the entire file and the probable cause affidavit and the charges, the Court is also absolutely convinced that the person to whom Mr. Parks has placed these calls is a protected person by the name of Michelle Bowman. The Court has heard Mr. Parks and Miss Bowman discuss in detail the fact that she should not show up for court; the fact that she has at certain points in the conversation discussed alternative explanations for a knife that was collected, for the scratch that was photographed by the police at the time the police were called to the home. The Court finds that Mr. Parks has substantially contributed to the lack of cooperation, absence of cooperation, on the part of Miss Bowman, who was the alleged victim in this case, [a]nd does grant the State's Motion for Forfeiture of his Right to Cross Examination by Wrongdoing.

Tr. p. 65-66.

Parks filed a motion for discharge in December 2009, which the trial court denied.

At Parks's bench trial, the court admitted the audio recording and the paper documentation of the 911 call pursuant to stipulation:

[STATE]: Your Honor, I am going to begin my case by playing the 911 call and offering State's Exhibit[s] . . . Six and Seven. Six and Seven are 911 calls and the report, the documentation of the 911 call.

THE COURT: Is there a stipulation on these?

[STATE]: Yes, Your Honor.

[PARKS]: To Exhibit[s] Six and Seven there is a stipulation.

THE COURT: To the admissibility of Exhibit[s] Six and Seven?

[PARKS]: To the admissibility, yes.

THE COURT: Okay. So no objection?

[PARKS]: No objection on those two.

THE COURT: We will show Exhibits Six and Seven are admitted pursuant to stipulation.

Id. at 86-87. The 911 call was played in open court.

Officer Cuevas testified that upon arriving on the scene, Bowman told him that Parks grabbed her by the throat, pushed her up against the refrigerator, held a large kitchen knife to her throat, and released her only when one of their children walked into the kitchen and said something.

Bowman testified that her five children were present in the home the night she called 911 and that the four children she had in common with Parks ranged from two to six years old. She did not remember what she said to the 911 operator. She also testified that she spoke with Officer Cuevas that night but could remember only “[b]its and pieces” of what she told him. *Id.* at 127. She further testified that Parks never held a knife to her throat, never strangled her, and never kept her from breathing.

The trial court found Parks guilty of Class D felony domestic battery and not guilty of criminal confinement and strangulation. Parks now appeals.

Discussion and Decision

Parks contends that the evidence is insufficient to support his conviction and that the trial court erred by denying his motion for discharge under Indiana Criminal Rule 4(B).

I. Sufficiency of the Evidence

Parks first contends that the evidence is insufficient to support his conviction for Class D felony domestic battery.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct.

App. 2010), *reh'g denied, trans. denied*. We consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

In the charging information, the State alleged the following:

Desmond Parks, on or about August 12, 2009, did knowingly or intentionally touch Michelle Bowman, a person who is or was a spouse of Desmond Parks; is or was living as if a spouse of Desmond Parks; or has a child in common with [Desmond Parks]; in a rude, insolent, or angry manner, that is: grabbed with hand(s), resulting in bodily injury to Michelle Bowman, that is: pain and/or redness, furthermore, defendant committed said act in the physical presence of Terrell Parks and/or Nicholas Parks and/or Daniel [P]arks and/or Emily Parks, a child less than sixteen (16) years of age, knowing that said child was present and might be able to see or hear the offense

Appellant's App. p. 23-24; *see also* I.C. § 35-42-2-1.3.

Because Bowman denied at trial that Parks ever held a knife to her throat, strangled her, or kept her from breathing, the only evidence of the domestic battery was the 911 recording and Officer Cuevas's testimony. Parks thus argues that the 911 recording and Officer Cuevas's testimony do not provide sufficient evidence of the offense.

Parks first argues that Bowman's voice in the 911 recording was not authenticated. Indiana Evidence Rule 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Authentication is thus an issue of admissibility. However, because Parks explicitly stipulated to the admissibility of the 911 recording, we find this argument unavailing. Regarding the sufficiency of the 911 recording as evidence supporting Parks's conviction, the 911 caller identified herself as Michelle Bowman. Bowman testified at trial that she called 911 on the night of the incident. Although she testified that she did not remember what she told the 911 operator or Officer Cuevas, the 911 recording and Officer Cuevas's testimony provided those facts. It was therefore reasonable for the trial court to infer that the caller was Bowman and that Parks had grabbed her and held a knife to her throat.

Parks then argues that "if [Bowman] had not appeared for trial, her statement to Ofc. Cuevas would not be admissible." Appellant's Br. p. 5. Despite Parks's argument based on what could have occurred, Bowman did appear for trial.¹ Further, as Parks concedes, Officer Cuevas's hearsay testimony falls under the excited utterance exception to the hearsay rule. *Id.*

The facts most favorable to the trial court's judgment reveal that Parks grabbed Bowman by the throat, pushed her up against the refrigerator, held a large kitchen knife to her throat, and released her only when one of their children walked into the kitchen and said something. Although Parks points to Bowman's testimony that he never held a knife to her throat, never strangled her, and never kept her from breathing, this is merely an invitation to reweigh the evidence and reassess witness credibility, which we may not

¹ Parks concedes that Bowman appeared to testify and thus makes no constitutional confrontation claim under *Crawford v. Washington*, 541 U.S. 36 (2004), or its progeny.

do. The evidence is thus sufficient to sustain Parks's conviction for Class D felony domestic battery.

II. Motion for Discharge

Parks also contends that the trial court erred by denying his motion for discharge under Indiana Criminal Rule 4(B).

The Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution guarantee the right to a speedy trial. *Wilkins v. State*, 901 N.E.2d 535, 537 (Ind. Ct. App. 2009), *trans. denied*. The provisions of Indiana Criminal Rule 4 implement these protections. *Id.* Indiana Criminal Rule 4(B)(1) provides in pertinent part:

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.

Rule 4(B) was designed to assure criminal defendants speedy trials, not to provide them with a technical means of avoiding trial. *Smith v. State*, 802 N.E.2d 948, 951 (Ind. Ct. App. 2004).

The trial court granted Parks's motion for speedy trial, which resulted in a speedy trial deadline of November 10, 2009. His bifurcated trial did not occur until January and February 2010. There is thus no dispute that Parks's trial occurred beyond November 10, 2009. However, as Rule 4(B)(1) indicates, the seventy-day time period may be extended where the delay is caused by the defendant. Any exigent circumstances may warrant a

reasonable delay beyond the limitations of Rule 4(B). *Id.* The reasonableness of such delay must be judged in the context of the particular case, and the decision of the trial judge will not be disturbed except for an abuse of discretion. *Id.*

Parks filed a motion to exclude Bowman's testimony three days before the original October 2009 trial date because she failed to appear for two scheduled depositions. The State filed a motion to continue and requested a hearing on forfeiture by wrongdoing two days before the original October 2009 trial date based on its discovery that Parks had completed over 175 phone calls to Bowman in violation of the court's no-contact order and its claim that Parks encouraged Bowman not to attend any hearings or depositions. After multiple hearings and reviewing the evidence, which included the CDs of the recorded phone calls between Parks and Bowman, the trial court ultimately found that Parks substantially contributed to Bowman's non-cooperation, granted the State's motion for forfeiture by wrongdoing, and attributed the delay to Parks.

The essence of Parks's claim here is that the trial court should not have determined that the delay in trial was caused by Parks.

Parks first argues that the trial court erred by attributing the delay to him because the voices in the recorded phone calls were not identified or authenticated. As noted above, Indiana Evidence Rule 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Further, as guidance, Rule 901 provides that an example of authentication or identification of telephone conversations conforming to this rule include "evidence that a call was made to

the number assigned at the time by the telephone company to a particular person . . . if . . . circumstances, including self-identification, show the person answering to be the one called.” Ind. Evidence Rule 901(b)(6).

Here, the trial court listened to the phone calls and determined the identities of the parties as Parks and Bowman. A review of the evidence shows that the phone calls originated from Parks’s cellblock and were made to the number listed in the police report as Bowman’s number. The caller was referred to as “D,” “Des,” “Dezy,” and the recipient was referred to as “Michelle.” The parties talked about Parks’s and Bowman’s children. A day before Parks’s and Bowman’s son Daniel’s birthday, the parties talked about buying Daniel a birthday cake. The caller talked about requesting a speedy trial. The recipient talked about having the knife at her throat and the pictures the police took of her throat, and the parties discussed alternate explanations of what occurred that night. In line with Evidence Rule 901, then, there is sufficient evidence that the CDs are what the State claims them to be, namely, phone calls between Parks and Bowman.

Nonetheless, Parks also argues that a case relied upon by the State to support its motion for forfeiture by wrongdoing, *Boyd v. State*, 866 N.E.2d 855 (Ind. Ct. App. 2007), *trans. denied*, is distinguishable because the facts presented there are more extreme than the facts presented here. In *Boyd*, we concluded that because the defendant murdered his wife before trial, he forfeited his right to confront her at trial. 866 N.E.2d at 858. Parks’s argument misses the mark. *Boyd* does not involve the issue before us, that is, whether the delay of trial was caused by the defendant. *Boyd* is therefore irrelevant to our consideration on appeal.

The mere fact that the evidence showed that Parks initiated over 50 hours of phone calls to Bowman in violation of the court's no-contact order and in which Parks and Bowman talked about Bowman not appearing in court was sufficient to show that the delay of trial was caused by Parks. The trial court did not abuse its discretion by finding that the delay was caused by Parks. We thus conclude that the trial court did not err by denying Parks's motion for discharge under Rule 4(B).

Affirmed.

BAKER, J., and BARNES, J., concur.