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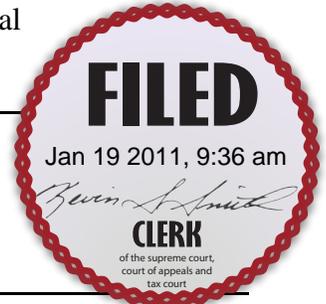
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**IN THE
COURT OF APPEALS OF INDIANA**



JAMIE S. WEDDLE,)
)
Appellant/Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee/Plaintiff.)

No. 53A01-1006-CR-313

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0905-FA-388

January 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Jamie S. Weddle appeals following his convictions for Class A felony Rape,¹ Class B felony Aggravated Battery,² Class D felony Criminal Confinement.³ Weddle contends that his convictions for both Class A felony rape and aggravated battery violate the prohibitions against double jeopardy. Weddle also contends that his convictions for both Class A felony rape and Class D felony criminal confinement violate the prohibitions against double jeopardy. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

At all times relevant to the instant appeal, Weddle and E.B. were dating and living together in E.B.'s home in Ellettsville. On May 1, 2009, Weddle and E.B. went to various bars in Ellettsville together. While at these bars, Weddle and E.B. drank, and Weddle played pool while E.B. conversed with friends. At some point, E.B. went outside with her friend Bill Wiley to help him load a piece of lawn equipment into his vehicle. In exchange, Wiley gave E.B. "enough [marijuana] for a joint." Tr. p. 353. When E.B. went back into the bar, she found that Weddle was "really upset" with her and they argued about why she was outside with Wiley. Tr. p. 356. Weddle and E.B. continued to argue throughout the evening about Wiley. At approximately 7:30 p.m., E.B. asked Weddle to take her home. At that time, E.B. went to bed, and Weddle returned to the last bar he and E.B. had visited.

At approximately 10:00 p.m., Weddle returned home and complained to E.B. about her friends, who he claimed "gave him a hard time about playing pool with [another

¹ Ind. Code § 35-42-4-1(b)(3) (2008).

² Ind. Code § 35-42-2-1.5 (2008).

³ Ind. Code § 35-42-3-3(a)(1) (2008).

woman].” Tr. p. 371. Weddle then accused E.B. of fellating Wiley while the two were outside the bar together earlier that evening. E.B. denied Weddle’s accusations and told him that he could “call [Wiley] and ask him.” Tr. p. 371. E.B. dialed Wiley’s phone number from her cellular phone. Weddle took the phone and left Wiley a threatening message.

After leaving the threatening message on Wiley’s voicemail, Weddle hung up the phone and “started smacking [E.B.] upside the head.” Tr. p. 373. Weddle then grabbed E.B., pushed her on the bed, and continued “smacking” E.B. Tr. p. 373. E.B. testified that Weddle was hitting her so hard that she “could see stars” and her “ears started ringing.” Tr. p. 373. Weddle then grabbed E.B. and held her down by her throat. E.B. testified that she could not breathe and that she asked Weddle to “please stop” but that he “just kept smacking” her. Tr. p. 373. Eventually, Weddle released E.B.’s neck, only to smack her “so hard that she hit the floor.” Tr. p. 374. E.B. landed on the hardwood floor on her left hip and immediately felt immense pain. As E.B. complained about the pain, Weddle “picked [her] up by [her] armpits and [] threw [her] back on the bed.” Tr. p. 375.

After throwing E.B. onto the bed, Weddle ripped off her shirt, took off her undergarments, held her down, forced her legs apart, and “threw” her left knee toward her shoulder. Tr. p. 376. E.W. heard a pop and again felt immense pain before Weddle “forced himself on [her].” Tr. p. 376. E.B. pleaded with Weddle to “Stop, please stop. You’re hurting me. If you love me why are you hurting me? Please stop.” Tr. p. 376-77. Weddle did not stop when requested to do so by E.B. but continued “until he was done.” Tr. p. 377. E.B. testified that at the time she did not want to have intercourse with Weddle and that the

pain she felt was unlike anything she had ever felt before, almost like the muscles were pulling away from her bones. After engaging in intercourse, Weddle got E.B. an icepack for her face before falling asleep next to the injured E.B. E.B. was on the bed between Weddle and the wall, and, because of the immense pain, could not move from the bed.

The next morning, E.B. pleaded with Weddle to call an ambulance. Weddle initially refused but finally agreed after E.B. told him that she would lie about how she incurred her injuries. Weddle followed E.B. to the hospital and stayed by her side throughout the day. Upon examination, an orthopedic surgeon determined that E.B. sustained a fracture to her hip, which required surgery. Eventually, Weddle left the hospital, and E.B. told the hospital staff that Weddle was responsible for her injuries.

On May 5, 2009, Weddle was charged with two counts of rape, as a Class A felony, *i.e.*, rape causing a serious bodily injury, Class A felony criminal deviate conduct, Class B felony aggravated battery, and Class B felony criminal confinement. The charges were later amended to include the correct dates of the alleged attacks. A jury trial was held on May 18-20, 2010, at which the orthopedic surgeon who examined E.B. in the emergency room testified that it was medically possible that the hip fracture was sustained when she hit the floor and the subsequent act of moving her knee likely only aggravated the injury. At the conclusion of trial, the jury found Weddle guilty of one count of Class A felony rape, aggravated battery, and the included offense of Class D felony criminal confinement. The jury found Weddle not guilty of the remaining charges. On June 11, 2010, the trial court sentenced Weddle to fifty years imprisonment on the Class A felony rape conviction, twenty

years imprisonment on the aggravated battery conviction, and three years imprisonment on the Class D felony criminal confinement conviction. The trial court ordered that the sentence for the aggravated battery conviction be run consecutively to the Class A felony rape conviction, and the sentence for the Class D felony criminal confinement conviction be run concurrently to the sentence for the Class A felony rape conviction, for an aggregate term of seventy years.

DISCUSSION AND DECISION

Weddle contends that his convictions for both Class A felony rape and aggravated battery violate the Double Jeopardy Clause of the Indiana Constitution. Weddle also contends that his convictions for both Class A felony rape and Class D felony criminal confinement violate the Double Jeopardy Clause of the Indiana Constitution. Conversely, the State contends that Weddle's convictions do not violate the constitutional prohibitions against double jeopardy, and thus, should be affirmed. Article I, Section 14 of the Indiana Constitution provides that "No person shall be put in jeopardy twice for the same offense." On appeal, we review whether Weddle's convictions violate the Double Jeopardy Clause of the Indiana Constitution *de novo*. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005). Although Weddle claims that his convictions violate the actual evidence test set forth in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), for reviewing claims under the Double Jeopardy Clause of the Indiana Constitution, the primary thrust of Weddle's argument on appeal is that his two convictions violate certain non-constitutional forms of double jeopardy that are based on statutory and common law principles.

“The Indiana Supreme Court has long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in *Richardson*.” *McElroy v. State*, 864 N.E.2d 392, 397 (Ind. Ct. App. 2007), *trans. denied*. One of these rules is that double jeopardy is violated where conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished. *Id.* (internal quotations omitted). Specifically, in his concurrence in *Richardson*, Justice Sullivan explained:

The legislature has provided that the punishment classification of certain crimes may be enhanced if the behavior [that] constitutes the crime is accompanied by certain specified additional behavior or causes certain specified additional harm. In situations where a defendant has been convicted of one crime for engaging in the specified additional behavior or causing the specified additional harm, that behavior or harm cannot also be used as an enhancement of a separate crime; either the enhancement or the separate crime is vacated.

Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring) (footnote omitted). Therefore, in order to determine whether Weddle’s convictions violate the prohibitions against double jeopardy, we must determine whether Weddle has been punished twice for the exact same act.

A. Class A Felony Rape and Aggravated Battery

Indiana Code section 35-42-4-1 provides that an individual commits Class A felony rape when the individual “knowingly or intentionally has sexual intercourse with a member of the opposite sex when: (1) the other person is compelled by force or imminent threat of

force ... [resulting] in serious bodily injury to a person.” “‘Serious bodily injury’ means bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or an organ; or (5) loss of a fetus.” Ind. Code § 35-41-1-25 (2008). Indiana Code section 35-42-2-1.5 provides that an individual commits aggravated battery when the individual “knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes: ... (2) protracted loss or impairment of the function of a bodily member or organ.”

Consistent with the statutory definitions, the State charged Weddle as follows:

[O]n or about May 1, 2009, in Monroe County, State of Indiana, Jamie Scott Weddle did knowingly have sexual intercourse with [E.B.], a member of the opposite sex, when [E.B.] was compelled by force or imminent threat of force, and said act resulted in serious bodily injury to [E.B.]

* * * *

[O]n or about May 1 to May 2, 2009, in Monroe County, State of Indiana, Jamie Scott Weddle did knowingly inflict injury on [E.B.] that caused protracted loss or impairment of the function of a bodily member or organ.

Appellant’s App. pp. 45-46. The charging information did not clearly allege which specific acts the State relied upon to prove both the Class A felony rape and aggravated battery charges. However, Weddle argues that the State relied upon the same acts to prove serious bodily injury in both charges.

The evidence presented at trial indicated that Weddle held E.B. down on the bed by her throat, repeatedly “smacked” E.B. upside the head hard enough to cause E.B. to see stars

and hear a ringing in her ears, and smacked E.B. so hard that she was knocked off the bed and landed on her left hip on the hardwood floor, immediately feeling immense pain. Weddle then picked E.B. up by the armpits, threw her on the bed, ripped her shirt off, took off her undergarments, forced her legs apart, forced her left knee toward her shoulder, and forced himself on her. E.B. testified that immediately after Weddle force her legs apart and her left knee to her shoulder, she heard a pop and felt immense pain unlike anything she had ever felt before. The orthopedic surgeon testified that it was medically possible that E.B. sustained the hip fracture when she hit the floor, and that it was unlikely that the act of moving her knee during the subsequent attack caused the hip fracture and likely only aggravated the injury. This evidence can properly support convictions for both Class A felony rape and aggravated battery.

However, although the evidence presented at trial can properly support convictions for both Class A felony rape and aggravated battery, we must determine whether there is a reasonable possibility that the jury used the same facts to establish both convictions. A reasonable possibility that the jury used the same facts to reach two convictions requires substantially more than a logical possibility. *Lee v. State*, 892 N.E.2d 1231, 1236 (Ind. 2008). Rather, reasonable possibility “turns on a practical assessment of whether the jury may have latched on to exactly the same facts for both convictions.” *Id.*

In its final instructions, the trial court instructed the jury on the statutory definitions of Class A felony rape and aggravated battery. The trial court’s reading of the statutory definitions reiterated that the “serious bodily injury” requirement for Class A felony rape

includes “bodily injury that causes extreme pain, or serious permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ” while aggravated battery requires a protracted loss or impairment of the function of a bodily member or organ. Tr. pp. 640, 645.

During closing arguments, the State stated the following regarding the rape charge:

To [p]rove rape, I have to prove that ‘On or about, May 1st of 2009,’ ... ‘In Monroe County, Indiana,’ ... [Weddle] ... ‘Knowingly had sexual intercourse with [E.B.] a member of the opposite sex,’ ... ‘By using for or imminent threat of force,’ [E.B.] testified [that] the Defendant threw her left knee up to her left shoulder, was hitting her and holding her down. You saw the photographs. [E.B.]’s injuries are consistent with force being use[d]. [E.B.] told you she did not consent to this. “Such act resulting in serious bodily injury to [E.B.]’ This is in the instructions that you have but serious bodily injury means: Bodily injury that causes extreme pain or serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. When the Defendant forced her legs apart and put her knee up to her shoulder he was inflicted injury that caused extreme pain. [E.B.] told you about how she cried throughout the attack and the level ten pain she was feeling and how she begged him to stop because it hurt so much. That was extreme pain.

Tr. pp. 606-08. Regarding the aggravated battery charge, the State stated:

‘On or about May 1st to May 2nd, 2009,’ ... ‘In Monroe County,’ ... ‘The Defendant Jamie Weddle,’ ... ‘Knowingly inflicted injury on [E.B.] that caused protracted loss or impairment of the function of a bodily member or organ,’ Well, there’s no statutory definition for the word protracted, Indiana Court’s [sic] have held that the plain meaning of protracted is to draw out or lengthen in time, to prolong. Another Indiana Court held that impairment means the fact or state of being damaged, weakened, or diminished, for purposes of the Aggravated Battery statute. In this case, it took eight months before [E.B.] was able to heal. She first walked with a walker for a couple of months and then she was able to walk by means of a cane. It was at least four months before she was able to walk under her own power without assistance. I submit to you that is protracted. And even today, she testified yesterday, that even to this day she has trouble making it up stairs. Impairment, the fact or state of being damaged, weakened, or diminished. If she can’t make it up the stairs, she’s damaged, weakened, or diminished. She was damaged, weakened,

or diminished for several months that followed. [E.B.] told you about being smacked so hard she hit the floor and how she felt the leg pain. You saw the x-rays. [The orthopedic surgeon] explained the seriousness of the injury and how it took eight months to heal. [E.B.] and [the orthopedic surgeon] told you about how she needed a walker and a cane to assist her. And to this day she has trouble with stairs and can't lay too long on her left side because of the hardware in her leg. I submit to you ladies and gentleman, a leg is a bodily member.

Tr. pp. 613-14. The State's closing argument clearly delineated Weddle causing E.B. to suffer extreme pain to effectuate the Class A felony rape from Weddle knocking E.B. to the floor causing the hip injury for the aggravated battery.

Weddle claims that *Bradley v. State*, 867 N.E.2d 1282 (Ind. 2007), *Davis v. State*, 770 N.E.2d 319 (Ind. 2002), and *Smith v. State*, 881 N.E.2d 1040 (Ind. Ct. App. 2008) support his claim that his rape conviction and aggravated battery conviction violate the prohibitions against double jeopardy. We disagree.

In *Bradley*, the defendant was charged with and convicted of aggravated battery after he inflicted upon the victim an open head wound requiring staples and a knife wound to the back, and criminal confinement after he confined the victim while armed with a deadly weapon, *i.e.*, a hammer, which resulted in an open head wound requiring staples. 687 N.E.2d at 1284. The Indiana Supreme Court determined that defendant's convictions for aggravated battery and criminal confinement violated the Double Jeopardy Clause of the Indiana Constitution because it was impossible to determine from the charging information, arguments by the State, final instructions, and evidence presented at trial whether the jury's findings of guilt were predicated upon separate and distinct facts. *Id.* at 1284-85.

In *Davis*, defendant was charged with and convicted of attempted murder and aggravated battery after he cut the victim's throat with a knife. 770 N.E.2d at 324. The Indiana Supreme Court determined that the defendant's aggravated battery and attempted murder convictions violated the Double Jeopardy Clause of the Indiana Constitution because his aggravated battery conviction arose from the same evidence that gave rise to his conviction for attempted murder. *Id.*

Likewise, in *Smith*, the defendant was charged with and convicted of Class B felony robbery and aggravated battery, both of which require a bodily injury to another, after he struck the victim twice in the mouth, knocking her tooth loose. 881 N.E.2d at 1048. Upon review, this court concluded that defendant's Class B felony robbery and aggravated battery convictions violated the Double Jeopardy Clause of the Indiana Constitution because his convictions were improperly predicated upon the same injury. 881 N.E.2d at 1048.

Here, although Weddle's convictions logically could have been based on the same facts, unlike in *Bradley*, *Davis*, and *Smith*, our review of the evidence presented at trial and the State's closing argument, which again clearly delineated the extreme pain of the rape from the physical injury of the aggravated battery, convinces us that there is no reasonable possibility that the jury actually used the same set of facts to establish both convictions. *See Lee*, 892 N.E.2d at 1232. Thus, Weddle's convictions for both Class A felony rape and aggravated battery do not violate the Double Jeopardy Clause of the Indiana Constitution.

B. Class A Felony Rape and Class D Felony Criminal Confinement

As previously mentioned, Indiana Code section 35-42-4-1 provides that an individual

commits Class A felony rape when the individual “knowingly or intentionally has sexual intercourse with a member of the opposite sex when: (1) the other person is compelled by force or imminent threat of force ... [resulting] in serious bodily injury to a person.” “‘Serious bodily injury’ means bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or an organ; or (5) loss of a fetus.” Ind. Code § 35-41-1-25. Indiana Code section 35-42-3-3 provides that an individual commits Class D felony criminal confinement when the individual “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, from one (1) place to another.” The criminal confinement of another is a Class B felony if the confinement “results in serious bodily injury to a person other than the confining or removing person.” Indiana Code § 35-42-3-3. For the purposes of Indiana Code section 35-42-3-3 to “‘confine’ means to substantially interfere with the liberty of a person.” Ind. Code § 35-42-3-1 (2008).

Consistent with the statutory definitions, the State charged Weddle as follows:

[O]n or about May 1, 2009, in Monroe County, State of Indiana, Jamie Scott Weddle did knowingly have sexual intercourse with [E.B.], a member of the opposite sex, when [E.B.] was compelled by force or imminent threat of force, and said act resulted in serious bodily injury to [E.B.]

* * * *

[O]n or about May 1 to May 2, 2009, in Monroe County, State of Indiana, Jamie Scott Weddle did knowingly or intentionally confine [E.B.], another person, without her consent, and said act resulted in serious bodily injury to

[E.B.]

Appellant's App. pp. 45-46. Again, the charging information did not clearly allege which specific acts the State relied upon to prove both the rape and criminal confinement charges.

With respect to the Class A felony rape and Class D felony criminal confinement charges, the trial evidence showed that Weddle grabbed E.B. by the neck and held her to the bed while "smacking" her upside the head, held E.B. to the bed while he forced himself on her, and trapped E.B. on the bed between his body and the wall. Tr. p. 373. This evidence can properly support convictions for both Class A felony rape and Class D felony criminal confinement, however, as is stated above, although the evidence can properly support both convictions, we must determine whether there is a reasonable possibility that the jury latched onto the same facts for both convictions.

In its final instructions, the trial court instructed the jury on the statutory definitions of rape and criminal confinement. During closing arguments, the State argued that Weddle confined E.B. several times during the course of the episode, including when he held her down by the neck and beat her, held her down and raped her, and trapped her between him and the wall while he slept.

Weddle claims that it is reasonably possible that the jury used the same evidence establishing Class A felony rape to also establish Class D felony criminal confinement. He argues that it was impossible to ascertain whether the jury, in finding that he committed Class D felony criminal confinement, relied on the fact that he held E.B. down while forcing her to engage in sexual intercourse. In its closing argument, the State argued that E.B. had been

confined numerous times, including during the rape, and does not clearly differentiate the facts relating to the rape from those relating to the confinement charge. Thus, Weddle argues that in finding him guilty of Class D felony criminal confinement, the jury reasonably could have relied upon the same evidence that established that he raped E.B. The State argues that it is probable that the jury relied on one of the two confinements not related to the Class A felony rape charge in finding that Weddle committed Class D felony criminal confinement.

We agree that it is possible that the jury predicated its finding of guilt regarding criminal confinement on evidence unrelated to the rape charge. From the evidence and the State's closing arguments, however, we conclude that there is a reasonable possibility that the jury predicated its finding of guilt regarding confinement solely on the evidence relating to the rape. If the latter evidence was the basis for the jury's decision, the Double Jeopardy Clause is implicated. *Bradley*, 867 N.E.2d at 1285. Because there is a reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of both Class A felony rape and Class D felony criminal confinement, the prohibitions against double jeopardy are violated. *See id.* (providing that the Indiana Double Jeopardy Clause is violated when there is a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense). We therefore vacate Weddle's conviction for Class D felony criminal confinement. *See id.* (providing that when two convictions contravene double jeopardy principles, we may vacate one of the convictions).

The judgment of the trial court is affirmed in part and reversed in part.

KIRSCH, J., and CRONE, J., concur.