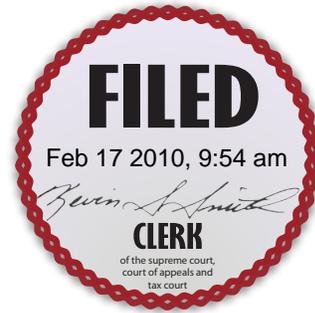


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRANK GREENE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-0905-CR-250

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0811-FB-261114

February 17, 2010

MEMORANDUM DECISION ON REHEARING—NOT FOR PUBLICATION

BAKER, Chief Judge

We grant appellant-defendant Frank Greene’s petition for rehearing for the limited purpose of clarifying our original decision, in which, among other things, we found sufficient evidence supporting Greene’s conviction for Criminal Confinement,¹ a class D felony. Greene v. State, No. 49A05-0905-CR-250 (Oct. 30, 2009). Greene was also convicted of class B felony criminal confinement, and argues on rehearing that he appealed the sufficiency of the evidence supporting the class B felony conviction, rather than his class D felony conviction. Therefore, Greene insists that we failed to address his argument.

The underlying facts, as described by this court, are as follows:

In 2008, Brenda Johnson lived with Greene, her boyfriend, in Indianapolis. On Friday, November 15, 2008, Johnson and Greene began arguing at 8:00 a.m., when Johnson intended to go buy dog food. When she attempted to leave, Greene grabbed her arm and throat and forced her into a bedroom, where he threw her on the bed. Greene took Johnson’s cell phone.

Several times, Johnson attempted to lift herself off of the bed, but Greene told her, “[b]itch, you are not leaving the house.” Tr. p. 14. He threw her back down onto the bed each time she attempted to leave, at one point climbing on top of her and holding her on the bed with his knees. Greene held Johnson in the bedroom for most of the day. He even escorted her to the bathroom and sat on her lap while she used the facilities. Greene refused to allow Johnson to eat, though he forced her to prepare food for him that he ate in her presence.

Johnson eventually slept. When she awoke on Saturday morning, she again attempted to leave the home. Greene still refused to allow her to leave, grabbing her, slapping her in the face several times, and kicking her. Then, Greene placed his hands around her throat and strangled her until she lost consciousness. When she

¹ Ind. Code § 35-42-3-3(a)(1).

regained consciousness, she was on the couch in the living room. Shortly thereafter, at approximately 1:00 a.m. on Sunday morning, the authorities arrived. Johnson had bruises on her face, neck, arms, and chest, and broken blood vessels on her neck.

Id., slip op. p. 2-3.

To convict Greene of class B felony criminal confinement, the State was required to prove that Greene knowingly or intentionally confined Johnson without her consent and that the confinement resulted in serious bodily injury to Johnson. I.C. § 35-42-3-3. The charging information alleged that Greene committed class B felony criminal confinement when he

knowingly, by force or threat of force, remove[d] Brenda Johnson from one place to another, that is: forcibly removed Brenda Johnson from the bedroom to the living room of her residence, which resulted in serious bodily injury, that is: loss of consciousness from being strangled, to Brenda Johnson

Appellant's App. p. 22. As we stated in our original decision,

[t]he evidence presented at trial established that, while in the bedroom, Greene placed his hands on Johnson's throat and strangled her until she lost consciousness. She testified that "everything went black" and that she had not merely fallen asleep. Tr. p. 22. When she regained consciousness, she was in the living room and did not remember moving there. There was no evidence that anyone else was in the apartment when Greene strangled Johnson. Under these circumstances, it was reasonable for the factfinder to infer that Greene moved Johnson from the bedroom to the living room couch after he strangled her to the point of lost consciousness. See Jones v. State, 780 N.E.2d 373, 376 (Ind. 2002) (holding that convictions may be based solely upon circumstantial evidence). His arguments to the contrary amount to a request that we reweigh the evidence, which we may not do.

Greene, slip op. p. 6. Although we mistakenly applied this analysis to Greene's class D felony conviction in our original decision, it is equally accurate to apply the analysis to his class B felony conviction. Thus, we find the evidence sufficient to support Greene's conviction for class B felony criminal confinement. We grant Greene's petition for rehearing for the sole purpose of clarifying our original decision, and deny the petition in all other respects.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., concurs.

RILEY, J., dissents with opinion.

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FRANK GREENE,)	
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)	
)	
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)	
Appellee-Plaintiff.)	

RILEY, Judge, dissenting with separate opinion.

I respectfully dissent from the majority’s opinion on rehearing which affirms Greene’s conviction of criminal confinement as a Class B felony. First, in its opinion on rehearing the majority appears to apply its analysis on whether the evidence was sufficient to support Greene’s conviction for criminal confinement as a Class D felony to Greene’s conviction for criminal confinement as a Class B felony. Because both felonies require the State to prove different elements beyond a reasonable doubt, I believe it to be more prudent to undertake a separate analysis of the evidence to evaluate the Class B felony. Specifically, whereas criminal confinement as a Class D felony is defined as

knowingly or intentionally confining another person without the other person's consent, the Class B felony additionally requires the State to establish beyond a reasonable doubt that the confinement resulted in serious bodily injury to a person other than the confining or removing person.

Turning to the merits of the argument, I conclude that the State did not satisfy its burden beyond a reasonable doubt. As already mentioned by the majority, the charging information alleged that Greene did

knowingly, by force, or threat of force, *remove Johnson from one place to another*, that is: forcibly removed Johnson from the bedroom to the living room of her residence, *which resulted in serious bodily injury*, that is: loss of consciousness from being strangled, to [Johnson].

(Appellant's App. p. 22) (emphasis added).

In order to prove the specific allegations in the charging information, the State relied on the following evidence presented at trial. Johnson testified that, in the bedroom, Greene placed his hands on her throat and strangled her until her vision blurred and everything went "black." (Transcript p. 22). She regained consciousness in the living room. The evidence indicates that only Greene was present in the residence when he strangled Johnson.

While I agree that a reasonable inference can be made that Greene "forcibly moved" Johnson from the bedroom to the living room, there is a complete lack of evidence that this "forced move resulted in serious bodily injury." *See* I.C. § 35-42-3-3. Although the State points towards Johnson's strangulation and loss of consciousness as

the serious bodily injury required under the statute, the record clearly indicates that this injury occurred before Greene forcibly moved Johnson from the bedroom to the living room. Therefore, I would reverse Greene's conviction on criminal confinement as a Class B felony.