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IN THE
COURT OF APPEALS OF INDIANA

DONNIE GROCE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0902-CR-111
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark Rogers, Judge
Cause No. 49G17-0810-FD-242963

September 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Donnie Groce appeals his convictions for Class D felony strangulation and Class A misdemeanor battery. Groce argues that his convictions violate the Double Jeopardy Clause of the Indiana Constitution because there is a reasonable possibility that the fact-finder used the same evidence to convict him of both counts. We find distinct evidence in the record to support each of Groce's two convictions. Moreover, Groce was tried to the bench, and we presume the trial court followed the law and relied on separate facts in finding him guilty. We therefore affirm the judgment of the trial court.

Facts and Procedural History

Groce and his girlfriend Serena Ferguson lived together in a house on East Minnesota Street in Indianapolis. In the early morning hours of October 25, 2008, Ferguson was in the bedroom talking to her sister on Groce's cell phone. Groce became angry that Ferguson had taken a call from an unknown, restricted number. Groce stormed in and snatched the phone from Ferguson's hand. He grabbed Ferguson by the hair and threw her from the chair onto the bed. Groce hit Ferguson on the head three or four times with a closed fist. He then put his hands around her neck and squeezed until she could barely breathe.

Groce let go and walked out of the bedroom, but he returned shortly thereafter. He picked up Ferguson by the throat, slammed her on the bed, and began choking her again. By this time, housemate Ryan Morris was in another room nearby. Morris witnessed the second attack, ran into the bedroom, and told Groce to stop. Morris and Groce began arguing. Groce left and walked outside.

Ferguson went upstairs to call the police. Law enforcement arrived at the scene, questioned the witnesses present, and observed injuries Ferguson sustained on her head and arms. Groce was arrested.

The State charged Groce with strangulation as a Class D felony, domestic battery as a Class A misdemeanor, and battery as a Class A misdemeanor. The charging information for strangulation alleged as follows:

> On or about 10/25/08, in Marion County, State of Indiana, the following named defendant Donnie Groce, did knowingly or intentionally, in a rude, insolent or angry manner, impede the normal breathing or the blood circulation of Serena Ferguson, another person, by applying pressure to the throat or neck of the other person or obstructing the nose or mouth of the other person.

Appellant's App. p. 14. The charging information for battery alleged as follows:

> On or about 10/25/08, in Marion County, State of Indiana, the following named defendant Donnie Groce, did knowingly in a rude, insolent or angry manner touch Serena Ferguson, another person, and further that said touching resulted in bodily injury to the other person, specifically: pain.

Id. at 16. A bench trial was held on December 17, 2008. In closing, the State argued that Groce

> [g]rabbed [Ferguson] by the hair. Threw her onto the bed. Choked her once at that point. Hit her several times in the head causing her pain at that point. She said that when he was strangling her then it caused her difficulty breathing. He then lets go of her. Some more words are exchanged. He then grabs her a second time by the throat. Slams her back down onto the couch . . . or onto the bed. . . . Based on all the evidence before you today the State has met its burden beyond a reasonable doubt and asks that you find the Defendant guilty of strangulation, domestic battery and battery.

Tr. p. 46. The trial court initially found Groce guilty of strangulation and domestic battery, acknowledging that an additional battery conviction would create a double jeopardy issue. The trial court amended its verdict in a subsequent order, finding Groce

guilty of strangulation and battery, but not guilty of domestic battery. Groce now appeals.

Discussion and Decision

Groce's sole contention is that his strangulation and battery convictions violate the Double Jeopardy Clause of the Indiana Constitution. Whether convictions violate double jeopardy is a question of law which we review *de novo*. *Grabarczyk v. State*, 772 N.E.2d 428, 432 (Ind. Ct. App. 2002).

Article 1, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are the "same offense" under Article 1, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). Groce contends that his two convictions fail the actual evidence test.

Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* at 1234. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.* Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the fact-finder's

perspective. *Id*. In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. *Id*.

The essential elements of strangulation are defined at Indiana Code § 35-42-2-9(b):

> A person who, in a rude, angry, or insolent manner, knowingly or intentionally:
>
> (1) applies pressure to the throat or neck of another person; or
>
> (2) obstructs the nose or mouth of the another [sic] person;
>
> in a manner that impedes the normal breathing or the blood circulation of the other person commits strangulation, a Class D felony.

The elements of battery are set forth at Indiana Code § 35-42-2-1:

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
>
> (1) a Class A misdemeanor if:
>
> (A) it results in bodily injury to any other person . . . .

In this case, Groce (1) twice placed his hands on Ferguson's neck and squeezed, preventing her from breathing and (2) grabbed Ferguson by the hair, threw her on the bed, and struck her on the head repeatedly. The former evidence supports Groce's conviction for strangulation and the latter for battery. Groce's two convictions are thus sustained by separate and distinct facts.

Groce nonetheless argues that the charging information for battery was vague, that the State did not clarify in closing argument what evidence supported the battery charge, and that the trial court did not specify what evidence it relied on in finding Groce guilty of battery. Accordingly, Groce contends that there is a reasonable possibility that the trial court used the strangulation evidence to support his battery conviction. We agree that the

charging information and closing argument are unspecific. This was a bench trial, however, and we presume the trial court knows and follows the applicable law. *Alexander v. State*, 768 N.E.2d 971, 978 (Ind. Ct. App. 2002), *aff'd on reh'g*, 772 N.E.2d 476, *trans. denied*. In the absence of any indication to the contrary, we presume the trial court used the appropriate evidentiary facts as the basis for the separate strangulation and battery convictions. *Cf. id.* at 977–78 (finding double jeopardy violation after bench trial, where, among other things, trial court's statements indicated it had relied on the same evidence to sustain two convictions).

We do not believe there is a reasonable possibility that the trial court used the same evidence to find Groce guilty of the two charges. Because Groce was not subjected to double jeopardy, we affirm the trial court.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.