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IN THE
COURT OF APPEALS OF INDIANA

ERICK DAMONE PETERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A01-0901-CR-26
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Jack A. Tandy, Judge
Cause No. 73D01-0802-FA-3

October 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Erick Damone Peters appeals his convictions for class A felony rape;[1] class A felony criminal deviate conduct;[2] class B felony criminal confinement;[3] and class B felony robbery.[4]

We affirm.

ISSUE

Whether the trial court erred in denying Peters' motion for a directed verdict upon the rape, criminal deviate conduct, criminal confinement, and robbery charges.

FACTS

During the early morning of February 2, 2008, Jerra French was at a Shelbyville nightclub with a friend. Peters tried to buy drinks for French, but she "refused them" because Peters made her "uncomfortable." (Tr. 256). According to French, "he was lookin' at women like they were prey" and making lewd comments to several women. (Tr. 257). Peters told French that "he was gonna [sic] take [her] pussy that night." (Tr. 257). Subsequently, employees of the nightclub made Peters leave the premises. Approximately half an hour later, Peters again approached French. He said, "'That was fucked up what you did to me'" and hit her on the side of her head. (Tr. 260). Peters then fled the nightclub.

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[1] Ind. Code § 35-42-4-1.
[2] I.C. § 35-42-4-2.
[3] I.C. § 35-42-3-3.
[4] I.C. § 35-42-5-1.

That same morning, at approximately 3:14 a.m., K.C. was working at the Village Pantry on State Road 44. Peters came into the store and asked K.C. whether she was married. She replied that she was. As Peters perused the deli selection, K.C. asked him "if there was something that [she] could help him with." (Tr. 278). Peters said that he "'want[ed] some fuckin' pussy,'" to which K.C. replied, "'Sorry, I can't help ya [sic] 'cause I'm married.'" (Tr. 278). Peters then said, "'[t]hat's bull fuckin' shit'"; ran behind the counter to where K.C. was standing; and "said that he was gonna [sic] take that pussy." (Tr. 278). K.C. put her hands out and "told him to back the fuck off" and that she "would give him whatever he wanted as long as he didn't hurt [her] or yell at [her]." (Tr. 280).

Peters then ordered K.C. to lock the doors and go to the back room. K.C. began crying and asked him to "at least wear a condom." (Tr. 283). Peters agreed and told her to get a pack of condoms, which she did. Once they were in the back room, Peters commanded K.C. to take off her clothes. K.C. took off her pants and underwear while Peters put on one of the condoms.

Peters then "put his hands up under [her] shirt and touched [her] breasts and he made [her] kiss him." (Tr. 288). He "told [her] to suck his dick." (Tr. 289). After K.C. protested, Peters "put his hands on [her] head, on [her] hair, and grabbed [her] hair and put [her] down on him." (Tr. 289). He then put his penis in her mouth.

Peters next ordered K.C. to lie down. He "forced open [her] legs" and began performing oral sex on her. (Tr. 292). He then put his penis in her vagina.

At some point, K.C. asked him to hurry up because police officers often came into the store, and she did not want them to see her naked. Upon hearing this, Peters stopped, saying "'I fucked up. I fucked up.'" (Tr. 294). Without removing the condom, he pulled up his pants, picked up the remaining condoms, and ordered K.C. to unlock the door.

As K.C. was unlocking the doors, Peters said, "'I already fucked up you might as well give me all your money.'" (Tr. 301). Fearing for her safety, K.C. gave him approximately eighty-one dollars from the registers. Peters then "put his coat over his head and ran out the door." (Tr. 306). Peters left the Village Pantry at approximately 3:25 a.m. K.C. immediately telephoned 911 and reported that Peters had fled west on foot.

At approximately 3:30 a.m., French encountered a police officer at an intersection less than half of a mile west of the Village Pantry. As she relayed the evening's events at the nightclub to the officer, a dispatch reported a rape and robbery at a Village Pantry located on State Road 44. French then noticed Peters walking west and alerted the officer. Officer Jamie Kolls apprehended Peters.

Officer Kolls "could see some money sticking out of [Peters'] right front jacket pocket." (Tr. 340). As he started searching Peters for weapons, he discovered a steak knife in the same pocket as well as a box of condoms. The box was open and contained two condoms still in their wrappers and "one empty package" or wrapper. (Tr. 341). A subsequent search at the jail revealed a used condom on Peters' person.

Videotape surveillance from the Village Pantry's security system showed Peters in the Village Pantry the morning of February 2, 2009. K.C. later identified Peters from a photographic array.

On February 4, 2008, the State charged Peters with Count I, class A felony rape; Count II, class B felony robbery; Count III, class B felony criminal confinement; Count IV, class A felony criminal deviate conduct; Count V, class D felony theft; and Count VI, class A misdemeanor battery. As to Counts I through IV, the State alleged that Peters committed the offenses while armed with a deadly weapon.

The trial court commenced a jury trial on October 28, 2008. Shelbyville Detective Michael Haehl testified that he viewed the surveillance video taken at the Village Pantry on February 2, 2009. He testified that the videotape showed Peters with his hands in his front pockets "[s]everal times." (Tr. 443). During cross-examination, Peters admitted that the video surveillance showed him with his hand in his coat pocket. The State played the videotape for the jury. The videotape showed Peters with his hand in his front right pocket. Peters, however, denied knowing that a knife was in his pocket.

At the conclusion of the State's case-in-chief, Peters moved for a directed verdict upon Counts I through IV, arguing that the State failed to present evidence that Peters was armed with a deadly weapon. The trial court denied the motion. The jury found Peters guilty on all counts.

For purposes of sentencing, the trial court merged Count V with Count II. Following a sentencing hearing on November 26, 2008, the trial court sentenced Peters to an aggregate sentence of eighty-six years.

DECISION

Peters asserts that the trial court erred in denying his motion for directed verdict. Specifically, he argues that the State failed to present evidence that he used or threatened the use of force when he took the money from the Village Pantry. He also argues that the State failed to present evidence that he was armed with a deadly weapon when he committed the offenses.

We note that Peters presented evidence after the denial of his motion for directed verdict. Thus, he has waived appellate review of whether the trial court erred in denying his motion. *See Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). "Waiver notwithstanding, in order for a trial court to grant a directed verdict, there must be a complete lack of evidence on a material element of the crime or the evidence must be without conflict and susceptible to only an inference in favor of the defendant's innocence." *Id.* If the evidence is sufficient to support the conviction on appeal, the trial court's denial of a motion for directed verdict cannot be in error. *Id.*

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted). We will sustain a judgment based on circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt. *Altes v. State*, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), *trans. denied*.

1. Use of Force

Peters asserts that the State failed to present sufficient evidence that he used or threatened the use of force when he took the money from the Village Pantry. He maintains that the absence of force merits only a theft conviction.

Indiana Code section 35-42-5-1 provides in relevant part as follows:

> A person who knowingly or intentionally takes property from another person or from the presence of another person:
>
> (1) by using or threatening the use of force on any person; or
> (2) by putting any person in fear;
> commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon . . . .

Here, the State charged that Peters took the money "by using force or by threatening the use of force . . . ." (App. 144). The State did not charge that Peters took the money by putting K.C. in fear.

> Under our present statute, the offense of robbery . . . does not require that a certain amount or type of force be proved to establish the commission of that offense. This Court has long recognized that the particular degree of force necessary to constitute robbery is not defined by statute or the common law. We have held that the degree of force used to constitute the crime of robbery has to be a greater degree of force than would be necessary to take possession of the victim's property if no resistance was offered and that there must be enough force to constitute violence. The nature of the threatened force is not material in the definition of robbery . . . and any threat of force, conveyed by word or gesture will suffice.

Maul v. State, 467 N.E.2d 1197, 1199-00 (Ind. 1984).

The record reveals that Peters did not just take the money from the registers; nor did K.C. give him the money of her own volition. Rather, the evidence shows that Peters forced K.C. to lock the front doors; forced her into a back room; forced her to partially undress; forced her to commit sexual deviate conduct; forced her to lie down on the floor; and subsequently raped her. After K.C. had endured these events, Peters told her, "'I already fucked up you might as well give me all your money.'" (Tr. 301). Thus, Peters' verbal instructions, in addition to the foregoing facts and surrounding circumstances, constituted the sufficient force necessary to effectuate the robbery. Given the circumstances of the case, we find the evidence sufficient to support Peters' conviction for robbery.

2. Armed With a Deadly Weapon

Peters also asserts that the evidence was insufficient to support the enhancement of his convictions for rape, criminal deviate conduct, criminal confinement, and robbery. To enhance Peters' convictions, the State was required to prove that he knowingly or intentionally had sexual intercourse with K.C.; caused K.C. to perform or submit to deviate sexual conduct; removed K.C. from one place to another; and took property from her "while armed with a deadly weapon[.]" *See* I.C. §§ 35-42-4-1; 35-42-4-2; 35-42-3-3; and 35-42-5-1.[5]

[5] Indiana Code section 35-42-4-1 provides that rape is a class B felony offense. However, it is a class A felony if, inter alia, it is committed while armed with a deadly weapon. Criminal deviate conduct also is enhanced from a class B felony to a class A felony if it is committed while armed with a deadly weapon. I.C. § 35-42-4-2. Pursuant to Indiana Code section 35-42-3-3(a)(2), it is a class D felony to knowingly or intentionally "remove[] another person, by fraud, enticement, force, or threat of force, from one (1) place

Peters does not dispute that a knife like the one found in his coat pocket is a deadly weapon. However, he contends that "[t]here is no evidence that the knife . . . was present and accessible to him during the offenses[.]" Peters' Br. at 9.

Here, the State presented evidence that approximately five minutes after Peters left the Village Pantry, officers apprehended him and discovered a steak knife in his front right coat pocket. Although Peters denied knowing that he had a knife in his pocket, the videotape taken from the store clearly shows Peters putting his hand in his front right pocket several times during his threatening encounter with K.C. Upon viewing the videotape, Peters admitted that he had his hand in that same pocket several times. Also, the jury viewed the videotape and therefore could draw its own inference before rendering its verdict.

The State presented circumstantial evidence that Peters possessed and had access to a deadly weapon when he committed his offenses. *See Davis v. State*, 523 N.E.2d 405, 407 (Ind. 1988) (finding sufficient circumstantial evidence that the defendant had been armed with a deadly weapon where he was holding a knife at the time of his capture). His argument otherwise is an invitation to reweigh the evidence and assess the credibility of the witnesses. We decline to do so.

Peters also argues that the evidence did not support the enhancements because K.C. was unaware of the knife's presence. We disagree.

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to another[.]" The offense, however, is a class B felony if it is committed while armed with a deadly weapon. *See* I.C. § 35-42-3-3(b)(2)(A). Pursuant to Indiana Code section 35-42-5-1, a person who commits robbery commits a class C felony. The offense, however, is a class B felony if it is committed while armed with a deadly weapon.

The facts here are similar to those in *Mallard v. State*, 816 N.E.2d 53 (Ind. Ct. App. 2004), *trans. denied*. In that case, Mallard stopped the victim by impersonating a police officer. Mallard had a handgun in his left front pocket during the commission of the offense; however, the victim was unaware of the handgun. The State charged Mallard with class B felony criminal confinement, alleging that he was armed with a deadly weapon. Mallard appealed his enhanced conviction, arguing that he never used the handgun or threatened the victim with his handgun, which remained in his pocket during the offense.

This Court held that the "statute does not require the State prove that a deadly weapon was used during the commission of the offense." 816 N.E.2d at 57. Rather, it found that "although Mallard never threatened [the victim] or used the loaded handgun during the commission of the offense, the weapon was <u>in his pocket at all relevant times</u> and a jury could reasonably conclude that Mallard <u>could have</u> used the handgun as a deadly weapon." *Id.* at 57 (emphasis added).

Thus, it is immaterial that K.C. was unaware of the knife's presence. The mere presence of a knife clearly would heighten the risk to her, and it is such a risk that warrants felony enhancements. *See id.* ("We can reasonably infer that our General Assembly considered the heightened risk to a . . . victim if the perpetrator is armed with a deadly weapon when it determined that a . . . felony enhancement was warranted in such cases."). Furthermore, the evidence herein is preponderantly against Peters because during the time that he threatened K.C., the videotape shows him repeatedly putting his hand in the same pocket where the knife was discovered. Accordingly, we find the

evidence sufficient to support Peters' convictions for class A felony rape; class A felony criminal deviate conduct; class B felony criminal confinement; and class B felony robbery.

Affirmed.

ROBB, J., and MATHIAS, J., concur.