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IN THE COURT OF APPEALS OF INDIANA

BRANDON C. WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0612-CR-579
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0608-FB-103

July 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Brandon C. Williams appeals his convictions following a jury trial of two counts of confinement with a deadly weapon[1] each as a Class B felony and claims that:

I. The trial court erred in refusing his instruction on intimidation as a lesser-included offense of confinement; and

II. His convictions were not supported by sufficient evidence because the testimony of the eyewitnesses was incredibly dubious.

We affirm.

FACTS AND PROCEDURAL HISTORY

Keisha Sims was driving Williams's vehicle, in which he was a passenger. Sims lost control of the vehicle, swerved, and hit a tree causing damage to the vehicle and knocking Williams temporarily unconscious. Sims immediately fled the scene on foot. Once Williams came to consciousness, he drove his car to Sims's uncle's house in search of Sims.

Williams arrived at the home of Sim's uncle, Perry Lipscomb, and demanded to see Sims. Lipscomb, who suffered from several disabilities, shouted from the couch that she was not there. Williams entered the home and grabbed the phone from Lipscomb's hand. Williams then went to the kitchen got a knife and ordered Lipscomb to call Sims. After Williams realized that Lipscomb did not know her number, he awoke Princess Witt, Sims's cousin, who was asleep in the same room with her daughter. Williams ordered Witt to call Sims. He then ordered Witt to go outside with him to see the damage to his car. While outside, Williams refused to allow Witt to use the restroom and forced her to urinate in the street. While everyone was in the home, Williams held the knife to Witt's

[1] *See* IC 35-42-3-3(b)(2)(A)

daughter's throat and to Lipscomb's throat and threatened to kill both of them if Witt would not call Sims. Williams said he had to kill them all so there would be no witnesses and then stabbed the wall by the front door with the knife. Witt and Lipscomb both felt they were not free to leave.

At one point, Williams was able to speak with Sims who was with her nephew. Her nephew overheard the conversation and called the police.

Williams and Witt again walked outside when the police arrived. Witt, with her daughter in her arms, ran after the officers frantically screaming. After the officers took Williams into custody, they confirmed a hole in the drywall by the front door similar to the size of a knife's thickness. They also found a knife inside of the home with white powder residue, similar to drywall dust.

The State charged Williams with two counts of confinement. During trial, Williams tendered a jury instruction on intimidation as a lesser-included offense of confinement, which the trial court rejected. The jury found Williams guilty as charged. Williams now appeals.

DISCUSSION AND DECISION

I. Intimidation as a Lesser-Included Offense of Confinement

Williams first contends that the trial court erred by not instructing the jury on intimidation, a Class C felony, as a lesser-included offense of confinement, a Class B felony.

Jury instructions are left to the trial court's sound discretion. *Ledesma v. State*, 761 N.E.2d 896, 898 (Ind. Ct. App. 2002). If the trial court rejects a tendered instruction

based on their interpretation of the law, we review the decision *de novo*. *White v. State*, 849 N.E.2d 735, 739 (Ind. Ct. App. 2006), *trans. denied*.

In *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995), our Supreme Court detailed how a trial court should determine whether or not to instruct on a lesser-included offense. First, the trial court must determine whether the proposed offense is inherently a lesser-included offense of the charged offense. *Id.* An offense is inherently included if the wording of the statute places all the elements of lesser offense within the greater offense. *Id.* If the lesser offense is not inherent in the greater offense, the trial court must then ask whether the proposed offense is factually a lesser-included offense. *Id.* A factually included offense exists when the facts alleged in the charging information, if proven, may establish criminal liability in either offense. *Id.* If the lesser offense is either inherently or factually included in the greater offense, a trial court may instruct on the lesser-included offense when the evidence suggests an evidentiary battle on those elements distinguishing the two offenses. *Id.*

Williams admits that intimidation is not an inherently included offense of confinement, and contrary to Williams's contention, intimidation, based on the charging information in this case, is not factually a lesser-included offense of confinement.

To prove intimidation as a Class C felony, the State must show:

> (a) A person who communicates a threat to another person, with the intent:
>
> (1) that the other person engage in conduct against the other person's will;
>
> (2) that the other person be placed in fear of retaliation for a prior lawful act; or

(3) of causing:

(A) a dwelling, a building, or another structure; or

(B) a vehicle;

to be evacuated;

commits intimidation, . . .

* * *

(b) However, the offense is a:

* * *

(2) Class C felony if, while committing it, the person draws or uses a deadly weapon.

IC 35-45-2-1.

Alternatively, confinement as a Class B felony exists when:

(a) A person who 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;

commits criminal confinement. . . .

(b) The offense of criminal confinement defined in subsection (a) is:

* * *

(2) a Class B felony if it:

(A) is committed while armed with a deadly weapon;

* * *

IC 35-42-3-3.

Here, the charging information alleged the following facts with regard to confinement: "On or about the 16th day of August 2006, in St. Joseph County, State of Indiana, [Williams] did knowingly confine [Witt/Lipscomb] without [her/his] consent while armed with a deadly weapon, to wit: a knife." *Appellant's App.* at 3-4.

Our Supreme Court stated previously in *McIntire v. State*, 717 N.E.2d 96, 99 (Ind. 1996), confinement as a Class B felony and intimidation as a Class C felony require proof of additional facts that the other does not. Confinement requires proof of a substantial interference with a person's liberty without that person's consent. *Lyles v. State,* 576 N.E.2d 1344, 1352 (Ind. Ct. App. 1991), *abrogated on other grounds*. Intimidation, on the other hand, requires proof of communication of a threat intended to induce conduct against the person's will or to place the person in fear of retaliation for a lawful act. *Id*. "The statutes defining the offenses require proof of different elements and it is possible to commit one without committing the other." *Id.*

As the statutes contain elements for confinement and intimidation that are exclusive of one another, the charging information alleges facts that exclusively support confinement and not intimidation. Stated differently, the State would not be able to prove intimidation based on the facts alleged in the charging information because there is no allegation that Williams made a threat. Thus, the trial court did not error by not providing an instruction on a lesser-included offense of intimidation.

II. Sufficiency of the Evidence and Incredibly Dubious Testimony

Next, Williams claims that evidence was insufficient to convict him of confinement because the testimony of Witt and Lipscomb are incredibly dubious. In

reviewing sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028 (Ind. Ct. App. 2002). We consider only evidence favorable to the judgment along with reasonable inferences drawn therefrom. *Id*. We will affirm a conviction if evidence and inferences establish that a trier of fact could reasonably conclude that the defendant was guilty beyond a reasonable doubt. *Id*.

Under the incredible dubiosity rule, an appellate court may impinge on the responsibility of the fact-finder to judge the credibility of the witnesses when confronted with inherently improbable, coerced, equivocal, or wholly uncorroborated testimony of incredible dubiosity. *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). There must be no circumstancial evidence to support the defendant's guilt. *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001). The testimony must be so incredible that no reasonable person could believe it. *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007).

Here, the testimony of Witt and Libscomb does not rise to this level. Williams points out that their testimony varied as to how many times Witt left the house with Williams, where the home phone was located, and who contacted Williams's estranged girlfriend, Sims, as proof that their testimony was incredible dubious. However, Williams fails to acknowledge that their evidence was consistent in the following regards: Williams threatened to kill them both; neither felt free to leave; Williams had a knife on him at all times; Williams held the knife to Witt's daughter's throat and to Lipscomb's throat; and Williams shoved the knife into the drywall by the front door. Williams's testimony confirmed that he was present, and the reporting officer's testimony confirmed

that it appeared a knife had been shoved through the drywall by the front door. Thus, the jury was free to conclude that Williams confined Witt and Lipscomb against their will with a deadly weapon.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.