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IN THE
COURT OF APPEALS OF INDIANA

GERALD A. NORRELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0612-CR-531
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl Heldt, Judge
Cause No. 82C01-0508-FA-846

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Gerald A. Norrell appeals his convictions for attempted murder as a class A felony[1] and criminal confinement as a class D felony.[2] Norrell raises three issues, which we restate as:

I. Whether the trial court abused its discretion by admitting certain photographs;

II. Whether the trial court abused its discretion by admitting Norrell's statement; and

III. Whether Norrell's convictions for attempted murder and criminal confinement violate the prohibition against double jeopardy.

We affirm in part and vacate in part.

The relevant facts follow. In June 2005, J.C. lived in an apartment in Evansville, Indiana, and allowed Norrell to move into her apartment for six months because he "had nowhere else to go." Transcript at 208. In mid-July 2005, J.C. "didn't feel comfortable with him being there anymore" and asked Norrell to move out. Id. at 212.

On July 29, 2005, J.C. went to a bar to watch a band and went out to eat afterwards. When she returned to her apartment at 5:00 a.m., Norrell appeared to be asleep on the couch. J.C. went to bed and awoke to Norrell hitting her on the head with "a sock full of rocks." Id. at 217. J.C. tried to get to the front door, but Norrell wrapped

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[1] Ind. Code §§ 35-41-5-1(2004); 35-42-1-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

[2] Ind. Code § 35-42-3-3 (2004) (subsequently amended by Pub. L. No. 70-2006, § 1 (eff. July 1, 2006)).

something around her neck "really tight." Id. at 218. J.C. struggled with Norrell until she passed out.

J.C.'s neighbors, Bryan Zangaro and Linzy Wagner, awoke to noises coming from J.C.'s apartment. They heard J.C. say, "Help me, stop. Why are you doing this to me?" over and over. Id. at 127. Zangaro ran to J.C.'s door and attempted to get inside. He could hear screaming and "hollering from [J.C.]" and a "loud commotion like somebody being thrown around the room." Id. at 128-129. Wagner called the police and Zangaro's mother, who was the landlord and had a key to J.C.'s apartment. When the police and Zangaro's mother arrived, they were unsuccessful in unlocking the door and broke a window to gain access to the apartment. When the police gained access to the apartment, Norrell ran out the back door, and the police pursued him.

Zangaro found J.C. laying face down on the floor covered with blankets. An extension cord was wrapped around her neck with a spoon "that was used like a tourniquet to tighten it down," and duct tape was wrapped around her hands. Id. at 259. Zangaro cut the duct tape off of her hands, and Zangaro's stepfather loosened the cord from J.C.'s neck. Paramedics determined that J.C. was "breathing, but very shallow, at a very slow rate" and transported her to the hospital where she ultimately recovered from her injuries. Id. at 248.

The State charged Norrell with attempted murder as a class A felony, aggravated battery as a class B felony,[3] and criminal confinement as a class B felony.[4] During the jury trial, the State sought to admit State's Exhibits 35-42, which were photographs taken of J.C. on August 1, 2005, after she regained consciousness. Norrell objected that the photographs were repetitive and had no probative value, but the trial court overruled Norrell's objection and admitted the photographs into evidence.

The State also sought to question Detective Dan Winters of the Evansville Police Department regarding a statement that Norrell made, and Norrell objected. During a hearing outside the presence of the jury, Detective Winters testified that he took a statement from Norrell after Norrell was arrested. Detective Winters advised Norrell of his Miranda rights, and Norrell waived his Miranda rights. Norrell told Detective Winters that he "hadn't talked to [J.C.] all day and he [had] spent the evening at Chris Fraser's apartment . . . ." Id. at 361. Norrell denied being at J.C.'s apartment that morning and denied that the police chased him. Norrell then asked for counsel, and Detective Winters took Norrell to the booking area, where they took Norrell's clothing for evidence and took photographs of wounds to his body.

Norrell then testified that he thought Detective Winters was going to question him about drugs. According to Norrell, he told Detective Winters that he understood his Miranda rights and told Detective Winters that he was with Chris Frazer and had not seen

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[3] Ind. Code § 35-42-2-1.5 (2004).

[4] I.C. § 35-42-3-3.

J.C. since the night before. After Norrell asked for an attorney, the officers took his clothing and photographed him. According to Norrell, Detective Winters continued to tell him that he was going to jail for a long time if he did not talk, Detective Winters turned the tape recorder on and off, Detective Winters watched over him during the fingerprinting and was "intimidating" and "badgering" him. Id. at 366. Norrell testified that Detective Winters questioned him before and after Norrell was undressed.

Norrell asked that his statement to Detective Winters be suppressed because Norrell "was intimidated, required to undress, remove his clothing and was continually asked after he had made a request that he have counsel present." Id. at 374. The trial court denied Norrell's motion.

Norrell testified at the trial and contended that J.C. was injured while they had sexual intercourse and engaged in "erotic asphyxiation." Id. at 437. The jury found Norrell guilty as charged. Due to double jeopardy concerns, the trial court did not enter judgment of conviction on the aggravated battery charge and reduced the class B criminal confinement to a class D conviction. Thus, the trial court entered judgment of conviction on attempted murder as a class A felony and criminal confinement as a class D felony. The trial court sentenced Norrell to thirty years for the attempted murder conviction and a concurrent sentence of eighteen months for the criminal confinement conviction.

I.

The first issue is whether the trial court abused its discretion by admitting certain photographs. Because the admission and exclusion of evidence falls within the sound

discretion of the trial court, we review the admission of photographic evidence only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Norrell argues that the trial court abused its discretion by admitting State's Exhibits 35 through 42, which were photographs taken of J.C.'s injuries after she regained consciousness. Norrell contends that J.C.'s injuries were adequately shown in State's Exhibit 3, which was a photograph showing the left side of J.C.'s face while she was unconscious, intubated, and wearing a cervical collar around her neck. Norrell argues that State's Exhibits 35 through 42 were repetitive, unnecessary, and unfairly prejudicial.

The Indiana Supreme Court has held that "[r]elevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice." Wilson, 765 N.E.2d at 1272. The State argues, and we agree, that the photographs were probative to an issue in the case, namely J.C.'s injuries. Exhibits 35 through 42 show J.C.'s injuries to both sides of her face, her neck, and eyes. On the other hand, Exhibit 3 shows J.C.'s injuries only on the left side of her face, her eyes are closed, and her neck is covered by the cervical collar. Exhibits 35 through 42 show injuries that were not depicted in Exhibit 3 and are not repetitive. "Generally photographs depicting injuries of a victim or demonstrating the testimony of a witness are relevant and admissible." Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), reh'g denied,

cert. denied, 126 S. Ct. 2936 (2006). Moreover, "[a]n appellant must establish that the probative value of the evidence was outweighed by the unfair prejudice flowing from it." Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004). Norrell made no such showing, and we cannot say that the probative value of the photographs was outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion by admitting Exhibits 35 through 42. See, e.g., Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003) (holding that the trial court did not abuse its discretion by admitting autopsy photographs where the defendant made no showing that "unfair prejudice flowing from the evidence outweigh[ed] its probative value").

II.

The next issue is whether the trial court abused its discretion by admitting Norrell's statement. Norrell seems to argue that the trial court abused its discretion by admitting his statement to Detective Winters because the statement was coerced and because Detective Winters intimidated him.

The Indiana Supreme Court has held:

> In addition to the required Miranda advisement, a defendant's self-incriminating statement must also be voluntarily given. See Gregory v. State, 540 N.E.2d 585, 592 (Ind. 1989); see also Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405 (2000) ("The requirement that Miranda warnings be given does not, of course, dispense with the voluntariness inquiry."). In judging the voluntariness of a defendant's waiver of rights, we will look to the totality of the circumstances, see Allen v. State, 686 N.E.2d 760, 770 (Ind. 1997), cert. denied, 525 U.S. 1073, 119 S.Ct. 807, 142 L.Ed.2d 667 (1999), to ensure that a defendant's self-incriminating statement was not induced by violence, threats, or other improper influences that overcame the

> defendant's free will, see Wilcoxen v. State, 619 N.E.2d 574, 577 (Ind. 1993).

Crain v. State, 736 N.E.2d 1223, 1230 (Ind. 2000).

When a defendant challenges the admissibility of his statement, the State must prove the voluntariness of the statement beyond a reasonable doubt. Turner v. State, 738 N.E.2d 660, 662 (Ind. 2000). "When a defendant makes such a challenge, the decision to admit the statement is left to the sound discretion of the trial court." Id. "In making its determination, the trial court weighs the evidence to ensure that a confession was not obtained 'through inducement, violence, threats or other improper influences so as to overcome the free will of the accused.'" Id. (quoting Ellis v. State, 707 N.E.2d 797, 801 (Ind. 1999)). "A trial court's finding of voluntariness will be upheld if the record discloses substantial evidence of probative value that supports the trial court's decision." Id. "This Court will not reweigh the evidence, and conflicting evidence is viewed most favorably to the trial court's ruling." Id.

Viewing the evidence most favorably to the trial court's ruling, the alleged intimidation occurred after Norrell had already made his statement denying any involvement to Detective Winters.[5] Norrell points out no statement that he made as a result of the alleged intimidation. Moreover, Norrell points out no intimidation that

[5] Norrell argues that "it is unclear as to whether the information was gained before or after Norrell requested counsel." Appellant's Brief at 12. However, Norrell makes no cite to the record for this statement. Our review of the record reveals that Norrell's clothing was removed after he made his statement to Detective Winters and that Detective Winters's alleged intimidation occurred during the collection of evidence and booking after Norrell had already made his statement.

occurred at or before the time he made his statement to Detective Winters. The State also points out that Norrell's testimony conflicted with Detective Winters's testimony. Detective Winters testified that he did not question Norrell after Norrell requested counsel, and Norrell's argument is an invitation to reweigh the evidence, which we cannot do. See, e.g., id. (holding that the defendant's claim that his statement was not voluntary was an invitation to reweigh the evidence). Under the totality of the circumstances, we conclude that Norrell has failed to demonstrate that his statement was induced by violence, threats, or other improper influences that overcame his free will. See, e.g., Crain, 736 N.E.2d at 1231 (finding no evidence of violence, threats, promises, or improper influence regarding the defendant's confession).

III.

The final issue is whether Norrell's convictions for attempted murder and criminal confinement violate the prohibition against double jeopardy. Norrell appears to argue that the trial court erred by entering convictions for attempted murder and criminal confinement because both counts were based on one continuous act and because the convictions violate the Richardson actual evidence test. Because we conclude that Norrell's convictions violate the actual evidence test, we need not address Norrell's argument that the convictions were based upon one continuous act.

Article I, Section 14 of the Indiana Constitution provides in part that: "No person shall be put in jeopardy twice for the same offense." The Indiana Supreme Court held in Richardson v. State that:

> two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, 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. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy "same offense" analysis under the Indiana Constitution.

717 N.E.2d 32, 49-50 (Ind. 1999) (footnote omitted).

Here, Norrell argues that his convictions violate the actual evidence test. Under the actual evidence test, we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. Id. at 53. "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. The Indiana Supreme Court has clarified that, "under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Bald v. State, 766 N.E.2d 1170, 1172 (Ind. 2002) (quoting Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)). Moreover, "double jeopardy under this test will be found only when it is reasonably possible that the jury used the same evidence to establish two offenses, not when that possibility is speculative or remote." Hopkins v. State, 759 N.E.2d 633, 640 (Ind. 2001).

To succeed in his claim of double jeopardy under the actual evidence test, Norrell must demonstrate a reasonable possibility that the jury used the same evidentiary facts to establish the essential element of both attempted murder and criminal confinement. See id. at 640. The attempted murder charging information provided:

> [O]n or about July 30, 2005, [Norrell] did attempt to commit the crime of murder by repeatedly striking [J.C.] and by placing an extension cord around the neck of the said [J.C.] while tightening the cord, which conduct constituted a substantial step toward the commission of said crime of murder . . . .

Appellant's Appendix at 25. The criminal confinement charging information provided:

> [O]n or about July 30, 2005, [Norrell] did knowingly confine [J.C.] without the consent of the said [J.C.], by placing duct tape around the hands and an extension cord around the neck of the said [J.C.] . . . .

Id. at 26. Thus, the charging information identified the striking of J.C. and placing and tightening the extension cord around her neck as the substantial steps in support of the attempted murder charge. The charging information identified the placing of duct tape around J.C.'s hands and the extension cord around her neck in support of the criminal confinement charge.[6]

It is impossible to know whether the jury based the attempted murder conviction upon the striking of J.C., placing the electrical cord around her neck, or tightening the

[6] The State argues that the criminal confinement conviction "rested on the evidence that Norrell confined [J.C.] by placing duct tape around her hands, while the attempted murder conviction was based upon the evidence that he had repeatedly struck [J.C.] and tightened an extension cord around her neck." Appellee's Brief at 12. We must disagree. The charging information for criminal confinement clearly alleges that Norrell confined J.C. by placing duct tape around her hands and an extension cord around her neck.

electrical cord, just as it is impossible to know whether the jury based the criminal confinement conviction upon the duct tape around J.C.'s hands or the placing of electrical cord around her neck. Both the attempted murder and the criminal confinement charges were based, in part, upon Norrell's placing of the electrical cord around J.C.'s neck. We conclude that there is a reasonable possibility that the jury used the same evidence – the placing of the extension cord around J.C.'s neck - to establish the essential elements of both the attempted murder and criminal confinement convictions. Consequently, we vacate Norrell's conviction for criminal confinement as a class D felony. See, e.g., Bradley v. State, __ N.E.2d __, No. 10S01-0706-CR-232 (Ind. June 13, 2007) (holding that the defendant's convictions for aggravated battery as a class B felony and criminal confinement as a class B felony violated the prohibition against double jeopardy); Vela v. State, 832 N.E.2d 610, 612 n.3 (Ind. Ct. App. 2005) (vacating a defendant's criminal confinement conviction due to double jeopardy concerns where the State conceded that the same acts may have been used to establish the defendant's aggravated battery and criminal confinement convictions); Polk v. State, 783 N.E.2d 1253, 1259 (Ind. Ct. App. 2003) ("[V]iewing the actual evidence, there exists a reasonable possibility that the robbery and confinement convictions are supported by the same evidence of the same transgression."), trans. denied.

For the foregoing reasons, we affirm Norrell's conviction for attempted murder as a class A felony and vacate Norrell's conviction for criminal confinement as a class D felony.

Affirmed in part and vacated in part.

MAY, J. and BAILEY, J. concur