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IN THE
COURT OF APPEALS OF INDIANA

JOSE JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0703-CR-241
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0606-FA-105631

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jose Johnson appeals his convictions and sentence for two counts of criminal deviate conduct,[1] each as a Class A felony, one count of intimidation[2] as a Class C felony, three counts of battery,[3] two as Class C felonies and one as a Class A misdemeanor, criminal confinement[4] as a Class D felony, and domestic battery[5] as a Class A misdemeanor. Johnson raises the following restated issues on appeal:

I. Whether the evidence presented was sufficient to support his intimidation and criminal deviate conduct convictions.

II. Whether his intimidation and criminal deviate conduct convictions violated his right against double jeopardy.

III. Whether the aggregate sentence of sixty-nine and one-half years is appropriate in light of Johnson's character and the nature of the offense.

We affirm.[6]

FACTS AND PROCEDURAL HISTORY

For several years, Johnson and W.L. had a relationship that produced two children. In January 2006, W.L. left Johnson for a few weeks and took their children to live with her mother. Eventually, W.L. and the children returned to Johnson. The relationship

[1] *See* IC 35-42-4-2.

[2] *See* IC 35-45-2-1.

[3] *See* IC 35-42-2-1.

[4] *See* IC 35-42-3-3.

[5] *See* IC 35-42-2-1.3.

[6] Johnson also claims a conflict exists between the trial court's oral sentencing statement and written sentencing statement that warrants a reduction in his sentence. On February 7, 2007, the trial court issued an amended sentencing order to reflect Johnson's correct aggregate sixty-nine and one half-year sentence. *Appellant's App.* at 283-84. The issue is now moot and not addressed on appeal. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (courts of appeal have "the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing." (internal citations omitted)); *see also Barton v. Fuller*, 231 N.E.2d 35 (Ind. 1967).

became abusive after Johnson suspected W.L. had been unfaithful while they lived apart.

From May 26, 2006 to June 8, 2006, Johnson brutalized W.L. through a series of different acts including battering her head, torso, arms, and legs, with a board, a belt, a hammer, pinching her breasts with pliers, lacerating her with box cutters, choking her to the point of unconsciousness, dragging her by her hair, and sodomizing her anus and vagina with the handle of a hammer. During these acts, W.L.'s children cried out for their mother in the open next room. Johnson also threatened to rip W.L.'s insides out so that no man would want to touch her again, unless she admitted to infidelity.

Johnson was charged with fourteen different counts, and after two trials, he was ultimately convicted of eight offenses: two counts of criminal deviate conduct, three counts of battery, one count of intimidation, one count of confinement, and one count of domestic battery. During sentencing, the trial court found Johnson's criminal history, violation of a no-contact order, and the nature of the offense as aggravating factors that warranted the sentence. Johnson now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim for sufficiency of the evidence, we consider only the evidence most favorable to the verdict and the reasonable inferences that can be drawn therefrom. *Norris v. State*, 755 N.E.2d 190, 192 (Ind. Ct. App. 2001) (citing *Davis v. State*, 658 N.E.2d 896, 897 (Ind. 1995)). We do not reweigh the evidence or assess witness credibility. *Id.* The conviction will be affirmed unless we conclude that no

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

B. Intimidation

Johnson argues that there was insufficient evidence to prove intimidation because the statement that he was going to rip W.L.'s guts out was not a threat, but instead "was no more than a description of what he was doing." *Appellant's Br*. at 7. Further, Johnson contends that the statement was not related to any prior lawful act as required under the statute as charged.

In order to convict Johnson for intimidation the State was required to put forth probative evidence that he:

> did communicate a threat to [W.L.], specifically, that he would "take her insides and rip them apart, so she wouldn't be able to have anymore children" with the intent that [W.L.] be placed in fear of retaliation for a prior lawful act, to wit: separating from [Johnson], and furthermore that [Johnson] did draw or use a deadly weapon while communicating said threat[.]

Appellant's App. at 39; *See* IC 35-45-2-1.

In *Hall v. State*, 837 N.E.2d 823, 827 (Ind. Ct. App. 2005), *reh'g granted*, *trans. denied* (2006), we found there was sufficient evidence to support the defendant's conviction for intimidation as a Class C felony because the defendant pulled out a deadly weapon right after making a threat without any break in the chain of events. *Id.* Further, the victim's instruction to leave the home and defendant's failure to comply, coupled with defendant's threat he was going to kill the victim was sufficient to establish that the threat was in relation to a prior lawful act, to wit: the victim's request that the defendant leave. *Id.*

In *Ransley v. State*, 850 N.E.2d 443, 446 (Ind. Ct. App. 2006), a property dispute

arose between two neighbors that escalated from a verbal altercation to pulling a handgun. In that case, we held that the State failed to prove that the defendant's threat was intended to place that victim in fear of retaliation for a *prior lawful* act. *Id.* (emphasis added). We stated that, as charged, the defendant's threat was in relation to a future act that without the neighbor's permission would be an unlawful trespass. *Id.* Thus, the defendant could not be found guilty of intimidation.

Here, the evidence presented at trial demonstrated that Johnson and W.L. were arguing about their relationship and that Johnson threatened and chastised W.L. for leaving him – a prior lawful act.

Johnson next claims he did not commit intimidation because he did not threaten to rip W.L.'s insides out, but actually did rip W.L.'s insides out. We cannot agree. During this altercation, Johnson threatened to "rip her insides out" and brutalized W.L. by sodomizing her with a deadly weapon – a hammer. Based on the record before us, particularly the evidence demonstrating Johnson's inhumanity, there was sufficient evidence to show that Johnson's threat may have included further brutalization beyond Johnson's odious and gruesome acts. The jury was free to conclude that Johnson's threat was not in relation to what he was doing, but included what else he may do. There was sufficient evidence to prove Johnson was guilty of intimidation as a Class C felony.

C. Criminal Deviate Conduct

Next, Johnson claims that there was insufficient evidence to prove his second criminal deviate conduct conviction. Specifically, Johnson asserts that the sole testimony against him came from the victim and could not conclusively support a finding that the

hammer he used to sodomize W.L.'s vagina either took place at her anus or ever penetrated her anus.

In order to convict Johnson of his second count of criminal deviate conduct, the State was required to prove beyond a reasonable doubt that:

> [Johnson], did knowingly and intentionally, while armed with a deadly weapon, to-wit: a hammer, cause [W.L.] to perform or submit to deviate sexual conduct by inserting a hammer into the anus of [W.L.], when [W.L.] was compelled by force or imminent threat of force to submit to such deviate sexual conduct[.]

Appellant's App. at 38; *see also* IC 35-42-4-2(a)(1), (b)(1).

We have continually held that the testimony of one witness may be sufficient to support a conviction. *Brasher v. State*, 746 N.E.2d 71, 72 (Ind. 2001). Here, after W.L. testified that Johnson shoved the hammer up into her vaginal area, she testified that Johnson shoved the hammer up into her bottom. *Tr.* at 369-70. She was also asked whether Johnson put the hammer handle into her vagina and her bottom, and she testified he did both. *Id.* This was sufficient evidence from which the jury could reasonably conclude that Johnson inserted the hammer handle into W.L.'s anus and support his second criminal deviate conduct conviction.

II. Double Jeopardy

A. Standard of Review

Johnson contends that his intimidation and criminal confinement convictions violate Indiana's double jeopardy clause. Under Article 1, Section 14 of the Indiana Constitution, a double jeopardy violation occurs when, 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. *Rawson v. State*, 865 N.E.2d 1049, 1054-55 (Ind. Ct. App. 2007) (citing *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)). However, under the actual evidence test, a defendant's double jeopardy rights are 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. *Id.*

B. Intimidation

Johnson argues that the actual evidence presented to support his intimidation conviction was part of the same evidence used to establish both of his criminal deviate conduct convictions.

In *Stafford v. State*, 736 N.E.2d 326, 332 n.5 (Ind. Ct. App. 2000), *trans. denied*, we rejected a defendant's claim that his convictions for intimidation and battery violated his double jeopardy protections. We determined that double jeopardy was not implicated by the intimidation conviction because the evidence that supported the charge and conviction of intimidation, i.e., threatening the victim while armed using a deadly weapon, was not the same evidence that supported the other convictions. *Id.*

Here, the intimidation charge involved Johnson using a hammer while threatening to rip W.L.'s insides out, whereas Johnson's convictions for criminal deviate conduct involved the separate and distinct act of Johnson inserting the hammer handle into and penetrating W.L.'s vagina and later W.L.'s anus. Therefore, we do not find any double jeopardy violation regarding Johnson's conviction for intimidation and two convictions for criminal deviate conduct.

C. Criminal Deviate Conduct

Johnson also contends that his two criminal deviate conduct convictions are in violation of his rights against double jeopardy because he claims the second act of alleged criminal deviate conduct was "merely incidental to the first" and was essentially the same act. *Appellant's App.* at 13.

In *Miller v. State*, 790 N.E.2d 437, 439 (Ind. 2003), the defendant's use of the same weapon in the commission of separate and distinct offenses did not violate double jeopardy because each of the defendant's convictions was supported by proof of at least one unique evidentiary fact not required for any other conviction. *Rawson*, 865 N.E.2d at 1055 (Ind. Ct. App. 2007).

Contrary to Johnson's contention, there was separate and distinct evidence to support the jury's finding of the first criminal deviate conduct, i.e., the act of inserting the hammer into W.L.'s vagina, and the second act of criminal deviate conduct, i.e., inserting the hammer into W.L.'s anus. *See Robinson v. State*, 835 N.E.2d 518, 522 (Ind. Ct. App. 2005) (multiple convictions will not be precluded if each statutory offense requires proof of additional fact that other does not). There was no double jeopardy violation.

III. Appropriateness of Sentence

A sentencing decision is within the sound discretion of the trial court. *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006), *trans. denied* (citing *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003)). If the sentence imposed is lawful, this court will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. *Boner v. State*, 796 N.E.2d 1249, 1254 (Ind. Ct. App. 2003);

Ind. Appellate Rule 7(B).

Here, we use the trial court's sentencing findings to learn the character of the offender and the nature of the offense. Specifically, as to Johnson's character, the trial court set forth that Johnson was in violation of a no-contact order at the time of his crimes and that his criminal history was extensive. His criminal history included convictions for carrying a handgun without a license, forgery, battery, criminal recklessness, two separate battery convictions arising from two separate domestic violence cases, operating while intoxicated, driving while suspended, and two separate resisting law enforcement convictions.

Most troubling is the nature of the offense. The trial court stated, "This is one of the most severe cases of domestic abuse the Court has seen." *Tr.* at 538. We agree. Over a two-week period, Johnson savagely assaulted the mother of his children using repulsive techniques and tools while their children were in the next room and could see and hear everything. He used a hammer, a slotted spoon, a board, a belt, box cutters, pliers, and his fists to batter W.L "from head to toe." *Tr.* at 539.

The trial court did not impose a sentence for the domestic battery conviction and imposed the advisory sentence for the other seven offenses. It then determined that three of the sentences would be concurrent and the remaining four consecutive to the three and to each other for a total sentence of sixty-nine and one-half years. Johnson's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

ROBB, J., and BARNES, J., concur.