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IN THE COURT OF APPEALS OF INDIANA

DIONNE STEWART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0905-CR-462
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
The Honorable Stanley Kroh, Commissioner
Cause No. 49G01-0810-FA-249157

January 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Dionne Stewart ("Stewart") appeals his conviction of rape[1] as a Class A felony, and challenges his aggregate sentence. The issues presented for our review are:

I. Whether there was sufficient evidence to support Stewart's rape conviction; and

II. Whether the sentence imposed by the trial court violates double jeopardy principles.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the verdict reveal that on September 28, 2007, T.R., a recovering cocaine addict, walked to a friend's house at around noon where she relapsed in her recovery and smoked crack cocaine with her friend until approximately 4:00 p.m. T.R. stayed at her friend's house talking and playing cards until the early morning hours of September 29, 2007. T.R. and another woman were sitting on the front porch of the house when three men, including Stewart and William Baxter ("Baxter"), walked by and spoke with them.

After the three men walked past, T.R. entered her friend's house, but then left to return to her house as she had to work later that day. The other people at her friend's house advised her against walking in that neighborhood at such a late hour. As T.R. walked home, she came across Stewart, Baxter, and a third man, who called her cute and propositioned her with drugs. The men approached T.R., asked for her name, continued to call her cute, and told her their nicknames. Stewart asked T.R. to hang out with the three men. When T.R.

[1] *See* Ind. Code § 35-42-4-1.

responded that she only wanted to walk home, Stewart informed her that they would walk with her.

While walking with T.R., Stewart pulled out a bag of cocaine, persuaded T.R. to use some, scooped a small amount of the cocaine out of the bag using a driver's license that had "Stewart" on it, and all four of them consumed some of the cocaine. The four stopped behind an abandoned house when Stewart said "This is the spot." *Tr.* at 68. T.R. felt uncomfortable about the situation, but complied when Stewart asked her to come with him as he walked toward the side of the house. Stewart told T.R. that he liked her, kissed her, and she returned the kiss. Stewart pulled his penis out of his pants and told T.R. to touch it, but she refused. The three men became angry with T.R. for using some of their cocaine and demanded payment for it. T.R. attempted to walk away from the three men, but they refused to allow her to walk home without them.

T.R. walked into an alley and was followed by the three men, when one of the men said, "Now." *Id.* at 77. Stewart came up to T.R. from behind and placed his arm around her neck, strangling her. When T.R. said that she would scream for help, one of the men in the group told the others to "[k]nock the bitch out." *Id*. at 78. Stewart and one of the other men began punching T.R. on the back of her head with their fists. T.R. became scared and feared that the men would kill her.

One of the men asked T.R. to remove her pants, but she refused. As one of the men kept watch, the other two forcibly removed T.R.'s pants. The three men then took turns repeatedly penetrating T.R.'s mouth, vagina, and anus, ejaculating in her mouth and vagina.

T.R. cried and begged the men to stop. Ultimately, the third man told the other two to go. The men took T.R.'s cell phone and house keys, and threatened to kill her if she told the police. When T.R. asked them to return her keys, Stewart told her to shut up and punched her in the mouth, causing her to bleed profusely.

After the men left, T.R. struggled to her feet, dressed, and walked to find help. Larrenquai Bailey ("Bailey"), who lived in the area, heard someone crying for help and helped T. R. Earlier, Bailey had heard what sounded like a fist hitting someone and heard a woman cry, "Please don't do that." *Id.* at 312-13. The police were summoned to Bailey's house.

Indianapolis Metropolitan Police Officer Mark Decker arrived at Bailey's house at approximately 6:49 a.m. and observed T.R. bleeding profusely from her mouth. He noted that her clothes were disheveled and torn and that T.R. had blood all over her hands and face. T.R. told Officer Decker that she had been raped and asked that he take her away from there because she feared that her attackers were still watching her. T.R. was taken to Wishard Hospital where she was examined, treated, and a sexual assault kit was completed.

T.R.'s injuries inflicted by her attackers included bumps on her head, scratches, a lost tooth, pain in her vagina, and wounds requiring plastic surgery. While at the hospital, T.R. made up a story about the location of the rape. Several weeks later, T.R. provided police officers with the correct location.

Forensic lab testing found semen on T.R.'s pants and matched other semen stains to Stewart's and Baxter's DNA. Based on that information, officers prepared a photo array

containing photos of Stewart and Baxter. T.R. identified Stewart and Baxter as two of the three men who assaulted her.

The State charged Stewart with two counts of rape, four counts of criminal deviate conduct, and one count of robbery, each as a Class A felony, one count of battery and one count of criminal confinement, each as a Class C felony, and one count of strangulation and one count of theft, each as a Class D felony, in addition to the allegation that Stewart was an habitual offender. After Stewart's jury trial, which concluded on April 16, 2009, Stewart was found guilty as charged. Stewart waived a jury trial on the habitual offender count, and after the presentation of evidence, the trial court determined that Stewart was an habitual offender. At sentencing, the trial court merged certain of the counts, ordered concurrent and consecutive sentences, which with the habitual offender enhancement to the rape conviction, resulted in an aggregate sentence of eighty-four years executed. Stewart now appeals.

DISCUSSION AND DECISION

I. Incredible Dubiosity

Stewart challenges the sufficiency of the evidence used to support his rape conviction, claiming that T.R.'s testimony was incredibly dubious. Stewart claims that T.R.'s testimony was equivocal and inconsistent and that there is no circumstantial evidence to support a conviction for rape.

When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). This review "respects 'the jury's exclusive province to weigh

conflicting evidence.'" *Id.* (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the verdict, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

"Within the narrow limits of the 'incredible dubiosity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). For testimony of a sole witness to be disregarded based on a finding of "incredible dubiosity," it must be inherently contradictory, wholly equivocal, or the result of coercion. *Id.* Moreover, there must also be a complete lack of circumstantial evidence of the defendant's guilt. *Id.* This rule is rarely applicable. *Id.*

In the present case, there was forensic DNA evidence that semen from both Stewart and Baxter was found on T.R.'s pants' leg, thus providing corroborating evidence that both men had a sexual encounter with T.R. Further, the injuries sustained by T.R., including the necessity of plastic surgery to repair the injury to T.R.'s mouth, are circumstantial evidence that the sexual encounter between Stewart, Baxter, and T.R. was not consensual. Consequently, as corroborating evidence supporting the rape conviction is present, the incredible dubiosity rule is inapplicable.

Additionally, T.R.'s testimony at trial was not incredible or equivocal. Her testimony at trial was consistent as was her identification of Baxter and Stewart as her attackers. Although Stewart challenges the inconsistencies between T.R.'s initial statements to police

and medical personnel, Stewart had the opportunity to cross-examine T.R. T.R. explained that her initial report differed from her testimony because she was fearful that her attackers were still watching her and would kill her if she told the truth. The jury was then free to decide whether T.R. was a credible witness. We will not reassess T.R.'s credibility as a witness. Because inconsistencies or contradictions between prior statements and testimony at trial do not trigger the incredible dubiosity rule, but rather go to the weight to be attributed to the evidence, we find no error. *See Buckner v. State*, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006) (rule applies to conflicts in trial testimony not conflicts between trial testimony and pre-trial statements to police); *Holeton v. State*, 853 N.E.2d 539, 542 (Ind. Ct. App. 2006) (discrepancies go to weight and credibility and do not trigger rule).

II. Double Jeopardy

Stewart argues that this case must be remanded because his sentence violates double jeopardy principles. Stewart claims that because the trial court merged certain of the counts against him instead of vacating those convictions, that double jeopardy principles were violated. Appellate review of double jeopardy claims is conducted *de novo*. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005).

"[A] defendant's constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count." *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006). "It is highly ordinary that a jury . . . may hear evidence about multiple counts during a single trial and determine guilt on each of them." *Carter v. State*, 750 N.E.2d 778, 780 (Ind. 2001). "These findings of guilt do not

mean that a defendant has faced multiple sentences or multiple judgments of conviction." *Id*. "[A] merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is "unproblematic" as far as double jeopardy is concerned." *Green*, 856 N.E.2d at 704. Our Supreme Court has disapproved cases which indicate that vacating a jury verdict is the appropriate remedy rather than merger and entering a judgment of conviction only on the merged count. *Laux v. State*, 821 N.E.2d 816, 820 (Ind. 2005).

Our review of the record reveals that the trial court did not enter judgment on the jury verdicts. Instead, at the sentencing hearing the trial court announced its intention of merging certain of the counts, entering judgment of conviction on only the non-merged counts, in some cases as lesser-included offenses, and then pronouncing the sentence on only the non-merged counts. *See Tr.* at 441-42. We note that there are two abstracts of judgment in this case which impose the same length of sentence. *See Appellant's App*. at 21-24. However, the second abstract of judgment, which supercedes the first abstract, and which includes a notation that it is a modification made on that later date, adds commentary that Stewart was convicted of lesser-included offenses under certain of the counts.[2] Judgment of conviction and sentences were entered on only the non-merged counts. Accordingly, we find that there has been no violation of double jeopardy principles here. Affirmed.

DARDEN, J., and MAY, J., concur.

[2] Additionally, the abstracts differ in that the first lists sentences on counts 2, 4, 6, 7, 8, 9 and 10 plus the habitual offender enhancement. *Appellant's App*. at 23. The second lists sentences on counts 1, 3, 5, 7, 8, 9, and 10 plus the habitual offender enhancement. *Id*. at 21. This difference is unproblematic, and possibly a scrivener's error, because the effect was to reflect the entry of conviction and sentence on only the non-merged counts and habitual offender enhancement of the Class A felony conviction.