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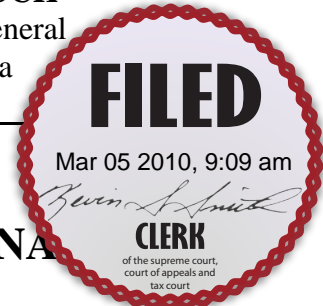
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**IN THE
COURT OF APPEALS OF INDIANA**



THOMAS HUFFINE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0908-CR-478

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0902-FC-28582

March 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Thomas Huffine appeals his conviction for strangulation as a class D felony. We affirm in part and reverse in part.

Issue

We find the dispositive issue to be whether Huffine's convictions for strangulation and domestic battery violate principles of double jeopardy.

Facts and Procedural History

On February 14, 2009, Huffine was living in an apartment with his girlfriend, Jaci Fultz, who was in her first trimester of pregnancy with Huffine's child, and her two-year-old son from a prior relationship. Huffine had two young sons, ages five and eight, who visited him every weekend. On February 14, 2009, Huffine, Fultz, and all three children went out for brunch. On the way home, the boys began "acting up" in the car. Tr. at 26. Huffine yelled at them and threatened to punch them if they did not "shut up." *Id.* Fultz started "going off on [Huffine]" because she thought that "it was just a dumb thing to say." *Id.* When they reached the apartment, Huffine followed Fultz into their bedroom and closed the door. Huffine screamed at Fultz for undermining his authority in front of his sons. Fultz attempted to leave the room, but Huffine blocked the door and threw her against the wall. Fultz fell to the ground, and Huffine placed his hands around her neck. He applied pressure until it became difficult for Fultz to breathe. Fultz struggled, but Huffine released his grip only when Fultz allowed her body to become limp. Fultz attempted to leave the room two

more times, and both times Huffine threw her on the bed and choked her again. He eventually relented and took a long nap.

The following night, Fultz visited Wishard Hospital and expressed concern about her pregnancy. Medical staff performed a sonogram on Fultz, and she scheduled a follow-up appointment. Before leaving the hospital, Fultz approached Indianapolis Metropolitan Police Department Officer Gary Toms and told him she “wanted to report a domestic violence.” *Id.* at 53. Officer Toms prepared a police report based on Fultz’s statement. On March 5, 2009, the State charged Huffine with class C felony battery upon a pregnant woman; class D felony strangulation; two counts of class D felony domestic battery with a child present; and class A misdemeanor intimidation. On July 8, 2009, Huffine waived his right to a jury trial. On July 20, 2009, in response to Huffine’s motion to dismiss all but the strangulation charge, the trial court reduced both domestic battery charges to class A misdemeanors. Following a trial, Huffine was convicted of class D felony strangulation and one count of class A misdemeanor domestic battery.¹ The trial court sentenced him to concurrent sentences of eighteen months for strangulation and nine months for domestic battery. The sentences were suspended, however, and Huffine was given credit for 141 days served. He was placed on probation for eighteen months. Huffine now appeals.

¹ The trial court stated that it did not convict Huffine of class C felony battery of a pregnant woman because the State failed to prove beyond a reasonable doubt that Huffine knew Fultz was pregnant when he assaulted her.

Discussion and Decision

Huffine argues that his convictions violate Article 1, Section 14 of the Indiana Constitution, which states, “No person shall be put in jeopardy twice for the same offense.” This provision was intended “to prevent the State from being able to proceed against a person twice for the same criminal transgression.” *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). In *Richardson*, our supreme court held that two or more offenses are the “same offense” 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. *Id.*

Huffine contends that his convictions violate the actual evidence test. Pursuant to that test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* at 53. Multiple convictions are prohibited if there is “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.” *Id.* In determining the facts used by the factfinder to establish the elements of each offense, it is appropriate to consider the charging information and arguments of counsel. *Lee v. State*, 892 N.E.2d 1231, 1234 (Ind. 2008).

To prove the strangulation charge in this case, the State was required to prove that Huffine “did knowingly in a rude, insolent, or angry manner impede the normal breathing and/or the blood circulation of Jaci Fultz, another person, by applying pressure to [her] throat

or neck[.]” Appellant’s App. at 18 (count II of charging information); *see also* Ind. Code § 35-42-2-9. In order to prove the domestic battery charge, the State was required to prove that Huffine “did knowingly in a rude, insolent, or angry manner touch Jaci Fultz, another person who ... is or was living as if [his] spouse ... and further, that said touching resulted in bodily injury to Jaci Fultz, specifically: pain and/or difficulty breathing[.]” *Id.* (count III of charging information); *see also* Ind. Code § 35-42-2-1.3.

Huffine notes that the manner in which the State worded the domestic battery charge demonstrates that it intended to use evidence of Huffine’s placement of his hands around Fultz’s neck to prove the “touching” element of that offense. At trial, the prosecutor asked Fultz if she experienced pain when Huffine choked her the third time, and she replied affirmatively. The State failed to elicit evidence of other pain she might have experienced during the incident, for example, when Huffine threw her against the wall. Moreover, in the prosecutor’s closing argument, he referenced Fultz’s pain only in the context of the choking actions of Huffine: “He pushed her down and he put his hands around her neck and strangled her. She told you that all 3 times she had difficulty breathing. She told you that she did feel pain, that it hurt when he was doing this to her.” Tr. at 85.

Finally, we must consider the comments of the trial court at the conclusion of this case:

On the strangulation, if there is a battery it was a strangulation, so I didn’t want to throw it out of hand. ... I’m satisfied beyond a reasonable doubt that the strangulation occurred. And I think that makes it a domestic battery. So I’ll find him guilty as charged on counts 2 and 3, not guilty on the remaining counts.

Id. at 92-93. The State argues that it presented evidence that Huffine choked Fultz three separate times on February 14, 2009, making it “highly unlikely that the trial court would have used the same act of choking to find Huffine guilty of both offenses.” In our view, however, if the trial court had intended to use one act of choking to support the strangulation conviction and another act of choking to support the domestic battery conviction, it could have easily articulated such. Trial judges are presumed to know the law and apply it correctly. *H.M. v. State*, 892 N.E.2d 679, 682 (Ind. Ct. App. 2008), *trans. denied*. Such presumption to the contrary, the trial court in this case indicated that there was one act of strangulation, which it also considered an act of domestic battery.

In sum, there is more than a reasonable possibility that the evidentiary facts used by the trial court to establish the essential elements of class D felony strangulation were also used to establish the essential elements of class A misdemeanor domestic battery. Based on the record before us, we have no choice but to reverse Huffine’s domestic battery conviction because it violates principles of double jeopardy. His conviction for class D felony strangulation stands.

Affirmed in part and reversed in part.

RILEY, J., and VAIDIK, J., concur.