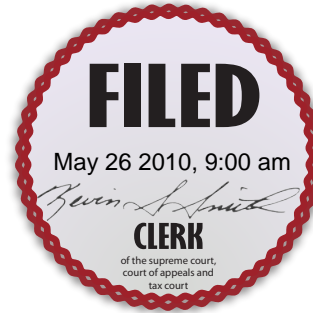


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICKY L. RUST,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 80A04-0907-CR-428

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0902-FB-00055

May 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Ricky L. Rust (“Rust”) was convicted in Tipton Circuit Court of Class D felony criminal recklessness, Class C felony battery, and Class B felony criminal confinement. After determining that the first two convictions merged into the Class B felony criminal confinement convictions for sentencing purposes, the trial court sentenced Rust to a term of fifteen years. Rust appeals and argues:

- I. That the trial court committed fundamental error when it allowed the admission of the 911 tapes into evidence;
- II. That the State failed to rebut Rust’s claim of self-defense; and
- III. That the evidence presented at trial was insufficient to support Rust’s conviction for Class B felony criminal confinement.

We affirm.

Facts and Procedural History

By February of 2009, Rust had lived with Donald Helton (“Helton”), Linda Fink (“Fink”), and Dorothy Jill Pottgiesser (“Pottgiesser”) in Rust’s home in rural Tipton County for a number of months. By February, Rust and Fink’s relationship had become increasingly intimate but was strained by Fink’s various refusals to Rust’s requests. Fink had spoken of moving out but Rust persuaded her to stay. Fink and Helton did not get along and got in a scuffle in Rust’s house. On February 9, 2009, Rust told Helton to move and drove him, in Pottgiesser’s car, to Kokomo to live.

While Rust was gone, Fink and Pottgiesser discussed leaving Rust’s house and living elsewhere. The conversation continued even after Rust returned. They later stated that they believed that Rust overheard their conversation. Rust then came in and told Pottgiesser to go upstairs to her room. After Pottgiesser left, Rust made Fink a drink.

As Fink drank, Rust struck her, knocking her to the floor. Rust continued to strike Fink until she left the house. Fink walked a mile to her aunt's house. She knocked but no one answered the door. Because Fink had no money, telephone, or transportation, she returned to Rust's house. Meanwhile, Rust and Pottgiesser drove to Fink's aunt's house to find Fink. Not finding Fink there, they went to a store and bought a bottle of whiskey then returned to Rust's house.

Fink had returned to Rust's house before Rust and Pottgiesser. When she heard Rust return, she hid between a bed and a wall. Pottgiesser saw Fink and noticed that Fink "was extremely bruised and bloody." Tr. p. 108. Fink signaled to Pottgiesser not to disclose where she was hiding. Pottgiesser went upstairs. Fink later came out of hiding to confront Rust about something he had said. Pottgiesser, who was upstairs, heard a commotion on the first floor. She went downstairs and saw Rust and Fink shouting at each other. During this argument, Fink pushed a metal cabinet over.

Rust struck Fink, who fell to the floor. He then picked up the metal cabinet and threw it on top of Fink. Rust punched Fink, hit Fink's head against the sink and the cabinets, and dragged her by the hair before throwing a table on top of her. He also threw dirt from a potted plant on Fink.

Pottgiesser went to help Fink sit up. She saw Rust pull a shotgun from behind the refrigerator. Fink testified that when she saw Rust with the shotgun, she "thought he was going to kill me. I was so scared I couldn't move." Tr. pp. 155-56. Rust then fired the shotgun, making a hole in the floor six inches from Fink's feet. Fink recalled that Rust said, "see how easy that could be." Tr. pp. 156-57. Pottgiesser took that to mean that

Rust would shoot Fink or herself if he wanted to. Rust then put the shotgun back behind the refrigerator.

Fink stood up and tried to leave the house several times, but Rust repeatedly blocked her path with his body. She eventually left the house with Rust in pursuit. Fink again walked to her aunt's house but after failing to get anyone to answer the door, she returned to Rust's house where she again hid between a bed and a wall.

Meanwhile, Rust had called 911 to report that Fink was harassing him. The dispatcher who took the call testified that Rust wanted to make sure that his report was being recorded. She also did not believe Rust was being truthful and alerted Tipton County Sheriff's Deputy Evan Smith ("Deputy Smith") of her belief. Deputy Smith attempted to call Rust. After his attempt to call Rust failed, Deputy Smith drove to Rust's house.

Deputy Smith arrived at Rust's house to find Rust standing in the driveway. Rust told Deputy Smith that he had called 911 because Fink had been harassing him. He also said that there was some property damage in the home caused by Fink but that "everything was okay now." Tr. p. 39. Rust informed the officer that no one was in the house. The officer asked to see the property damage, but Rust would not allow him to enter the house.

Meanwhile, inside the house, Pottgeiser told Fink that the police had arrived. Fink left her hiding place. Deputy Smith saw Pottgeiser exit the house. Pottgeiser told the deputy that the woman he was looking for was inside the house. Deputy Smith began to enter the house and saw Fink walking towards him. The deputy testified that Fink "had a

badly beaten right eye with a laceration and contusions on her forehead.” Tr. p. 41. Deputy Smith recalled that Rust shouted that Fink had fallen down the stairs and that Pottgieser should tell the officer the same thing. Tr. p. 42.

On February 24, 2009, the State charged Rust with Class D felony criminal recklessness, Class C felony intimidation, Class C felony battery, and Class B felony criminal confinement. On March 2, 2009, Rust filed a pro se motion for discovery seeking copies of “all evidence.” Appellant’s App. p. 12. On March 4, 2009, Rust was in custody, was appointed counsel, and requested a speedy trial. A jury trial was set for Tuesday, April 28, 2009. The State provided Rust with discovery, including information that Rust had made statements to the 911 dispatcher and that these statements had been recorded.

On the day of trial, the State informed the court that on the previous Thursday or Friday they had spoken with the 911 dispatcher about the contents of Rust’s 911 calls and had decided to use one or more of those calls at trial. The State then contacted Rust’s attorney on Sunday, April 26, 2009, and informed him of the decision. The State provided Rust with a copy of the 911 recording on Monday, March 27, 2009. Rust also filed his witness list on the day of trial and conceded that the State had not acted in bad faith.

At trial, Rust moved to exclude the 911 recording arguing that the recording is “surprise evidence.” The State replied that it would not offer the recording until the next day. The trial court denied Rust’s motion but stated that Rust should have the

opportunity to review the recordings before the next day and could renew his objection at that time. During the first day of trial, the 911 recordings were not mentioned.

On the second day of trial, Rust did not object to the 911 recordings. The State played one of the two recordings. Rust sought to have the other recording played for the sake of completeness. The trial court granted the request and the other recording was played. At the conclusion of the State's evidence, the trial court granted Rust's motion for a directed verdict on the Class C felony intimidation charge. The jury convicted Rust of the remaining charges. The trial court merged the charges into the Class B felony criminal confinement conviction and sentenced Rust to fifteen years in the Department of Correction. Rust now appeals.

I. Admission of Evidence

Rust initially argues that the trial court committed fundamental error when it allowed the State to present the 911 recordings at trial. Rust failed to contemporaneously object to the admission of these recordings at trial. Rust recognizes that he did not object to the recordings when they were offered into evidence and that he did not specifically request a continuance. "It is well-settled that in order to properly preserve an issue for appellate review, one must state with reasonable specificity the grounds for his objection while before the trial court." Yurina v. State, 474 N.E.2d 93, 99 (Ind. 1985). Because Rust failed to raise this issue before the trial court, the issue must constitute a fundamental error which is an exception to waiver. Benson v. State, 762 N.E.2d 478, 755 (Ind. 2002).

The fundamental error exception is extremely narrow. Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process. Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000). The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. Id.

Although Rust raises the issue of fundamental error, he fails to present any argument that addresses how he was so deprived of fundamental due process that a fair trial was impossible. In fact, Rust acknowledges that the State did not act in bad faith, that he did receive a copy of the recordings before trial, and that the trial court gave him an opportunity to object to the admission of the recordings which he did not take. Additionally, when the State only played one recording, Rust demanded that the other recording be played based on the doctrine of completeness. Rust has failed to establish that the trial court committed fundamental error when it admitted the 911 recordings.

II. Self-defense Claim

Rust also argues that the State failed to present sufficient evidence to rebut his claim of self-defense. The standard for reviewing a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same standard used for any claim of insufficient evidence. Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). We neither reweigh the evidence nor judge the credibility of witnesses. Id. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. Id. “A valid claim of self-defense is legal justification for an otherwise criminal act.” Id. To prevail on a self-defense claim, Rust must show that he:

(1) was in a place where he had a right to be; (2) did not provoke, instigate or participate willingly in the violence; and (3) had been in reasonable fear or apprehension of bodily harm. See also Henson v. State, 786 N.E.2d 274, 277 (Ind. 2003); Ind. Code § 35-41-3-2 (2006). The State need only negate one of the necessary elements. Wilson, 770 N.E.2d at 800. The law is well settled in that the amount of force used must be proportionate to the urgency of the situation. Hollowell v. State, 707 N.E.2d 1014, 1024 (Ind. Ct. App. 1999).

Rust contends that his self-serving testimony had not been rebutted by the State's evidence. However, Fink and Pottgieser's testimony adequately rebutted Rust's self-defense claim. Rust is merely asking us to believe his testimony over that of Fink and Pottgieser. We will not reweigh the evidence or the credibility of the witnesses.

III. Sufficiency of the Evidence

Finally, Rust argues that the evidence presented was insufficient to support his conviction for Class B felony confinement. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. If inferences may be reasonably drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt, then circumstantial evidence will be sufficient. Id.

Under Indiana Code section 35-42-3-3(a), “A person who knowingly or intentionally . . . confines another person without the other person’s consent . . . commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Class D felony.” Section (b) states that “[t]he offense of criminal confinement defined in subsection (a) is . . . a Class B felony if it . . . is committed while armed with a deadly weapon[.]”

Initially, Rust argues that the evidence is insufficient to support his conviction for Class B felony criminal confinement because the trial court granted a directed verdict as to the Class C felony intimidation charge. Criminal confinement and intimidation are different charges with different elements, so his argument is unavailing. Also, the criminal confinement conviction occurred after the completion of all evidence while the directed verdict on the intimidation charge occurred after the completion of the State’s evidence only.

Next, Rust contends that despite Fink and Pottgieser’s testimony, the State failed to present sufficient evidence to support Rust’s convictions. Indiana Code section 35-42-3-1 defines confine as “to substantially interfere with the liberty of a person.” After beating Fink, Rust threatened Fink with a shotgun and discharged that shotgun at Fink’s feet, making a hole in the floor six inches from Fink’s feet. At trial, Fink testified that when she saw Rust with the shotgun, she “thought he was going to kill me. I was so scared I couldn’t move.” Tr. pp. 155-56. Fink recalled that Rust said, “see how easy that could be.” Tr. pp. 156-57. Pottgiesser testified that she saw Rust fire the shotgun and took Rust’s statement to mean that Rust would shoot Fink or herself if he wanted to.

Rust then put the shotgun back behind the refrigerator. Fink then tried to leave but was repeatedly prevented from leaving by Rust.

Although Rust put the shotgun down, he still sought to prevent Fink from leaving the house. See Spivey v. State, 436 N.E.2d 61, 63 (Ind. 1984) (holding that the fact that the two victims were able to break away from the confinement did not negate a finding that the confinement took place); see also Sammons v. State, 397 N.E.2d 289, 294 (Ind. Ct. App. 1979) (holding that the fact that the brief length of confinement was not a determinative factor of “substantial” interference, for while time may be a factor, it was the type or nature of interference that was most significant).

This evidence is sufficient to support Rust’s conviction for Class B felony criminal confinement.¹

Conclusion

Rust has failed to establish that the trial court did commit fundamental error when it admitted the 911 recordings. The State provided sufficient evidence to rebut Rust’s claim of self-defense. The evidence is sufficient to support Rust’s conviction for Class B felony criminal confinement.

Affirmed.

RILEY, J., and BRADFORD, J., concur.

¹ We only address Rust’s Class B felony criminal confinement conviction. Although Rust mentions his other convictions in passing, he does not argue that the evidence was not sufficient to support these convictions. In addition, the trial court merged the other convictions into the Class B felony criminal confinement conviction for sentencing purposes.