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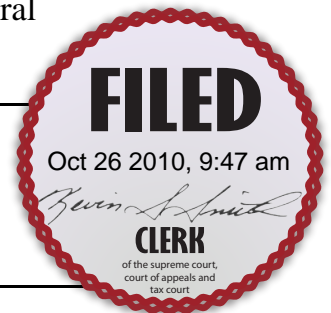
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**IN THE
COURT OF APPEALS OF INDIANA**



RUSSELL TIMMONS,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

[illegible]

No. 79A05-0910-CR-567

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0707-FA-17

October 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Russell Timmons appeals his conviction for Confinement,¹ a class C felony. Timmons argues that the trial court gave an improper jury instruction and that there is insufficient evidence supporting the conviction. Finding no error and sufficient evidence, we affirm.

FACTS

In 2004, Timmons's wife was in a car accident that resulted in a personal injury lawsuit. They eventually settled the litigation in mediation with the opposing party, who was represented by an attorney named Linda Polley. Timmons and his wife later refused to honor the settlement agreement, and Polley subsequently filed a motion to enforce the agreement.

On June 22, 2007, following a hearing, the trial court ordered Timmons and his wife to honor their portion of the settlement agreement. Timmons was "displeased" with this result and approached Polley as everyone vacated the courtroom. Tr. p. 420.² Timmons yelled "hey lady," and violently pushed Polley to the ground, causing her to fall on her hands and knees. Id. at 160-61. Timmons grabbed Polley by her torso and began dragging her towards the fourth floor balcony. Upon reaching the railing of the balcony, Timmons picked Polley up and moved her body in the direction of the railing. Polley was "struggling and screaming at the top of [her] lungs and trying to brace [herself] and keep [herself] from going over the railing." Id. at 162. Several deputies and other bystanders quickly surrounded

¹ Ind. Code § 35-42-3-3.

² There are multiple portions of the written transcript that are missing or duplicated. Thus, we join with the parties in citing to the electronic version of the transcript rather than the written one.

Timmons and attempted to force him to release Polley. After he released her, she fell to the ground, at which time Timmons's "hands went immediately to an area around her neck and he began shaking her." Id. at 198. A deputy finally subdued Timmons, and Polley crawled to safety. As a result of the altercation, Polley sustained some bruising and pain to her neck, arms, and other areas of her body.

On July 3, 2007, the State charged Timmons with class A felony attempted murder, class B felony attempted aggravated battery, and class C felony confinement. At the close of Timmons's July 31, 2009, jury trial, Timmons objected to the trial court's jury instruction on the offense of confinement. The trial court overruled the objection. The jury found Timmons guilty of class C felony confinement and acquitted him of the remaining charges. On September 14, 2009, the trial court sentenced Timmons to four years, with three years to be served in community corrections and one year suspended to probation. Timmons now appeals.

DISCUSSION AND DECISION

I. Jury Instruction

Timmons first argues that the trial court gave an erroneous jury instruction regarding the offense of confinement. Jury instruction is within the trial court's sound discretion, and we will reverse only if we find an abuse of that discretion. Cline v. State, 726 N.E.2d 1249, 1256 (Ind. 2000). In evaluating the trial court's decision to give a tendered instruction, we will consider whether the instruction correctly states the law, whether there is evidence in the record to support the instruction, and whether the substance of the tendered instruction is

covered by other instructions that are given. Chambers v. State, 734 N.E.2d 578, 580 (Ind. 2000).

Indiana Code section 35-42-3-3 provides that a person commits class C felony confinement when he knowingly or intentionally “(1) confines another person without the other person’s consent; or (2) removes another person, by fraud, enticement, force, or threat of force, from one place to another,” causing bodily injury. The trial court’s jury instruction regarding this offense reads as follows:

The term “confine” is defined by law as meaning to substantially interfere with the liberty of a person.

Before you may convict the Defendant of confinement as charged in Count III, the State must have proved the elements of part 1 or part 2 of the following beyond a reasonable doubt:

The Defendant

1. knowingly or intentionally confined Linda Polley without her consent or
2. knowingly or intentionally removed Linda Polley by force or by force or threat of force from one (1) place to another.

If the State failed to prove either part 1 or part 2 beyond a reasonable doubt, you must find the Defendant not guilty of confinement, a Class D felony.

If you find the State did prove each of the elements [of] either part 1 or part 2 beyond a reasonable doubt, you may find the defendant guilty of confinement, a Class D felony.

If you further find that beyond a reasonable doubt the confinement resulted in bodily injury to Linda Polley then you may find the Defendant guilty of confinement, a Class C felony.

Appellant’s App. p. 59.

Timmons argues that this instruction, “combined with the charging information and verdict form on that count,” was an abuse of discretion. Appellant’s Br. p. 5. The charging information alleges that Timmons “did knowingly or intentionally confine another person, to wit: Linda Polley, without her consent, or remove her by force or threat of force from one (1) place to another, resulting in bodily injury” to Polley. Appellant’s App. p. 17. Timmons argues that because the State charged alternative criminal acts in this count, and because the verdict form did not specify the prong under which Timmons was being convicted—either knowingly or intentionally confining Polley or removing her by force or threat of force from one place to another—the instruction at issue raised the risk of the jury being confused as to which act resulted in conviction. In other words, “it is impossible to determine which part of Ind. Code § 35-42-3-3 the jury found the defendant to have violated.” Appellant’s Br. p. 10.

Although Timmons addresses the charging information, jury instruction, and general verdict form, he does not argue that either the information or the verdict form were erroneous. Instead, he focuses solely on the instruction. That said, he makes no argument that the instruction incorrectly states the law or that there is no evidence in the record to support the instruction.

It is true, as Timmons points out, that the confinement statute is written in the disjunctive and includes two distinct types of criminal confinement—confinement by non-consensual restraint and confinement by removal—which are two separate crimes, each requiring proof of different elements. Kelly v. State, 535 N.E.2d 140, 141 (Ind. 1989). In Kelly, the charging information alleged only non-consensual confinement, but the trial court

tendered a jury instruction that covered both types of confinement and provided a general verdict form. In reversing the defendant's conviction, our Supreme Court found that "the jury in the instant case may well have concluded that the defendant was guilty only of the uncharged offense of confinement by removal rather than non-consensual confinement as charged" Id. at 143; see also Hobson v. State, 675 N.E.2d 1090, 1094-95 (Ind. 1996) (reversing defendant's murder conviction where he was charged with intentional murder but jury instructions included felony murder; general verdict form made it impossible to determine whether he was convicted and sentenced separately both for felony murder and the underlying felony charge).

Here, unlike in Kelly, both versions of confinement were charged and both were included in the jury instruction. Because there was no discrepancy, the confinement instruction did not allow the jury to convict Timmons on a theory not contained in the information.

As noted above, Timmons does not raise an explicit argument related to the verdict form. His argument, however, centers implicitly on the fact that the general verdict form makes it impossible to know which version of confinement Timmons was found to have committed. The verdict form provides: "We, the jury, find the defendant, Russell A. Timmons, guilty of Information of Criminal Confinement, a Class C felony as charged in Count III." Appellant's App. p. 85 (emphasis added). Our review of the record reveals that the State presented two theories of confinement in the information and at trial, namely, non-consensual confinement and confinement by removal. We find that the charging information

and the jury instructions as a whole adequately explained to the jury the elements the State had to prove to convict Timmons on either of those theories, and the jurors were further instructed that “[t]o return a verdict, each of you must agree to it.” Id. at 72; see also Taylor v. State, 840 N.E.2d 324, 333-34 (Ind. 2006) (holding that although jury unanimity is required as to the defendant’s guilt, it is not required as to the theory of his culpability). Moreover, as more fully explored below, there was evidence to support Timmons’s conviction under either theory. Therefore, even if we cannot be sure on which theory the jury found Timmons guilty, he has not demonstrated that the trial court’s decision to give the instruction constituted an abuse of discretion and we decline to reverse on this basis.

II. Sufficiency

Timmons also contends that the evidence is insufficient to support his conviction. In reviewing claims of insufficient evidence, we neither reweigh the evidence nor assess witness credibility, and will affirm unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

Polley testified that Timmons grabbed her entire torso and restrained her movements such that she could not break free from his grip. He continued to restrain her notwithstanding her struggles to break free. Timmons protests that the encounter was brief, but it is well established that the time of confinement is not the determinate factor in assessing whether the defendant’s actions constituted substantial interference. Sammons v. State, 397 N.E.2d 289, 294 (Ind. Ct. App. 1979). Instead, the most significant factor is the

type and nature of the interference. Id. Under these circumstances, we find the evidence sufficient to support Timmons's conviction of confinement under the non-consensual restraint prong of the statute.³

The record also reveals that after grabbing Polley's torso, Timmons forcefully dragged her across the room towards the fourth-floor balcony railing. Our Supreme Court has held that "[t]he [confinement] statute does not provide exceptions that depend on how far a person is moved. The essence of the offense is the restriction of a person's freedom of movement and liberty against his will." Cornelius v. State, 508 N.E.2d 548, 549 (Ind. 1987). Here, although Timmons only dragged Polley for a relatively short distance, the evidence is sufficient to support a conclusion that he removed her by force or threat of force from one place to another. Thus, we find the evidence to support his confinement conviction under the removal prong of the statute.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.

³ Timmons does not contest the fact that Polley sustained bodily injury as a result of the incident.