

Case Summary

Appellant-Defendant Dwight A. Looney (“Looney”) appeals his convictions for Strangulation, a Class D felony, and Battery, as a Class A misdemeanor. We affirm in part, reverse in part, and remand with instructions to vacate the Battery conviction and sentence.

Issues

Looney presents two issues for review:

- I. Whether the State failed to present sufficient evidence of probative value to support his convictions, because the testimony of the primary witness against him was incredibly dubious; and
- II. Whether his multiple convictions contravene the Double Jeopardy provisions of the Indiana Constitution.

Facts and Procedural History

On October 13, 2006, Looney and Kawana Rule (“Rule”) were having drinks in Looney’s Indianapolis apartment when Looney called “a chat line” and Rule became upset. (Tr. 13.) Rule then telephoned a former boyfriend and she and Looney began “tussling over” the telephone. (Tr. 5.) Looney pushed Rule down, sat on top of her, and choked her.

Rule called a friend to come and get her. Once outside the apartment, Rule asked Looney to return some of her property to her. When Looney refused to do so, Rule summoned the police. Indianapolis Metropolitan Police Department Deputy Darryl Jones (“Deputy Jones”) responded and observed that Rule had “redness and swelling over her left eye” and slight redness around her neck. (Tr. 23.)

On November 1, 2006, the State charged Looney with Strangulation, Battery, and Domestic Battery. On April 2, 2007, at the conclusion of a bench trial, Looney was found

guilty of Strangulation and Battery. On April 9, 2007, the trial court sentenced Looney to concurrent sentences of 730 days, with 545 days suspended, for Strangulation, and 365 days, with 185 days suspended, for Battery. Looney now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

In order to convict Looney of Strangulation, as charged, the State was required to establish that he knowingly or intentionally, in a rude, insolent or angry manner, impeded Rule's normal breathing or blood circulation by applying pressure to her throat or neck. See Ind. Code § 35-42-2-9. In order to convict Looney of Battery, as charged, the State was required to establish that he knowingly touched Rule in a rude, insolent or angry manner, causing her bodily injury, more specifically, pain and redness. See Ind. Code § 35-42-2-1.

In a trial before the bench, the court is responsible for weighing the evidence and judging the credibility of witnesses as the trier of fact, and we do not interfere with this function on appeal. O'Neal v. State, 716 N.E.2d 82, 87 (Ind. Ct. App. 1999), trans. denied. In reviewing a claim of insufficient evidence, we look only to the evidence most favorable to the judgment and all reasonable inferences that support the judgment. Hubbard v. State, 719 N.E.2d 1219, 1220 (Ind. 1999.) We must affirm a conviction if the factfinder heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt. Graham v. State, 713 N.E.2d 309, 311 (Ind. Ct. App. 1999), trans. denied.

In rare cases, the "incredible dubiousity rule" will permit an appellate tribunal to impinge upon the factfinder's responsibility to judge the credibility of witnesses. Berry v.

State, 703 N.E.2d 154, 160 (Ind. 1998). Application of the rule is limited to cases where a sole witness provides inherently contradictory testimony that is equivocal or coerced, and no circumstantial evidence supports the defendant's guilt. Id.

Rule testified as follows. Looney became angry with her when she telephoned a former boyfriend. Looney began trying to take the telephone away from Rule, and they began to "tussle." (Tr. 5.) Looney pushed Rule down, sat on her, placed his hands around her neck, and choked her. Rule testified that she had difficulty breathing and suffered pain when Looney was squeezing her neck. She testified further that the right side of her face was red and sore.

Nevertheless, Looney argues that Rule's testimony must be excluded in its entirety because Rule's version of events is improbable and because Looney testified that he was in Gary, Indiana and not in Indianapolis on the date in question. Looney presents no basis for applying the incredible dubiousity rule. We are not confronted with a situation in which a single witness provides inherently contradictory or equivocal testimony. Moreover, Deputy Jones corroborated details of Rule's testimony when he testified that he noticed redness and swelling over Rule's left eye and that "she had redness around her neck slightly." (Tr. 23.)

Looney simply asks this Court to negatively assess Rule's credibility and to resolve in Looney's favor conflicts arising from the testimony of multiple witnesses. However, the trier of fact, rather than this Court, is in the best position to weigh the evidence presented and to resolve conflicts arising from the testimony of multiple witnesses. Graham, 713 N.E.2d at 311. The State presented sufficient evidence to support Looney's convictions for

Strangulation and Battery.

II. Double Jeopardy

Looney contends that he was twice convicted of the “same offense” in violation of the Indiana Constitution because “the [record] contains no evidence of battery independent of the ongoing strangulation.” Appellant’s Brief at 7.

Indiana’s Double Jeopardy Clause is embodied in Article 1, Section 14 of the Indiana Constitution, which provides, “No person shall be put in jeopardy twice for the same offense.” Our Supreme Court has concluded that 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 addition to the traditional notion that double jeopardy bars subsequent prosecution, our Supreme Court has construed Indiana’s Double Jeopardy Clause as also prohibiting multiple punishments. Id.

In Richardson, our Supreme Court established a two-part test for analyzing double jeopardy claims. Specifically:

two or more offenses are the “same offense” in violation of Article I, Section 14 of the Indiana Constitution, 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. at 49. If the evidentiary facts that establish one offense establish only one or several, but not all of the essential elements of the second offense, there is no double jeopardy violation. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

The statutory elements and actual evidence tests are separate considerations under the

double jeopardy analysis. Richardson, 717 N.E.2d at 53. Thus, even where the statutory elements define the offense as capable of being committed by disparate acts, the convictions may nonetheless constitute a violation of double jeopardy “if the actual evidence presented at trial demonstrates that each offense was not established by separate and distinct facts.” Castillo v. State, 734 N.E.2d 299, 303 (Ind. Ct. App. 2000), summarily aff’d, 741 N.E.2d 1196 (Ind. 2001); see also Richardson, 717 N.E.2d at 53.

In addition to the statutory elements and actual evidence tests, Indiana courts have a long history of adherence to rules of statutory construction and common law that have often been described as double jeopardy, but are not governed by the constitutional test of Richardson. See Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002). The rules prevent (1) conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished; (2) conviction and punishment for a crime that is a lesser-included offense of another crime for which the defendant has been convicted and punished; (3) conviction and punishment for a crime that consists of the very same act as another crime for which the defendant has been convicted and punished; (4) conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished; and (5) conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished. Id. Here, the third category is implicated.

The State charged that Looney touched Rule in a rude, insolent or angry manner by applying pressure to her throat. The State also charged that Looney touched Rule in a rude, insolent or angry manner causing bodily injury, specifically, pain and redness. The charging documents do not necessarily describe separate acts.

Rule testified in pertinent part as follows:

Rule: He took [the phone] from me but he pushed me down and then that's when he started choking me.

State: You say he started choking you. How did he – did he have both hands?

Rule: Yes. He was sitting on top of me and I really couldn't move.

State: And when you say he was choking you, describe what he was doing. Where were his hands?

Rule: Around my neck.

State: What was he doing with his hands?

Rule: He was choking me and he was talking to the guy on the cell phone at the same time.

State: Okay, so how many hands did he have on your neck?

Rule: He um, at first he had two hands and then after that he had one hand and he was talking on the cell phone with the other hand.

State: Did you ever have any trouble breathing?

Rule: Yes.

State: Did he cause any pain while he was squeezing your neck?

Rule: Yes.

State: Did you lose consciousness?

Rule: No.

State: Did you have any other injuries resulting from the incident between the two of you?

Rule: The side of my right face was real red.

State: And how did that happen?

Rule: I guess from tussling.

State: Was it red before you guys got in your dispute?

Rule: No.

State: Was it sore afterwards?

Rule: Yes.

(Tr. 6-7.) Subsequently, Rule testified that the “tussling stopped” and she left. (Tr. 17.)

Essentially, Rule testified to an ongoing “tussle” during which she was injured. When it came to an end, she left the premises. Rule’s testimony did not differentiate the event of the infliction of the red mark on her face from the event of strangulation. Two red marks were apparent – one on the face and one on the neck - but they may well have been inflicted simultaneously during the strangulation. As such, the State did not establish, by separate and distinct facts, the commission of two separate offenses. Looney may not be punished twice for a single act. See Guyton, 771 N.E.2d at 1143.

We remand to the trial court with instructions to vacate Looney’s conviction and sentence for Battery.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and CRONE, J., concur.