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IN THE COURT OF APPEALS OF INDIANA

ROBERT MURPHY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A04-1003-CR-149
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Kenneth G. Todd, Judge
Cause No. 53C03-0812-FA-1100

December 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Robert Murphy appeals his convictions for criminal deviate conduct as a class A felony,[1] robbery as a class C felony,[2] and criminal confinement as a class D felony.[3] Murphy raises three issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain his convictions; and

II. Whether his conviction for criminal confinement violates the prohibition against double jeopardy.

We affirm.

The facts most favorable to Murphy's convictions follow. In the afternoon of December 20, 2008, M.H. was running a seventeen-mile route which included a portion of the "unofficial Rails to Trails" in Monroe County. See Transcript at 94. As M.H. was running northbound on the trail just north of Country Club Drive, she passed three other runners going southbound on the trail, including Tracy Gates, whom M.H. recognized because Gates worked at the Bakehouse. Approximately forty-five seconds to a minute later, Murphy, who was running northbound on the path and dressed in "[s]treet clothes, black pants, black shoes and a dark top" and a "stocking cap," passed Gates and the other runners. Id. at 99. Gates noticed that Murphy had sustained a significant amount of trauma to his face.

Approximately forty-five seconds to a minute after passing Gates and the other two runners, M.H. heard Murphy's footsteps behind her and, assuming that it was another

[1] Ind. Code § 35-42-4-2 (2004).

[2] Ind. Code § 35-42-5-1 (2004).

[3] Ind. Code § 35-42-3-3 (Supp. 2006).

runner, moved over to the right to allow the approaching person to pass on the left. Instead of passing her, Murphy "grabbed [M.H.] from behind," which was "pretty forceful" and "like being tackled," so that M.H. "couldn't move around." Id. at 53, 55. Murphy held M.H. from behind, held her head secure, and said to her, "I'm not going to do anything sexual to you, I just want your money." Id. at 54. M.H. told Murphy that she was "just out running and . . . [didn't] have any . . . money on [her]." Id. at 55.

Murphy then told M.H. to "turn out [her] pockets," and M.H. was eventually able to get a key and an energy gel packet out of the pocket sewn into the waistband of her tights and gave them to Murphy. Id. at 55. While still holding M.H., Murphy pulled an ear warmer which M.H. was wearing down over M.H.'s eyes to blindfold her. Murphy then ordered M.H. to take off her shoes, and M.H. took off one shoe and held it up to show Murphy that she did not have anything in the shoe. M.H. then told Murphy she was "going to need to sit down to take off the other shoe . . . and take off [her] gloves to undo the shoe laces." Id. at 59. Murphy, who was standing over and still holding M.H., then told M.H. to take off her shirt because "he wanted to see if [M.H.] had anything hidden in [her] bra." Id. at 60. M.H. pulled her shirt over her head, and Murphy "fumbl[ed]" around between M.H.'s breasts and there was nothing there. Id. at 60-61.

At that point, Murphy pulled up on M.H.'s clothing and sports bra, which exposed M.H.'s breasts. After M.H.'s breasts were exposed, Murphy told M.H. that he wanted her to lick her breasts, but she refused. Murphy put one of his hands on M.H.'s throat and told her again to lick her breasts. M.H. started to cry and complied. Murphy told

M.H. to put her shoes back on and to stand up. After M.H. stoop up, Murphy, who was behind M.H. and had one of his hands on her neck, forced M.H. forward towards a wooded area or brush near the trail. M.H. "struggled a little bit because [she] didn't want to go back there," and Murphy said "he would kill [M.H.] if [she] didn't do as he said." Id. at 63. M.H. could not see where she was going because she was still blindfolded. M.H. protested and stated "please don't do this" several times. Id.

Once in the wooded area, Murphy gave M.H. a "rougher shove" from behind, and M.H. fell over onto her hands and knees. Id. at 66. Murphy pulled down M.H.'s pants and underwear and then pushed M.H. down so that she "was laying flat." Id. at 67. Murphy told M.H. that if she did as he said, he would not kill her. Murphy then told M.H. to "roll over so that [she] was lying face upwards." Id. at 67. Murphy ordered M.H. to "finger [her]self." Id. at 68. M.H. cried and told Murphy "don't do this," and Murphy told her to "stop screaming." Id. M.H. "tried to play along," but Murphy "didn't like it," "leaned in really close," and threatened to hit M.H. if she did not "do it right." Id. at 69.

Murphy then made M.H. pull up her shirt and lick her breasts and finger her vagina at the same time. Murphy ordered M.H. to say "I like doing this for you daddy" and "I'm a dirty little whore." Id. at 69-70. Murphy also repeatedly told M.H. that he wanted her to repeat the phrases in a "younger voice." Id. at 69. Murphy also ordered M.H. to lick the fingers that had been inside her vagina. From the sounds Murphy was

making, M.H. believed that Murphy was aroused and was under the impression that he was masturbating.

At some point, Murphy asked M.H. if she "wanted to suck his cock." Id. at 70. M.H. said no, and Murphy grabbed her by her ponytail, pulled her to her knees, told her to open her mouth, and forced his penis into her mouth. M.H. could not breathe and was choking and gagging. Murphy took his penis out of M.H.'s mouth, and she "doubled over a little bit" trying to catch her breath. Id. at 71. Murphy forced his penis into M.H.'s mouth a second time, and again Murphy could not breathe.

Murphy told M.H. to stand up and put her clothes on, and she complied. Murphy dropped M.H.'s water bottle, gloves and shirt next to her and told her to take a drink. After M.H. collected her belongings, Murphy guided her over to face a tree and told M.H. to stay there. M.H. heard Murphy "using his foot to scuff over the area somehow." Id. at 73. Murphy then told M.H. not to move until he told her, and M.H. heard Murphy move away. Murphy shouted for M.H. to "go," and M.H. stumbled back to the trail. Id. at 74. M.H. saw Gates and the other two runners that she had passed earlier in the day running back northbound on the trail. Gates and her friends called the police using M.H.'s cell phone.

The police arrived on the scene and spoke with M.H., Gates, and the other runners. Gates later went to the police station and assisted with the generation of a composite sketch of Murphy by describing his different features and scarring. Bloomington Police Detective Sarah Carnes talked to M.H. about going to the hospital to do a sexual assault

kit and STD testing, and M.H. requested Detective Carnes to go with her. Detective Carnes met M.H. and M.H.'s fiancé at Bloomington Hospital. While Detective Carnes was waiting for a room for M.H., she observed Murphy sitting in the emergency room. Detective Carnes noticed Murphy because of the distinct marking on the left side of his face and because "[e]verything about the composite, including the distinct description of the wounds appeared to match the subject that [she] saw sitting in the emergency room." Id. at 145.

Detective Carnes spoke with Murphy, and Murphy acknowledged that he wore his black shoes and had walked by the "trail entrance" near Country Club Drive to get his bicycle from a crash that he had been in the previous day. Id. at 151. Detective Carnes took photographs of Murphy with his permission, obtained his address, and asked him to submit to an evidence collection kit. M.H. also submitted to a sexual assault victim kit.

Later in the day, police asked Gates to visit the police station again and showed her some photographs of Murphy. Gates recognized Murphy as the person she observed on the trail in street clothes with the markings on the side of his face. At some point after the attack, M.H. observed a story on the internet which included Murphy speaking, and M.H. immediately recognized Murphy's voice.

On December 22, 2008, the State charged Murphy with: Count I, criminal deviate conduct as a class A felony; Count II, sexual battery as a class C felony; Count III, robbery as class C felony; Count IV, criminal confinement as a class D felony; and Count V, intimidation as a class D felony. A bench trial commenced on October 23, 2009, at

which the State presented evidence and testimony to identify Murphy as the person who attacked M.H. on December 20, 2008. Murphy was found guilty of Counts I, III, IV, and V as charged and battery as a class B misdemeanor as a lesser included offense of sexual battery under Count II. Murphy's convictions under Counts II and V were merged with his conviction under Count I for sentencing. After a hearing, Murphy was sentenced to fifty years for his conviction for criminal deviate conduct, seven years for his conviction for robbery, and three years for his conviction for criminal confinement, and the court ordered the sentences be served consecutive to each other.

I.

The first issue is whether the evidence is sufficient to sustain Murphy's convictions. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

Murphy argues that the evidence is insufficient to show that: (A) he was the person who committed the crimes; and (B) he committed the offense of robbery by putting M.H. in fear.

A. Identification

Murphy argues that the evidence was insufficient to prove that he "was the person who committed the crimes as charged" and essentially argues that the identifications of him were unreliable and points to possible discrepancies in the witnesses' testimony. Appellant's Brief at 7.

Identification testimony need not necessarily be unequivocal to sustain a conviction. Heeter v. State, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996). Elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990). The unequivocal identification of the defendant by a witness in court, despite discrepancies between his description of the perpetrator and the appearance of the defendant, is sufficient to support a conviction. Emerson v. State, 724 N.E.2d 605, 610 (Ind. 2000), reh'g denied. Inconsistencies in identification testimony impact only the weight of that testimony, because it is the jury's task to weigh the evidence and determine the credibility of the witnesses. Gleaves v. State, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007) (citing Badelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001), trans. denied). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a

conviction. Id. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. Id.

Murphy specifically argues that "[M.H.] identified [him] by listening to a news story that identified him as the perpetrator" and that "[o]nce [M.H.] laches [sic] on to Murphy as the perpetrator, any subsequent confirmation is worthless." Appellant's Brief at 9. Murphy also argues that "there are over 2 million males in Indiana over the age of 18," that "[t]here is no independent source for [M.H.'s] voice identification," and that "[o]ne should not be convicted beyond a reasonable doubt because he sounds like someone from Indiana." Id. at 9-10. Murphy further argues that "[a]t best, [Gates] places Murphy on the trail near the time of the incident," that Gates "was shown one picture of Murphy" which was "unduly suggestive," that Gates "says that Murphy was wearing a stocking cap although no such hat was found in his apartment," that Gates described the bruises on Murphy's face as "squarish," and that Gates "makes no courtroom identification of Murphy." Id. at 10-11. Finally, Murphy argues that "[t]he DNA evidence does not identify Murphy as the perpetrator and no reasonable fact-finder could find otherwise." Id. at 12.

The State argues that "[t]he circumstances surrounding the attack provide abundant evidence that [Murphy] was the assailant." Appellee's Brief at 7. The State argues that Murphy admitted being on the trail, that Gates identified Murphy as the person running behind M.H., and that no one else was in the area. The State argues that M.H. described Murphy as wearing black pants and black shoes and that police later

discovered those items at Murphy's house. The State further argues that M.H. had many opportunities to hear Murphy's voice and that M.H. knew that Murphy was her attacker as soon as she heard his voice on the news story. The State argues that the results of DNA testing show that "there was a 1 in 22 million chance that someone other than [Murphy] contributed the DNA found during M.H.'s sexual assault examination." Id. at 8-9.

In this case, the record reveals that the State presented testimony from M.H., Gates, Detective Carnes, Marci Wease, a serologist and DNA analyst with the Indiana State Police Laboratory, and other witnesses regarding the identification of Murphy. The evidence most favorable to the convictions reveals that Gates and two other runners were running southbound on the trail on December 20, 2008, after Gates finished her shift as a manager at the Bakehouse. Gates testified that she observed a female runner running northbound on the trail just north of Country Club Drive. Gates further testified that approximately forty-five seconds to a minute after passing M.H. and while still north of Country Club Drive, Gates observed a young man running in the same direction as M.H. on the trail. Gates noticed that the man had "a f-----d up face," that the man "had some major trauma" to the left side of his face, and that "you couldn't miss [it] at all." Transcript at 97. Gates also testified that she noticed that the man was wearing "[s]treet clothes, black pants, black shoes and a dark top." Id. at 99. Gates testified that her "initial thought was that he was late for work at Taco Bell" because there was a Taco Bell

off of the trail. Id. Gates testified that she did not see anyone other than the female runner and the young man in street clothes on the trail that day.

Gates testified that later in the day she went to the police station and assisted with the generation of a composite sketch of the man she had seen on the trail by describing his different features and scarring. Gates also testified that police showed her a photograph to see if she recognized the person and that she was able to identify Murphy as the man she observed on the trail earlier that day.

M.H. testified that approximately forty-five seconds to a minute after passing Gates, whom M.H. recognized because Gates worked at the Bakehouse, and the other two runners, M.H. heard footsteps behind her and, assuming that it was another runner, moved over to the right to allow the approaching person to pass on the left, but the man instead grabbed her from behind so that she could not move. M.H. further testified that she did not see the man's face but that she "could tell that . . . he had dark colored shoes, maybe dark pants . . . ." Id. at 67.

Further, M.H. testified that Murphy spoke to her throughout the encounter. M.H. testified that she "could hear [Murphy's voice] in [her] head . . . playing . . . like a broken record, over and over . . . especially just certain words that he had said." Id. at 82. M.H. also testified that she "really did have a good impression of the voice," that sometime after the attack on December 20, 2008, there was a news story "from one of the Indy news stations" about Murphy, that she "found that on the internet and watched that," and that "they actually showed him talking on camera and so I, it was the same voice, I mean

it was, it was him. I knew it, I knew it immediately, as soon as I heard the voice." Id. at 82-83. M.H. testified that she "just got a chill as soon as [she] heard it, [she] just knew." Id. at 83. M.H. also made an in-court identification of Murphy as the person whose voice she recognized.

Detective Carnes testified that when she spoke to Murphy at Bloomington Hospital, Murphy acknowledged that he wore his black shoes and had walked by the trail entrance near Country Club Drive earlier that day. Carnes testified that Murphy stated that he had walked east on Country Club Drive to Pizza Hut, then walked to CVS, and then stopped and got his bicycle lock off of his bicycle. Carnes also testified that the apartment at which Murphy lived was "just a few blocks from . . . where the incident occurred" and to the location of the CVS on the south side of Country Club Drive. Id. at 150. The police recovered black pants and black shoes from Murphy's residence.

Murphy testified that he had been in a bike wreck on December 19, 2008, which resulted in some facial injuries and that he worked at Pizza Hut and had been there on the day of December 20, 2008 because he had misplaced his work schedule and had a note from the doctor related to the bike wreck. Murphy testified that he had gone to the trail area on December 20, 2008 to get his bike lock and that he did not own a vehicle and walked to get around.

Wease, the serologist and DNA analyst, testified that she examined the contents of the evidence collection kits administered to Murphy and M.H., including oral swabs and head hair combings from M.H. A Certificate of Analysis setting forth the results of

Wease's examinations was admitted into evidence. Wease testified that the threshold frequency for scientific certainty was one in 330 billion. The Certificate of Analysis included the following results:

> The estimates of the combined probability of inclusion (i.e. the chance of selecting an unrelated individual at random that would be included) for the DNA result obtained from the swab of the head hair combing debris . . . , which demonstrated the presence of a mixture from which [Murphy] could not be excluded as being a possible contributor, occur in the approximate percentages of the populations of unrelated individuals listed below:
>
> | | | |
> |---|---|---|
> | CAUCASION | 0.0000045% | 1 in 22 MILLION |
> | AFRICAN AMERICAN | 0.00000020% | 1 in 500 MILLION |
> | HISPANIC | 0.00000044% | 1 in 220 MILLION |

State's Exhibit 15 at 2-3.

To the extent that there were factual differences between the testimony of Gates that the markings on Murphy's face were "squarish" or any other descriptions of Murphy and Murphy's actual appearance, or that Gates testified that Murphy was wearing a stocking cap but that no such hat was found in Murphy's apartment, it was the function of the trier or fact to resolve such conflicting evidence. See Wilder v. State, 716 N.E.2d 403, 405 (Ind. 1999) (noting that it is the duty of the fact-finder to assess the credibility of witness testimony including identifications and observing that defense counsel cross-examined the witnesses regarding their inability prior to trial to identify the defendant).

Based upon the evidence most favorable to the convictions as set forth in the record, we cannot say that it was unreasonable for the trier of fact to believe the identification testimony and evidence presented by the State. See Carr v. State, 728 N.E.2d 125, 128, 130 (Ind. 2000) (holding that the evidence was sufficient to sustain the

defendant's conviction where the evidence included a report comparing DNA found at the crime scene to the defendant's and concluded that the two matched at five loci and that the probability of two unrelated Caucasians with this correlation was 1 in 4,500); Oliver v. State, 431 N.E.2d 98, 100 (Ind. 1982) (holding that there was sufficient evidence to support the conclusion beyond a reasonable doubt that the defendant was the person who committed the crime where identification of the defendant was corroborated by testimony regarding the clothing worn by the defendant); Bane v. State, 424 N.E.2d 1000, 1002 (Ind. 1981) (concluding the evidence was sufficient to sustain the defendant's convictions and noting that "[i]dentification of the perpetrator of an offense through recognition of voice is not insufficient as a matter of law," that "there is no rule requiring buttressing corroborative identification evidence[,] and voice identification has been treated as independently sufficient," and that "[e]quivocalities manifested by voice identification witnesses between the time of the offense and trial affect credibility and are for the trier of fact to consider, and not appellate courts") (citation omitted).

B. Robbery

Murphy also argues that the evidence was insufficient to sustain his conviction for robbery as a class C felony. The offense of robbery as a class C felony is governed by Ind. Code § 35-42-5-1, which provides in relevant part that "[a] person who knowingly or intentionally takes property from another person or from the presence of another person . . . by putting any person in fear . . . commits robbery, a Class C felony.

Specifically, Murphy argues that the State "failed to prove that a robbery as charged occurred" and that "[t]he items were removed from [M.H.] long before she was in fear and long before any threat to kill her was made." Appellant's Brief at 14. Murphy argues that M.H. expressed no fear at the time M.H. was grabbed and only started to panic a little bit when the ear warmer was pulled over her eyes. Murphy argues that M.H. was not scared until later. The State argues that "ample circumstantial evidence exists to show M.H. was placed in fear and complied with [Murphy's] demands [to take her property] because of that fear" and that "[a]ll of M.H.'s actions during the encounter were clearly out of fear of the consequences of noncompliance." Appellee's Brief at 10-11. The State also argues that "[a] full and fair reading of the relevant portion of M.H.'s testimony simply shows that at the time her property was taken [M.H.] had not yet foreshadowed the impending sexual assault." Id. at 11. In his reply brief, Murphy argues that M.H. became afraid "after the robbery was complete" and that M.H. "complied not out of fear but to get the matter over with quicker." Appellant's Reply Brief at 4.

"In order to establish the element of fear, it is not necessary for the victim to testify that he or she was actually put in fear." Rickert v. State, 876 N.E.2d 1139, 1141 (Ind. Ct. App. 2007) (citing Clemmons v. State, 538 N.E.2d 1389 (Ind. 1989)). The element of fear in the crime of robbery may be inferred from the circumstances. Hightower v. State, 490 N.E.2d 1111, 1112 (Ind. 1986).

During M.H.'s testimony, the following exchange occurred:

Q. [Y]ou talked about doing what he was telling you to do at that point, why?

A. I didn't feel like it was going to turn into anything really bad at that point, I really just thought he . . . just wanted money and as soon as he saw that I didn't have any money he was going to just run off at that point. So I said . . . to myself . . . I'll just cooperate . . . even if he [steals] my key it's not really that big of [a] deal . . . it's nothing I can't afford to lose . . . I'm not going to provoke him or struggle right now . . . I'm not going to try anything.

Q. Okay. And, and how did you feel at that point when this was going on?

A. Um, it's kind of hard to describe . . . it was like this is actually happening? . . . it hadn't hit me that I was actually in this situation . . . this was only thirty (30) seconds into the whole thing . . . it hadn't hit me . . . I couldn't believe it was actually happening. You hear stories about this kind of thing happening, and it's actually happening . . . .

Transcript at 56-57.

The record reveals that, even if M.H. did not specifically testify that she felt fear prior to the moment she gave her key and gel packet to Murphy, the trier of fact could reasonably infer that M.H. was in fear during that time based upon the evidence presented by the State. M.H. testified to facts consistent with the foregoing, including the fact that Murphy forcefully grabbed her from behind while she was running so that she could not move, held M.H.'s head secure, told M.H. to turn out her pockets, took the key and gel packet that had been in the pocket sewn into M.H.'s tights, pulled down M.H.'s ear warmer so that she could not see, and proceeded to assault M.H. who started to cry. As previously mentioned, M.H. testified that, at the time of the robbery, "it hadn't hit [her]

that [she] was actually in this situation" and that "this was only thirty (30) seconds into the whole thing . . . ." Transcript at 57.

Based upon our review of the record, we conclude that evidence of probative value exists from which the court as the trier of fact could reasonably infer from the evidence presented that M.H. was put in fear at the time of the robbery. See Rickert, 876 N.E.2d at 1141 (concluding that jury could infer that the victim surrendered money because she was afraid despite the fact that the victim testified that she was not fearful during the robbery given evidence that the robbery happened so fast, that the victim did not register what was happening at the time, and became afraid afterwards); see also Hightower, 490 N.E.2d at 1112 (holding that the trier of fact could reasonably infer beyond a reasonable doubt that the defendant frightened the victim into handing him her purse based in part upon the circumstances that the criminal episode lasted hours during which the victim was threatened, beaten, and raped).

II.

The next issue is whether Murphy's conviction for criminal confinement violates the prohibition against double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. The Indiana Supreme Court has held that "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." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

Murphy argues that his convictions for criminal deviate conduct and criminal confinement violate the prohibition against double jeopardy based upon the actual evidence test.[4] Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id. The Indiana Supreme Court has determined the possibility to be remote and speculative and therefore not reasonable when finding no sufficiently substantial likelihood that the jury used the same evidentiary facts to establish the essential elements of two offenses. Hopkins v. State, 759 N.E.2d 633, 640 (Ind. 2001) (citing Long v. State, 743 N.E.2d 253, 261 (Ind. 2001); Redman. v. State, 743 N.E.2d 263, 268 (Ind. 2001)); Griffin v. State, 717 N.E.2d 73, 89 (Ind. 1999), cert. denied, 530 U.S. 1247, 120 S. Ct. 2697 (2000). "[U]nder the . . . actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several,

[4] Murphy does not argue that his conviction for criminal confinement and robbery violates the prohibition against double jeopardy or that any of his other convictions violate the prohibition against double jeopardy.

but not all, of the essential elements of a second offense." Spivey v. State, 761 N.E.2d 831, 832-833 (Ind. 2002).

The offense of criminal deviate conduct is governed by Ind. Code § 35-42-4-2, which provides that "[a] person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when . . . the other person is compelled by force or imminent threat of force . . . commits criminal deviate conduct, a Class B felony." Ind. Code § 35-42-4-2(a). However, the offense "is a Class A felony if . . . it is committed by using or threatening the use of deadly force . . . ." Ind. Code § 35-42-4-2(b). In its information charging Murphy with criminal deviate conduct as a class A felony, the State alleged that Murphy knowingly caused M.H. "to perform deviate sexual conduct when such other person was compelled by the imminent threat of deadly force, to wit: [Murphy] said he would kill [M.H.] if she did not comply." Appellant's Appendix at 16. The offense of criminal confinement as a class D felony is governed by Ind. Code § 35-42-3-3, which provides that "[a] person who knowingly or intentionally . . . confines another person without the other person's consent . . . or . . . removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another . . . commits criminal confinement . . . [as] a Class D felony." Ind. Code § 35-42-3-3(a). In its information charging Murphy with criminal confinement, the State alleged that Murphy "did knowingly confine [M.H.] without the consent of said person." Appellant's Appendix at 17.

Murphy appears to argue that the criminal confinement occurred during the time that the criminal deviate conduct occurred. Murphy argues that the criminal deviate conduct started at the point that "[t]he assailant had a hold of [M.H.] when he first threatened to kill her if she did not comply" and concluded when the assailant said "GO!" Appellant's Brief at 15. The State argues that Murphy "confined [M.H.] after the robbery, but before the criminal deviate conduct, and again after the criminal deviate conduct" and that "[t]his confinement was not necessary to complete either of the other crimes and occurred when neither crime was being committed." Appellee's Brief at 12. In his reply brief, Murphy argues that "[t]he threat was the basis for the conviction of Criminal Deviate Conduct" and that "[t]he evidence that [M.H.] was terrified and feared for her safety caused her to submit to the criminal deviate conduct and caused her to restrict her liberty." Appellant's Reply Brief at 5.

The Indiana Supreme Court has observed that "[c]ertainly, one who commits . . . criminal deviate conduct necessarily 'confines' the victim at least long enough to complete such a forcible crime." Gates v. State, 759 N.E.2d 631, 632 (Ind. 2001). The Court determined whether the defendant's convictions for rape, criminal deviate conduct, and confinement violated double jeopardy and stated, "[w]ithout pausing to elaborate on the statutory or constitutional frameworks, [the defendant's] entitlement to relief depends upon whether the confinement exceeded the bounds of the force used to commit the rape and criminal deviate conduct." Id.

Here, the evidence shows that independent crimes were committed. The record reveals that, after taking M.H.'s keys and gel pack and before committing the criminal deviate conduct offenses, Murphy stood over M.H. while she was on the ground and ordered her to perform various actions. Also prior to committing the criminal deviate conduct offenses, Murphy forced M.H. into a wooded area by holding onto her neck, stated that he would kill her if she did not do as he said, and forced M.H. to lie flat on the ground and perform additional actions as he stood over her and gave her various orders. Murphy leaned in close to M.H. and threatened to hit her if she did not "do it right." Transcript at 69. At some point, Murphy then forced M.H. to her knees and forced his penis into her mouth two times and thus committed the offense of criminal deviate conduct. After the criminal deviate conduct offense was committed and after Murphy finished masturbating, Murphy ordered M.H. to stand up, put her clothes on, and told her to take a drink. Murphy told M.H. to face a tree as he scuffed over the area and told her not to move until told to do so. Murphy shouted for M.H. to "go," and M.H. eventually made her way back to the trail. Id. at 74.

Based upon the evidence of the ongoing nature of the confinement and the use or threatened use of force upon M.H. at various points during the incident, we find no sufficient substantial likelihood, and thus cannot say that Murphy has demonstrated a reasonable possibility, that the trier of fact based its determination of guilt on the confinement count upon the evidence used to find Murphy guilty of criminal deviate conduct. The confinement of M.H. was not coextensive with the criminal deviate

conduct, but instead went beyond that necessary to accomplish it. Accordingly, the criminal confinement conviction does not violate Murphy's right against double jeopardy. See Gates, 759 N.E.2d at 632 (concluding that the defendant's tying the victim's hands behind her back with twine was not a necessary part of the criminal deviate conduct and that such restriction was not integral to the force or limitations inherent in that charge); Salone v. State, 652 N.E.2d 552, 561 (Ind. Ct. App. 1995) (holding that the defendant's conviction for criminal confinement did not violate his right against double jeopardy because the confinement of the victims went beyond that necessary to accomplish the criminal deviate conduct).

For the foregoing reasons, we affirm Murphy's convictions for criminal deviate conduct as a class A felony, robbery as a class C felony, and criminal confinement as a class D felony.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.