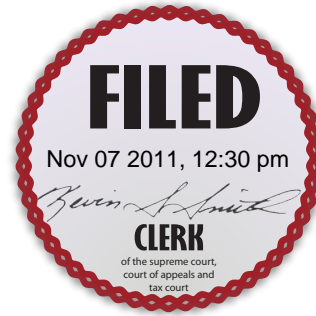


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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER BOURNIQUE,)

Appellant-Defendant,)

vs.)

No. 27A04-1103-CR-156)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Dana J. Kenworthy, Judge Pro Tempore
Cause No. 27D02-1011-FA-182

NOVEMBER 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Christopher Bournique appeals from his convictions for Class A felony rape, Ind. Code § 35-42-4-1(a)(1), (b)(2) (1998), and Class C felony intimidation, Ind. Code § 35-45-2-1 (a)(1), (b)(2) (2006). We affirm in part, reverse in part, and remand.

ISSUE

Bournique raises two issues, which we consolidate and restate as: whether his convictions violate Indiana's double jeopardy clause.

FACTS AND PROCEDURAL HISTORY

Bournique and his wife ("Wife") married in June 2009. Due to a troubled marriage, Bournique moved out of the marital home in October 2010. Although he and Wife engaged in consensual sex one or two weeks after he moved out, she told him the next day that it was a mistake. She changed the locks on the house on November 1. The two agreed that Bournique would pick up the remainder of his belongings from the house on November 11. On November 9, Wife consulted an attorney about filing for divorce.

On November 10, Wife went to bed at 8:30 p.m. so she could wake up for her 3:00 a.m. shift. She left her phone plugged in on the nightstand and left the door unlocked because she was expecting a friend from work. Instead of being awakened by her friend, Wife was awakened when she felt something brush against her hip. Bournique was straddling her with his face just inches from hers. Wife panicked and began screaming, asking him why he was there and telling him that he was not supposed to be there. Bournique told her to shut up and put his hand over her mouth. Wife could tell from the tone of his voice that he was mad. Bournique told her that he had a gun. Wife could feel

the gun pressed against the left side of her head. Bournique said he was there “to have sex with his wife one last time.” Tr. p. 194. Wife repeatedly told him no and tried to wrestle away from him, but he kept the gun against her head and used his other hand to alternate between pinning her shoulder, pinning her wrist, and covering her mouth. Wife struggled with Bournique for a while but then stopped for fear of getting killed. Wife submitted to Bournique having sex with her but never conveyed in any way that she consented to the sex.

Afterwards, Bournique’s demeanor completely changed. He was calm. Wife looked at the nightstand and noticed that her phone was gone. Bournique still had the gun. He started talking with her, and she told him what she thought he wanted to hear to keep him calm. She asked him to put the gun down and also asked where her phone was. He eventually gave her the phone. He also removed the clip from the gun, took the bullet out of the chamber, and put the gun in the lockbox in the room. Wife promised Bournique that she would not call the police and told him that she needed to get some sleep before going to work. When he left, Wife called her parents, who called the police.

The State charged Bournique with Class A felony rape, Class C felony intimidation, and two other counts. A jury found him guilty of Class A felony rape and Class C felony intimidation but not guilty of the other two counts. The trial court sentenced him to twenty-five years with five years suspended to probation for the rape and a concurrent three years for the intimidation. Bournique now appeals.

DISCUSSION AND DECISION

Bournique contends that his convictions violate the prohibition against double jeopardy. The double jeopardy clause of the Indiana Constitution provides, “No person shall be put in jeopardy twice for the same offense.” Ind. Const. art. 1, § 14. Our Supreme Court has held that two or more offenses are the “same offense” in violation of Indiana’s double jeopardy clause 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).

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.* Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the fact-finder’s perspective. *Id.*

To convict Bournique of Class A felony rape as charged here, the State had to prove beyond a reasonable doubt that he knowingly or intentionally had sexual intercourse with Wife when she was compelled by force or the imminent threat of force while Bournique was armed with a gun. Appellant’s App. p. 7; *see* Ind. Code § 35-42-4-

1(a)(1), (b)(2). To convict Bournique of Class C felony intimidation as charged here, the State had to prove beyond a reasonable doubt that he communicated a threat to Wife with the intent that she engage in conduct against her will while Bournique was armed with a gun. Appellant's App. p. 8; *see* Ind. Code § 35-45-2-1 (a)(1), (b)(2).

Here, the State concedes that Bournique's convictions violate the actual evidence test. That is, the evidence presented to support the Class A felony rape charge, Bournique pressing the gun against Wife's head to compel her to submit to sexual intercourse, was the same evidence presented to support the Class C felony intimidation charge. A reasonable possibility thus exists that the evidentiary facts used by the jury to establish the essential elements of Class A felony rape were also used to establish the essential elements of Class C felony intimidation. We conclude that the two convictions violate Indiana's double jeopardy clause. *See Davis v. State*, 770 N.E.2d 319, 324 (Ind. 2002) (violation of Indiana's double jeopardy clause where conviction for aggravated battery arose from the same evidence that gave rise to conviction for attempted murder). We therefore leave standing the Class A felony rape conviction and remand with instructions to vacate the Class C felony intimidation conviction. *See Richardson*, 717 N.E.2d at 55 (vacating the conviction with the less severe penal consequences where two convictions cannot stand).

CONCLUSION

For the reasons stated above, we remand to the trial court with instructions to vacate Bournique's Class C felony intimidation conviction. The trial court is affirmed in all other respects.

Affirmed in part, reversed in part, and remanded with instructions.

ROBB, C.J., and BAILEY, J., concur.