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IN THE
COURT OF APPEALS OF INDIANA

PAUL AYALA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0612-CR-1163
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G17-0610-FD-198625

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Paul Ayala appeals his convictions, after a bench trial, of criminal confinement as a class D felony and battery as a class A misdemeanor, as well as the sentence imposed by the trial court.

We affirm.

ISSUES

1. Whether the convictions for criminal confinement and battery violate Ayala's rights under the Indiana Constitution.

2. Whether the sentence imposed by the trial court on the criminal confinement conviction is inappropriate.

FACTS

On October 13, 2006, Ayala was living with his fiancée Christy in Indianapolis. That afternoon, his sixteen-year-old daughter T. came to visit. T. and Christy had went out shopping together. When they returned, around 8:00 p.m., Ayala was lying "on the couch, half- asleep, half-awake, watching wrestling" on the television. (Tr. 10). Christy told him "to wake up and spend . . . time with" his daughter. *Id.* Ayala reacted with anger, "yelling" at Christy and calling her names. (Tr. 11).

Christy received a telephone call from a girlfriend and went outside to the van parked behind the house to carry on the conversation. Ayala stormed out of the house, "very angry" and slamming the back door behind him. (Tr. 13). Ayala was yelling at Christy as he walked to the van. As T. watched, Ayala "grabbed [Christy] by the throat, . . . pulled [her] out of the van," "slam[med] her on her left side on the ground," and "drag[ged] [her] along the side of the van" on the ground for about fifteen feet. (Tr. 52,

12, 52). This "hurt" her. (Tr. 52). Christy ran back inside, "crying" and told T. "she couldn't take the abuse" anymore. (Tr. 16).

Ayala came back inside, still yelling at and berating Christy. When the telephone rang, Ayala answered it and was distracted. T. took a cell phone and dialed the police. T. handed the phone to Christy, and Christy reported what had happened.

The police arrived within minutes. Officer Andrew Sheler arrived first, and he found Christy "very upset and . . . crying." Officer Michael Beatty then arrived, and found Christy "crying very hysterically," "shaking," and having "a hard time controlling herself." (Tr. 24, 25, 26). Christy and T. reported to Beatty what had happened, and Christy expressed her "complaint of pain . . . to her neck and her shoulder." (Tr. 26). Ayala "stated that nothing had happened" except for "a verbal argument" between himself and Christy. (Tr. 27).

The State charged Ayala with criminal confinement, as a class D felony, and battery, as a class A misdemeanor.[1] Trial was held on November 20, 2006. Christy, T., and the officers testified as reflected above. In addition, Christy testified that she sustained cuts and bruises on her legs, shoulder, and arm during the incident. The trial court found Ayala guilty of both the criminal confinement and battery offenses.

A sentencing hearing was held on November 30, 2006. Ayala asked the trial court "for mercy" and for "help with [his] anger problems." (Tr. 75). His counsel argued for the minimum sentence and placement on home detention. The State noted that Ayala's

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[1] Ayala was also charged with domestic battery, *see* Ind. Code § 35-42-2-1.3, but this charge was dismissed after Christy testified at trial that she was actually married to a man other than Ayala.

attack on Christy had been witnessed by his own daughter. The State further noted the history of abuse, in that there had been two previous incidents in which charges were filed but later dismissed because once Christy failed to appear and the other time she recanted. The State argued for a three-year sentence, with one year suspended.

The trial court stated that it had "heard the evidence presented during the trial," after which it found Ayala guilty of criminal confinement as a class D felony "based on the fact that he dragged the victim out of the van, causing her to fall on her shoulder." (Tr. 84). It further stated that it found Ayala guilty of battery as a class A misdemeanor, "finding that the victim . . . was dragged by [Ayala] along the ground next to the van." *Id.* The trial court then noted Ayala's lengthy criminal history – that Ayala had "been arrested fifteen times, convicted in five separate cases," and "been placed on probation three prior" times. (Tr. 85). The trial court expressly noted Ayala's two previous arrests on charges that he committed battery on Christy. It found the fact that Ayala's daughter "was a witness to the events" of October 13, 2006, was an aggravating factor. For the criminal confinement conviction, the trial court imposed a three-year sentence, with two years suspended. For the battery conviction, the trial court imposed a one year sentence. The trial court ordered that the sentences run concurrently.

DECISION

1. Double Jeopardy

The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, sec. 14. As we recently explained,

> Indiana's Double Jeopardy Clause 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). Two offenses are "the 'same offense,' so as to violate Indiana's Double Jeopardy Clause,
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> > 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.* (emphasis in original). Under the "actual evidence test," we examine the actual evidence presented at trial "to determine whether each challenged offense was established by separate and distinct facts." *Id.* at 53.
>
> > 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 defendant must show "more than a remote or speculative possibility that the same facts were used." *Goldsberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005). To determine what facts were used, "we consider the evidence, charging information, final jury instructions, and arguments of counsel." *Id.*

Scott v. State, 859 N.E.2d 749, 752 (Ind. Ct. App. 2007).

Ayala argues that his convictions for criminal confinement violate Indiana's Double Jeopardy Clause because both convictions were "based on the same act of pulling and dragging" Christy. Ayala's Br. at 3. He asserts that the "situation in this case is similar to the scenario addressed" in *Rogers v. State*, 814 N.E.2d 695 (Ind. Ct. App. 2004), and requires that his battery conviction "be vacated." Ayala's Br. at 4, 5. We cannot agree.

As the State notes, *Rogers* did not involve the offense of criminal confinement. Rogers was convicted of criminal recklessness, as a class D felony, and battery, as a class A misdemeanor. We found that Rogers committed but a single criminal act: the "act of hitting" the victim. *Id.* at 703. We ordered Rogers' battery conviction vacated because Rogers could not be convicted of both criminal recklessness and battery "based on that one act." *Id.*

To establish criminal confinement, the State was required to prove that Ayala knowingly or intentionally confined Christy without her consent. Ind. Code § 35-42-3-3(a)(1). To "confine" means "to substantially interfere with the liberty of a person." I.C. § 35-2-3-1. The knowing or intentional "remov[al]" of "another person by . . . force . . . from one place to another" is the offense of criminal confinement as a class D felony. I.C. § 35-2-3-3. To the trial court, the State argued that it met its "burden as far as proving the criminal confinement by him removing her forcibly from inside the van to outside of the van." (Tr. 63). Moreover, the trial court expressly stated that it found Ayala guilty of criminal confinement "based on the fact that he dragged the victim out of the van, causing her to fall on her shoulder." (Tr. 84). Indeed, the evidentiary facts establish that when Ayala grabbed Christy and pulled her out of the van, he committed the offense of criminal confinement.

The facts supporting Ayala's conviction for battery took place thereafter – when Ayala dragged Christy on the ground, hurting her and causing bruises. Battery is the knowing or intentional touching of another person in a rude, insolent or angry manner that results in bodily injury to another person. I.C. § 35-42-2-1. "Bodily injury" is

defined as any impairment of physical condition, including pain. I.C. § 35-41-1-4; *Tucker v. State*, 725 N.E.2d 894, 897 (Ind. Ct. App. 2000), *trans. denied*.

We do not find it a reasonable possibility that the trial court used the same evidentiary fact to convict Ayala of both the criminal confinement and battery offenses. Therefore, his rights under the Double Jeopardy Clause of the Indiana Constitution were not violated.

2. Sentence

The Indiana Constitution authorizes "independent appellate review and revision" of the sentence imposed by the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* It is the burden of the defendant appealing his sentence to "persuade the appellate court" that his sentence "has met th[e] inappropriateness standard of review." *Id.* at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Ayala argues that his three-year sentence for his criminal confinement conviction is inappropriate. He asserts that the "alleged altercation . . . only lasted a few seconds" and could have been "far worse," rendering the act "an unremarkable episode of criminal confinement." Ayala's Br. at 6. As to his character, he simply claims there is "nothing heinous" about it. *Id.*

As the trial court noted, the offense not only involved Christy but also Ayala's own daughter, who witnessed it. The nature of Ayala's attack on Christy moved his daughter to facilitate Christy's call to the police. We find other evidence reflects the affect of the attack on T.; she testified that when the police arrived, she had gone in the house to talk to an officer.

> and my father opened the front door and said, "She cannot speak. She is a minor." So we went back outside and I just told the police officer what happened, in front of my father.

(T. 17). In addition, we find the fact that T. testified unequivocally at trial to be a commentary on the heinous nature of Ayala's violent acts against Christy – after she had simply suggested that he spend time with his daughter. Further, as the trial court also noted, this was the third time that charges had been brought against Ayala for violence against Christy.

As to the nature of the offender, the above reflects Ayala's lack of concern about what his daughter witnesses and/or his inability to control his behavior in the presence of his offspring. Moreover, Ayala's character must be assessed in light of his lengthy history of involvement in the criminal justice system.

Ayala has not persuaded us that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

MAY, J., and CRONE, J., concur.