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ATTORNEY FOR APPELLANT:

JOHN A. KESLER, II
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

CHARLES A. LONG,	)	
	)	
Appellant-Defendant ,	)	
	)	
vs.	)	No. 84A01-0606-CR-0265
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Elred, Judge
Cause No. 84D01-0506-FA-1526

November 30, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Charles A. Long ("Long") was convicted in Vigo Circuit Court of Class A felony rape, Class B felony robbery, and Class B felony criminal confinement. Long now appeals and presents two issues, which we restate as:

I. Whether there was sufficient evidence to support Long's conviction for rape; and

II. Whether there was sufficient evidence to support the jury's findings that Long was armed with a deadly weapon when he committed his crimes.

We affirm.

Facts and Procedural History

On the morning of June 6, 2005, S.B. left her place of employment in her car to run a work-related errand. As S.B. prepared to enter a parking lot, a man later identified as Long approached her car, pointed a handgun in her face and told her that "nothing bad" would happen if she cooperated with him. Tr. p. 8. Long got in the passenger side of the car and instructed S.B. to drive to a certain location. Long had his gun in his lap, pointed at S.B.'s ribs as she drove to the alley, where Long instructed her to stop. Long then asked S.B. where her purse was. S.B. explained that she had left her purse at work, but offered Long her car if he would let her go. Instead, Long told S.B. to remove her clothes. When S.B. screamed in fear, Long pointed his gun at her, told her to be quiet or else "things were about to get ugly." Tr. pp. 13, 27. After S.B. removed her clothes, Long made her climb over to his seat where he proceeded to have sexual intercourse with her while his gun was pointed at her back.

After raping her, Long took his cellular telephone and read the information on S.B.'s vehicle registration to a person he claimed to be an accomplice. Long told S.B. to

go back to work, get her purse, and return to the car or else he and his accomplice would "take care of the place," which S.B. took as a threat to the safety of her co-workers. Tr. p. 17. S.B. complied with Long's instructions and returned with her purse. Thereafter, she went to an ATM machine and withdrew $150 and gave it to Long. Long then told S.B. to drop him off at a local motel. Long told S.B. that he knew where she lived and warned her not to tell anyone what had happened or else he would "take care" of her and her family. Long even claimed that he and his unnamed accomplice had "taken care" of another victim before when she had not complied with his threats. After Long left, S.B. returned to work and tried to remain silent out of fear of Long and his threats. However, she soon broke down when co-workers asked about her appearance. Over her objections, her co-workers called the police, who took S.B. to the hospital. S.B. later identified Long from a photographic line-up as her attacker.

On June 9, 2005, the State charged Long with Class A felony rape, Class B felony robbery, and Class B felony criminal confinement. A jury trial commenced on February 8, 2006, and the jury found Long guilty as charged at the conclusion of the trial on February 10, 2006. At a hearing held on March 9, 2006, the trial court sentenced Long to the advisory sentence on all three convictions: thirty years on the Class A felony conviction and ten years on each Class B felony conviction, all to run concurrently. Long now appeals.

Standard of Review

Long's appellant's arguments challenge the sufficiency of the evidence. Upon review of claims of insufficient evidence we neither reweigh the evidence nor assess the

credibility of the witnesses. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. Instead, considering only to the evidence most favorable to the verdict and reasonable inferences drawn therefrom, we will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. Id.

I. Rape

Long first challenges the sufficiency of the evidence supporting his rape conviction. Long concedes that there was evidence to support his convictions for criminal confinement and robbery, but claims that there was no evidence that he forced S.B. to have sexual intercourse with him. We are unable to agree. To convict Long for rape, the State had to prove that Long "knowingly or intentionally has sexual intercourse with a member of the opposite sex when . . . the other person is compelled by force or imminent threat of force" and that Long did so "while armed with a deadly weapon." Ind. Code § 35-42-4-1 (2004).

Here, S.B. testified that Long, while armed with what she described as a handgun, pointed the gun at her, told her to remove her clothes, and forced her to have sexual intercourse while Long pointed a gun at her back. This is sufficient to prove that Long raped S.B.

Long claims that simply stating that "things were about to get ugly" is not necessarily a threat. This argument is unpersuasive. Long uttered these words after commandeering S.B.'s car, forcing her to drive to a remote location, pointing a gun at her, and telling her to remove her clothes. Certainly the jury could conclude that Long's

statement was a threat of bodily harm to S.B. if she did not comply with his demand for sex. That S.B.'s hospital records indicated that S.B. stated she denied Long "used force," is, at most, a conflict in the evidence which we will not reweigh upon appeal.

Long's claim that S.B.'s testimony was incredibly dubious is also unavailing. Application of the incredible dubiosity rule is rare, and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that it runs counter to human experience and no reasonable person could believe it. Kien, 782 N.E.2d at 407. Simply put, there is nothing inherently improbable about S.B.'s testimony, and a reasonable jury could believe her.

II. Deadly Weapon

Long next claims that there was insufficient evidence to prove that he was armed with a deadly weapon while he committed his crimes.[1] Again, we are not convinced. We first note that Long's entire argument on this issue is premised upon the jury accepting his testimony that the weapon he was armed with was a BB pistol. We note, however, that S.B. testified that Long was armed with a "handgun, silver and black handle" which was like the handgun that belonged to the investigating detective, Detective Czupryn, which he had shown her. Detective Czupryn also testified that S.B. identified his police handgun as looking like the gun used by Long. From this, the jury could have concluded that Long was armed with a handgun, i.e. firearm, which is a

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[1] All of Long's convictions were elevated to higher felony level because they were committed while Long was armed with a deadly weapon.

deadly weapon. See Ind. Code § 35-41-1-8 (2004 & Supp. 2007); Ind. Code § 35-47-1-5 (2004); Ind. Code § 35-47-1-6 (2004).

Even if the jury did believe Long's self-serving testimony that he was armed only with a BB pistol, which it was under no obligation to do, there was still sufficient evidence that this pistol fit within the definition of a deadly weapon. The question of whether a weapon is a deadly weapon is determined from a description of the weapon, the manner of its use, and the circumstances of the case. Davis v. State, 835 N.E.2d 1102, 1112 (Ind. Ct. App. 2005), trans. denied. Although not "firearms," pellet and BB guns, even if disabled or inoperable, may be considered deadly weapons. See id.; Merriweather v. State, 778 N.E.2d 449, 457-58 (Ind. Ct. App. 2002); Whitfield v. State, 699 N.E.2d 666, 670-71 (Ind. Ct. App. 1998), trans. denied.

Here, Long pointed his gun in S.B.'s face and at her body and threatened her by saying that, if she did not cooperate, "things were about to get ugly." S.B. was terrified and thought that the gun was "real," testifying that it looked like a police firearm. The investigating officer, Detective Czupryn, testified that S.B. said that Long's weapon looked like his gun. Detective Czupryn further testified that, based upon his experience and training, that a BB gun can inflict serious and permanent injury.[2] Under similar facts and circumstances, we have held that the trier of fact could reasonably have determined

[2] Long argues that Detective Czupryn's testimony was made without a proper foundation and should not be credited. However, Long did not object to this testimony at trial and cannot now be heard to complain about the propriety of its admission. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). And, as already noted, we do not reweigh evidence upon appeal. Kien, 782 N.E.2d at 407.

that a BB or pellet gun was a deadly weapon. See Davis, 835 N.E.2d at 1112-13; Merriweather, 778 N.E.2d at 457-458; Whitfield, 699 N.E.2d at 670-71.

Conclusion

In conclusion, the evidence was sufficient to support Long's conviction for rape, and the evidence was sufficient to support the jury's conclusion that Long committed his crimes while armed with a deadly weapon.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.