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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD H. THOMAS, JR.,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 87A05-0610-CR-544

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0410-FB-93

June 11, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Richard H. Thomas, Jr. (Thomas), appeals his convictions for Count I, criminal confinement while armed with a deadly weapon, a Class B felony, Ind. Code §§ 35-42-3-3(a)(1), (b)(2)(a), and Count VII, attempted rape by force and/or by use of a deadly weapon, a Class A felony, I.C. §§ 35-42-4-1(a)(1), (b)(2) and 35-41-5-1.

We affirm.

ISSUES

Thomas raises two issues on appeal, which we restate as follows:

- (1) Whether the State presented sufficient evidence to sustain Thomas' conviction for attempted rape by force and/or by use of a deadly weapon; and
- (2) Whether Thomas' convictions for attempted rape by force and/or by use of a deadly weapon and criminal confinement while armed with a deadly weapon violate his protection against double jeopardy.

FACTS AND PROCEDURAL HISTORY

On October 20, 2004, Jillian Ransom (Ransom) and her two children went to sleep in her bed between 8:30 and 9:00 p.m.¹ Later that night she awoke with a pain in her wrist. At first she was unsure what was causing the pain. She said “ouch” and tried to move, but “a hand came over [her] face” and a voice said to her, “shut up[,] bitch.” (Transcript p. 41, 42). She then realized “by his voice and the shape of his hands,” the intruder was her husband, Thomas, from whom she was separated and had a restraining

¹ Portions of the record refer to Jillian Ransom as Jillian Thomas. We will refer to her as Jillian Ransom for the duration of this Opinion.

order against him. He had bound her hands and was turning her over so she was lying on her back. (Tr. p. 42). It was then she realized her children were no longer in bed with her. She asked Thomas where the children were; he responded, “the kids [are] gone.” (Tr. p. 42). Ransom screamed and Thomas continued to put his hands over her face and throat. Thomas told her that if the police came, he would kill her. He also put a gun to her head. Ransom asked why he had a gun. Thomas replied, “he came to get what was his and that he was in control and [Ransom] was going to listen to what he told [her].” (Tr. p. 43). He also said that if she did not “fuck him, he was going to kill [her] and kill the kids and kill himself.” (Tr. p. 44). Thomas informed Ransom he had more guns in the house, including a machine gun.

Thomas and Ransom’s two-year-old daughter entered the bedroom shortly after Ransom screamed. Thomas told Ransom to put her to bed. Ransom reminded Thomas she was tied up. Thomas retrieved a knife from the kitchen and cut the ties off Ransom. Ransom rocked their daughter to sleep in front of Thomas. Once their daughter was asleep, Ransom laid down in her bed with their daughter. While Ransom was lying with her daughter, Thomas put duct tape over Ransom’s mouth and tried to bind her wrists and feet with a t-shirt. This time though, Ransom “threw her hands back and said no.” (Tr. p. 45).

Thomas went into the kitchen and Ransom tried to follow him without being noticed. She crawled to the bathroom, afraid she would not be able to walk and with the intention to stay out of sight. When she got to the bathroom she began vomiting in the toilet. Thomas made her get up and took her into the kitchen. He had her wait there

while he retrieved a black camisole and pair of black thong panties. Thomas told her to put on the items. Ransom refused. Thomas took off Ransom's pants and panties, and ripped off her shirt. While Ransom was naked, Thomas licked Ransom between the legs and on her chest. He then made her step into the thong panties and pulled the camisole onto her. Thomas then carried Ransom into the living room and made her straddle and kiss him. Thomas told Ransom, she was not "acting like [she wanted] it." (Tr. p. 49). So, he slapped her and told her she was going to die, the kids were going to die, and he was going to kill himself too. Ransom asked for a glass of water. Thomas let her have some water but told her, "it was the last glass of water [she] would ever drink."

Thomas then asked Ransom, "will you fuck me if I give you a line?" (Tr. p. 49). He lit a torch that he removed from his bag and went to Ransom's bedroom to retrieve his pants. He then removed some "crank" from one of the pockets. (Tr. p. 49). At this point, Ransom heard her son tossing and turning in his room. She got up to go see him, despite Thomas telling her she could not do so. On her way to his room she turned on the hall light. When she came back into the living room, Ransom told Thomas to turn off the light so he did not attract attention to the trailer. When Thomas went to turn off the light, still clad only in the camisole and thong panties, Ransom made a break for the door. The minute she got off the steps in the front of her trailer she began screaming for help.

Thomas chased after Ransom. When he caught her, he grabbed her hair and threw her down. Ransom continued screaming for help. As people began approaching them, Thomas dragged Ransom by her hair back to her trailer. When two neighbors, one of whom was a police officer, came running across the street, Thomas let go of Ransom and

began running for Ransom's trailer. Thomas tripped and was apprehended by the police officer. Inside Ransom's trailer the police found, among other items, a Bushmaster 223 assault rifle which Thomas referred to as a machine gun, a magazine containing 28 rounds and a black powder pistol, a container with two condoms inside, a bottle of personal lubricant, hacksaw blades, tie wraps, a dog chain and rope.

On October 21, 2004, the State filed an Information charging Thomas with Count I, criminal confinement while armed with a deadly weapon, a Class B felony, I.C. §§ 35-42-3-3(a)(1), (b)(2)(A); Count II, escape, a Class C felony, I.C. § 35-44-3-5(a); Count III, residential entry, a Class D felony, I.C. § 35-43-2-1.5; Count IV, domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3(a)(1); Count V, battery resulting in bodily injury, a Class A misdemeanor, I.C. § 35-42-2-1(a)(1)(A); and Count VI, domestic battery with a prior conviction, a Class D felony, I.C. § 35-42-2-1.3(a)(1). On October 19, 2005, the State filed an additional Information charging Thomas with Count VII, attempted rape by force and/or by use of deadly weapon, a Class A felony, I.C. §§ 35-42-4-1(a)(1), (b)(1) and 35-41-5-1; Count VIII, deviate sexual conduct by force and/or by use of deadly weapon, a Class A felony, I.C. §§ 35-42-4-2(a)(1), (b)(1), and/or (2); Count IX, intimidation with a deadly weapon, a Class C felony, I.C. § 35-45-2-1(a)(1), (b)(1)(A), (b)(2); Count X, pointing a loaded firearm, a Class D felony, I.C. § 35-47-4-3(b); Count XI, unlawful possession of a firearm by a domestic batterer, a Class A misdemeanor, I.C. § 35-47-4-6(a); Count XII, use of a firearm, I.C. § 35-50-2-11; and Count XIII, possession of methamphetamine, a Class D felony, I.C. § 35-48-4-6. The State subsequently moved to dismiss Counts III through VI and VIII through XI; the trial

court granted the Motion. On June 27, 2006 through June 30, 2006, a jury trial was held. The jury found Thomas guilty of Count I, criminal confinement while armed with a deadly weapon, a Class B felony; Count II, escape, a Class C felony; Count VII, attempted rape by force and/or by use of a deadly weapon, a Class A felony; and Count XIII, possession of methamphetamine, a Class D felony. On August 7, 2006, Thomas was sentenced to the presumptive sentence for each offense: ten years for Count I, four years for Count II, thirty years with five years suspended for Count VII, and one and one half years for Count XIII, with all sentences to run concurrently.

Thomas now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Thomas argues the State presented insufficient evidence to support his conviction for attempted rape by force and/or by use of a deadly weapon. Our standard of review for a sufficiency of the evidence claim is well settled; we will not reweigh the evidence or assess the credibility of the witnesses. *White v. State*, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.* A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *Id.*

To convict a defendant of attempted rape as a Class A felony, as charged in this case, the State must prove that the defendant, while armed with a deadly weapon, knowingly or intentionally took a substantial step toward having sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force. I.C. §§ 35-42-4-1(a)(1), (b)(2) and 35-41-5-1(a); *Oeth v. State*, 775 N.E.2d 696, 700 (Ind. Ct. App. 2002). Sexual intercourse is defined as “an act that includes any penetration of the female sex organ by the male sex organ.” I.C. § 35-41-1-26.

Thomas first claims the State failed to prove beyond a reasonable doubt that, while armed with a deadly weapon, he knowingly or intentionally took a *substantial step* toward having sexual intercourse with Ransom. Specifically, he argues the defense of abandonment should be applied because there was no genital to genital touching and when Ransom was totally naked in front of him, rather than forcing intercourse, he dressed her in lingerie.

What constitutes a “substantial step” toward the commission of a crime is dependent upon the facts of the case, but the requirement is a minimal one and is often defined as any overt act in furtherance of the crime. *Oeth*, 775 N.E.2d at 700. This court has held that “a substantial step toward rape begins with a physical assault on the victim, and there does not have to be any sexual touching or positioning or an attempt to remove the victim’s or the defendant’s clothing.” *Id.* The determination of what constitutes a *substantial step* is within the province of the jury. *Id.*

The fact that Thomas broke into Ransom's home, took off his pants, put a gun to her head, said that if she did not "fuck him, he was going to kill [her] and kill the kids and kill himself," removed her clothes, licked her between her legs and on her chest, made her wear a black camisole and thong panties, straddle him on the couch, kiss him, and commented that Ransom was not "acting like [she wanted] it," clearly supports the jury's finding that he took a substantial step toward the crime of rape. (Tr. pp. 44, 49). Thomas' attempt to coax Ransom into having sexual intercourse in exchange for drugs, Ransom's fleeing the trailer at the first opportunity, and Thomas' attempt to escape the neighbors and police does not avail him of the defense of abandonment for attempted rape. *See Dukes v. State*, 501 N.E.2d 420, 422 (Ind. 1986) (fleeing prior to actually committing the rape does not avail him of the defense of abandonment for the crime of attempted rape.).

Additionally, Thomas argues the events of the entire night are not indicative of committing attempted rape by force and/or by use of a deadly weapon because he was only armed at the beginning of the night. "When rape is elevated to a Class A felony due to the use of a deadly weapon, it is not necessary for the State to show that the weapon was held on the victim at all times." *Oeth*, 775 N.E.2d at 701 (citing *Potter v. State*, 684 N.E.2d 1127, 1137 (Ind.1997)). When reviewing a sufficiency claim concerning whether a defendant was armed with a deadly weapon, appellate courts look to such factors as whether there was an initial show of deadly force with the weapon, whether the intent was to intimidate the victim with the weapon, and whether the weapon was at least constructively under the defendant's control at all times. *Id.*

Our review of the record reveals that Thomas brought a machine gun, a magazine containing 28 rounds, a black pistol, hacksaw blades, tie wraps, a dog chain and a rope into Ransom's home. The fact that Thomas was not in actual possession of any of the weapons he brought with him throughout the entire course of events does not prevent him from elevation of his offense to a Class A felony. *See Potter*, 684 N.E.2d at 1137 (finding sufficient evidence to convict the defendant of rape while armed with a deadly weapon where the defendant threatened the victim with a knife even though the knife was located in an adjoining room during the actual rape). Given these facts, we find that there exists sufficient evidence from which the jury could have found that Thomas committed attempted rape by force and/or by use of a deadly weapon.

II. *Double Jeopardy*

Thomas next contends his convictions for attempted rape by force and/or by use of a deadly weapon and criminal confinement while armed with a deadly weapon violate Indiana's Double Jeopardy Clause. Specifically, Thomas argues both convictions resulted from the same act.

In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our Supreme Court established a two-part test for analyzing double jeopardy claims. Specifically, it 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."

Id.

The objective of the statutory elements test is to determine whether the essential elements of separate statutory crimes charged could be established hypothetically. *Merriweather v. State*, 778 N.E.2d 449, 453 (Ind. Ct. App. 2002). Comparing the essential statutory elements of one charged offense with the essential statutory elements of the other charged offense identifies the charged offenses. *Id.* We review the relevant statutes and the charging instruments and consider the essential statutory elements to determine the identity of the offense charged, but do not evaluate the manner or means by which the offenses are alleged to have been committed, unless the manner or means comprise an essential element. *Id.* After this court identifies the essential elements of each charged offense, we must determine whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that also establishes the essential elements of the other charged offense. *Id.* at 454.

In the instant case, Thomas was convicted of criminal confinement while armed with a deadly weapon and attempted rape by force and/or by use of a deadly weapon. Criminal confinement while armed with a deadly weapon, is statutorily defined as “[a] person who knowingly or intentionally [] confines another person without the other person’s consent The offense . . . is . . . a Class B felony if it [] is committed while armed with a deadly weapon.” I.C. § 35-42-3-3(a)(1), (b)(2)(A). Attempted rape by force and/or by use of a deadly weapon, is statutorily defined as a person who knowingly or intentionally takes a substantial step toward having sexual intercourse with a member of the opposite sex while armed with a deadly weapon. I.C. §§ 35-42-4-1(a)(1), (b)(1) and 35-41-5-1. Clearly, the crimes of criminal confinement while armed with a deadly

weapon and attempted rape by force and/or by use of a deadly weapon contain distinct elements, *i.e.* “criminal confinement requires proof of nonconsensual substantial interference with a person's liberty whereas attempted rape requires proof of a substantial step toward having forced sexual intercourse with a member of the opposite sex.” *Edwards v. State*, 479 N.E.2d 541, 545 (Ind. 1985). Therefore, convictions of criminal confinement while armed with a deadly weapon and attempted rape by force and/or by use of a deadly weapon do not violate Indiana’s statutory elements test. *See id.* (confinement and attempted rape are not the same offenses for double jeopardy purposes).

We do recognize that some amount of confinement is inherent in rape. However, any confinement of a victim beyond that inherent in the force used to effectuate the rape, or attempted rape, constitutes a violation of the confinement statute apart from the violation inherent in the offense of forcible (attempted) rape. *Parks v. State*, 734 N.E.2d 694, 701 (Ind. Ct. App. 2000), *trans. denied*. Without thoroughly analyzing the facts of the instant case, Thomas alleges the confinement was only necessary to effectuate the attempted rape. It is clear from a complete examination of the facts in this case, that the confinement charge was proved separate and apart from the attempted rape charge. Before attempting to rape Ransom, Thomas bound Ransom’s hands, told her to “shut up bitch” when she tried to move, told her “the kids were gone,” and that if the police came he would kill her. (Tr. p. 42). He then put a gun to her head. When Ransom asked Thomas why he had a gun, he told her “he came to get what was his and that he was in

control and [Ransom] was going to listen to what he told [her].” (Tr. p. 43). He then released Ransom from the restraints, and she went to settle their daughter.

After their daughter was asleep, Thomas again tried to confine Ransom by binding her hands and feet with a t-shirt. He was unsuccessful and moved into the kitchen. When Thomas realized Ransom was in the bathroom, he made her get up and took her into the kitchen. He made her wait in the kitchen while her retrieved a black camisole and pair of black thong panties. Thomas told her to put on the items. When Ransom refused, Thomas took off Ransom’s pants and panties, and ripped off her shirt. While Ransom was naked, Thomas licked Ransom between the legs and on her chest. He then made her step into the thong panties and pulled the camisole onto her. Thomas then carried Ransom into the living room and made her straddle and kiss him. Thomas told Ransom, she was not “acting like [she wanted] it.” Thus, we conclude Thomas confined Ransom beyond the confinement that occurred in his attempt to rape Ransom.

CONCLUSION

Based on the foregoing, we find (1) the State presented sufficient evidence to sustain Thomas’ conviction for attempted rape by force and/or by use of a deadly weapon; and (2) Thomas’ conviction for attempted rape by force and/or by use of a deadly weapon and criminal confinement while armed with a deadly weapon do not violate his protection against double jeopardy.

Affirmed.

NAJAM, J., and BARNES, J., concur.