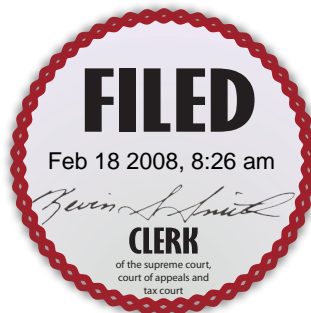


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID ANTHONY HOEFT,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 37A03-0707-CR-347

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable J. Philip McGraw, Judge
Cause Nos. 37D01-0703-FC-066

February 18, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant David Anthony Hoeft appeals his convictions for Intimidation,¹ a class C felony, and Pointing a Firearm,² a class D felony. Specifically, Hoeft argues that his convictions for both offenses violate double jeopardy prohibitions under the United States Constitution and the Indiana Constitution. Hoeft also contends that the evidence was insufficient to support the convictions. Finding no error, we affirm the judgment of the trial court.

FACTS³

On March 21, 2007, Hoeft and his girlfriend, Trish Hamby, were at their Jasper County apartment arguing about money. Hoeft was intoxicated and began screaming at Hamby. When Hamby told Hoeft to calm down, Hoeft told her to leave the apartment. When she refused, Hoeft decided to leave and take the bed with him. When Hoeft realized that he was unable to carry the mattress, he walked downstairs and kicked the refrigerator. Hoeft then went back upstairs, retrieved his shotgun, pointed it at Hamby, and threatened to “blow her head off.” Tr. p. 88. Hamby pulled backwards and Hoeft again pushed the gun barrel into her neck.

Hoeft again told Hamby to leave, and he followed her to her vehicle. At some point, Hoeft reached under the vehicle, stood up, and told Hamby that she would not be

¹ Ind. Code § 35-45-2-1(b)(2).

² Ind. Code § 35-47-4-3(b).

³ We remind counsel for the defendant that the Statement of Facts section of an appellate brief “shall be in narrative form and shall not be a witness by witness summary of the testimony.” Ind. Appellate Rule 46(A)(6)(c).

able to leave. When Hamby attempted to step into the vehicle, Hoeft blocked the door and prevented her from shutting it. Hoeft continued yelling at Hamby, demanding that she exit the vehicle. When she refused, Hoeft threatened to “bust” the windows. Id. at 90. At some point, Hoeft fired a shot into the air. After Hamby again refused to leave the vehicle, Hoeft smashed the driver’s side window with the butt of the rifle.

Thereafter, Hamby exited the vehicle and Hoeft told her to get her “a** in the house.” Id. at 92. As Hamby ran into the yard, she dialed 911 on her cell phone. When Hoeft realized that Hamby was calling the police, he ran to his Jeep with his rifle and drove off “like a bat out of hell.” Id. at 94. When Jasper County sheriff’s deputies arrived at the scene, Hamby was “visibly shaking.” The officers also noticed a “substantial red mark” on Hamby’s neck. Id. at 106, 110.

Hoeft was eventually apprehended and arrested by the Indiana State Police and charged with intimidation, pointing a firearm, and domestic battery. Following a jury trial on May 29, 2007, Hoeft was found guilty as charged. Thereafter, Hoeft was sentenced to five years for intimidation with one year suspended and to three years for pointing a firearm, with the sentences to be served concurrently.⁴ Hoeft now appeals.

⁴ The trial court imposed no sentence on the domestic battery count. In the sentencing order, the trial court observed “the charges arose out of the same set of facts and circumstances,” and concluded that “the costs shall merge into the Class ‘C’ Felony.” Appellant’s App. p. 8. The abstract of judgment also shows that no conviction was entered on the domestic battery count. Id. at 9. Under these circumstances, it is apparent that the trial court merged the offenses, and we need not remand for further action. See Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) (observing that a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is “unproblematic” as far as double jeopardy is concerned, and no remand is necessary).

DISCUSSION AND DECISION

I. Double Jeopardy Concerns

Hoefl claims that his convictions and sentences for both intimidation and pointing a firearm cannot stand in light of double jeopardy concerns. Specifically, Hoefl asserts that he should not have been convicted and sentenced on both counts because the offenses “were premised upon [the] use of a deadly weapon, and one alleged act was used to support both convictions.” Appellant’s Br. p. 13. Moreover, Hoefl argues that the same evidentiary facts were presented to prove the convictions on both offenses. As a result, Hoefl maintains that his convictions “represent double jeopardy under the Constitutions of the United States and the State of Indiana and must be vacated and set aside.” Id.

A. Federal Double Jeopardy Claim

In addressing Hoefl’s claim that the United States Constitution bars a conviction for both offenses on double jeopardy grounds, we note that the Fifth Amendment to the United States Constitution states that no person shall be “subject for the same offense to be twice put in jeopardy of life or limb.” In Blockburger v. United States, 284 U.S. 299, 304 (1932), the United States Supreme Court determined that where

an act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two different offenses or only one is whether each provision requires proof of an additional fact which the other does not.

In this case, Hoefl correctly observes that the State was required to prove, beyond a reasonable doubt, the following essential elements of the offense of intimidation:

- 1) the Defendant
- 2) Communicated a threat to Trisha Hamby
- 3) With the intent that Trisha Hamby be placed in fear of retaliation
- 4) for a prior lawful act
- 5) while committing the offense, the Defendant drew or used a deadly weapon.

Appellant's Br. p. 10-11; I.C. § 35-45-2-1 (b)(2). Hoeft also points out that

[t]o obtain a conviction under Count 2, Pointing a Firearm . . . [t]he State of Indiana was required to prove beyond a reasonable doubt the essential elements of the crime:

- 1) The Defendant
- 2) Knowingly or intentionally
- 3) Pointed a firearm
- 4) At Trisha Hamby.

Appellant's Br. p. 10-11; I.C. § 35-47-4-3(b). In light of the above, it is apparent that the State was required to prove different elements to convict on both charges. More specifically, the additional elements of communication of a threat and intending to place Hamby in fear of retaliation were proved when Hoeft shot his gun into the air and smashed Hamby's window in an attempt to remove her from the vehicle. Tr. p. 90-92. This evidence is distinct from the elements of the pointing a firearm charge, which were satisfied when the evidence established that Hoeft pointed his shotgun at Hamby's neck when they were in the residence and threatened to "blow her head off." Id. at 88. As a result, Hoeft's claim that his convictions for both offenses violate double jeopardy principles under the United States Constitution fails.

B. Indiana Double Jeopardy

Hoeft claims that his convictions violate double jeopardy prohibitions under Article I, section 14 of the Indiana Constitution because the State used the same

evidentiary facts to establish all the elements of both offenses. In Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999), our Supreme Court determined that two or more criminal offenses violate the double jeopardy clause if, with respect to the actual evidence used to convict, the essential elements of one challenged offense establish the essential elements of the other offense. Id.; see also Storey v. State, 875 N.E.2d 243, 248 (Ind. Ct. App. 2007).

Under the actual evidence test, the evidence presented at trial is examined to determine whether each offense was proven by separate and distinct facts. Richardson, 717 N.E.2d at 53. Application of the actual evidence test requires us to “identify the essential elements of each challenged crime and to evaluate the evidence from the jury’s perspective, considering where relevant the jury instructions, argument of counsel, and other factors that may have guided the jury’s determination.” Lamagna v. State, 776 N.E.2d 955, 959 (Ind. Ct. App. 2002). We also note that if it is shown that the State “carefully parsed” the evidence at trial, dual convictions may stand. See Storey, 875 N.E.2d at 249 (upholding the defendant’s convictions for both possession of methamphetamine in excess of three grams with intent to deliver and manufacture of methamphetamine in excess of three grams when the State “carefully parsed the evidence at trial, relying primarily on the finished product of methamphetamine to support the possession offense and the unfinished product to support the manufacturing offense”). This court further observed in Storey that the State presented two separate theories of conduct at trial to support the defendant’s possession and manufacturing offenses. Id.

In this case, the State's evidence established that Hoeft committed the pointing a firearm offense when he pulled his shotgun from the closet and pointed it at Hamby's neck while they were inside the residence. Thereafter, Hoeft committed the act of intimidation when Hoeft subsequently walked outside with Hamby, threatened her with the shotgun, smashed her car window, and yelled for her to get out of the vehicle. And the prosecutor's closing argument tracked the proof that was presented at trial:

The Defendant is charged, actually in three counts. The first count is intimidation. Now in order to prove him guilty of intimidation we have to show that he communicated a threat to another person with the intent that the other person be placed in fear or retaliation for a prior lawful act. Now that's however, if it's done with a deadly weapon it becomes a C felony.

We're talking about intimidation in the, the, you know, that's when you threaten somebody. 'If you don't do this,' if you don't get out of that car.' It can be—a threat can be an expression by words or actions. . . . This Defendant right over here threatened, intimidated, placed in fear or retaliation for her prior lawful act of refusing to leave the house, refusing to get out of the car. By words or actions, we've proved beyond a reasonable doubt.

Tr. p. 130-32. The prosecutor further stated that

[Hoeft] is also charged with pointing a firearm, and that's pretty much self-explanatory. He had to knowingly or intentionally point a firearm at Trish Hamby, and he did. He pointed a firearm. . . . [H]e . . . got the gun out of the case, he loaded it, and he pointed it at her.

Id. at 131. When considering the above along with the evidence that was presented at trial, it is apparent that the State carefully explained and presented the facts to the jury with regard to both offenses. Thus, Hoeft does not prevail on his double jeopardy claim under the Indiana Constitution.

II. Sufficiency of the Evidence

Hoeft argues that the evidence was insufficient to support the convictions. Specifically, Hoeft maintains that his convictions must be reversed because the witnesses lacked credibility and “this case is largely devoid of investigatory evidence.” Appellant’s Br. p. 16.

When reviewing a challenge to the sufficiency of evidence, we will not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury’s exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 125 (Ind. 2005). We have often emphasized that appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Id. Expressed another way, we will affirm the defendant’s conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty. Id. Additionally, the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

As discussed above, Hamby testified about the events that occurred on March 21, 2007, and our review of her testimony demonstrates that the State established the elements of the charged offenses. Moreover, the additional evidence presented at trial corroborated Hamby’s testimony. Specifically, the photographs that were admitted at trial showed Hamby’s broken window and Hoeft’s empty rifle bag. Moreover, the photos showed the shotgun cartridges on the bed. States Ex. 3.

In essence, it is apparent that Hoeft’s arguments focus on the alleged inadequacies of the police investigation. Appellant’s Br. 13-16. However, those contentions merely

amount to an invitation that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. McHenry, 820 N.E.2d at 125. As a result, we conclude that the evidence was sufficient to support Hoefl's convictions.

The judgment of the trial court is affirmed.

RILEY, J., and MAY, J., concur.