



**DARDEN, Judge**

STATEMENT OF THE CASE

Ernest Smith appeals his convictions for attempted theft, as a class D felony,<sup>1</sup> and unauthorized entry of a motorized vehicle, as a class B misdemeanor.<sup>2</sup>

We affirm.

ISSUES

1. Whether the trial court abused its discretion by limiting cross-examination.
2. Whether Smith's convictions constitute double jeopardy.

FACTS

At approximately 7:00 p.m. on December 21, 2009, Robert Allen was sitting in the driver's seat of his car on Indianapolis' Meridian Street, "waiting on a female friend to show up." (Tr. 16). Allen had reclined his seat and was watching a portable television, which was sitting on the front passenger seat, when he noticed Smith walking toward the vehicle.

Initially, Smith walked past the vehicle. He, however, turned around, returned to the vehicle, "snatched open" the front passenger-side door, and grabbed the television. (Tr. 18). As Smith tried to take the television, Allen grabbed Smith's hand and asked what he was doing. Smith exclaimed, "don't shoot me," before he "took off running."

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<sup>1</sup> Ind. Code §§ 35-41-5-1; 35-43-4-2.

<sup>2</sup> I.C. § 35-43-4-2.7.

(Tr. 20). “[A]t the same time basically,” Allen exited his vehicle and started chasing Smith. (Tr. 20).

Allen chased Smith to a bar on Pennsylvania Avenue. Smith ran inside the bar; Allen stayed outside and telephoned the police. After several minutes, Smith came out of the bar and “charged towards” Allen. (Tr. 28). Allen “got below [Smith] and [he] picked him up, slammed him to the ground.” (Tr. 28). After a brief struggle, Allen “got into a position where [he] had [Smith] . . . almost in a full nelson position,” with his “[a]rms under [Smith’s] arms around the back of his neck with [his] feet wrapped around [Smith’s] legs so he couldn’t go anyway.” (Tr. 29). Allen held onto Smith until police arrived approximately three or four minutes later.

On December 23, 2009, the State charged Smith with Count I, theft as a class D felony; Count II, unauthorized entry of a motorized vehicle as a class A misdemeanor; and Count III, battery as a class B misdemeanor. On April 21, 2010, the State filed an amended information, alleging Smith to be an habitual offender. On April 23, 2010, the State filed a motion to dismiss Count III, which the trial court granted.

The trial court held a jury trial on April 27, 2010. The jury found Smith guilty of attempted theft as a class D felony and unauthorized entry of a motorized vehicle as a class B misdemeanor. Smith stipulated to the predicate felonies charged by the State in the habitual offender count. The trial court therefore found Smith to be an habitual offender.

The trial court held a sentencing hearing on May 11, 2010. On Count I, the trial court sentenced Smith to three years; enhanced that sentence by three years based on Smith's habitual offender status; and ordered that five years be executed and one year be served on work release. On Count II, the trial court sentenced Smith to a concurrent sentence of 180 days.

Additional facts will be provided as necessary.

### DECISION

#### 1. Limitation on Cross-Examination

Smith asserts that the trial court abused its discretion in limiting his examination of Allen's "psychological disorders and medication . . . ." Smith's Br. at 13. Smith argues that the evidence of Allen's disorder and medication was relevant "both as to Allen's credibility as a witness, and as to whether Smith committed the alleged offenses against Allen." *Id.* We disagree.

The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution. It is "one of the fundamental rights of our criminal justice system." To be sure, "this right is subject to reasonable limitations placed at the discretion of the trial judge." "[T]rial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

*Smith v. State*, 721 N.E.2d 213, 218-19 (Ind. 1999) (internal citations omitted).

Here, Allen testified on direct examination that he remembered "[p]retty much" everything that occurred the evening of December 21, 2009. (Tr. 15). Allen denied

taking “any type of medication that would affect [his] memory in any way” on that date. (Tr. 15).

On cross-examination, Allen admitted that he had been prescribed medication for “stress” but stated he had not taken his medication on December 21, 2009. (Tr. 60). Allen further admitted that although he remembered “pretty much everything” that occurred on December 21, 2009, it was “safe to say” that he could not recall everything. (Tr. 63).

Smith then sought to examine Allen regarding the effect of not taking his medication, to which the State objected. The trial court sustained the objection, after which Smith made an offer of proof.

During the offer, Allen admitted that he had been prescribed Risperidone for anxiety disorder and explained that it helps him “handle situations a lot differently.” (Tr. 68). For instance, he speculated that had he taken his medication, he “wouldn’t have been out there trying to chase [Smith] and fight him. [He] would have just called the [p]olice.” (Tr. 68).

Allen acknowledged that his medication impairs his memory “[t]o a certain extent” by making it difficult to recollect. (Tr. 69). He, however, denied that his medication affected his memory regarding the events of December 21, 2009, or caused him to “hallucinate or remember anything that didn’t happen . . . .” (Tr. 70). Finding it to be irrelevant and highly prejudicial, the trial court ruled any evidence regarding Allen’s mental disorder or use of medication inadmissible.

Indiana Evidence Rule 402 provides that, generally, “[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.” Indiana Evidence Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “Regarding relevance, while generally evidence of drug use may be excluded at trial, evidence of drug use affecting a witness’s ability to recall underlying events is admissible.” *Williams v. State*, 819 N.E.2d 381, 386 (Ind. Ct. App. 2004).

In this case, Smith offered no proof that either Allen’s mental disorder or medication affected his memory of the underlying events or his ability to testify as to the events. Thus, any evidence regarding his anxiety disorder or prescribed medication was irrelevant. Accordingly, we find no error in refusing to allow Smith to cross-examine Allen further regarding the effects of his mental disorder or his medication.

## 2. Double Jeopardy

Smith asserts that his convictions for attempted theft and unauthorized entry of a motorized vehicle constitute double jeopardy. He contends that there was a reasonable possibility that the jury used the same evidence to convict him of both offenses; namely, “the opening of Allen’s car door.” Smith’s Br. at 16.

Pursuant to Article 1, Section 14 of the Indiana Constitution, “[n]o person shall be put in jeopardy twice for the same offense.”

[T]wo offenses are the “same offense” in violation of the Indiana 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.

*Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)).

Under the “actual evidence” test,

the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. 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.* at 1234. ““The Indiana Double Jeopardy Clause is not violated when evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.”” *Lee*, 892 N.E.2d at 1234 (quoting *Spivey v. State*, 717 N.E.2d 831, 833 (Ind. 2002)).

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 jury’s perspective . . . .” In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel.

*Id.* (internal citations omitted).

Regarding the offense of attempted theft as a class D felony, the State was required to prove that Smith attempted to “exert unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use.”

I.C. § 35-43-4-2. Specifically, the State charged that Smith attempted to exert unauthorized control over Allen's television. Regarding the offense of unauthorized entry of a motorized vehicle as a class B felony, the State was required to prove that Smith entered Allen's vehicle, knowing that he did not have Allen's permission to enter the vehicle. I.C. § 35-43-4-2.7.

The evidence presented at trial shows that on December 21, 2009, Smith opened Allen's vehicle's door and reached into the vehicle without Allen's consent. Smith then grabbed Allen's television in an attempt to take it. These facts can properly support both convictions. We therefore find no violation of Indiana's prohibition against double jeopardy.

Affirmed.

BAILEY, J., and NAJAM, J., concur.