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IN THE
COURT OF APPEALS OF INDIANA

ERIC GREEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0808-CR-679
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Annie Christ-Garcia, Judge
Cause No. 49G17-0805-FD-122706

March 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Eric Green appeals his convictions and sentence for class D felony domestic battery with a minor child present and class D felony criminal confinement. We affirm.

Issues

I. Whether Green's convictions violate double jeopardy; and

II. Whether the trial court relied on an improper aggravator in sentencing.

Facts and Procedural History

Green and Stanya Carter lived together for two years. On May 22, 2008, Carter and her two daughters were sleeping in the home she shared with Green. Carter was asleep on the couch in the living room, and her five-year-old daughter was asleep on the loveseat. Her thirteen-year-old daughter was sleeping in her bedroom. At approximately 2:00 a.m., Green arrived at the residence. He sat on the couch where Carter was sleeping and poured noodles in Carter's hair. Carter woke up, and Green began yelling, "Get up, bitch." Tr. at 9. Green pulled her off the couch by her hair and dragged her around the living room. She hit her face on the fireplace. Green released her hair, and Carter went to her thirteen-year-old daughter's bedroom. Green grabbed her hair again in the bedroom. While in her daughter's bedroom, Carter attempted to call the police. Green grabbed Carter and threw her down. He then broke the phone to prevent her from calling the police.

The State charged Green as follows: count 1, class D felony domestic battery with a minor child present; count 2, class D felony battery on a child; count 3, class D felony battery on a family or household member; count 4, class D felony criminal confinement; count 5,

class A misdemeanor battery; count 6, class A misdemeanor domestic battery; and count 7, class A misdemeanor interference with reporting crime. At the bench trial on June 23, 2008, the trial court granted judgment on the evidence as to count 2 and found Green guilty of the six remaining counts. The trial court merged count 3 with count 1, count 5 with count 6, and count 6 with count 1. The court imposed concurrent sentences of two years on count 1, two years on count 4, and one year on count 7.[1]

Discussion and Decision

I. Double Jeopardy

Green contends that his convictions for domestic battery and criminal confinement constitute double jeopardy under the actual evidence test enunciated in *Richardson v. State*. 717 N.E.2d 32 (Ind. 1999).[2] We must determine whether there is "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 53. The actual evidence test "requires substantially more than a logical

[1] Green does not challenge his conviction or sentence for count 7.

[2] The State asserts that Green waived his double jeopardy claim because he failed to raise it at the trial court. Generally, if a party fails to raise an objection at the trial court, the objection is waived at the appellate level. *Bensen v. State*, 762 N.E.2d 748, 755 (Ind. 2002). However, our supreme court has provided an exception to the waiver rule for fundamental error. *Id.* at 755. Whether double jeopardy constitutes fundamental error must be decided on a case-by-case basis. *Taylor v. State*, 717 N.E.2d 90, 96 n.7 (Ind. 1999). We choose to discuss the double jeopardy issue on the merits in this case.

possibility" that the fact-finder relied on the same evidence for two convictions.[3] *Lee v. State*, 892 N.E.2d 1231, 1236 (Ind. 2008). "'[R]easonable possibility' turns on a practical assessment of whether the [fact-finder] may have latched on to exactly the same facts for both convictions." *Id.*

Green alleges that the hair pulling was used to convict him of both the domestic battery and the criminal confinement charges. The charging information alleges that Green committed domestic battery by touching Carter so as to result "in bodily injury to the other person, specifically: pain and/or redness" and committed criminal confinement by removing Carter by force "[f]rom the couch to the wall of the living room." Appellant's App. at 14, 17. The State presented evidence that in addition to pulling Carter's hair in the living room, Green also dumped noodles in Carter's hair, pulled her by the hair in a separate incident in the bedroom, grabbed her, and threw her down. Tr. at 8, 11. In light of the foregoing, we conclude that there is no reasonable possibility that the fact-finder relied on the same facts to satisfy the essential elements of both convictions. Therefore, we affirm.

II. Sentencing

Green also alleges that the trial court improperly used an element of the domestic battery conviction as an aggravator in sentencing. Green does not appeal his sentence for his criminal confinement conviction, however, and both convictions received the same

[3] The State alleges that the "danger cited by *Richardson* does not exist" because this was a bench trial. Appellee's Br. at 5. The State thus maintains that we should not apply the actual evidence test to bench trial judgments. However, this Court has applied the actual evidence test in cases arising from bench trials, and we see no reason to treat this case any differently. *See, e.g.*, *Robinson v. State*, 835 N.E.2d 518, 520, 523 (Ind. Ct. App. 2005).

concurrent sentences. Any error was therefore harmless. Consequently, we affirm Green's sentence.

Affirmed.

ROBB, J., and BROWN, J., concur.