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**IN THE
COURT OF APPEALS OF INDIANA**

SAMUEL LAJUAN SHAW,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 45A03-0806-CR-302

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0704-FA-10

April 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Samuel Shaw appeals his convictions for aggravated battery and criminal confinement, both Class B felonies. On appeal, Shaw raises two issues, which we restate as 1) whether Shaw's convictions violated the Indiana constitutional prohibition against double jeopardy and 2) whether sufficient evidence supports Shaw's criminal confinement conviction. Concluding that Shaw's convictions violate double jeopardy, but that sufficient evidence supports Shaw's criminal confinement conviction as a Class D felony, we affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

On the evening of April 23, 2007, Douglas Hilbrich was watching television at a friend's home when Shaw entered, pressed a handgun to the back of his head, and said, "I want my money now or I'm going to shoot you." Transcript at 64. Shaw was referring to a debt of Hilbrich, who had purchased cocaine from Shaw several months earlier. Hilbrich told Shaw he did not have the money, to which Shaw replied, "you better give me my money, I'm not kidding, I'm going to shoot you." *Id.* Shaw then walked outside and opened the trunk of his vehicle.

Hilbrich eventually followed Shaw outside, hoping to negotiate an agreement. When Shaw saw Hilbrich standing on the front porch, he again told Hilbrich, "I'm not kidding, I want my money." *Id.* at 65-66. Hilbrich offered to go home and get the money, but Shaw refused, telling Hilbrich he was "not going anywhere." *Id.* at 66. Hilbrich's attempted negotiation descended into an argument, with Shaw and Hilbrich each accusing the other of disrespect. At some point during the argument, Hilbrich saw

Shaw put his right hand in his pocket. Thinking he was going for his handgun, Hilbrich grabbed Shaw's collar and right arm. The two then crashed through a porch railing, which knocked Hilbrich to the ground and caused Shaw to break free of Hilbrich's grasp. As Hilbrich stood up, Shaw shot him in the throat. Thereafter, Hilbrich called 911, and Shaw placed his handgun on the front passenger seat of his vehicle and stood outside. While the two were waiting for the police to arrive, Hilbrich told Shaw several times, "I can't believe you shot me," while Shaw claimed he did so because Hilbrich had attacked him. Id. at 70, 72.

On April 24, 2007, the State charged Shaw with attempted murder, a Class A felony; attempted robbery, a Class A felony; aggravated battery, a Class B felony; criminal confinement, a Class B felony; battery, a Class C felony; and criminal confinement, a Class D felony. The trial court presided over a jury trial from February 4 to 7, 2008, at which Hilbrich, Shaw, and several investigating officers testified. The jury found Shaw not guilty of attempted murder and attempted robbery, but guilty of the remaining charges. The trial court entered judgments of conviction for Class B felony aggravated battery and Class B felony criminal confinement, but declined to enter judgments of conviction for Class C felony battery and Class D felony criminal confinement due to double jeopardy concerns. Shaw now appeals.

Discussion and Decision¹

I. Double Jeopardy Violation

Shaw argues his convictions for aggravated battery and criminal confinement violate double jeopardy. Article I, Section 14, of the Indiana Constitution states, “No person shall be put in jeopardy twice for the same offense.” “[T]wo 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.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original). To prevail under the “actual evidence” test, “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 53. In applying the actual evidence test, a reviewing court may consider the charging information, arguments of counsel, and final jury instructions. McIntire v. State, 717 N.E.2d 96, 100 (Ind. 1999).

To convict Shaw of aggravated battery as a Class B felony, the State had to prove beyond a reasonable doubt that he knowingly or intentionally inflicted injury on Hilbrich and that the injury either created a substantial risk of death or caused protracted loss or impairment of the function of a bodily member or organ. See Ind. Code § 35-42-2-1.5.

¹ We note at the outset that Shaw argues the State has waived its arguments regarding his double jeopardy and sufficiency of the evidence challenges for failure to provide cogent reasoning or citation to proper authorities. Although Shaw is correct that a party generally “waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record,” Diaz v. State, 753 N.E.2d 724, 728 n.4 (Ind. Ct. App. 2001), trans. denied, we cannot say the State’s arguments constitute a failure in either instance. Accordingly, we reject Shaw’s argument that the State has waived its arguments on appeal.

To convict Shaw of criminal confinement as a Class D felony, the State had to prove beyond a reasonable doubt that Shaw knowingly or intentionally confined Hilbrich without his consent. See Ind. Code § 35-42-3-3(a)(1). The offense is elevated to a Class B felony if the defendant commits the offense while armed with a deadly weapon or if the confinement results in serious bodily injury to a person other than the defendant, in this case Hilbrich.² See Ind. Code § 35-42-3-3(b)(2)(A) and (B).

The information³ and final jury instruction for the aggravated battery charge are largely identical and track the language of the statute. Specifically, the charging information alleges that Shaw “did knowingly or intentionally inflict injury on Douglas Hilbrich which created a substantial risk of death or caused protracted loss or impairment of the function of a bodily member or organ,” appellant’s appendix at 8.1, and the final jury instruction states that to convict Shaw of aggravated battery,

the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. inflicted injury on Douglas Hilbrich
4. and the injury created a substantial risk of death or caused protracted loss or impairment of the function of a bodily member or organ of Douglas Hilbrich.

Tr. at 399-400.⁴

² The offense also is elevated to a Class B felony if it is committed on an aircraft, Ind. Code § 35-42-3-3(b)(2)(C), but we omit reference to that enhancement because such circumstances are not implicated in this case.

³ The charging information for each offense was included as “Instruction No. 1” in the final jury instructions and appears on three unnumbered pages between pages 391 and 392 of the transcript. For ease of reference, we cite to the charging information that is included in Shaw’s appendix.

⁴ This instruction actually appears as “Instruction No. 9” on an unnumbered page between pages 399 and 400 of the transcript.

The information for the criminal confinement charge tracks the language of the statute as to the Class D felony elements of the offense, but goes on to include two instances in which the offense is elevated to a Class B felony: “[O]n or about April 23, 2007, . . . [Shaw] did knowingly or intentionally, while armed with a handgun, a deadly weapon, confine Douglas Hilbrich without his consent which resulted in serious bodily injury to Douglas Hilbrich” Appellant’s App. at 8.1. For its part, the final jury instruction omits reference to Shaw being armed with a deadly weapon, focusing instead on serious bodily injury to Hilbrich:

Before you may convict the Defendant [of criminal confinement as a Class B felony], the State must have proved each of the following elements beyond a reasonable doubt:

1. The defendant
2. knowingly or intentionally
3. confined Douglas Hillbrich [sic] without his consent
4. and the confinement resulted in serious bodily injury to Douglas Hillbrich [sic].

Tr. at 401-02.⁵

Shaw argues his convictions violate double jeopardy because there is a reasonable possibility the jury used the gunshot wound to Hilbrich to support both the “substantial injury”⁶ element of aggravated battery and the “serious bodily injury” enhancement of criminal confinement (i.e., the fact elevating criminal confinement from a Class D to a Class B felony). Before addressing this argument, we note initially that by framing his double jeopardy violation as such, Shaw is arguing merely that there is a reasonable

⁵ This instruction actually appears as “Instruction No. 11” on an unnumbered page between pages 401 and 402 of the transcript.

⁶ We use the term “substantial injury” as shorthand to describe the element of aggravated battery that either creates a substantial risk of death or causes protracted loss or impairment of the function of a bodily member or organ. See Ind. Code § 35-42-2-1.5.

possibility the jury used the same evidentiary facts to establish one element of the aggravated battery offense and one element of the criminal confinement offense. As our supreme court explained in Spivey v State, 761 N.E.2d 831, 833 (Ind. 2002), such an argument, even if sustained, does not violate the Richardson actual evidence test because, under that test, “the Indiana Double Jeopardy Clause is not violated when the 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.” Nevertheless, our supreme court has acknowledged several common law rules that also can serve as a basis for a double jeopardy violation. See Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002). Because one of those common law rules is consistent with Shaw’s argument – that is, “Conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished.” Id. (quoting Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring)) – we will address Shaw’s argument in that context.

As mentioned above, the charging information for criminal confinement alleges that Shaw committed the offense while armed with a deadly weapon and that the offense resulted in serious bodily injury to Hilbrich. During closing argument, the prosecutor discussed how these two enhancements – committing the offense while armed with a deadly weapon and the offense resulting in serious bodily injury – supported the criminal confinement charge:

Our next charge, which is confinement, which says that he knowingly and intentionally confined our victim, Douglas Hilbrich. When he put that gun to the back of Douglas Hilbrich’s head in that house, there is no way that man thought[,] [“]I can get up and walk away.[”] He didn’t

move. He didn't move. Any reasonable person in that situation would know, I can't go anywhere. If it's not for that one, we go to the second incident where they are outside, and Doug says[,] [""]let me go to my house to get the money.[""] You're not going anywhere. He knowingly and intentionally confined him, without Doug's consent. Doug wanted to go to his house and get the money to pay him. You're not going anywhere, and he went to retrieve that gun to make sure. He knowingly and intentionally confined our victim, Douglas Hilbrich, without our victim's consent. And he did it by way of a deadly weapon, which is the handgun. He also caused injury to our victim. Douglas Hilbrich, because the gun went off, he fired it intentionally; so when our victim goes to – well, when our victim says he wants to leave, when he says no, you can't leave. You are disrespecting me, he goes to pull the gun out. Doug goes to grab his hand, [an] ensuing struggle occurs, to which he ends up shooting our victim, Douglas Hilbrich, in the course of confining him.

Tr. at 352-53. Given these statements, it appears the prosecutor invited the jury to conclude that Shaw committed criminal confinement in either of two instances, first when he pressed a handgun to the back of Hilbrich's head and stated, "I want my money now or I'm going to shoot you," *id.* at 64, and later when the two were outside and he told Hilbrich, "you're not going anywhere," *id.* at 66. It also appears that in either instance, the prosecutor invited the jury to conclude that Shaw was armed with a deadly weapon or that the confinement resulted in serious bodily injury.

Such an approach by the prosecutor is problematic because it created the possibility that the jury used the gunshot wound to Hilbrich to support both the substantial injury element of aggravated battery and the serious bodily injury enhancement of criminal confinement. Compounding this problematic approach is the final instruction on criminal confinement, which, as mentioned above, omits reference to Shaw being armed with a deadly weapon and relies instead on the serious bodily injury enhancement. Juries are presumed to follow the trial court's instructions, Chandler v.

State, 581 N.E.2d 1233, 1237 (Ind. 1991), and given such an instruction, we conclude there is a reasonable possibility, if not a near certainty, that the jury used the gunshot wound to Hilbrich to support both the substantial injury element of aggravated battery and the serious bodily injury enhancement of criminal confinement.⁷ Because the jury's use of the evidence in such a manner violates one of the common law rules expressed in Guyton, see 771 N.E.2d at 1143, it follows that Shaw's convictions for aggravated battery and criminal confinement violate double jeopardy.

II. Sufficiency of Evidence

The remedy for a double jeopardy violation is to reduce or vacate one of the convictions. Spears v. State, 735 N.E.2d 1161, 1166 (Ind. 2000). Shaw contends, however, that his criminal confinement conviction cannot be reduced from a Class B to a Class D felony because insufficient evidence supports that conviction. Before addressing this argument, we note the following standard of review:

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007) (citations omitted), trans. denied.

⁷ As the foregoing discussion implies, had the prosecutor pled, proved, and argued his case by contending that Shaw committed criminal confinement while armed with a deadly weapon, such an approach probably would not have violated double jeopardy because that fact would not have overlapped with the substantial injury element of aggravated battery.

As mentioned above, to convict Shaw of criminal confinement as a Class D felony, the State had to prove beyond a reasonable doubt that Shaw knowingly or intentionally confined Hilbrich without his consent. See Ind. Code § 35-42-3-3(a)(1). Indiana Code 35-42-3-1 states that “‘confine’ means to substantially interfere with the liberty of a person.”

Shaw focuses his argument on his confrontation with Hilbrich while the two were outside, contending that his conduct at that time does not amount to confinement. In making this argument, Shaw acknowledges he told Hilbrich, “you’re not going anywhere,” tr. at 66, in response to Hilbrich’s offer to go home and get money, but contends he did not confine Hilbrich on the porch because there is no evidence Hilbrich thought he was not free to leave. To support this contention, Shaw cites the following testimony of Hilbrich on direct examination: “Q Did you try to walk off anyway, why didn’t you try to leave anyway? A I really don’t know, I should have, I thought that after the fact, but I figured I could talk to the man rationally.” Id. at 76. Shaw claims this testimony demonstrates Hilbrich “did not try to leave the porch but instead thought he could discuss the situation with Shaw.” Appellant’s Brief at 8.

That the victim did not feel free to leave is relevant in determining whether the defendant substantially interfered with his liberty. See Ransom v. State, 850 N.E.2d 491, 498 (Ind. Ct. App. 2006); see also Ryle v. State, 549 N.E.2d 81, 84 n.4 (Ind. Ct. App. 1990) (“One . . . may be confined . . . by being subjected to threats of physical force or an asserted authority to which he submits.” (quoting R. Perkins, *Criminal Law* 172 (2d ed. 1969))). Although the foregoing testimony indicates Hilbrich thought he could reason

with Shaw, we are not convinced it forecloses a reasonable inference that Hilbrich nevertheless thought he was not free to leave (and, by extension, that negotiation was his best option under the circumstances). Indeed, Hilbrich testified to the following on cross-examination: “Q Okay. Then at what point did my client keep you from going anywhere? A On the front porch. Q And how did he do that? He said[,] [‘]you’re not going anywhere.[’]” Id. at 84. We also note that Shaw was armed⁸ when he told Hilbrich he was “not going anywhere” and that this statement came moments after Shaw had pressed a handgun to Hilbrich’s head and demanded money. Based on this evidence, a jury could have reasonably concluded that Shaw substantially interfered with Hilbrich’s liberty. That the interference was nonconsensual is evident from the fact that Hilbrich testified he offered to go home and get Shaw his money. Thus, sufficient evidence supports Shaw’s criminal confinement conviction as a Class D felony.

Conclusion

Shaw’s convictions for aggravated battery and criminal confinement violate double jeopardy, and sufficient evidence supports Shaw’s conviction for criminal confinement as a Class D felony. Accordingly, we affirm Shaw’s conviction for aggravated battery as a Class B felony and instruct the trial court to reduce Shaw’s criminal confinement conviction to a Class D felony and sentence him accordingly.

Affirmed in part, reversed in part, and remanded with instructions.

CRONE, J., and BROWN, J., concur.

⁸ Hilbrich testified Shaw did not display his handgun when he made the statement, see id., but nothing in the record indicates he was not armed, and Hilbrich thought he was armed on the porch, see id. (cross-examination of Hilbrich: “Q So from in the house to the porch, he had his gun in the house; but on the porch he had put it [] away? A Yes, sir.”).