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ATTORNEY FOR APPELLANT:

SUSAN D. RAYL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANDRAE GREEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0806-CR-486
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
The Honorable Nancy Broyles, Commissioner
Cause No. 49G05-0606-FC-109954

April 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Following a bench trial in Marion Superior Court, Andrae Green ("Green") was convicted of Class C felony battery, Class D felony criminal recklessness, and Class A misdemeanor carrying a handgun without a license. Green appeals and presents two issues, which we restate as: (1) whether his felony convictions constitute double jeopardy, and (2) whether his sentence is inappropriate. The State cross-appeals and claims that Green's appeal is untimely. Concluding that Green's appeal is timely, but that his appellate arguments are without merit, we affirm.

Facts and Procedural History

On June 14, 2006, Jesse Johnson ("Johnson") was at his home in Indianapolis with his cousin, and some other friends. At some point that night, someone knocked on Johnson's front door. He opened the door to see a young woman he had seen before standing in the doorway. When the woman moved, Green, who was standing outside, fired four or five shots inside the house. Johnson was struck in the leg with a bullet fired by Green. Johnson's cousin called the police. When the police arrived at the scene, they found two spent bullet casings inside the house and a gun holster outside the house. The police also photographed four bullet holes in the wall of the house. While in the hospital and at trial, Johnson identified Green as the man who had fired the shots.

The State eventually charged Green with Class C felony battery causing serious bodily injury, Class B felony criminal recklessness, and Class A misdemeanor carrying a handgun without a license. Green waived his right to a jury trial on August 1, 2006. A bench trial was held on September 15, 2006, at the conclusion of which the trial court found Green guilty as charged. At a sentencing hearing held on November 15, 2006, the

trial court found as a mitigating factor that incarceration would impose a hardship on Green's dependents. The trial court found Green's criminal history to be an aggravating factor. Concluding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Green to concurrent terms of six years for the Class C felony conviction, two years for the Class D felony conviction, and one year for the Class A misdemeanor conviction. Green now appeals.

State's Cross-Appeal

On cross-appeal, the State argues that Green's appeal is untimely and should therefore be dismissed. Green was sentenced on November 15, 2006 and filed an untimely *pro se* notice of appeal on February 9, 2007. Accordingly, his appeal was dismissed on May 18, 2007. On April 30, 2008, Green, now represented by counsel, filed a motion for permission to file a belated notice of appeal, which the trial court granted that day. Pursuant to Indiana Post-Conviction Rule 2(1)(f)(2), Green's belated notice of appeal was due on May 30, 2008. Green, however, filed his belated notice of appeal on June 3, 2008. In its appellee's brief, the State noted this untimely filing and argued that Green's appeal should be dismissed. The State acknowledged that, even if we did dismiss Green's appeal, he could still seek permission to file yet another belated notice of appeal. In response to the State's argument, Green filed a motion with this court on November 20, 2008, requesting that we hold his appeal in abeyance so that he could file a second motion for permission to file a belated notice of appeal. We granted this motion on December 4, 2008. On December 9, 2008, Green filed his second motion for permission to file a belated notice of appeal, which the trial court granted on

December 11, 2008. On January 9, 2009, we resumed consideration of Green's appeal and ordered him to file his reply brief, if any, within fifteen days after the filing of the amended notice of completion of the clerk's record.

Although Green's initial belated notice of appeal may have been untimely filed, he has since filed a second, and timely, belated notice of appeal Also, an amended notice of completion of the clerk's record has been filed. We therefore decline the State's request that we dismiss Green's appeal because the issue of the timeliness of his belated notice of appeal has since been rectified.

Double Jeopardy

Green claims that his convictions for Class C felony battery causing serious bodily injury and Class D felony criminal recklessness constitute double jeopardy under the Indiana Constitution. Article 1, Section 14 of the Indiana Constitution states, "No person shall be put in jeopardy twice for the same offense." In Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999), our supreme court held that two or more offenses are the "same offense" in violation of Article 1, 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.

Green makes no claim under the statutory elements portion of the Richardson test. Instead, he claims that his convictions constitute double jeopardy under the "actual evidence" portion. "The actual evidence test prohibits multiple convictions if 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.'" Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (quoting Richardson, 717 N.E.2d at 53). See also Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002) (citing Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring)) (listing among situations which constitute double jeopardy under rules of statutory construction and common law a conviction for a crime which consists of the same act as another crime for which the defendant has already been convicted). The actual evidence test "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." Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

A "reasonable possibility" that the trier of fact used the same facts to reach two convictions requires substantially more than a logical possibility. Lee v. State, 892 N.E.2d 1231, 1236 (Ind. 2008). "This does not reflect a 'literal' or 'relaxed' application of the actual evidence test. Rather, 'reasonable possibility' turns on a practical assessment of whether the [trier of fact] may have latched on to exactly the same facts for both convictions." Id.

Green claims that both of his felony convictions were based on the same evidence, i.e. his act of firing a gun into Johnson's house, and therefore constitute double jeopardy. We disagree. Green did not commit a single act of firing into Johnson's home. Instead, he committed several, distinct criminal acts by firing multiple shots into the house. Thus, Green did not commit a single criminal act which constituted both the battery causing serious bodily injury and the criminal recklessness. He fired one shot which hit Johnson

in the leg, and this evidence supported his conviction for battery causing serious bodily injury. He also fired several other shots into the house, and this evidence supported his conviction for criminal recklessness. We therefore conclude that there was no reasonable possibility that the evidentiary facts used by the trial court to establish the essential elements of Green's battery conviction were also used to establish the essential elements of his criminal recklessness conviction.[1]

The cases cited by Green are distinguishable because, in those cases, the defendant's convictions for battery and criminal recklessness were established by a single act of striking the victim. See Rogers v. State, 814 N.E.2d 695, 703-04 (Ind. Ct. App. 2004);[2] Adams v. State, 754 N.E.2d 1033, 1035 (Ind. Ct. App. 2001). In contrast, Green's convictions were based upon several acts of firing multiple shots. Thus, Green's convictions for battery and criminal recklessness do not constitute double jeopardy.

Sentencing

Green also claims that the sentence imposed by the trial court was inappropriate. As noted, the trial court sentenced Green to concurrent sentences of six years for the battery conviction, two years for the criminal recklessness conviction, and one year for the conviction for carrying a handgun without a license. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise authorized by statute if, after due

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[1] Indeed, at the sentencing hearing, the trial court rejected Green's claim that his criminal recklessness conviction should "merge" into the battery conviction. We presume that trial courts know and follow the applicable law. State v. Glasscock, 759 N.E.2d 1170, 1174 (Ind. Ct. App. 2001). We therefore presume that the trial court did not use the same evidence to establish both convictions.

[2] The Rogers opinion was abrogated in part by Hammon v. State, 829 N.E.2d 444, 453 (Ind. 2005), cert. granted, 546 U.S. 976, rev'd and remanded sub nom. Davis v. Washington, 547 U.S. 813 (2006).

consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of the offenses committed by Green, we note that Green fired a handgun several times into an occupied house. He struck one of the occupants in the knee. Green is fortunate that no one was killed. Regarding the character of the offender, we note that Green has a history of criminal behavior in Michigan. Green has accumulated at least four convictions, including carrying a concealed weapon, possession of a controlled substance, and escaping from prison.[3]

Green acknowledges his criminal history, but argues that his convictions were too remote in time to support his sentences. To the extent that Green is arguing that the trial court erred in its weighing of his criminal history, this argument is no longer available to him. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007) (explaining that under the post-Blakely sentencing regime, a trial court cannot be said to have abused its discretion in failing to properly weigh such factors). Although Green's convictions may not have been in his immediate past—the last occurring in 1993—his multiple convictions still do not speak well for his character.

[3] The presentence investigation report indicates that Green had nine convictions in Michigan, including aggravated assault, carrying a concealed weapon, possession of a controlled substance, armed robbery, and receiving stolen property. However, at the sentencing hearing, the parties apparently agreed that Green's criminal history consisted only of two convictions for carrying a concealed weapon, two convictions of possession of a controlled substance, and one conviction for escaping from prison.

Giving due consideration to the trial court's sentencing discretion, we cannot say that Green's aggregate sentence of six years is inappropriate in light of the nature of Green's offenses and his character.

Conclusion

We decline the State's request that we dismiss Green's appeal. Green's convictions for battery and criminal recklessness do not constitute double jeopardy, and the trial court's imposition of an aggregate six-year sentence was not inappropriate.

Affirmed.

BAILEY, J., and BARNES, J., concur.