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IN THE
COURT OF APPEALS OF INDIANA

BRANDON FRENCH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0809-CR-785
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0803-FB-61767

April 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Brandon French appeals his convictions and sentence for class B felony robbery and class B felony criminal confinement. We affirm his robbery conviction and sentence and vacate his criminal confinement conviction.

Issues

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

II. Whether French's sentence for robbery is inappropriate given his character and the nature of the offense.

Facts and Procedural History

On March 17, 2008, at approximately 11:00 p.m., Mark Johnson was walking home from work. A silver car approached and parked on the side of the road facing the wrong way. French, the driver, exited the car and asked Johnson if he was "looking for something." Tr. at 13. French then pulled a handgun and demanded the contents of Johnson's pockets. The passenger also exited the car. French pointed the gun at Johnson and took Johnson's cell phone and a bag with three new shirts in it. The passenger patted Johnson down while French pointed the gun at Johnson. The passenger took Johnson's wallet. The two men returned to the car. French got in the driver's seat and smiled and pointed the gun at Johnson as he drove away. The entire encounter lasted approximately three to five minutes.

The police arrived within a few minutes of the robbery. One police officer located a car matching Johnson's description of the silver car with a license plate number nearly identical to the one Johnson provided. The police took Johnson to the car, and he identified the two men and his stolen property.

The State charged French with class B felony robbery, class B felony criminal confinement, and class A misdemeanor carrying a handgun without a license. On July 14, 2008, a jury found French guilty as charged. The trial court sentenced French to concurrent terms of twelve years with eight years executed and four years suspended on both felony convictions and one year executed on the misdemeanor conviction.[1]

Discussion and Decision

I. Double Jeopardy

French contends that his convictions for robbery 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. "'[R]easonable possibility' turns on a practical assessment of whether the jury may have latched on to exactly the same facts for both convictions." *Lee v. State*, 892 N.E.2d 1231, 1236 (Ind. 2008).

Robbery consists of taking property "by using or threatening use of force or by putting any person in fear." Ind. Code § 35-42-5-1. Criminal confinement consists of confining a person without consent or removing another person "by fraud, enticement, force, or threat of force, from one (1) place to another." Ind. Code § 35-42-3-3. "Generally, double jeopardy

[1] French does not challenge his conviction or sentence for the misdemeanor.

[2] French concedes that his convictions do not violate the statutory elements test under *Richardson*.

does not prohibit convictions for criminal confinement and robbery when the facts indicate that the confinement was more extensive than that necessary to commit the robbery. In these circumstances, criminal confinement is a separate criminal transgression." *Benavides v. State*, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*.

The State makes the following argument:

> Independent evidence establishes the elements of both crimes. Defendant used the firearm to commit the robbery, then after the robbery was completed he pointed the gun at Johnson, smiled, and drove away. Based on Defendant's additional behavior, Johnson was scared to run or move. This separate use of the firearm was above and beyond the force necessary to commit the already completed robbery.

Appellee's Br. at 6-7 (citations to transcript omitted). We disagree. In *Vanzandt v. State*, we held that ordering the victims to lie on the floor while Vanzandt "effected his robbery and obtained access to the getaway vehicle [was] not separate and apart from the force used to effect the robbery." 731 N.E.2d 450, 455 (Ind. Ct. App. 2000). Here, French's pointing of the gun at Johnson before driving away is similar to Vanzandt's actions, in that the goal in both cases was merely to effect the getaway. Under the facts of this case, we conclude that French's pointing of the gun as he drove away did not constitute confinement more extensive than that necessary to commit the robbery.[3]

Therefore, we vacate French's criminal confinement conviction. French's robbery conviction remains.

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[3] French also claims that his convictions violate Indiana Code § 35-38-1-6 because criminal confinement is a factually lesser-included offense of robbery in this case. Given our resolution of this issue on double jeopardy grounds, we need not address this issue.

II. Sentencing

Indiana Appellate Rule 7(B) permits an appellate court to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." French contends that his enhanced sentence for robbery is inappropriate in light of his young age and his mental health issues. Specifically, French alleges that his sentence is inappropriate because he had recently turned eighteen years old when he committed the offenses, and he suffered from attention deficit hyperactivity disorder, an emotional handicap, a learning disability, and anger management issues resulting from his father's incarceration. The defendant bears the burden to establish that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.

The advisory sentence is the appropriate starting place for evaluating the nature of the offense. *Harris v. State*, 897 N.E.2d 927, 929 (Ind. 2008). The advisory sentence for a class B felony is ten years, with the minimum of six years and the maximum of twenty years. Ind. Code § 35-50-2-5. French approached an innocent pedestrian walking home from work late at night, pointed a loaded firearm at him, demanded the contents of his pockets, took his cell phone and new shirts, and worked in tandem with his partner to steal the victim's wallet. Though this is not the worst imaginable offense, it showed a callous disregard for the safety of others.

As for French's character, while a juvenile he "received thirteen referrals in Marion County resulting in true findings for the charges of Disorderly Conduct, Resisting Law

Enforcement, Criminal Recklessness, Possession [of] Marijuana and Possession [of] Cocaine." Presentence Report at 7. The juvenile system has given him several opportunities to reform his behavior without imposing incarceration, including informal home detention, formal probation, and formal home detention. He has failed to successfully complete any of those programs. In fact, French was released on a community transition program when he committed this offense. His juvenile record demonstrates a lack of respect for the law and his failure to reform despite several court intervention programs. French has failed to establish that his sentence is inappropriate. Therefore, we affirm.

Affirmed in part and vacated in part.

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