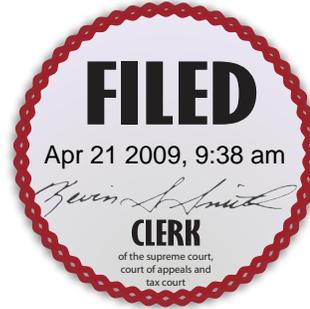


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**SCOTT KNIERIM**  
Baldwin, Adams, Knierim, and Kamish  
Danville, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHRISTOPHER C. WRIGHT, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 55A01-0902-CR-63  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MORGAN CIRCUIT COURT  
The Honorable Brian H. Williams, Judge Pro Tempore  
Cause No. 55C01-0803-FD-92

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**April 21, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Christopher Wright challenges the sufficiency of the identification evidence to support the enhancement of his invasion of privacy conviction to a class D felony. We reverse and remand with instructions to enter judgment and sentence as a class A misdemeanor.

## Facts and Procedural History

On August 25, 2008, Wright's bifurcated trial was held in Morgan County. In the first phase, a jury found Wright guilty of invasion of privacy as a class A misdemeanor. Tr. at 3. During the second phase, which was tried to the bench, the State produced one witness. After the State introduced documents regarding the February 2008 conviction of one Christopher Wright for invasion of privacy, Deputy Brian Gapehart testified that he had never come in contact with Wright prior to August 25, 2008, the day of trial. *Id.* at 17. Deputy Gapehart's research consisted of running a criminal history rather than ever speaking with Wright. *Id.* at 11-13. Throughout the second phase, defense counsel objected to the State's attempt to show identification solely via documentation. *See id.* at 11-20. However, determining that the State had proven beyond a reasonable doubt that Wright had a prior conviction for an unrelated offense, the court entered a finding of guilt as to the class D felony. *Id.* at 21.

On September 24, 2008, the court sentenced Wright on the class D felony "to imprisonment in the Morgan Co. Jail for a period of 1 ½ years," but suspended a portion, ordered probation, and awarded jail time credit. *See Appellant's Br.* at 12.

## Discussion and Decision

Preliminarily, we note that the State did not file an appellee's brief. This "circumstance in no way relieves us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required." *Blunt-Keene v. State*, 708 N.E.2d 17, 18 (Ind. Ct. App. 1999). However, controverting arguments advanced for reversal is an obligation which properly remains with counsel for the appellee. *Id.* Accordingly, when an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. *Bovie v. State*, 760 N.E.2d 1195, 1197 (Ind. Ct. App. 2002). Prima facie error means "error at first sight or appearance." *Blunt-Keene*, 708 N.E.2d at 19.

A person who commits invasion of privacy, which is ordinarily a class A misdemeanor, may be convicted and sentenced for a class D felony "if the person has a prior unrelated conviction for an offense under" the invasion of privacy statute. Ind. Code § 35-46-1-15.1. "In enhancement proceedings concerning recidivist conduct, mere documentary evidence relating to a conviction of one with the same name as the defendant is not sufficient to demonstrate that it was indeed the defendant who was convicted of the prior offense." *Livingston v. State*, 537 N.E.2d 75, 77-78 (Ind. Ct. App. 1989) (citing *Sullivan v. State*, 517 N.E.2d 1251, 1253-54 (Ind. Ct. App. 1988), *trans. denied*). "It has long been recognized that certified copies of judgments or commitments containing the same name or a name similar to a defendant's may be introduced to prove the conviction of prior offenses; however, *there must be other supporting evidence to identify the defendant as being the same person named*

in the documents.” *Sullivan*, 517 N.E.2d at 1254 (emphasis added) (citing *Pointer v. State*, 499 N.E.2d 1087, 1089 (Ind. 1986), and *Coker v. State*, 455 N.E.2d 319, 322 (Ind. 1983)).

Other supporting evidence to identify the defendant can include photographs, fingerprints, physical descriptions, and testimony of an arresting officer. *See, e.g., Keegan v. State*, 564 N.E.2d 533, 535-36 (Ind. Ct. App. 1990) (finding sufficient evidence of identification where “documentary evidence establishing the prior conviction contains the same date of birth as the present defendant *and the source of the defendant’s birthdate is the defendant.*”<sup>[1]</sup> The record reveals the arresting officer obtained Keegan’s birthdate from Keegan’s driver’s license at the time of Keegan’s arrest.”) (emphasis added); *Fozzard v. State*, 518 N.E.2d 789, 792 (Ind. 1988) (finding that documents of prior convictions containing both the same birth date and a photograph which the jury could compare with the defendant seated in the courtroom constituted sufficient evidence of identification); *Sapp v. State*, 513 N.E.2d 178, 180 (Ind. 1987) (finding sufficient evidence of identification in certified copies of Department of Correction records with the defendant’s name, date of birth, social security number, fingerprints and physical description, combined with State’s fingerprinting expert who testified that the defendant’s fingerprints matched those in the records); *Seeglitz v. State*, 500 N.E.2d 144, 149 (Ind. 1986) (sustaining jury’s identification where photographs and fingerprint sheets attached to commitment records were offered and physical characteristics of the individual previously convicted were also documented in

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<sup>1</sup> *Cf. Sullivan*, 517 N.E.2d at 1254 (“There is no evidence in the record establishing that the birthdate was obtained from Sullivan at the time of his arrest[.]”).

commitment records); *Thomas v. State*, 471 N.E.2d 677, 680 (Ind. 1984) (finding that properly admitted photographs and fingerprints attached to records for prior felonies constituted sufficient evidence to determine that Thomas was the person who had committed the prior felonies); *see also Jones v. State*, 716 N.E.2d 556, 558 (Ind. Ct. App. 1999) (finding the combination of the investigating deputy's testimony, matching birth dates and social security numbers, and matching dates and cause numbers on a driving record were sufficient to establish that Jones had a prior conviction and was indeed the person with the prior conviction, therefore supporting an enhanced sentence).

In the present case, no identification evidence was submitted. The State offered no photographs, no fingerprints, and no testimony from an officer familiar with Wright to confirm that the Christopher Wright in the prior offense documentation was the same Christopher Wright who was present at the second phase of the trial. The person who committed the February 2008 invasion of privacy may very well have been the same Christopher Wright whose bifurcated trial was held in August 2008. However, presented only with the documentary evidence noted *supra*, and given Deputy Gapehart's candid admission that he had never had contact with Wright (and thus could not identify him), a reasonable trier of fact could not find beyond a reasonable doubt that this Christopher Wright was the same person who committed the previous offense. Thus, Wright has established *prima facie* error. Accordingly, we reverse and remand with instructions to vacate the judgment of conviction and sentence as a class D felony and to enter judgment and sentence as a class A misdemeanor. *See Livingston*, 537 N.E.2d at 78.

Reversed and remanded.

BRADFORD, J., and BROWN, J., concur.