



## Case Summary

Alleging that the Double Jeopardy prohibitions of the Indiana Constitution<sup>1</sup> are violated by certain of his multiple convictions, Tyrone G. Postell (“Postell”) seeks to have his conviction for Criminal Mischief, as a Class A misdemeanor,<sup>2</sup> vacated and to have his conviction for Criminal Deviate Conduct, as a Class A felony,<sup>3</sup> reduced to a Class B felony.<sup>4</sup> We affirm in part, reverse in part, and remand with instructions.

## Issues

Postell presents two issues for review:

- I. Whether there is a reasonable possibility that the jury used the same evidence to convict him of Burglary and Criminal Mischief; and
- II. Whether there is a reasonable possibility that the jury used the same evidence to convict him of Intimidation and to support the elevation of his Criminal Deviate Conduct offense from a Class B felony to a Class A felony.

## Facts and Procedural History

During the early morning hours of August 4, 2009, Postell waited outside the Indianapolis apartment of his sister-in-law until she went to work. Postell anticipated the opportunity to confront his estranged wife, R.P., who had been staying at the apartment. Postell, who was armed with a knife and wearing socks on his hands, climbed on utility

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<sup>1</sup> Under the federal constitution, two or more offenses are not the same offense if each statutory offense requires proof of an additional fact which the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932). Postell specifically concedes that his multiple convictions pass the Blockburger test and that there is no federal Double Jeopardy violation.

<sup>2</sup> Ind. Code § 35-43-1-2.

<sup>3</sup> Ind. Code § 35-42-4-2.

<sup>4</sup> Postell does not seek to have his convictions of Burglary, as a Class B felony, Criminal Confinement, as a Class B felony, Intimidation, as a Class C felony, or Domestic Battery, as a Class A misdemeanor, vacated.

meters and reached the second story balcony of the apartment. He began to bang on the French doors. This awakened R.P., who realized that it was Postell at the door. She then ran down the stairs and outside.

Postell kicked in the door, breaking the glass. He then ran through the apartment and downstairs to pursue R.P., who had been knocking at neighbor's doors to no avail. R.P. ran into the parking lot, but tripped and fell on some rocks. Postell leaned over R.P., put a knife to her throat, and said that if she "screamed or yelled anything" he would kill her. (Tr. 37.) Postell grabbed R.P.'s arm and pulled her up, demanding that she come with him.

Postell allowed R.P. to dress but informed her that, "if it was necessary" he would come back and kill both R.P. and her sister. (Tr. 41.) Postell forced R.P. into his vehicle and drove to his apartment building. Postell parked his vehicle and told R.P. "you're going to go in here and you're going to do me right." (Tr. 41.) Postell then struck R.P. in the face and pulled her toward the apartment. Once inside, Postell renewed his threat to kill R.P. Postell and R.P. engaged in sexual activity.<sup>5</sup>

Postell drove R.P. back to her sister's apartment, after eliciting a promise from R.P. that she would return to him in two days. Postell warned R.P. that he would return and kill both her and her sister if she failed to keep her promise. After Postell left, R.P. called police.

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<sup>5</sup> Postell and R.P. each testified that there was sexual activity, although their accounts varied. R.P. testified that there was one instance of Criminal Deviate Conduct, while Postell testified that there were two instances. Postell and R.P. each testified that sexual intercourse was attempted. Ultimately, Postell was convicted of Criminal Deviate Conduct and acquitted of Rape.

Postell was charged with Criminal Deviate Conduct, as a Class A felony, Rape, as a Class A felony,<sup>6</sup> Burglary, as a Class B felony,<sup>7</sup> three counts of Criminal Confinement, two as Class B felonies and one as a Class C felony,<sup>8</sup> Intimidation, as a Class C felony,<sup>9</sup> Domestic Battery, a Class A misdemeanor,<sup>10</sup> Battery, as a Class A misdemeanor,<sup>11</sup> and Criminal Mischief, a Class A misdemeanor. Postell was brought to trial on June 30, 2010. With the exception of the count of Rape, Postell was found guilty as charged. In light of Double Jeopardy concerns, the trial court declined to enter judgments of conviction on the second and third counts of Criminal Confinement or the Battery count.

On July 22, 2010, the trial court sentenced Postell to thirty-five years for Criminal Deviate Conduct, fourteen years each for Burglary and Criminal Confinement, six years for Intimidation, and one year each for Domestic Battery and Criminal Mischief. The trial court ordered that all the sentences be served concurrently, providing for an aggregate sentence of thirty-five years. This appeal ensued.

## **Discussion and Decision**

### **I. Burglary/Criminal Mischief**

Article I, Section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Richardson v. State, 717 N.E.2d 32 (Ind. 1999), explained that two offenses are the same offense if the statutory elements of the crimes are

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<sup>6</sup> Ind. Code § 35-42-4-1.

<sup>7</sup> Ind. Code § 35-43-2-1.

<sup>8</sup> Ind. Code § 35-42-3-3.

<sup>9</sup> Ind. Code § 35-45-2-1.

<sup>10</sup> Ind. Code § 35-42-2-1.3.

<sup>11</sup> Ind. Code § 35-42-2-1.

the same or the actual evidence used to convict is the same. The statutory elements analysis is the Blockburger test, conceded to be inapplicable in this case. See Goldsberry v. State, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005). The actual evidence test addresses evidence presented at trial to determine whether separate and distinct facts were presented as to each offense. Id. There must be more than a remote or speculative possibility that the same facts were used. Id.

The actual evidence test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). Under the Richardson actual evidence 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. Id.

The State alleged that Postell committed Burglary by breaking and entering R.P.'s apartment, Ind. Code § 35-43-2-1,<sup>12</sup> and alleged that Postell committed Criminal Mischief by intentionally breaking R.P.'s door, Ind. Code § 35-43-1-2.<sup>13</sup> Postell contends that the same evidence was used to satisfy the breaking element of Burglary and to prove the offense of Criminal Mischief. The State concedes the alleged Double Jeopardy violation. Our review

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<sup>12</sup> Indiana Code Section 35-43-2-1 provides in relevant part that “a person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary[.]”

<sup>13</sup> Indiana Code Section 35-43-1-2(a)(1) provides in relevant part that “a person who recklessly, knowingly, or intentionally damages or defaces property of another person without the other person’s consent ... commits criminal mischief[.]”

of the record indicates that the jury heard testimony regarding a single act of breaking. The Criminal Mischief conviction rests upon the same evidence used to establish the breaking element of Burglary. Accordingly, the Criminal Mischief conviction must be vacated.

## II. Intimidation/Criminal Deviate Conduct

The State alleged that Postell committed Criminal Deviate Conduct<sup>14</sup> and further alleged that the offense was accomplished by the use of deadly force or threat of deadly force, elevating the offense to a Class A felony. See Ind. Code § 35-42-4-2(b)(1). The State also alleged that Postell committed Intimidation, by threatening a forcible felony, with the intent that R.P. engage in conduct against her will, that is, keeping silent, and that Postell did so while armed with a deadly weapon. See Ind. Code § 35-45-2-1. Postell asserts that there is a reasonable possibility that the jury relied on evidence of his threat to kill R.P. while they were in the bedroom both to elevate the Criminal Deviate Conduct offense and to establish the elements of Intimidation.

Where one conviction is elevated based upon the same behavior that forms the basis of another conviction, the two cannot stand. See Strong v. State, 870 N.E.2d 442, 443 (Ind. 2007). To remedy a double jeopardy violation, a court may reduce the sentencing classification on one of the offending convictions. Id.

Here, however, the State presented evidence that Postell made multiple threats to kill

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<sup>14</sup> Pursuant to Indiana Code Section 35-42-4-2(a)(1), “a person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when the other person is compelled by force or imminent threat of force commits criminal deviate conduct[.]” Indiana Code Section 35-41-1-9 defines “deviate sexual conduct” to include “an act involving a sex organ of one person and the mouth or anus of another person[.]”

R.P. during the events of August 4, 2009. After R.P. had tried without success to get the attention of neighbors, Postell caught up to her in the parking lot. Holding a knife to R.P.'s throat, Postell threatened to kill her if she yelled or screamed. Once they were in Postell's vehicle, Postell advised R.P. that they were "going to go back to the apartment" and "if it was necessary he was going to come back ... to kill [R.P.'s sister]." (Tr. 41.) After Postell had "escorted [R.P.] straight to the bedroom," he told R.P. "you knew I would find you. I knew where you were. I'm going to kill you. Don't you know I'm crazy?" (Tr. 42.) Postell reiterated that he would kill both R.P. and her sister should R.P. fail to return to his apartment in two days as promised.

In closing, the State argued that the crime of Intimidation had been proven by evidence that Postell "brandished" his knife and threatened R.P. that he would kill her if she screamed. (Tr. 178.) This argument invited the jury to consider R.P.'s testimony that she had tried to summon neighbors and tried to run, but when Postell caught up to her, he held a knife to her throat and threatened to kill her if she yelled or screamed. There are discrete evidentiary facts to support the elevation of the Criminal Deviate Conduct offense. R.P. testified that she was compelled to engage in deviate sexual conduct because Postell was threatening to kill her. She described two threats made to her inside Postell's bedroom – one to kill her and one to kill both her and her sister. We find no reasonable possibility that the same evidence was used to establish the elements of Intimidation and also to elevate the Criminal Deviate Conduct offense. Postell's convictions for both Criminal Deviate Conduct, as a Class A felony, and Intimidation, as a Class C felony, do not violate the Double Jeopardy

provisions of the Indiana Constitution.

**Conclusion**

We remand with instructions to set aside the conviction and sentence for Criminal Mischief, as a Class A misdemeanor. Otherwise, Postell's convictions are affirmed.

Affirmed in part; reversed in part; and remanded.

FRIEDLANDER, J., and BROWN, J., concur.