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**IN THE
COURT OF APPEALS OF INDIANA**

TERRY JONES,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0810-CR-932
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Stanley E. Kroh, Commissioner
Cause No. 49G03-0801-FB-24813

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Terry Jones appeals his convictions and sentences, after a jury trial, for criminal confinement¹ and robbery.²

We affirm in part and reverse in part.

ISSUES

1. Whether Jones' convictions for robbery and criminal confinement violate double jeopardy principles.
2. Whether Jones' sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

Shortly after 10:00 p.m., on January 26, 2008, Fazoli restaurant employees Sophia Bell, Ana Hernandez, Francisca Torres, and manager Aaron Staton were preparing to close for the evening. Bell and Staton were behind the counter, and Torres and Hernandez were working in the kitchen area. An armed man entered the store. His face was concealed from view and he wore a plaid shirt and white sweatpants with a distinctive blue stripe detail. The man ordered Hernandez and Torres to move from the kitchen and employee door area to the drive-thru area. He pointed the gun at Bell and ordered her to give him money from the drive-thru cash register. He then pointed the gun at Staton and instructed Staton to give him money from the safe. Staton explained that the restaurant's cash was stored in a time-delay safe that would take approximately

¹ Indiana Code § 35-42-3-3.

² Ind. Code § 35-42-5-1.

twelve minutes to unlock. The armed man stated that he would wait. In the meantime, Staton gave the robber some rolled coins from a different safe. As they waited for the time-delay safe to unlock, Staton activated a silent panic alarm.

Officer Mark Kuykendall of the Indianapolis Metropolitan Police Department responded to the call. He looked through the front door of the restaurant and saw “a group of the employees just standing there,” including a female employee with a “real big deer-in-the-headlights look.” (Tr. 26). Kuykendall realized that the robbery was still in progress. The armed man saw Kuykendall watching him and fled the scene. Kuykendall gave chase, following the man’s white pants in the darkness. For a moment, Kuykendall lost sight of the robber; however, in the next instant, he saw the brake lights of a vehicle activate. The armed man jumped into the passenger side of the vehicle. The lights illuminated the rear of the suspect vehicle and Kuykendall advised dispatch that the suspect vehicle was a dark-colored Chevy Tracker.

Police stopped the Tracker approximately two blocks from the restaurant. Jones was seated in the rear seat of the vehicle, dressed in white pants with blue stripes. Police found a blue plaid jacket “on the driver’s side of the vehicle in the back seat under the seat” and a skull cap “in the very back of the SUV.” (Tr. 160, 161). They also found \$320.00 in bills “tucked down between the cushions” near where Jones was seated. (Tr. 163). Police later recovered \$129.00 found by a customer in the drive-thru lane. Fazoli’s confirmed that in all \$449.00 in cash was taken in the robbery. Kuykendall later discovered an unloaded .40 caliber handgun on the path of the foot pursuit.

On January 28, 2008, the State charged Jones with the following offenses: count I, class B felony unlawful possession of a firearm by a serious violent felon; counts II and III, two counts of class B felony criminal confinement as to Bell; count IV, class B felony criminal confinement of Staton; count V, class B felony criminal confinement of Torres; count VI, class B felony criminal confinement of Hernandez; counts VII and VIII, two counts class B felony robbery, committed against Fazoli's employees, Staton and Bell, respectively; count IX, class A misdemeanor resisting law enforcement; and count X, class A misdemeanor carrying a handgun without a license. In a separate information, the State filed Part II of count X – referred to in the record as count XI – wherein it enhanced the carrying a handgun without a license offense to a class C felony. On March 28, 2008, the State filed a separate charging information alleging that Jones was an habitual offender.

On September 10, 2008, the trial court conducted Jones' jury trial, after which Jones was convicted on all counts. In the second phase of the trial, Jones pled guilty to being an habitual offender. Thereafter, the State moved to dismiss count I, class B felony unlawful possession of a firearm by a serious violent felon, and count XI, the enhanced handgun charge, which motion was granted. As a result of the dismissal of counts I and XI, the trial court renumbered the remaining counts for sentencing purposes.

The trial court conducted a sentencing hearing on September 19, 2008. Citing double jeopardy considerations, the trial court declined to enter judgment of conviction on renumbered counts I and II (criminal confinement of Bell), and III (criminal confinement of Staton). As to the remaining counts, it imposed sentence as follows: on

renumbered counts IV (criminal confinement of Torres) and V (criminal confinement of Hernandez), the trial court imposed two concurrent twenty-year sentences, plus a twenty-year enhancement of count IV, based upon the habitual offender adjudication. On counts VI (robbery of Staton) and VII (robbery of Bell), it imposed two consecutive twenty-year sentences to be served consecutively to counts IV and V. On count VIII (resisting law enforcement) and count IX (carrying a handgun without a license), the trial court imposed two concurrent one-year sentences, to be served concurrently with the remaining sentences. Thus, the trial court imposed an aggregated sentence of eighty years. Jones now appeals.

DECISION

Jones argues that his sentences violate double jeopardy principles. He also asserts that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

1. Double Jeopardy

Jones argues that he “cannot be convicted of both counts of robbery or of both robbery and confinement without violating principles of double jeopardy.” Jones’ Br. at 7.

A. Robbery Convictions

First, Jones asserts that his act of robbing Bell and Staton constituted a single robbery of the Fazoli’s establishment; thus, he argues, “[a]llowing [two] robbery convictions, predicated on a single act of robbery, to stand violates double jeopardy by allowing multiple punishments for the same offense in a single proceeding.” Jones’ Br. at 9. We agree. The State appears to concede the point in its brief, wherein it asserts that

it “recognizes that [Jones’] two robbery convictions may violate the principles of double jeopardy.” State’s Br. at 6.

Both parties cite *Williams v. State*, 395 N.E.2d 239 (Ind. 1979), for the proposition that Jones’ two robbery convictions may violate the prohibition against double jeopardy. In *Williams*, the defendant robbed a bank at gunpoint, taking money from four different tellers. He was subsequently convicted of four counts of armed robbery and sentenced to fifteen years on each conviction. On review, our supreme court held that “an individual who robs a business establishment, taking that business’s money from four employees, can be convicted of only one count of armed robbery” *Id.* at 248.

The instant situation is akin to that in *Williams*. Although Jones took money from Bell and Staton, all the money belonged to Fazoli’s; thus, we find that he committed a single robbery. Accordingly, we hereby vacate one of the robbery convictions. Because the trial court declined to enter judgment of conviction and sentencing on counts I and II (Jones’ criminal confinement convictions as related to Bell) and count III (Jones’ criminal confinement of Staton), the State urges us to remand to the trial court to reinstate Jones’ criminal confinement conviction as to either Bell or Staton and to impose sentence accordingly. The State cites to *Taflinger v. State*, 698 N.E.2d 325, 328 (Ind. Ct. App. 1998) for the proposition that the trial court can resentence a defendant on a vacated conviction after the greater offense is reversed on appeal. However, we believe that double jeopardy considerations preclude us from doing so because the confinement of Bell and Staton was no more than necessary to effectuate the robbery. See *Vanzandt v. State*, 731 N.E.2d 450, 455-56 (Ind. Ct. App. 2000).

B. Criminal Confinement and Robbery Convictions

Jones asserts that his convictions for robbery and criminal confinement violate the prohibition against double jeopardy.

Article I, section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Our Supreme Court has held that two or more offenses are the “same offense, 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).

Under [the actual evidence test], the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the ‘same offense’ in a claim of double jeopardy, 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 *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002), our supreme court explained further that if the evidentiary facts establishing one offense establish only one or several, but not all, of the essential elements of the second offense, there is no double jeopardy violation. *Id.*

In charging Jones with two counts of class B felony robbery, the State alleged that while armed with a deadly weapon, he knowingly or intentionally took United States currency belonging to Fazoli’s from Staton and Bell by threatening the use of force or putting them in fear. (App. 33-34). Likewise, in charging Jones with two counts of class

B felony criminal confinement, the State alleged that while armed with a deadly weapon, he knowingly or intentionally removed Torres and Hernandez from the kitchen area to the front of the restaurant by fraud, enticement, force, or threat of force. (App. 33).

Jones argues that “[t]he two confinement charges here can’t be separated from the robbery” because “the same evidence used to establish the robbery was necessarily relied on to establish each of the confinements.” Jones’ Br. at 10. We disagree.

The evidence adduced at trial disclosed that Jones confined Torres and Hernandez when he, while armed with a deadly weapon, ordered them to move from the kitchen to the front of the restaurant, which action was not necessary to effectuate the robbery. We believe that these facts are separate and distinct from the actual evidence used to establish the essential elements of the robberies, to-wit: that Jones, while armed with a deadly weapon, ordered Bell to give him money from the drive-thru cash register and to give him the money therefrom; and ordered Staton to give him money from the restaurant’s safes. Because Jones’ criminal confinement of Torres and Hernandez was not necessary to effectuate the robbery, we conclude that the jury relied upon different evidentiary facts to establish the criminal confinement of Torres and Hernandez than it relied upon to establish the essential elements of the robberies. Accordingly, we find no double jeopardy violation involving Jones’ convictions for criminal confinement and robbery.

1. Inappropriateness of Sentence

Jones argues that his sentence is inappropriate in light of the nature of his offenses and his character. We disagree.

We may revise a sentence if, “after due 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. Ind. Appellate Rule 7(B). “Although Rule 7(B) does not require us to be ‘very deferential’ to a trial court’s sentencing decision, we still must give due consideration to that decision.” *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). “We also understand and recognize the unique perspective a trial court brings to its sentencing decisions.” *Id.* The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh’g*, 875 N.E.2d 218.

Jones does not dispute that a trial court may consider a defendant’s prior criminal history before imposing sentence. In determining whether a sentence is inappropriate, the advisory sentence is the starting point that the Legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class B felony is ten years. Here, for the two counts of class B felony criminal confinement, the trial court imposed two concurrent twenty-year sentences, plus a twenty-year enhancement on count IV for Jones being an habitual offender; and two consecutive twenty-year sentences for the robbery convictions³; and two concurrent one-year sentences for resisting law enforcement and carrying a handgun without a license, as class A misdemeanors, for an aggregate sentence of sixty years.

³ Pursuant to discussion above and our order vacating one of Jones’ robbery convictions, the trial court may only impose a single twenty-year sentence for robbery.

Our review of the nature of the offenses reveals that Jones entered the restaurant, brandishing a deadly weapon, and by threat of force, removed Torres and Hernandez from the kitchen area to the front of the restaurant. He also forced Bell and Staton to give him money from the drive-thru cash register and one of the safes, respectively, by putting them in fear or threatening the use of force. We acknowledge that the offenses herein are similar to many felony robbery and confinement offenses; however, because Jones' confinement of Torres and Hernandez was not necessary to his commission of the robbery, he, thereby, involved additional victims in his crimes.

In our review of his character, we note that Jones' criminal history includes four true findings as a juvenile for burglary and resisting law enforcement in 1986; criminal mischief and conversion in 1987; class D felony theft, class A misdemeanor resisting law enforcement, and criminal trespass (X 2) in 1989. As an adult, Jones has four prior misdemeanor convictions and three prior felony convictions. Three of his four felony convictions are for robbery. At the sentencing hearing, the trial court remarked as follows, with regard to Jones' criminal history and propensity to re-offend:

[L]ooking at your adult history . . . , a conviction for a robbery, a Class C Felony, . . . in 1993, a conviction after you'd served that sentence, it appears. * * * [T]here is another conviction April 21, '93 for Robbery, a Class B Felony. It appears to the Court that you served a six-year sentence on that robbery conviction. And then after being released from that sentence, . . . you committed another robbery and confinement. And it appears that you were found guilty of a B Felony and served ten years on that case. And after serving that sentence, again, a new case. You were found guilty of Public Intoxication in 2006, Criminal Trespass again, in 2006, Public Intoxication in 2007.

What strikes the Court overwhelmingly here is . . . it appears that you have made these decisions repeatedly, particularly the robbery offenses, and that prior attempts at rehabilitation have not been successful.

The fact that you've committed these same offenses in the past and committed them again here give the Court great concern that you're likely to re-offend. And the Court does believe that you are in need of rehabilitation that can best be provided by a penal facility.

You put great fear into the hearts and minds of several people this day you made the decision to take these actions, walking into that Fazoli's restaurant with a loaded⁴ handgun and . . . confining them and demanding money from them with a deadly weapon. * * * [I] think you make a decision of this type, you're putting everyone in danger, including yourself. And I would think, after serving a significant prison sentence, you would have thought twice about making these same type of actions in the future.

(Sent. Tr. 279-83).

We echo the trial court's sentiments and conclude that Jones' criminal history, alone, provides a sufficient basis for his enhanced sentence. *See Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998). Given Jones' extensive criminal history, which shows that prior attempts at rehabilitation have failed, and his continued pattern of antisocial behavior, which evidences a strong likelihood that he will re-offend, we find that his enhanced sentence is not inappropriate. Further, we remand to the trial court to vacate one of Jones' robbery convictions, thereby leaving him with an aggregate sentence of sixty years.

Affirmed in part and reversed in part.

BAILEY, J., and ROBB, J., concur.

⁴ Jones' handgun was not loaded.