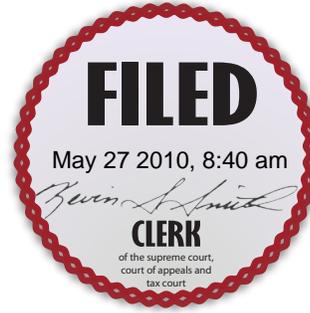


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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OMOND J. SMITH,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 48A05-1001-CR-17

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APPEAL FROM THE MADISON CIRCUIT COURT  
The Honorable Fredrick R. Spencer, Judge  
Cause No. 48C01-0902-FB-101

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**May 27, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Omond Smith appeals his conviction for Class C felony battery and his sentence for Class B felony criminal confinement, Class C felony battery, and Class B felony possession of a deadly weapon by an incarcerated person. We affirm in part, reverse in part, and remand.

## **Issues**

Smith raises two issues, which we reorder and restate as:

- I. whether his convictions for criminal confinement and battery violate double jeopardy; and
- II. whether he was properly sentenced to an aggregate term of forty-eight years.

## **Facts**

On February 19, 2009, Smith, who was incarcerated in the Department of Correction, was transported to the Madison County Jail for a post-conviction relief hearing on a murder conviction. During the intake process, Smith's jacket, shirt, and boots were removed. Smith was not patted down or strip searched. While Smith was waiting to be medically screened by nurse Marcia Schrenker, he was told to wait outside the medical office, in a hallway area with a table and two chairs. Instead of waiting in the hallway, Smith walked into the medical office where Schrenker was sitting at a desk. Schrenker told Smith he could not be there. Smith put his arm around Schrenker's neck, the two struggled, and Smith pushed Schrenker to the floor, where he tried to shove a sock into Schrenker's mouth. During the struggle, Schrenker felt something sharp at her neck and face. Jail officers came to Schrenker's aid, and a sock and a weapon made of

paperclips and tape were found on the floor in the medical office. Schrenker suffered a “cut abrasion” on her jaw, redness on her cheek and around her neck, and a hoarse voice. Tr. p. 80.

The State charged Smith with Class B felony criminal confinement, Class C felony battery, and Class B felony possession of a deadly weapon by an incarcerated person. A jury found Smith guilty as charged. The trial court sentenced Smith to twenty years on the Class B felony convictions and eight years on the Class C felony conviction. The trial court ordered the sentences to be served consecutively for a total sentence of forty-eight years. Smith now appeals.

## **Analysis**

### ***I. Double Jeopardy***

Smith argues that his convictions for criminal confinement and battery violate double jeopardy principles because, “[t]here is a real possibility that the same evidence was relied on by the jury for both convictions.” Appellant’s Br. p. 10. Smith asserts the criminal confinement and battery occurred simultaneously. “Under the actual evidence test, the Indiana Double Jeopardy Clause is violated when there is a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Bradley v. State, 867 N.E.2d 1282, 1285 (Ind. 2007). The application of this test requires us to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008).

In determining the facts used by the fact-finder to establish the elements of each offense, we consider the charging information, jury instructions, and arguments of counsel. Id.

The State argues, “[t]he confinement occurred by Defendant grabbing Schrenker around the neck, and although it continued, it was separate from the battery that occurred when Schrenker felt the shiv against her face and neck.” Appellee’s Br. p. 7. The State contends, “[i]t is reasonable to conclude that the jury used these two separate facts to convict Defendant.” Id. at 8. Our supreme court has clarified, however, that “the ‘proper inquiry’ is not whether there is a reasonable probability that, in convicting the defendant of both charges, the jury used different facts, but whether it is reasonably possible it used the same facts.” Bradley, 867 N.E.2d at 1284.

At trial, Schrenker testified:

A. He . . . I stood up and I remember pointing to the door saying you go back out there and I will see you. And then he came towards me and put his arm around my neck and took me down.

Q. Took you down. Does that mean threw you to the floor?

A. Well, we struggled I believe standing up for a little bit. I was trying to get away and start [sic] screaming for help. So it seemed like a long, time but he eventually did have me to the floor.

Q. Okay. Did you continue to struggle with him as he had you on the floor?

A. Yes.

Q. Was there something that he was trying to do while he had you on the floor?

A. Put a sock in my mouth.

Q. Did he ever get that done?

A. Apparently so. I . . . my . . . the inside of my mouth was cut, so he kept trying to jam it in there.

Q. Okay, and did he have something else in his other hand?

A. I felt something sharp at my neck and my face, but I couldn't during the struggle figure out what it was.

Tr. pp. 67-68. Surveillance video shows the physical attack lasted no more than thirty seconds.

Based on the charging information, to convict Smith of Class B felony confinement, the State was required to prove that he knowingly or intentionally confined Schrenker without her consent while armed with a deadly weapon. See Ind. Code § 35-42-3-3(b)(2)(A). To convict Smith of Class C felony battery, the State was required to prove that he knowingly or intentionally touched Schrenker in a rude, insolent, or angry manner, resulting in bodily injury, and that he committed the offense while armed with a deadly weapon. See I.C. § 35-42-2-1.<sup>1</sup> The State relied on Smith's use of a deadly weapon, the shank, to support both of these charges.<sup>2</sup>

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<sup>1</sup> This charge specifically read, "Smith did knowing touch Marcia Schrenker in a rude, insolent, or angry manner, resulting in bodily injury and while armed with a deadly weapon, namely, a 'shank' or 'shiv', which is, in essence, a homemade knife." App. p. 10. The bodily injury element enhances the battery from a Class B misdemeanor to a Class A misdemeanor. See I.C. § 35-42-2-1(a)(1). The use of a deadly weapon enhances Class B misdemeanor battery to a Class C felony. See I.C. § 35-42-2-1(a)(3).

<sup>2</sup> Smith also argues that the possession of the same deadly weapon was improperly used to enhance the confinement and battery charges. However, based on our conclusion today, we need not address this argument.

The State's opening argument did little to distinguish these offenses and repeatedly referred to the incident generally as a struggle. In its closing argument, the State referred to Smith substantially interfering with Schrenker's liberty when he held her down on the floor and prevented her from getting up. The State also argued that Smith moved the shank against Schrenker's neck before he jerked her down to the floor. The State explained that the confinement occurred from the time Smith grabbed Schrenker around the neck until the time that jail officials appeared and Smith got up from the floor. In describing the battery, the State explained that Smith rudely grabbed Schrenker around the neck, put the knife up against her neck, and took her down to the floor.

Given the evidence in this case, the manner in which the case was charged, and the arguments made by the State, we conclude that there is a reasonable probability that the jury used the same evidence when it convicted Smith of criminal confinement and battery. See Ransom v. State, 850 N.E.2d 491, 501 (Ind. Ct. App. 2006) (finding double jeopardy violation for Class B felony criminal confinement conviction and Class C felony battery conviction where the State did not clearly explain to the jury that certain evidentiary facts were alleged to constitute the confinement and that separate evidentiary facts allegedly constituted the battery.) Smith's Class B felony criminal confinement conviction and Class C felony battery conviction violate double jeopardy. Because the battery occurred as an inherent part of the criminal confinement, we vacate Smith's Class C felony battery conviction. See Bradley, 867 N.E.2d at 1285 ("When two convictions contravene double jeopardy principles, we may vacate one of the convictions or 'we may

remedy the violation by reducing either conviction to a less serious form of the offense if doing so will eliminate the violation.” (citations omitted)).

## ***II. Sentence***

Smith argues that his actions were a single episode of criminal conduct, limiting his sentence to the advisory sentence for a Class A felony, thirty years. See I.C. § 35-50-1-2(c) (limiting the term of imprisonment for a single episode of criminal conduct to the advisory sentence for the next highest class of felony). The State agrees and requests that the matter be remanded to correct Smith’s sentence to thirty years. As such, we reverse the trial court’s imposition of the forty-eight-year sentence and remand for the imposition of a thirty-year sentence.<sup>3</sup>

## **Conclusion**

Smith’s convictions for criminal confinement and battery violate double jeopardy, and Smith was incorrectly sentenced to forty-eight years for a single episode of criminal conduct. We reverse Smith’s battery conviction and remand for the trial court to reduce Smith’s sentence to thirty years for the remaining convictions.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and MAY, J., concur.

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<sup>3</sup> In his conclusion, Smith asks us to vacate his battery conviction and reduce his sentence for the confinement and possession of a deadly weapon convictions to thirty years. Thus, as a practical matter, the effect of vacating Smith’s battery conviction does not impact his sentence.