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IN THE
COURT OF APPEALS OF INDIANA

ZACHERY BLACKWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 67A01-1101-CR-98
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0910-FC-167

June 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Zachery Blackwell was convicted of Attempted Robbery[1] as a class C felony, Criminal Confinement[2] as a class D felony, and Aiding Rioting[3] as a class D felony. Blackwell presents two issues for review:

1. Do Blackwell's convictions for attempted robbery and criminal confinement violate the Double Jeopardy Clause of the Indiana Constitution?

2. Do Blackwell's convictions for attempted robbery and aiding rioting violate the Double Jeopardy Clause of the Indiana Constitution?

We affirm.

On August 22, 2009, the inmates in the Behavioral Modification Unit (BMU) at the Putnamville Correctional Facility were confined to their bunks because of a recent incident. At approximately 8:30 p.m., in clear defiance of the correctional officers, Blackwell and over a dozen other inmates sat up on their bunks and proceeded to put on their boots, hats, and gloves (something that these inmates usually do when they are about to fight).[4] Blackwell and the other inmates left their bunks and quickly covered several of the cameras in the unit.

Three correctional officers were in the BMU at the time, Officer Gill and Sergeant Johnson were at the guard desk and Officer Scott was near the counselor's office. A group of inmates attacked Officer Gill and Sergeant Johnson at the guard desk, smashing the

[1] Ind. Code Ann. § 35-42-5-1(West, Westlaw through 2011 Pub. Laws approved & effective through 06/28/2011); Ind. Code Ann. § 35-41-5-1 (West, Westlaw through 2011 Pub. Laws approved & effective through 06/28/2011).
[2] I.C. § 35-42-3-3 (West, Westlaw through 2011 Pub. Laws approved & effective through 06/28/2011).
[3] Ind. Code Ann. § 35-45-1-2 (West, Westlaw through 2011 Pub. Laws approved & effective through 06/28/2011).
[4] The inmates that chose not to participate in the ensuing riot stayed in their bunks and flipped over onto their bellies.

window with padlocks attached to belts and swinging these dangerous weapons at Sergeant Johnson. Officer Gill and Sergeant Johnson retreated out of the unit. At the same time, Blackwell and Bradley Clephane, another inmate, approached Officer Scott near the counselor's office in order to disarm him. Blackwell and Clephane demanded that Officer Scott get down or he would be hurt. Blackwell and Clephane then moved Officer Scott into a corner. In the meantime, other inmates barricaded the doors and tossed chairs and other items about the unit.

After moving Officer Scott into a corner, Blackwell and Clephane told Officer Scott to get down or he would get hurt; as a result Officer Scott complied. At this point, other inmates joined in harassing Officer Scott. Blackwell demanded that Officer Scott hand over his keys, radio, and OC (pepper) spray. Clephane and another inmate confiscated the items from Officer Scott. Several of the inmates then moved Officer Scott to the counselor's office, where he was knocked unconscious. When Officer Scott regained consciousness inmates were beating and kicking him. The Weapons Team and Quick Response Unit quickly entered the BMU and quelled the uprising.

On October 5, 2009, the State charged Blackwell with attempted robbery. On October 7, 2010, the State amended the information to include charges of criminal confinement, intimidation, and aiding rioting. A jury trial was held on December 2, 2010, at the conclusion of which the jury found Blackwell guilty of all charges. On December 30, 2010, the trial court sentenced Blackwell to six years for attempted robbery and two years for

criminal confinement to be served consecutively to the attempted robbery term.[5] The trial court also sentenced Blackwell to two years to be served consecutively for aiding rioting and suspended the sentence to probation. On February 25, 2011, the trial court re-sentenced Blackwell by ordering the criminal confinement sentence be served concurrently with the attempted robbery sentence.

1.

Blackwell argues that his convictions for attempted robbery and criminal confinement violate the Double Jeopardy Clause of the Indiana Constitution. Blackwell contends that the evidentiary facts used to establish attempted robbery were also used to establish criminal confinement. Specifically, Blackwell argues that the confinement constituted the substantial step towards completion of the robbery. "Unless there is force beyond that which is inherently necessary in any robbery, there cannot be a separate conviction for confinement." *Harvey v. State*, 719 N.E.2d 406, 411 (Ind. Ct. App. 1999).

Article 1, section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Indiana's double jeopardy analysis involves dual inquiries: the statutory elements test and the actual evidence test. *Davis v. State*, 770 N.E.2d 319 (Ind. 2002). Blackwell does not challenge his convictions under the statutory elements test, but contends that his convictions of attempted robbery and criminal confinement violate the actual evidence test. The actual evidence test would be violated if the evidentiary facts used by the jury to establish the essential elements of the attempted robbery offense were also

[5] The trial court merged the criminal confinement and intimidation convictions.

used to establish all of the elements of the confinement offense. *See Spivey v. State*, 761 N.E.2d 381 (Ind. 2002).

Indiana has determined that "where the confinement of a victim is greater than that which is inherently necessary to rob [him], the confinement, while part of the robbery, is also a separate criminal transgression." *Hopkins v. State*, 759 N.E.2d 633, 639 (Ind. 2001) (citing *Harris v. State*, N.E.2d 406 (Ind. 1999)).

In the current case, the confinement exceeded the bounds of the force used to commit the attempted robbery. The record shows that Blackwell herded the victim over to a corner and this was unnecessary to affect the robbery. Before moving Officer Scott, Blackwell threatened him with harm and during the move Officer Scott's liberty was restricted, constituting confinement. After getting Officer Scott to the corner of the BMU, Blackwell ordered him to give up his OC (pepper) spray, radio, and keys. Thus, Blackwell's confinement of Officer Scott occurred before the robbery and extended beyond what was necessary to accomplish the robbery. As a result, Blackwell's convictions for attempted robbery and criminal confinement do not violate double jeopardy principles. *See Gates v. State*, 759 N.E.2d 631 (Ind. 2001).

2.

Blackwell argues that his convictions for attempted robbery and aiding rioting violate the prohibitions against double jeopardy found in the Indiana Constitution. Blackwell contends that these convictions violate the actual evidence test. Blackwell asserts that the attempted robbery is the only evidence of his participation in the riot. Blackwell stresses that

if the attempted robbery was the extent of his participation, he has already been punished for this crime and thus cannot be punished twice.

In this case, the State prosecuted Blackwell under the theory of accomplice liability. Under the theory of accomplice liability, one who aids or assists in a crime is equally as culpable as the one who commits the actual crime. *See Hauk v. State*, 729 N.E.2d 994 (Ind. 2000). There is no distinction between the criminal responsibility of a principal and that of an accomplice. *Id*. The statute governing accomplice liability establishes it not as a separate crime, but as a separate basis of liability for the crime charged. *See* I.C. § 35-41-2-4; *Hampton v. State*, 719 N.E.2d 803 (Ind. 1999). Presence at the crime scene alone cannot sustain a conviction, but factors to consider include: (1) presence at the scene of the crime; (2) companionship with another engaged in a crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the occurrence of the crime. *See Whendon v. State*, 765 N.E.2d 1276 (Ind. 2002). In the case at bar, Blackwell is charged with the actions of the other rioters, which includes the assault on the guard desk and the barricading of the doors.

Blackwell's presence at the scene is not in dispute. Blackwell's companionship with the others was proven by the evidence that showed him sitting up with the other inmates that chose to riot and putting on his hat, boots, and gloves (an indication that he was going to fight). There was no evidence that Blackwell opposed the riot. To be sure, the inmates opposed to the riot stayed in their bunks and flipped over onto their bellies. Here, the evidence showed that Blackwell put on his hat, boots, and gloves before the riot, as did the other rioters; Blackwell was off of his bunk during the riot; and Blackwell's actions after the

riot were no different from several of the inmates who engaged in the uprising. As a result, Blackwell's convictions for attempted robbery and aiding rioting do not violate double jeopardy principles.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.