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IN THE
COURT OF APPEALS OF INDIANA

ROBERT L. MURRAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0811-CR-561
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
The Honorable Natalie Bokota, Magistrate
Cause No. 45G04-0712-FB-112

July 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Robert L. Murray ("Murray") appeals his convictions and sentence for Robbery, as a Class B felony,[1] Confinement, as a Class B felony,[2] and Battery, as a Class C felony.[3] We affirm.

Issues

Murray raises three issues, which we restate as:

I. Whether the State's cross-examination of a witness constituted prosecutorial misconduct;

II. Whether Murray's convictions of Robbery and Confinement violated the double jeopardy clause in Article 1, Section 14 of the Indiana Constitution; and

III. Whether his sentence is inappropriate.

Facts and Procedural History

Murray was age thirty. He had three teenage cousins, E.H., J.M., and D.H., who resided with their mother in Hammond (the "house"). On December 21, 2007, Murray was at the house to fix a wall in the basement. That afternoon, J.M. arrived with two males, G.D. and someone known as Joe or "Dollar." At some point, Murray and his three cousins were in the basement with G.D., Dollar and a friend of D.H. As the seven talked, someone suggested that they "go for fast money." Transcript at 270. After some discussion and preparation, Murray, E.H., J.M., G.D., and Dollar (the "five males") put

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[1] Ind. Code § 35-42-5-1.
[2] Ind. Code § 35-42-3-3.
[3] Ind. Code § 35-42-2-1.

on hoodies and/or jackets, gloves, hats, and things to cover their faces. They planned to rob a nearby liquor store.

In darkness, the five males left the house. Murray carried an AK-47 that was wrapped in something, Dollar carried a revolver, and two others carried bags. Walking through the alleys, they reached the liquor store, confirmed that the area was clear, and entered the store.

At approximately 5:30 p.m., Talat Haddad ("Talat") was in a back room of the liquor store with his seventeen-year-old son, Issa Haddad ("Issa"). A bell rang; Talat left the back room to see who had entered the store. Two masked males put guns to his face. Talat grabbed the end of the AK-47, but one of the males placed a handgun to Talat's head. Per instruction, Talat lay down on the floor. Other masked men entered the store. One began to place alcohol and cigarettes into a bag; another ordered Talat to open the store's cash register. Talat later testified, "[i]t was a very, very scary situation. I don't know what time I'm going to be shot. When I'm going to be shot. It's a very scary moment to me." Id. at 58.

While this was occurring, Issa looked out of the back room and saw two males holding guns to his father's head. Issa ran to the phone in the back room, but was stopped by the two gunmen. They pointed their guns at him, started yelling, and demanded that he open the safe. When he told them that he did not know its location, the males ordered Issa to lie face down. One searched the back room and took the store owner's handgun, while the other kept a gun pointed at Issa. Just before the males left, one of them hit the

back of Issa's head with a gun. His head hurt for a week. Ultimately, the five males took money from the store's cash register, alcohol, cigarettes, and the owner's handgun.

The five males returned to the house after having been gone fifteen to twenty minutes. Murray was still carrying the AK-47. They entered through the back door of the house, went immediately to the basement, and divided the stolen money. Upon investigation, the police traced the males to the house, where they were arrested.

Issa downloaded data from the surveillance camera and gave this information to the police. The video revealed that the five males were in the liquor store for two minutes. The State charged Murray with Robbery of Talat and Issa, Confinement of Issa, and Battery of Issa.

At trial, Murray presented one witness, G.D. On direct examination, G.D. acknowledged having initially lied to the police regarding who participated in the robbery, using "made-up" names. Tr. at 759. He testified that he was trying to protect Dollar and D.H. On cross-examination, he admitted that he also signed a plea agreement, stating that there were four perpetrators: Murray, E.H., J.M., and himself. G.D. explained,

> I signed it because my lawyer went over it very briefly and told me if I don't sign this and take this nine years then somebody's going to tell on me and I'm facing forty-eight years. I just took whatever – I did whatever he asked me to do and I ran with it.

Tr. at 770. When asked for clarification about the factual stipulation in his plea agreement, G.D. testified as follows:

A: I'm not saying it's a lie. What I'm saying is I didn't read the whole thing and my lawyer didn't read the whole thing to me.

Q: But the bottom line is, that stipulated factual basis has Robert Murray's name in it, and that's a lie because he wasn't there; is that what you're now saying?

A: What I'm saying is I don't feel like he was there. He wasn't there. I didn't see him. He wasn't no [sic] part of it.

Q: When you signed your name to the document and it had Robert Murray's name there as a participant in the robbery, that's a lie?

A: Again, I'm going to tell you, I didn't see that portion of the paper.

Id. at 772. As the State's cross-examination of G.D. continued, the prosecutor asked additional questions relating to the inconsistencies in G.D.'s assertions.

Q: So, [G.D.], if I understand your testimony to be correct, everything you said prior to today's date was a lie?

A: Everything?

Q: Who was there?

A: No, I told you I was there.

Q: Except for you being there, everything else except what came out of your mouth here today was a lie?

A: Everything that was stipulated at the police station.

Q: And everything that was stipulated in the factual basis, which you signed and agreed was accurate, was a lie?

A: If that's the way you want to put it.

Q: I'm not putting it. I'm asking . . .

A: Again, I'm going to keep telling you that to me I didn't feel it was a lie because I didn't see half of the stuff. I just signed it because I was under pressure.

Q: Okay. And so when Judge Stefaniak asked you if you were submitting to this plea fully and voluntarily, you lied to the Judge and said yes?

A: I fully and voluntarily signed it. I fully and voluntarily wanted to take nine years instead of having to do forty-eight years and not knowing what the outcome would be.

Id. at 778-79. After additional questioning, G.D. admitted that he lied during his plea hearing. At no time did Murray object to this questioning.

After a five-day trial, the jury found Murray guilty as charged.[4] The trial court found no mitigating circumstances and three aggravating circumstances – the fact that Murray had recently violated the conditions of his parole, his criminal history, and the fact that one of the victims was under age eighteen. It found that the aggravating circumstances outweighed the absence of any mitigating circumstances and sentenced Murray to terms of eighteen years for Robbery, eighteen years for Confinement, and six years for Battery. The terms were ordered to run consecutively and to be fully executed for an aggregate term of forty-two years.

Murray now appeals.

Discussion and Decision

I. Prosecutorial Misconduct

Murray argues that the State's cross-examination of G.D. constituted prosecutorial

[4] A Habitual Offender enhancement was dismissed during trial, upon Murray's motion.

misconduct. Because he did not raise a contemporaneous objection, he acknowledges on appeal that he must establish fundamental error. Appellant's Brief at 8.

Where a claim of prosecutorial misconduct is preserved, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Baer v. State, 866 N.E.2d 752, 756 (Ind. 2007), reh'g denied, cert. denied, 128 S.Ct. 1869 (2008); and Bozeman v. State, 526 N.E.2d 1173, 1174 (Ind. 1988). To assess the former, we refer to case law and the Indiana Code of Professional Responsibility. Baer, 866 N.E.2d at 756. Where the claim was not preserved, the defendant must also establish that "the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Id. at 763 (quoting Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006)).

Murray suggests that the prosecutor committed misconduct by stating her personal opinion about G.D.'s credibility. In trial, a lawyer shall not state a personal opinion as to the credibility of a witness. Ind. Professional Conduct Rule 3.4(e). Nonetheless, the credibility of a witness may be attacked by any party. Ind. Evidence Rule 607.

G.D. testified clearly that, at three different times, he offered three different accounts of who participated in the robbery. In his initial statement to the police, he fabricated the names of his accomplices. In the stipulated factual basis for his guilty plea, he stated that Murray was an accomplice. Then at Murray's trial, G.D. recanted and

denied that Murray was involved.

While the prosecutor asked G.D. multiple questions about these inconsistencies and whether he lied to the court during his plea hearing, they were for the legitimate purposes of attacking G.D.'s credibility and addressing his assertion that he signed the plea agreement without reviewing it. At no time did the prosecutor state her personal opinion regarding G.D.'s credibility. As soon as G.D. testified that he lied during his plea hearing by telling the judge that he had read the agreement, the prosecutor concluded her cross-examination. The State's cross-examination of G.D. did not constitute prosecutorial misconduct.

II. Indiana's Double Jeopardy Clause

Next, Murray argues that his convictions of Robbery and Confinement violated the double jeopardy clause in Article 1, Section 14 of the Indiana Constitution. He therefore asks this Court to vacate his conviction of Confinement.

A. Applicable Law

"No person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14. We analyze alleged violations of this clause pursuant to our supreme court's opinion in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), as clarified by Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). Under the actual-evidence test, 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 all of

the essential elements of a second challenged offense.[5] Richardson, 717 N.E.2d at 53; and Spivey, 761 N.E.2d at 833. To do so, we consider the essential elements of the offenses, the charging information, the jury instructions, the evidence, and the arguments of counsel. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). The term "reasonable possibility" "turns on a practical assessment of whether the jury may have latched on to exactly the same facts for both convictions." Id. at 1236.

"[W]here the confinement of a victim is greater than that which is inherently necessary to rob them, the confinement, while part of the robbery, is also a separate criminal transgression." Hopkins v. State, 759 N.E.2d 633, 639 (Ind. 2001). In Hopkins, the defendant wielded a gun, ordered two victims to a basement, and took their money. He then searched upstairs. While doing so, his accomplice shot one of the victims. The defendant returned to the basement and shot the other victim. The Hopkins court reasoned as follows:

> It was not necessary to force the victims into the basement to rob them. After initially taking the money, it was not necessary to force them to stay in the basement as Defendant searched the house. Both Defendant's removal of [the victims] to the basement and the confinement after robbing them were separate criminal transgressions from the robberies themselves.

Id. at 640. Therefore, Hopkins' convictions did not violate Indiana's double jeopardy clause. Id.

Indiana courts have reached the same conclusion in several other cases involving

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[5] Murray concedes that his convictions do not violate the Indiana Constitution under the statutory-elements test set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

Robbery and Confinement. See Boatright v. State, 759 N.E.2d 1038, 1044 (Ind. 2001) (defendant forced victim to office, took employer's money, took victim to front desk, took her back to office, and took her money); Harris v. State, 716 N.E.2d 406, 412 (Ind. 1999) (victim was robbed, then tied up, placed in closet, and later apprehended when trying to escape); Smith v. State, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008) (correctional officer was confined in control booth, robbed, then drug to bathroom); Benavides v. State, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004) (defendant confined victim "in the bedroom at gunpoint before forcing her into the living room where he took" items), trans. denied; Seide v. State, 784 N.E.2d 974, 979 (Ind. Ct. App. 2003) (upholding six convictions where the defendant robbed three victims, then held them for an additional three hours); Merriweather v. State, 778 N.E.2d 449, 455 (Ind. Ct. App. 2002) (defendant had victim empty cash register, ordered her to an office, and kept her there for fifteen minutes); and Thy Ho v. State, 725 N.E.2d 988, 993 (Ind. Ct. App. 2000) (accomplice grabbed victim by her neck, defendant led her to upstairs bedroom, allowed her to soothe her son, and ordered victim and son to bedroom while accomplice robbed them).

In contrast, Indiana courts have vacated Confinement convictions where the victim was detained only long enough to achieve the Robbery. For example, Murray cites Vanzandt v. State, 731 N.E.2d 450 (Ind. Ct. App. 2000), trans. denied. In Vanzandt, the defendant entered a restaurant, brandished a gun, ordered the manager and an employee to the floor, and had the employee stand up to empty the cash register. That employee then

lay back down. Vanzandt took the employee's car and drove away. He was convicted of robbing the employee and two counts of Confinement. The Vanzandt court upheld the Robbery conviction and the conviction relating to the Confinement of the manager. However, we vacated the conviction relating to the Confinement of the employee, reasoning that the "force or threat of force exerted by Vanzandt against [the employee] was that exerted to accomplish the robbery." Id. at 455-56. See also Polk v. State, 783 N.E.2d 1253, 1259 (Ind. Ct. App. 2003) (vacating Confinement conviction where the defendant fled after hitting the victim on the head and robbing him), trans. denied.

While Murray relies on the Vanzandt decision, the State argues that the reasoning in Vanzandt actually favors its position. The Vanzandt court upheld the Robbery conviction as to the employee and the Confinement conviction as to the manager, even though the incident was brief and the confinement was limited to one room. Thus, we agree with the State that our decision in Vanzandt provides support for a conclusion that Indiana's double jeopardy clause would not be violated by convictions for robbing Talat and confining Issa.

B. Elements of Offenses, Charges,

Jury Instructions, Evidence, and State's Argument

Pursuant to Lee, referenced above, when analyzing whether there was a reasonable possibility that the jury used the same evidence to establish the elements of both Robbery and Confinement, we consider: the elements of the offenses, the charges, the preliminary and final jury instructions, the evidence, and the State's closing and rebuttal arguments.

Lee, 892 N.E.2d at 1234. Confining a person without his consent, while armed with a deadly weapon, is a Class B felony. Ind. Code § 35-42-3-3. Taking property from a person, by using or threatening the use of force, while armed with a deadly weapon, is also a Class B felony. Ind. Code § 35-42-5-1. For its Robbery charge, the State alleged that Murray and three others, while armed with a handgun, took items from Talat and Issa by using or threatening the use of force. For Confinement, the State alleged that Murray and three others, while armed with a handgun, confined Issa without his consent. These precise allegations were used in the preliminary and final jury instructions. Thus, there were potentially two victims of Robbery (Talat and Issa), but only one victim of Confinement (Issa).

As for the evidence, Talat, the store owner, D.H., J.M., and E.H. each testified about items taken from the store. There was far less testimony regarding the stolen handgun. Talat was in the store when the robbers were searching the back room. And although Issa knew that they were searching the back room, he did not observe the males take the store owner's handgun. While the State asked the store owner what his handgun looked like and how he identified it, the owner did not testify where it was before the robbery. From our review of the transcript, it appears that the jury did not learn where the store owner's handgun had been until the testimony of an investigating officer, the State's fifth witness, on the second day of trial. Later, J.M. testified that he saw Dollar holding a gun other than the one Dollar had brought into the store. Of the robbers, Dollar was the only one to avoid arrest; accordingly, the jury did not have the benefit of his testimony.

There was significantly more evidence about the items stolen from the store than evidence regarding the store owner's handgun, apparently taken from the back room in which Issa was confined. Furthermore, there was no evidence that Issa ever exercised control of the store owner's handgun.

Finally, regarding the State's closing and rebuttal arguments, the State emphasized accomplice liability, the relationships among the five males and the other witnesses, and written communications that Murray sent from prison to his accomplices. The items taken were mentioned by the State, but were not a point of emphasis.

The evidence admitted during the course of this five-day jury trial placed a far greater emphasis on the items taken from the area around Talat – cash, liquor, and cigarettes – than the handgun taken from the area around Issa. Furthermore, there was no evidence that Issa ever exercised control of the store owner's handgun. Indeed, while Issa was able to observe that the back room was being searched, he was not aware that anything had been taken from that area.

Based upon our decision in Vanzandt and the record before us, we conclude that Murray has not demonstrated a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of Robbery may also have been used to establish all of the essential elements of Confinement. See Richardson, 717 N.E.2d at 53; and Spivey, 761 N.E.2d at 833. Therefore, Murray's convictions of Robbery and Confinement did not violate his rights under the double jeopardy clause in Indiana's Constitution.

III. Appropriateness of Sentence

Finally, Murray asserts that his forty-two-year aggregate sentence was inappropriate. As the State correctly notes, Murray's actual argument is that the trial court failed to explain why it was imposing consecutive sentences. As Murray states in the last two substantive sentences of his Appellant's Brief,

> Although the trial court identified the three (3) aggravating circumstances and indicated its sentencing considerations, it did not explain why the circumstances justified consecutive sentences as opposed to further enhanced concurrent sentences. As such, it is apparent that the trial court improperly sentenced Murray and that his sentence should be revised by this court under its authority to review and revise sentences.

Appellant's Brief at 17.

"The imposition of consecutive sentences is a separate and discrete decision from sentence enhancement, although both may be dependent upon the same aggravating circumstances." Mathews v. State, 849 N.E.2d 578, 589 (Ind. 2006) (citing Ajabu v. State, 722 N.E.2d 339, 343 (Ind. 2000)). "[B]efore a trial court can impose a consecutive sentence, it must articulate, explain, and evaluate the aggravating circumstances that support the sentence." Monroe v. State, 886 N.E.2d 578, 580 (Ind. 2008). Furthermore, "the question under Appellate Rule 7(B) is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate." King v. State, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

Here, the trial court found Murray's criminal history, his violation of parole, and Issa's youth as aggravating circumstances; it found no mitigating circumstances. It then

stated,

> The nature of the crime is among the most serious for an armed robbery, meaning that at least two of the individuals were armed. The crime was affected by everyone storming into the business. We all remember from the videotape that there were threats that were made, shouting, a lot of profanity-laced threats. Certainly, Mr. Haddad was terrified. He was screaming during it in fear.
>
> The juvenile was hit in the head with a deadly weapon before everyone exited the store. I mean, the only reason for that is just viciousness and cruelty. There was absolutely no reason for that.

Tr. at 31. Accordingly, we reject Murray's assertion that the trial court failed to explain its sentencing analysis.

Aside from noting the findings of aggravating and mitigating circumstances, Murray's brief says very little, if anything, about the nature of the crime or his character. Regardless of whether he waived review under Indiana Appellate Rule 7(B), we note that Murray armed himself with an AK-47, entered a liquor store with four others, and terrorized two victims in the process of robbing the store. He had three prior felony convictions – Robbery while Armed, Possession of Cocaine, and Robbery. Accordingly, we do not find that his sentence is inappropriate.[6]

Conclusion

The State did not commit prosecutorial misconduct. Murray's convictions of Robbery and Confinement did not violate Indiana's double jeopardy clause. Finally,

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[6] See Indiana Appellate Rule 7(B) (stating that this "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender").

Murray's sentence is not inappropriate.

Affirmed.

DARDEN, J., and ROBB, J., concur.