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IN THE
COURT OF APPEALS OF INDIANA

CURTIS F. SAMPLE, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0812-CR-585
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G01-0602-FA-10

August 14, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Curtis F. Sample, Jr. appeals his convictions for attempted murder, a class A felony,[1] and criminal confinement as a class B felony.[2] He also appeals his habitual offender adjudication.[3]

We affirm.

ISSUES

1. Whether the trial court abused its discretion in admitting evidence.

2. Whether the evidence was sufficient to support Sample's conviction for criminal confinement.

3. Whether Sample's convictions for attempted murder and criminal confinement constitute double jeopardy.

4. Whether the trial court abused its discretion in instructing the jury.

FACTS

In the summer of 2005, C.W. began taking care of her daughter's Gary apartment while her daughter worked in another state. By January of 2006, C.W. had vacated her own apartment and moved into her daughter's apartment. During that time, Sample, who was known to C.W. by his nickname, B.C., possessed a key to the apartment. C.W.'s daughter, who had been dating Sample, had given him the key before she moved.

Before moving into the apartment, C.W. had met Sample on several occasions while visiting her daughter. After moving into her daughter's apartment, C.W. twice encountered him. The first time, he let her into the apartment after she had locked herself

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[1] Ind. Code §§ 35-42-1-1; 35-41-5-1.
[2] I.C. § 35-42-3-3.
[3] I.C. § 35-50-2-8.

out. The second time, she came home and discovered him with a woman in one of the bedrooms. C.W. made Sample leave the apartment. Although she later asked her daughter and son to get the key back from Sample, he never returned it.

During the early morning of January 9, 2006, C.W. "was awakened by the presence of BC in the apartment." (Tr. 80). When asked what he was doing there, he replied that he needed somewhere to stay. C.W. informed him that he could not stay there and began following him down the hallway to the living room, "thinking he's going to go on out the door." (Tr. 80). He, however, turned and "back handed" her, cutting her face with his ring. (Tr. 80). He then pulled out a large pocket knife and ordered her to go in the living room and lie down on the floor. She did as she was ordered, lying near the front door. Sample then went into the kitchen and retrieved a butcher knife.

As Sample was examining the knife, running "his thumb and forefinger . . . up and down the blade as if to examine how sharp it was," C.W. fled the apartment. (Tr. 85). As she fled down a common hallway, C.W. "could feel the knife going in [her] back . . . ." (Tr. 85). She fell outside a neighbor's door and started screaming. After she fell, Sample "went to jab at [her] with the knife." (Tr. 86). C.W., however, grabbed the blade. As she was still holding onto the blade, Sample "pulled [her] hair back, took the knife, and went around [one] ear . . . and tried to go to the other side of [her] ear" with the knife. (Tr. 86). After the knife's blade broke, Sample began hitting C.W.'s head with his fist. He then pulled the pocket knife out of his pocket and began cutting her with it. During the attack, C.W. was screaming "and fighting with him[.]" (Tr. 86).

At approximately 1:30 a.m., Gary Police Officer Anthony Hawkins received a dispatch for "a rape and stabbing in progress." (Tr. 137). When he arrived at the main entrance to the apartment building, he "saw two people inside, one person ran towards the back, the other one was a black female. She was standing there, completely naked, covered in blood, huddled in the corner of the hallway." (Tr. 140). Officer Hawkins radioed to fellow officers that the suspect had fled toward the back of the building.

Officer Mark Davis observed Sample run out of the rear of the apartment building. He noticed that Sample's clothing "was heavily stained in blood, in what appeared to be blood." (Tr. 190). After a brief foot chase, Officer Davis cornered Sample in an alley and took him into custody. A search of Sample revealed "a folding knife . . . stained with blood" in his pocket. (Tr. 188).

Once officers took Sample into custody, Officer Hawkins went back to the apartment building and followed the route taken by Sample, "looking for anything that might have been dropped or thrown out" because he had seen Sample discarding items during the chase. (Tr. 146). Officer Hawkins discovered "parts to a knife" lying in "a large area of blood in the hallway . . . ." (Tr. 169).

Paramedics transported C.W. to the hospital, where she received several stitches to the wounds on her face, neck, chest, and hands. Subsequently, C.W. identified Sample from a photographic array.

On or about January 10, 2006, the State charged Sample with Count I, attempted murder, a class A felony; Count II, rape as a class A felony; Count III, rape as a class B felony; Count IV, criminal confinement as a class B felony; Count V, battery as a class C

felony; Count VI, criminal confinement as a class D felony; and Count VII, battery as a class A misdemeanor.[4] On April 18, 2008, the State filed an amended information against Sample, alleging him to be an habitual offender for having been convicted of class D felony criminal recklessness in 1993 and class B felony robbery in 1997.

The trial court commenced a five-day jury trial on September 15, 2008. In addition to the foregoing, C.W. also testified that after encountering Sample in her apartment's hallway, he ordered her to remove her gown and go back into the bedroom. C.W. testified that she complied because she "was afraid he was going to stick [her] with the knife" but kept asking why he would "do this" to her, a sixty-year old woman. (Tr. 109, 83). Sample only told her to "shut the fuck up." (Tr. 83).

C.W. testified that once in the bedroom, Sample pushed her onto her back on the bed and "stuck his penis inside" her vagina. (Tr. 88). He then made her "turn over and he proceeded to enter [her]" again. (Tr. 84). To get him to stop, C.W. told him that she needed to use the bathroom. Taking the knife with him, Sample followed her to the bathroom and "stood there" while she urinated. (Tr. 84). He then made C.W. take a shower because she was "bleeding profusely . . . ." (Tr. 84). After she was done showering, he ordered her into the living room.

On September 16, 2008, Sample filed a motion in limine, seeking to prohibit the State from "presenting any evidence or argument concerning the tape recording of 911

[4] We note that the charging information and probable cause affidavit provided in the appendix is from an unrelated case against Sample.

telephone calls made on January 9, 2006." (App. 55). The trial court denied Sample's motion. Over Sample's objection, the trial court admitted into evidence a compact disc containing recordings of the 911 telephone calls and "radio traffic" related to the present case. The jury, however, only heard four of those calls—also over Sample's objections. Those calls were between the 911 operator and unidentified persons.

During trial, Officer Hawkins described Sample as having braids at the time of his arrest. He identified Sample during the trial but stated that his hair style was different. Over Sample's objection, the trial court then admitted into evidence two photographs of Sample, depicting Sample as he appeared on January 9, 2006, soon after his arrest. These photographs also showed him in jail attire.

The trial court also admitted into evidence several photographs of Sample, depicting injuries, including scrapes or cuts to his shoulder, arm, chest, and back. Sample, however, objected to the admission of these photographs, arguing that the jury would be prejudiced by Sample's tattoos.

Rebecca Tobey, a forensic biologist in the Indiana State Police Laboratory's DNA Serology Unit, testified that both Sample and C.W. were the sources of DNA extracted from blood samples taken from the clothing Sample was wearing at the time of his arrest. She further testified that C.W. was the source of DNA extracted from blood samples taken from the folding knife discovered in Sample's pocket.

The jury found Sample guilty of Counts I and IV through VII. Thus, the jury found him not guilty of rape. The jury also found him to be an habitual offender. For

purposes of sentencing, the trial court merged Counts V and VII with Count I and merged Count VI with Count IV.

The trial court held a sentencing hearing on October 22, 2008, after which it sentenced Sample to fifty years on Count I, enhanced by thirty years for Sample's habitual offender status, and fifteen years on Count IV. The trial court ordered that the sentences be served consecutively. Thus, Sample received a total sentence of ninety-five years.

Additional facts will be provided as necessary.

DECISION

1. Admission of Evidence

Sample contends that the trial court erred with respect to two evidentiary issues. He asserts that the trial court improperly admitted tapes of 911 calls made during the attack on C.W. and improperly admitted photographs depicting his tattoos and jail attire.

> We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (citations omitted), *reh'g denied*.

a. *911 tapes*

Sample argues that the trial court abused its discretion in admitting tapes of the telephone calls made to and from 911. Specifically, he contends that the tapes were testimonial, and therefore, the admission of the tapes violated his "right to confront and cross-examine the witnesses under the Sixth Amendment to the federal constitution and his right 'to meet the witnesses face to face'" under the Indiana Constitution.[5] Sample's Br. at 11.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court ruled that in the case of testimonial evidence, the Sixth Amendment allows for its admission only where the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *See* 541 U.S. at 67. The Court, however, left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68.

Subsequently, in *Davis v. Washington*, 547 U.S. 813 (2006), the United States Supreme Court examined whether the 911 recordings of the victim's statements and responses to the 911 dispatcher's interrogation were testimonial and therefore subject to the requirements of the Sixth Amendment's Confrontation Clause. It explained testimonial and nontestimonial statements as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances

[5] Sample, however, failed to develop a cogent argument and provide citation to authority regarding the Indiana Constitution. Thus, he has waived this issue. *See Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002) (stating that a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*.

> objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

In finding the statements in *Davis* to be nontestimonial, the Supreme Court noted that the caller was "speaking about events as they were actually happening, rather than 'describ[ing] past events'"; the caller "was facing an ongoing emergency" and the call "was plainly a call for help against bona fide physical threat"; "the nature of what was asked and answered. . . was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past"; and the dispatcher's interrogation of the caller was informal, taking place over the telephone. *Id.* at 826 (quoting *Lilly v. Virginia*, 526 U.S. 116, 137 (1999)).

In this case, the caller in the first 911 call played for the jurors gives the address of the apartment building and reports that "a man is stabbing a woman in the hallway." (Ex. 144). In the second call, the caller requests an ambulance and verifies the location. Regarding C.W., the caller reports that "she's been raped" and stabbed. (Ex. 144). The caller reiterates that C.W. has been "raped and stabbed." (Ex. 144). She describes the man as "stabbing the shit out of her." (Ex. 144).

The third call is initiated by the 911 operator, informing the caller that the police are en route. The caller informs the operator that the back door to the apartment building is open and that C.W. is "right at [her] front door," near the back of the building. (Ex. 144). When asked by the 911 operator whether the caller got a description of the suspect, the caller replies that she did not; "all [she] knew it was a man . . . and she saw [C.W.,]"

who was "unclothed." (Ex. 144). The caller also states that she saw a knife when she opened her door, at which point she closed her door but could hear C.W. screaming for help. The caller reiterates that she got "no description at all" of the suspect or his clothing because "it happened so fast." (Ex. 144). She describes what she observed as follows: "I saw somebody around her neck. I thought they was playing until I seen the knife. The dude looked up and saw me and he kept going and he ran." (Ex. 144). The caller supposes that the suspect fled into the alley because the back door is open. During the fourth call, the caller identifies herself and reports that the ambulance has arrived.

Given the criteria outlined in *Davis*, we cannot agree that the 911 calls in this case were testimonial in nature. Here, the 911 calls were made either during or immediately after the attack on C.W. and were describing an ongoing emergency; notably, that C.W. was being or had just been stabbed; was suffering from potentially life-threatening injuries; and that her assailant had fled. Furthermore, the questions posed by the dispatcher clearly had the primary purpose of locating both the victim and her assailant, someone who possibly remained armed and posed a danger to the police and the public. *See Collins v. State*, 873 N.E.2d 149, 155 (Ind. Ct. App. 2007) (finding statements to 911 regarding past events to be nontestimonial where the statements served to establish whether the suspect posed a present danger), *trans. denied*. Finally, the conversations occurred during informal 911 calls, with excited members of the public providing information regarding the ongoing emergency over the telephone.[6]

[6] Although one of the callers stated that C.W. had been raped, the admission of this telephone call describing a past event constitutes harmless error, if any, as the jury acquitted Sample of rape.

The circumstances surrounding the statements made during the 911 calls in this case objectively indicate that the primary purpose was to enable police assistance to meet an ongoing emergency. Accordingly, the statements were not testimonial in nature. Thus, their admission did not violate Sample's Sixth Amendment rights.

b. *Photographs*

Sample next asserts that the trial court abused its discretion in admitting photographs depicting his tattoos and jail attire. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ind. Evidence Rule 401. "'Generally speaking, relevant evidence is admissible, and irrelevant evidence is inadmissible.'" *Southern v. State*, 878 N.E.2d 315, 321 (Ind. Ct. App. 2007) (quoting *Sandifur v. State*, 815 N.E.2d 1042, 1048 (Ind. Ct. App. 2004), *trans. denied*), *trans. denied*.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence.

Evid. R. 403. "The trial court has wide latitude in weighing these factors, and we review its decision only for an abuse of discretion." *Prewitt v. State*, 761 N.E.2d 862, 869 (Ind. Ct. App. 2002).

Regarding the photographs of Sample in jail attire, he argues that the evidence deprives him of the presumption of innocence. Specifically, he argues that the

photographs are equivalent to mug shots, the only purpose of which "was to unduly prejudice[] [him] in the eyes of the juror." Sample's Br. at 18.

> An individual accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of suspicion, indictment, continued custody, or other circumstances not offered as proof at trial. However, this does not mean that every practice tending to single out the accused from everyone else in the courtroom must be struck down.

Southern, 878 N.E.2d at 320 (internal citations omitted).

Here, the State entered the photographs into evidence to demonstrate a change in Sample's appearance from the time of his arrest to the time of trial. Officer Hawkins testified that the photographs showed Sample as he appeared on January 9, 2006. Cheryl Stanley, a crime scene investigator with the Gary Police Department, subsequently testified that she took the photographs of Sample "towards the evening" of January 9, 2006. (Tr. 271).

We do not find that the photographs unduly prejudiced Sample where the State elicited testimony that they were taken the day of Sample's arrest; the photographs preserved his image at the time of his arrest; and the State introduced the photographs to show that Sample's appearance had changed prior to trial. *See Kelley v. State*, 460 N.E.2d 137, 138 (Ind. 1984) (finding no prejudice in admitting a photograph of the defendant in jail where the photograph was taken to preserve his image; other direct evidence was offered to the effect he was in jail; and "[p]olice testimony indicated to the jury the purpose of the photograph and the circumstances under which it was taken").

We therefore find no abuse of discretion in admitting the photographs of Sample in jail attire.

Regarding the photographs depicting Sample's tattoos, he maintains that their prejudicial effect outweighs their probative value because they imply that he was involved in gang-related activities. The State, however, argues that the photographs are relevant because they show that Sample had visible injuries, corresponding with C.W.'s testimony that she had struggled and fought with her assailant.

As to Sample's assertion that the photographs unduly prejudiced him because his tattoos "allow[ed] the jury to infer his gang affiliation, or at least speculate about membership," we disagree. Sample's Br. at 19. Sample's tattoos include a portrait of a child, a cartoon character, the words "Kool Breeze," the name "Dequan," and the initials "GDN." (*See* Exs. 128, 132). Because we do not believe that the photographs clearly indicate gang-related activity, we do not find the minimal, if any, prejudice renders the photographs inadmissible in light of the probative value in admitting evidence that Sample had been involved in a physical altercation with his alleged victim.

Finally, even if the trial court improperly admitted the photographs, we conclude that any error in the admission of the evidence was harmless. "'The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Wertz v. State*, 771 N.E.2d 677, 684 (Ind. Ct. App. 2002) (quoting *Headlee v. State*, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997), *trans. denied*).

In this case, there was substantial evidence of Sample's guilt. C.W. testified that Sample brutally stabbed her. She further testified that she fought back. Witnesses testified that at the time of his arrest, Sample's clothes were covered in blood, and he was carrying a knife like the one described by C.W. Later tests revealed that the DNA in the blood on Sample's clothing and knife matched C.W.'s DNA. In light of this evidence, any error in admitting the photographs was harmless.

2. Sufficiency of the Evidence

Sample asserts that the evidence is insufficient to support his conviction for class B felony criminal confinement where the jury acquitted him of rape. Specifically, he contends that the State failed to prove criminal confinement because he "did not confine [C.W.] in the apartment because she did not testify to such or when she did testify about being confined, the jury did not believe it as shown by acquitting [him] on the rape charges." Sample's Br. at 27.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Pursuant to Indiana Code section 35-42-3-3,

> A person who knowingly or intentionally:
>
> (1) confines another person without the other person's consent; or
>
> (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;
>
> commits criminal confinement as a class D felony.

The offense is classified as a class B felony if it is committed while armed with a deadly weapon or "results in serious bodily injury to a person other than the confining or removing person[.]" I.C. § 35-42-3-3(b)(2)(B). To "confine" means "to substantially interfere with the liberty of a person." I.C. § 35-42-3-1. Furthermore, Indiana Code section 35-42-3-3 "does not require the State prove that a deadly weapon was <u>used</u> during the commission of the offense." *Mallard v. State*, 816 N.E.2d 53, 57 (Ind. Ct. App. 2004) (emphasis added), *trans. denied*. In this case, however, the State charged that Sample confined C.W. "while armed with a knife, a deadly weapon," a class B felony. (App. 37).

Here, C.W. testified that she first encountered Sample in the hallway of her apartment, where he pulled out a knife. She testified that, while holding the knife to her side, Sample ordered her to remove her gown and go into the bedroom. Taking the knife with him, he later confined her to the bathroom. At some point, and while he still had the knife, he also ordered her to go in the living room and lie down on the floor. Given the evidence, the jury could reasonably infer that Sample, while armed with a deadly weapon, substantially interfered with C.W.'s liberty without her consent. We therefore find the evidence sufficient to prove that Sample committed class B felony criminal confinement.

3. Double Jeopardy

Sample next asserts that his convictions for attempted murder and criminal confinement violate Indiana's prohibition against double jeopardy. Essentially, he argues that the jury could not have found him guilty of confining C.W. in her apartment since it did not find him guilty of rape; thus, it had to have found that he confined C.W. in the common hallway, where he stabbed C.W. He, however, asserts that the evidence shows that "there was no confinement beyond the force used to grab [C.W.] and cut her with the knife." Sample's Br. at 26.

Pursuant to Article 1, Section 14 of the Indiana Constitution, "[n]o person shall be put in jeopardy twice for the same offense."

> [T]wo offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause 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.

Lee v. State, 892 N.E.2d 1231, 1233 (Ind. 2008) (quoting *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 1234. "'The Indiana Double Jeopardy Clause is not violated when 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.'" *Lee*, 892 N.E.2d at 1234 (quoting *Spivey v. State*, 717 N.E.2d 831, 833 (Ind. 2002)).

> Application of this test requires the court to "identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury's perspective . . . ." In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel.

Id. (internal citations omitted).

Again, the State charged Sample with, and the jury convicted him of, class B felony criminal confinement and attempted murder. For the criminal confinement conviction, the State was required to establish that he, (1) while armed with a deadly weapon, (2) knowingly or intentionally (3) confined another person without the other person's consent, or (4) removed another person, by fraud, enticement, force, or threat of force, from one place to another. *See* I.C. § 35-42-3-3.

For the attempted murder conviction, the State was required to establish that he, (1) acting with the specific intent to kill, (2) engaged in conduct that constituted a substantial step toward the commission of (3) killing another person. *See* I.C. §§ 35-41-5-1; 35-42-1-1; *Jones v. State*, 868 N.E.2d 1205, 1210 (Ind. Ct. App. 2007), *trans. denied*. Specifically, the State charged that Sample "while acting with the intent to kill, did intentionally attempt to kill [C.W.] by stabbing and wounding her with a knife, a deadly weapon . . . ." (App. 37).

The evidence presented at trial shows that on January 9, 2006, Sample entered C.W.'s apartment while armed with a knife. He ordered C.W. to go into the living room and lie down. C.W. complied with Sample's order. Once his attention was diverted, she

opened the front door and escaped the apartment. Sample, however, caught up with her and began stabbing her.

These facts can properly support both convictions. The criminal confinement conviction is supported by an armed Sample ordering C.W. to go into the living room, lie down on the floor, and remain there. The attempted murder conviction is supported by Sample stabbing C.W. We therefore find no violation of Indiana's prohibition against double jeopardy.

4. Jury Instruction

Sample asserts that the trial court abused its discretion in instructing the jury during the trial's habitual offender phase that it must find him to be an habitual offender if the State proved certain facts beyond a reasonable doubt. He argues that by mandating the jury to find him to be an habitual offender, "the jury loses its unfettered right to determine the law and the facts" pursuant to Article 1, Section 19 of the Indiana Constitution. Sample's Br. at 23.

The pertinent instruction reads as follows:

> INSTRUCTION NO. 2
>
> The State may seek to have a person sentenced as an habitual offender for any felony by proving that the person has accumulated two (2) prior unrelated felony convictions.
>
> You may find the Defendant to be an habitual offender only if the State has proven each of the following facts beyond a reasonable doubt:
>
> * * *
>
> If the State failed to prove each of these facts beyond a reasonable doubt, you must find the defendant is not an habitual offender.

> If the State did prove each of these facts beyond a reasonable doubt, you must find the defendant is an habitual offender.

(App. 553) (emphasis added).

The trial court also instructed the jury during the habitual offender phase as follows:

> Under the constitution of Indiana, you are given the right to decide both the law and the facts of the case. In fulfilling this duty, you are to apply the law as you actually find it to be and you are not to disregard it for any reason. The final instructions you are now receiving are your best source in determining what the law is.

(App. 557).

> [T]he purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Instructing the jury is generally within the trial court's discretion and is reviewed only for an abuse of that discretion. Instructions are to be read together as a whole and we will not reverse for an instructional error unless the instructions, as a whole, mislead the jury. A defendant is entitled to a reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights. Finally, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.

Buckner v. State, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006).

Our legislature has authorized juries "to determine both habitual offender status and the law and the facts . . . independent of the State Constitution." *Walden v. State*, 895 N.E.2d 1182, 1185 (Ind. 2008) (discussing Indiana Code section 35-37-2-2(5), which provides that "[t]he judge shall inform the jury that they are the exclusive judges of all questions of fact, and that they have a right, also, to determine the law"). Thus, the trial

court must—at least—instruct the jury of its ability to determine the law and the facts.[7] *Id.* at 1186.

The trial court, however, is not obliged to offer an additional advisement that the jury has "the right to determine habitual offender status without strict reliance on the number of felony convictions the defendant has accrued" or that it may "disregard prior convictions in addition to informing [it] of its ability to determine the law and the facts," particularly where the trial court emphasizes in the jury instruction that the jury "'may'—not must—find the defendant a habitual offender if the State has proved two prior unrelated felony convictions." *Id.* This is so because the use of "may" reinforces the jury's discretion. *Id.* at 1186-87.

"However, an instruction which minimizes the jury's power of discretion in making a determination on habitual offender status does not necessarily amount to reversible error, if accompanied by another instruction informing the jury that it is the judge of the law and the facts." *Flake v. State*, 767 N.E.2d 1004, 1007 (Ind. Ct. App. 2002) (citing *Parker v. State*, 698 N.E.2d 737, 742 (Ind. 1998)). Such is the case where the jury is instructed of its right to determine both the law and the facts. *See id.* at 1008; *cf. Parker*, 698 N.E.2d at 742-43 (finding reversible error where the trial court instructed the jury that it "should" find the defendant to be an habitual offender because, although the trial court instructed the jury that it is the judge of the law and the facts, it only did so two weeks prior to the habitual offender phase).

[7] While the trial court need not refer to the Indiana Constitution in this instruction given the applicability of Indiana Code section 35-37-2-2(5), doing so does not prejudice the defendant. *See id.* at 1186 n.3.

In *Flake*, this Court found no reversible error where the trial court instructed the jury that "if it found the State had proved the predicate felonies, then it 'should' find defendant to be a habitual offender"; and the trial court also instructed the jury that "Under the Constitution of the State of Indiana the jury is given the right to determine both the law and the facts. The instructions of the Court are your best source in determining the law." *See id.* (emphasis added).

In this case, the trial court similarly instructed the jury. Given that the trial court expressly instructed the jury that it had "the right to decide both the law and the facts of the case," we cannot say the entire habitual offender jury charge prevented the jury from exercising its constitutional discretion. *See id.* Thus, we find no reversible error.[8]

Affirmed.

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

[8] Nonetheless, we encourage the use of "may" in lieu of "must" when instructing juries on determining habitual offender status in the future.