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ATTORNEY FOR APPELLANT:

KEVIN WILD
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN McLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RICHARD PEREZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0812-CR-1108
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 5
The Honorable Grant W. Hawkins, Judge
The Honorable Mark Jones, Judge Pro Tempore
Cause No. 49G05-0805-FB-120299

August 20, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Richard Perez (Perez), appeals his conviction for Count I, burglary, a Class B felony, Ind. Code § 35-43-2-1; Count II, robbery, a Class B felony, I.C. § 35-42-5-1; and Count III, criminal confinement, a Class B felony, I.C. § 35-42-3-3.

We affirm.

ISSUES

Perez raises two issues on appeal, which we restate as follows:

(1). Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he committed burglary and robbery; and

(2) Whether his conviction and sentence for burglary and robbery violate Indiana Constitution's prohibition against double jeopardy.

FACTS AND PROCEDURAL HISTORY

In the evening of May 18, 2008, Eduardo DeLeon Calderon (Calderon) was in his Marion County, Indiana, apartment that he shared with his two roommates, Daniel Vargas (Vargas) and Saul Munoz Mendez (Mendez). Calderon was watching television, while Vargas and Mendez were in their respective bedrooms. Hearing a knock on the front door, he went to the door and began to open it. However, the door was forced open and two men entered the apartment. Calderon recognized one of them as Perez. Perez and Calderon had been employed by the same employer and knew each other socially. Besides noting that he was a black male, Calderon did not recognize the other male who has his face covered by a mask and hood.

The black male pointed a handgun at Calderon while Perez demanded to know where his money was. Fearing that he would be shot, Calderon told Perez that the money was in his bedroom. Perez walked down the hall, looked in Calderon's bedroom but found only a little money. Perez also entered Vargas' bedroom. Vargas, who had been asleep, woke up and recognized Perez. Perez indicated that everything was fine for Vargas but that he "had more problems with [Calderon]." (Transcript p. 36). Perez assured Vargas that nothing would happen to him. Vargas followed Perez into the living room where he noticed Calderon being held at gunpoint. Vargas managed to leave the room and escape from the apartment through a window.

Mendez was in his bedroom, with the door locked. While looking out the window, he saw the black male outside at the front door. He tried to call out to Calderon not to open the front door but his warning came too late. After hearing the commotion in the apartment, Mendez called the police. At some point, Perez and the black male left the apartment with the money Perez had taken out of Calderon's bedroom.

On May 20, 2008, the State filed an Information, which was amended on July 22, 2008, charging Perez with Count I, burglary, a Class B felony, I.C. § 35-43-2-1; Count II, robbery, a Class B felony, I.C. § 35-42-5-1; and Count III, criminal confinement, a Class B felony, I.C. § 35-42-3-3. On October 30, 2008, a bench trial was held. At the close of the evidence, the trial court found Perez guilty as charged. On November 21, 2008, at the sentencing hearing, the trial court sentenced Perez to twelve years on each of the three Counts, with three years suspended from each Count and two years probation and with the

sentences to run concurrently. This sentence was to run consecutive to a current sentence Perez was serving for a probation violation.

Perez now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Perez contends that the State failed to present sufficient evidence to sustain his convictions for burglary and robbery. He does not contest the sufficiency of the evidence on his criminal confinement conviction. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A conviction may be based on circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

A person commits burglary, a Class B felony, when he "breaks and enters the building or structure of another person, with intent to commit a felony in it . . . while armed with a deadly weapon." I.C. §35-43-2-1. A person commits robbery, a Class B felony, when he knowingly or intentionally takes property from another person while armed with a deadly weapon by (1) using or threatening the use of force on any person or (2) by putting any person in fear.

In contesting the sufficiency of the evidence of these two convictions, Perez claims that "[i]n finding the State's witnesses credible and [Perez] not credible, the trial court defied all sense of reason and common sense." (Appellant's Br. p. 12). Thus, in essence, Perez' claim amounts to a request to reweigh the witnesses' credibility. We will not do this.

II. *Double Jeopardy*

Next, Perez contends that the trial court violated the prohibition against double jeopardy, as provided in Article I, Section 14 of the Indiana Constitution, by entering conviction and sentence for both burglary and robbery. Article I, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our supreme court developed a two-part test for Indiana double jeopardy claims, holding that

> two or more offenses are the same offense in violation of Article I, Section 14 of the Indiana Constitution, 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 established the essential elements of another challenged offense.

Perez does not contend that his convictions and sentences violate the actual elements test, only that they violate the actual evidence test. 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. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002) explained further that

> The test is *not* merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or several, but not all, of the essential elements of a second offense.

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." *Id*. at 832. 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*.

Perez was convicted of burglary and robbery as Class B felonies. For the burglary conviction, the State was required to establish that Perez, (1) knowingly or intentionally, (2) broke and entered a building, (3) with the intent to commit a felony, and (4) while armed with a deadly weapon. I.C. § 35-43-2-1. For robbery, the State needed to establish that Perez, (1) knowingly or intentionally, (2) while armed with a deadly weapon, (3) took property from Calderon, (4) by putting Calderon in fear or by using or threatening the use of force on Calderon. I.C. § 35-42-5-1.

With regard to the commission of an underlying felony, required for a burglary conviction, our supreme court clarified

> The criminal transgression addressed by the proscription of burglary is the breaking into and entering of a building or structure of another person with the intent to commit a felony. Thus, the criminal transgression of burglary is committed by a person intending to commit an underlying felony at the moment the building or structure is broken into and entered. The person's culpability is established at the point of entry regardless of whether the

> underlying intended felony is ever completed. Indeed, a person who breaks and enters without any intent to commit an underlying felony is not guilty of burglary. Because burglary and the underlying intended felony (if committed) are separate criminal transgressions, *Richardson* does not prohibit conviction and sentencing for both.

Swaynie v. State, 762 N.E.2d 112, 114 (Ind. 2002).

Here, the trial court was presented with distinct facts supporting both convictions. The court clearly used evidence, not used to prove the burglary offense, to establish that Perez took money from Calderon after putting Calderon in fear of his life. As such, we do not conclude that the trial court violated the double jeopardy prohibition by convicting and sentencing him for both burglary and robbery.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Perez committed burglary and robbery; and his conviction and sentence for burglary and robbery does not violate the Indiana Constitution's prohibition against double jeopardy.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.