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FILED
Dec 13 2011, 9:11 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

NICHOLAS RYAN,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A02-1103-CR-230
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-1004-FB-032149

December 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Following a bench trial, Nicholas Ryan appeals his eight convictions of robbery and nine convictions of criminal confinement, all Class B felonies, and sentence thereon. He raises two issues for our review: whether his convictions violate the prohibition of double jeopardy in the Indiana Constitution, and whether his thirteen-year aggregate sentence is inappropriate in light of the nature of his offenses and character. We conclude that five of his convictions of criminal confinement violate principles of double jeopardy, and therefore reverse those convictions but affirm all others. We also conclude that his sentence is not inappropriate but remand this case to the trial court to amend its sentencing order and abstract of judgment in accordance with the pertinent statute.

Facts and Procedural History

On April 20, 2010, at around 11:30 p.m., two men wearing bandannas over their faces entered the home of Matthew Walbert and his fiancée, Natasha Weaver. Walbert and Weaver were in the living room and several of their friends were also in the home. Kaylei Coss was in the kitchen; Josh Whitaker, Dustin Chandler, and Ben McCullough were in the garage; and Billy Brown II, Matthew Cherry, Jordon Pritchett, Hayley Loudman, and Loudman's three-month-old son were in a bedroom. These lawful occupants included ten adults and one infant.

One of the two intruders held a baseball bat while the other pointed a handgun in Walbert's face and told him and Weaver "to sit down and be quiet and don't move." Transcript at 59. The intruders ordered Weaver to stay in the living room and ordered Walbert to gather valuables from the home. Ryan and a fourth intruder entered the home

from a back door, both with their faces partially covered as well. Ryan lifted his shirt to display a gun to Walbert, and ordered Walbert back to the living room.

One intruder placed a bat to Coss's back and told her to go and "sit in the f-ing living room." Id. at 94. An intruder placed a gun to Brown's back, told him that he had "fucked up," and ordered him to go to the living room. Id. at 84. Pritchett and Cherry were also ordered to go to the living room. One of the four intruders holding a handgun entered the garage and ordered Whitaker, Chandler, and McCullough to empty their pockets and go to the kitchen, and then to the living room.

One intruder held the victims captive in the living room with a handgun while the other three gathered valuables throughout the home. This included Brown's cellular phone and laptop computer; Weaver's cellular phone; Walbert's iPod music player and cash; Weaver's and Walbert's shared television, laptop computer, cash, and video game system; McCullough's cellular phone and cash; Whitaker's cellular phone, wallet, and its contents; Chandler's cash; Pritchett's cellular phone and a compact disc; and Cherry's laptop.

Walbert and Weaver recognized Ryan because Ryan formerly dated one of Weaver's close friends, and in the past fought with Walbert. Detectives found at least some of the stolen items in Ryan's home, and the State charged Ryan with eight counts of robbery and nine counts of criminal confinement, all Class B felonies.[1] Following a bench trial, the trial court found Ryan guilty and entered a judgment of conviction as to

[1] We note that of the ten adult victims and one infant victim in the home, Ryan was convicted of both robbery and criminal confinement as to each except for Coss, Loudman, and Loudman's infant. Ryan was convicted of criminal confinement of Coss, but not robbery. The State did not charge Ryan with any offense as to Loudman or her infant. The record indicates that Loudman and her infant were present during the incident, but left before officers arrived in response to the 911 call.

all counts. Following a sentencing hearing, the trial court found as a mitigating factor that Ryan had no criminal history, and found as an aggravating factor that a three-month-old baby was present during the heist. The trial court sentenced Ryan to eight years for each of the eight counts of robbery to be served concurrent with one another and consecutive to nine concurrent terms of five years for each count of criminal confinement. This is an aggregate thirteen-year sentence. The trial court suspended all five years for the criminal confinement offenses, and ordered the last two years of his executed sentence to be served through community corrections work release. Ryan now appeals. Additional facts will be supplied as appropriate.

Discussion and Decision

I. Double Jeopardy

Ryan appeals his convictions based on the double jeopardy clause of the Indiana Constitution and explicitly omits a challenge based on the United States Constitution. Our supreme court has explained 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 establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (footnote omitted). Ryan appeals pursuant to the actual evidence test and expressly omits a challenge based on the statutory elements of the offenses.

> 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 (footnote omitted).

"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." Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). A "'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. The Double Jeopardy Clause is not violated if the possibility of the jury latching on to the same facts for both convictions is "speculative or remote." Spivey v. State, 761 N.E.2d 831, 834 n.6 (Ind. 2002). Where a trial court made no finding regarding a serious evidentiary dispute, we review double jeopardy challenges de novo. Spears v. State, 735 N.E.2d 1161, 1166 (Ind. 2000).

As an accomplice to his confederates, Ryan is liable for all their actions which were probable and natural consequences of a common plan. Hauk v. State, 729 N.E.2d 994, 998 (Ind. 2000). To convict Ryan of each count of robbery as a Class B felony, the State was required to prove beyond a reasonable doubt that Ryan or his confederates knowingly or intentionally took property from another person or from the presence of another person by using or threatening the use of force on any person or by putting a person in fear, and did so while armed with a deadly weapon or resulting in bodily injury to any person other than himself. See Ind. Code § 35-42-5-1. To convict Ryan of each count of criminal confinement as a Class B felony, the State was required to prove beyond a reasonable doubt that Ryan or his confederates knowingly or intentionally confined another person without the other person's consent or removed another person by

force or threat of force from one place to another while armed with a deadly weapon. See Ind. Code § 35-42-3-3.

Double jeopardy principles do not prohibit convictions of robbery and criminal confinement when the actual evidence indicates that the confinement or force employed was more extensive than that necessary to commit the robbery. See Brown v. State, 671 N.E.2d 401, 410 (Ind. 1996) (regarding confinement beyond that necessary for robbery); Merriweather v. State, 778 N.E.2d 449, 456 (Ind. Ct. App. 2002) (regarding force beyond that necessary for robbery). Ryan was convicted of both robbery and criminal confinement as to Walbert, Weaver, Brown, Cherry, McCullough, Whitaker, Chandler, and Pritchett.[2]

Here, the victims were herded into one room of the house. McCullough, Whitaker, and Chandler were in the garage when they the intruders approached them and ordered them to turn over their personal property. McCullough turned over his cellular phone, Whitaker turned over his wallet and cellular phone, and Chandler turned over thirty dollars from his wallet. This completed the robbery. The intruders then ordered these three to go through the house to the living room, where they remained with the other occupants. This constitutes confinement beyond that necessary to commit the robbery.

All other victims had their property taken from their person or elsewhere in the house after they arrived at and were waiting in the living room. This sequence of events does not include any force or confinement beyond that necessary to conduct the robbery. Perhaps the State could have presented evidence of separate and distinct facts that would

[2] See supra, note 1.

have indicated force or confinement beyond that necessary to commit the robbery. But the State failed to do so. In our review of the actual evidence presented, there is a reasonable possibility that the evidentiary facts used by the trial court to establish the elements of robbery were also used to establish the elements of criminal confinement. Accordingly, we reverse Ryan's convictions of criminal confinement of Walbert, Weaver, Brown, Cherry, and Pritchett. We affirm his eight convictions of robbery and convictions for criminal confinement of McCullough, Whitaker, and Chandler, and the conviction for criminal confinement of Coss.

II. Inappropriate Sentence

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. Nevertheless, the defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

For each Class B felony conviction, one may be imprisoned for six to twenty years, and the advisory sentence is ten years. Ind. Code § 35-50-2-5. For his eight robbery convictions, Ryan was ordered to serve eight concurrent terms of eight years, which is slightly more than the minimum and below the advisory sentence. For his nine

criminal confinement convictions, Ryan was ordered to serve nine suspended five-year terms, concurrent with each other and consecutive to his eight-year term for his robberies. This is less than the minimum sentence. In all, Ryan was ordered to serve a thirteen-year sentence, of which the trial court suspended the last five years and ordered that the last two years executed be with a community corrections work release program. Our reversal of five of Ryan's convictions on double jeopardy grounds, as explained above, does not affect his sentence, so we address his appellate argument that his sentence is inappropriate in light of the nature of his offenses and his character.

As a preliminary matter, we note that the trial court ordered Ryan to serve five years for each count (which we reduced to four counts) of criminal confinement. Five years for this Class B felony is less than the minimum of six years. Ind. Code § 35-50-2-5. It appears that while the trial court intended to order Ryan serve the minimum for this offense, it sentenced him to less than the required minimum. Accordingly, we remand this to the trial court to correct its order for the remaining convictions of criminal confinement.

Next, we address whether Ryan's aggregate sentence is inappropriate taking into consideration the aforesaid error. Ryan was convicted of robbing eight people and confining three of those and a ninth person. He was not charged, but the evidence shows that he also at least confined a tenth adult and her infant. The dangerous nature with which Ryan and his compatriots carried out this offense, especially with respect to the infant, does not make his sentence – which is less than the advisory for both robbery and criminal confinement – inappropriate.

Ryan's character is certainly not as deplorable as this offense may otherwise suggest, but his character does not lead us to the conclusion that his aggregate sentence is inappropriate. Ryan began drinking alcohol before he became of legal age, and has been using marijuana consistently for seven years without an attempt at drug treatment. For this reason, his lack of a criminal record is relatively insignificant because he has been consistently violating state drug laws.

As to Ryan's argument that he deserves an alternative to prison for a greater proportion of his sentence, we note our reluctance to conclude that the placement of a defendant's sentences is inappropriate:

> As a practical matter, trial courts know the feasibility of alternative placements in particular counties or communities. For example, a trial court is aware of the availability, costs, and entrance requirements of community corrections placements in a specific locale. Additionally, 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.

Fonner v. State, 876 N.E.2d 340, 343-44 (Ind. Ct. App. 2007) (emphasis in original).

For this reason, regardless of whether Ryan's placement elsewhere might be more appropriate, we defer to the trial court's decision not to provide Ryan with a complete alternative to prison because, as discussed above, his aggregate sentence is not inappropriate in light of the nature of his offenses and character.

Conclusion

There is a reasonable possibility that the evidentiary facts used by the trial court to establish the elements of eight counts of robbery were also used to establish the elements of five counts of criminal confinement. We reverse Ryan's convictions of criminal confinement of Walbert, Weaver, Brown, Cherry, and Pritchett. We affirm his eight

robbery convictions and conviction for criminal confinement of Coss, McCullough, Whitaker, and Chandler. Ryan's aggregate sentence is not inappropriate in light of the nature of his offenses and character. We instruct the trial court to amend its sentencing order and abstract of judgment, and further direct the trial court to clearly state if those six years are to be suspended.

Affirmed in part, reversed in part, and remanded with instructions.

BARNES, J., and BRADFORD, J., concur.