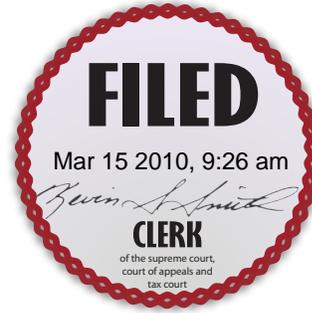


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MARK SMALL
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

STEPHEN TESMER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MARCUS CRUMBLE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 49A02-0909-CR-858

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0806-FB-155813

March 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Marcus Crumble appeals his convictions for Class B felony Robbery¹ and Class C felony Battery,² and the finding that he is a Habitual Offender.³ Upon appeal Crumble challenges the sufficiency of the evidence to support his convictions. Crumble additionally claims that his convictions violate double jeopardy principles, and that certain comments by the trial court during the habitual offender phase constituted reversible error with respect to that finding. We affirm.

FACTS AND PROCEDURAL HISTORY

Ralph Gonzales⁴ owns rental properties at 5811 and 5821 West 25th Street in Speedway. These properties are apartment buildings located immediately behind the Speedway Shopping Center. On the evening of May 16, 2008, Gonzales was mowing the grass on these properties when he felt someone grab him from behind. Gonzales's assailant, who had a very strong grip, pulled Gonzales away from the lawnmower and back approximately ten to fifteen feet. Shortly thereafter, the assailant stabbed Gonzales in his arm, hand, and head, causing him to feel sharp pains. Gonzales turned to face his assailant, but the assailant pulled Gonzales to the ground, preventing Gonzales from looking at his face. Gonzales continually tried to break free from the assailant's grasp, calling for help the whole time. The assailant told Gonzales to "shut the f*** up," and maintained his grip, pulling Gonzales to the ground twice. Tr. p. 157. By this time

¹ Ind. Code § 35-42-5-1 (2007).

² Ind. Code § 35-42-2-1 (2007).

³ Ind. Code § 35-50-2-8 (2007).

⁴ Mr. Gonzales is also known by the name Mike Commonly.

Gonzales, whose sleeve was soaked with blood, and who saw blood on his pants and shoe, knew he was bleeding profusely. Gonzales asked his assailant what he wanted, and the assailant said the word “money.” Gonzales took his wallet out of his back pocket, took approximately eighty dollars out of the wallet, and handed it to the assailant. The assailant, who asked, “[I]s that all you got?”, let go of his grip on Gonzales and took the money. Gonzales ran approximately twenty to thirty feet up a nearby hill. At that point, Gonzales turned to look at the assailant, who he saw was holding garden shears with an approximately eight-inch blade. Gonzales described his assailant to be a young male African-American of medium build who had an afro hairstyle that was approximately “an inch thick.” Tr. p. 160. The assailant had a white “smudge mark” on the right side of his nose.

Jennifer Adams, who at the time of the attack was looking for boxes in the dumpsters behind the Speedway Shopping Center, witnessed the above events with her mother and younger sister. Adams observed that Gonzales’s attacker was an African-American male with a skinny, “kind of tall” build, and a small afro. Tr. p. 201. Both Adams and her little sister observed “something white” on or in the attacker’s nose. Tr. p. 201. Adams estimated that the attacker was in his 30s. Adams’s mother, Cheryl Alka, similarly saw an African-American male with a small afro and a regular build attack Gonzales.

Gonzales saw his assailant walk toward the back of the Speedway Shopping Center. Gonzales returned to his apartment building and asked a tenant to call 911. Officer Kyle Hodges of the Speedway Police Department arrived minutes later, and

Gonzales gave him a description of the assailant. Officer Hodges rendered Gonzales emergency aid until an ambulance arrived. Officer Hodges then spoke to Adams, her sister, and Alka, who described the incident and the attacker. Adams reported seeing something white in the attacker's nose.

Gonzales was transported to a hospital where he received treatment for lacerations to his head, neck, hand, and forearm. The laceration to Gonzales's forearm required stitches. Gonzales later discovered that he had also sustained significant bruising to his arm. The bruising lasted approximately a month.

Officer Hodges's investigation of the site of the attack yielded items including a hair comb, a watch, a rolled-up band-aid, and pocket change, all located within approximately five feet of the lawnmower and inches from one another. The watch was broken, with the wristband torn from the pin attaching it to the watch face. Gonzales claimed that he had been carrying a hair comb and change in his pocket, all of which he lost during the attack. Gonzales denied that he was wearing band-aids—or lost one—at the time of the attack, and he indicated that the watch found at the scene was not his.

Speedway Police Officer Mirantha Wilson subsequently presented Gonzales with a series of photographic arrays so that Gonzales could identify certain characteristics consistent with those of his assailant. On May 29, 2008, Gonzales identified one of the persons pictured in the photo array as someone with features similar to his assailant's. According to Gonzales, the person pictured shared sixty to seventy percent of his assailant's characteristics. The person pictured was not Crumble.

On June 6, 2008, Officer Robert Dine of the Speedway Police Department came into contact with Crumble and noticed that he had a white object or substance in one of his nostrils. Officer Dine reported this information to Officer Wilson upon hearing that the instant case involved a suspect with a white object or substance in his nose.

On June 12, 2008, Officer Wilson presented Gonzales with a photographic array which included a picture of Crumble. Gonzales identified Crumble on the basis that Crumble's characteristics were ninety percent similar to those of Gonzales's assailant. Gonzales indicated that he was not positive or "100 percent sure" that the person he selected in either array was his assailant. Tr. p. 176.

Subsequent DNA testing of the band-aid matched Crumble's profile to a reasonable degree of scientific certainty. DNA testing of the watch yielded a partial profile which was consistent with Crumble's profile such that there was only a 1 in 92,000 probability that the DNA belonged to a different African-American individual.

On June 26, 2008, the State charged Crumble with Class B felony robbery. In a July 18, 2008 amended information, the State additionally charged Crumble with Class C felony battery. On August 19, 2008, the State alleged Crumble to be a habitual offender based upon his two alleged prior felony convictions.

The matter was tried to a jury on July 27-28, 2009, and the jury found Crumble guilty of both the robbery and battery counts. During closing argument in the habitual offender phase of the trial, defense counsel stated as follows:

You all know what the habitual offender enhancement means, what the consequences of that finding are for this man. If you're going to drop that

finding on anyone, you need to be convinced beyond a reasonable doubt that this is the man who had both of those convictions

Tr. p. 506. Following defense counsel's argument, the trial court stated as follows, over defense counsel's objection.

Ladies and gentlemen, traditionally there's not, traditionally in the habitual portion of a trial the State doesn't have the last word, but the attorneys are worried that a comment [defense counsel] made might mislead you. I don't think it will but let me make it clear that a finding that Mr. Crumble is an habitual offender does not result in his going to prison for life. This is not one of those California three shoplift strikes and you're in jail forever states. Having said that, I'm not going to tell you what the consequence is but it's not as dire as some of you might worry, or as [the prosecutor] was worried.

Tr. p. 510.

The jury subsequently found Crumble to be a habitual offender based upon his 1997 conviction for auto theft and his 2002 conviction for carjacking. During an August 12, 2009 sentencing hearing, the trial court sentenced Crumble to concurrent sentences of twenty years for his robbery conviction and eight years for his battery conviction, enhanced by twenty years due to his habitual offender status, for an aggregate sentence of forty years in the Department of Correction. This appeal follows.

I. Sufficiency of the Evidence

Crumble first challenges the sufficiency of the evidence to establish that he was the perpetrator of the attack on Gonzales. In making this argument, Crumble highlights the fact that no eyewitness identified him with certainty and suggests that the DNA and white nose substance evidence were inadequate to prove his identity beyond a reasonable doubt.

In evaluating the sufficiency of the evidence to support Crumble's convictions, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

Crumble was convicted of Class B felony robbery and Class C felony battery. Pursuant to Indiana Code section 35-42-5-1, which defines Class B felony robbery, Crumble was charged with knowingly, while armed with a deadly weapon, taking cash from Gonzales's person or presence by putting Gonzales in fear or by using or threatening the use of force. Pursuant to Indiana Code section 35-42-2-1, which defines Class C felony battery, Crumble was charged with knowingly touching Gonzales in a rude, insolent, or angry manner by stabbing at Gonzales with a deadly weapon. Crumble's only challenge to the above elements is to the sufficiency of the evidence identifying him as the perpetrator.

It is true that neither the victim nor the eyewitnesses identified Crumble with certainty as the perpetrator. But this was not the only evidence. Most significantly, a band-aid matching Crumble's DNA was found among the items left at the scene of the

attack, feet from Gonzales's lawnmower and inches from his comb and change. The jury was within its fact-finding discretion to conclude from the proximity of the band-aid to Gonzales's possessions and the lengthy, physical nature of the attack, that the band-aid had been dropped during that attack by either Gonzales or his assailant, the only two persons at the scene, rather than by a random trespasser walking to or from the shopping center. Gonzales denied having worn a band-aid, and the band-aid matched Crumble's DNA, supporting the reasonable inference that Crumble was Gonzales's assailant. In addition, a watch also found among those items was consistent, to a high probability, with Crumble's DNA. Further, Gonzales's assailant was described by both Gonzales and an eyewitness as having a unique white substance or object on or in his nose, and Crumble was later seen by Officer Dine to have this similarly unique white identifier on or in his nose. The presence of the band-aid among other items dropped during the attack, suggesting that its owner was Gonzales's attacker; the DNA evidence in the band-aid, demonstrating Crumble was its owner; and the unique "white substance" identifier viewed on both the perpetrator's and Crumble's nose is adequate to support the fact-finder's conclusion that Crumble was the perpetrator of Gonzales's attack. Accordingly, we decline Crumble's challenge to the sufficiency of the evidence to support both his robbery and battery convictions on the grounds that it did not establish him as the perpetrator.

II. Double Jeopardy

A. Actual Evidence Test

Article I, Section 14 of the Indiana Constitution provides that “No person shall be put in jeopardy twice for the same offense.” In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), the 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 establish the essential elements of another challenged offense.

(Emphasis in original). In articulating the “actual evidence test” as a method for evaluating double jeopardy claims, the *Richardson* court explained as follows:

Under this inquiry, 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. Significantly, “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 even several, but not all, of the essential elements of a second offense.” *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002).

Crumble alleges that his robbery and battery convictions violate double jeopardy because they both alleged that he used the same instrument of force, namely a knife.⁵ The mere fact that two convictions share a single element or fact does not constitute a double jeopardy violation. To constitute a double jeopardy violation, the convictions must share *all* of the same facts or elements. *See id.*; *Richardson*, 717 N.E.2d at 49. Here, they share neither. The crime of robbery requires the element of taking another person's property; the crime of battery contains no such element. The evidence establishing Crumble's robbery conviction included the fact that Crumble took Gonzales's cash. The fact that Crumble took Gonzales's cash was not necessary to establish the touching element of Crumble's battery conviction. Instead, the State relied upon Crumble's act of stabbing Gonzales to establish this touching. In addition, to the extent the "use of force" element of robbery may also have been established by Crumble's stabbing Gonzales, there were multiple stabbings, including wounds to Gonzales's head and forearm, any one of which could satisfy the "use of force" element of robbery, and any other of which could establish the touching element of battery. Given that Crumble's convictions for robbery and battery shared neither the same elements nor the same evidence, we find no double jeopardy violation.

⁵ There is no dispute that the garden shears constituted the "knife" alleged in the charging information.

III. Habitual Offender Finding

Crumble's final challenge upon appeal is to the trial court's comments to the jury during the habitual offender phase that a habitual offender finding did not result in a life sentence.

Punishment is not an element of the crime charged, and when punishment is not to be imposed by the jury, it is not a matter to be placed before the jury for its consideration. *See Lainhart v. State*, 916 N.E.2d 924, 934 (Ind. Ct. App. 2009). Indeed, the Indiana Supreme Court, in addressing this matter, has explained as follows:

A jury must determine beyond a reasonable doubt, from the evidence presented, whether an accused did those specific acts which constituted the crime with which he was charged. In performing this Guilt assessing task, the jury must be oblivious to the legislature's punishment scheme. To hold otherwise, we would be condoning verdicts in which the jury might compromise, to the defendant's benefit or detriment, in order to reach a certain number of years of imprisonment.

Id. (quoting *Debose v. State*, 270 Ind. 675, 676, 389 N.E.2d 272, 273-74 (Ind. 1979)).

In light of this precedent, the State points to defense counsel's comments insinuating that the defendant faced a serious punishment and argues that any error in the trial court's comments regarding Crumble's punishment constituted invited error. It is true that defense counsel raised the issue of the defendant's punishment, and the trial court's comments were simply an effort to ameliorate any detrimental effect of those comments.

In any event, we cannot say that the trial court's comments constituted error, much less reversible error. Significantly, in *Coy v. State*, 720 N.E.2d 370, 374 (Ind. 1999), the Supreme Court concluded that the issue of life imprisonment was a special matter

comparable to the death penalty, and merely informing potential jurors that a defendant would not receive a sentence of life in prison—in the absence of a showing of prejudice—did not constitute error. *See id.* In reaching this conclusion, the Supreme Court observed that the prosecutor—who had informed the jury that the defendant was not subject to the death penalty or life imprisonment—had not outlined the range of penalties for each of the offenses the defendant faced. *Id.* In the *Coy* court’s view, this lessened the danger that the jurors would compromise on a verdict. *Id.* In addition, the Supreme Court considered it beneficial to alleviate juror concerns about imposing one of the two harshest penalties available in Indiana. *Id.* Lastly, the Supreme Court found the remarks had no prejudicial effect because defense counsel was permitted to emphasize the seriousness of the penalty and because the court instructed the jury that the judge had the sole responsibility for assessing the defendant’s penalty within a range of possibilities. *Id.*

Here, like in *Coy*, the jurors were merely informed that the defendant would not face life in prison. There was a single charge at issue, namely the habitual offender charge, and the jurors were given no information regarding the potential range of this sentence. As in *Coy*, this would have reduced the risk of a compromise verdict. Further, the court’s purpose in instructing the jury was merely to alleviate potential concerns that jurors would be asked to impose one of the two harshest penalties in Indiana, which the *Coy* court considered to be a beneficial purpose. To the extent that this case differs from *Coy* on the grounds that the trial court, rather than the prosecutor, made the comments, *Crumble* is unable to establish prejudice. Apart from informing the jury that the

defendant did not face life in prison, the trial court's comments did not nullify defense counsel's suggestion to the jury that a habitual offender finding had serious consequences. Accordingly, Crumble is unable to establish prejudice.

While we would caution the trial court that any comments regarding a defendant's punishment are risky, we are unable under the instant circumstances to conclude that the comments at issue were either erroneous or prejudicial. Accordingly, we conclude Crumble's claim on this point warrants no relief.

Having concluded that there was sufficient evidence to support Crumble's convictions, that they do not violate double jeopardy principles, and that the trial court's comments during the habitual offender phase of the trial did not compromise the habitual offender finding, we affirm Crumble's robbery and battery convictions and the finding that he is a habitual offender.

The judgment of the trial court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.