ATTORNEY FOR APPELLANT:

**TAFFANEE L. KEYS**
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**RICHARD C. WEBSTER**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| JAVON CUSHENBERRY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0608-CR-463 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0509-FA-168888

**August 3, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Javon Cushenberry appeals his convictions and sentence for Class C felony attempted battery, Class C felony intimidation, two counts of Class D felony criminal recklessness, and Class A misdemeanor carrying a handgun without a license. We affirm in part, reverse in part, and remand.

## Issues

Cushenberry raises five issues, which we combine, reorder, and restate as:

I. whether there is sufficient evidence to support his convictions for one of the criminal recklessness counts, intimidation, and carrying a handgun without a license;

II. whether double jeopardy concerns preclude him from being convicted of both attempted battery and the second criminal recklessness count; and

III. whether he was properly sentenced.

## Facts

On September 21, 2005, Annie Dancy drove her niece, Claudette Sanders-Brown, to her apartment in the Colonial Square complex in Indianapolis so she could pick up some items and spend the night with Dancy. Accompanying Dancy and Sanders-Brown were Dancy's two daughters, Bianca and Briana, her infant granddaughter, and her ex-husband, Michael Wilson, Sr. Dancy's son, Michael Wilson, Jr., was accused of having recently murdered Demetrius Nance, who had several friends who either lived or gathered at the Colonial Square apartment complex. When Dancy arrived at the

complex, several persons were congregated outside on the steps of Sanders-Brown's apartment building and the unit next door.

Bianca, Briana, and Sanders-Brown collected some items from Sanders-Brown's apartment and put them in the car. Bianca and Briana got back into the car, and Bianca told Dancy to start the car because she was feeling nervous about being in the complex. Sanders-Brown had to return to her apartment for one more thing, however. Before she did so, Cushenberry walked in front of Dancy's vehicle and after doing so said, "you better ride the f*** out right now." Tr. p. 70. Soon thereafter, Cushenberry drew a handgun and fired a shot at Dancy's vehicle, while Sanders-Brown was still standing at the driver's side door. Sanders-Brown then ran or crawled up the steps to her apartment while Dancy attempted to drive away quickly. While running or crawling up the steps, Sanders-Brown saw two other individuals to her left firing shots at Dancy's vehicle as it fled the apartment complex. She identified these men as Michael Rutherford and Jovan Stewart. Dancy's vehicle was struck by at least three bullets. One shot shattered the rear passenger window, which caused cuts to Briana. Another shot lodged in the back of the passenger seat directly behind the infant's car seat. A third penetrated the vehicle above the right rear tire. There is conflicting evidence as to how many shots in total were fired at the vehicle.

The State charged Cushenberry, along with Rutherford and Stewart, with one count of Class A felony attempted murder, two counts of Class D felony criminal recklessness, and one count of Class C felony intimidation; Cushenberry also was charged with Class A misdemeanor carrying a handgun without a license. The trial court

conducted a bench trial on July 11, 2006. At the conclusion of the State's evidence, the trial court granted Rutherford and Stewart's motion for judgment on the evidence with respect to the intimidation charge and one of the criminal recklessness charges, but it denied Cushenberry's identical motion. The trial court also ruled that Cushenberry could not be convicted of attempted murder, but that it would proceed on that charge of the information as a lesser-included offense of Class C felony attempted battery. After the defense rested, the trial court found Cushenberry guilty of attempted battery, both criminal recklessness charges, intimidation, and carrying a handgun without a license. It also entered judgments of conviction for all counts. It sentenced Cushenberry to eight years for the attempted battery and intimidation convictions, three years for both criminal recklessness convictions, and one year for the carrying a handgun without a license conviction, all to be served concurrently.[1] Cushenberry now appeals.

## Analysis

### *I. Sufficiency of the Evidence*

We first address Cushenberry's argument that there is insufficient evidence to support three of his convictions. When considering a claim of insufficient evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Trimble v. State, 848 N.E.2d 278, 279 (Ind. 2006). If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. Id.

[1] The abstract of judgment reflects that Cushenberry was convicted of Class A felony attempted murder, not Class C felony attempted battery. On remand, the trial court is directed to correct this error.

### *A. Criminal Recklessness*

Cushenberry was charged and convicted of two counts of criminal recklessness. The first count, count II of the information, alleged that he fired a gun at Sanders-Brown; the second, count III of the information, alleged that he fired a gun at the vehicle occupied by Dancy, Dancy's granddaughter, Briana, Bianca, and Michael Wilson, Sr. Cushenberry's sufficiency argument is directed towards the first count concerning Sanders-Brown.

Sanders-Brown testified that while she was standing at the driver's side door of Dancy's vehicle, she heard Cushenberry say, "you need to get the f*** out of here." Tr. p. 156. Shortly thereafter, a shot was fired towards Sanders-Brown and the vehicle. She also testified that this shot came from her right, and when she looked in that direction she saw Cushenberry standing, alone, near a tree. This evidence is sufficient to sustain Cushenberry's conviction for criminal recklessness based on his shooting at Sanders-Brown.

### *B. Intimidation*

Next, Cushenberry contends there is insufficient evidence to support his conviction for Class C felony intimidation. A person commits Class A misdemeanor intimidation if, among other possibilities, he or she communicates a threat to another person with the intent that the other person engage in conduct against his or her will. Ind. Code § 35-45-2-1(a)(1). Indiana Code Section 35-45-2-1(b)(2) provides that intimidation is a Class C felony "if, while committing it, the person draws or uses a deadly weapon." Cushenberry does not deny that there is sufficient evidence he communicated a threat so

as to constitute Class A misdemeanor intimidation, but he does claim there is insufficient evidence to establish that he did so while "drawing" or "using" a deadly weapon.

Here, the evidence most favorable to the conviction reveals that Cushenberry communicated a threat to the occupants of Dancy's vehicle along the lines of, "you better ride the f*** out right now." Tr. p. 70. At about the same time, Cushenberry lifted up his shirt, revealing a black object tucked into his waistband. Shortly thereafter, Cushenberry drew a gun and fired at least one shot at Dancy's vehicle.

Cushenberry argues that this evidence fails to prove he "drew" or "used" the gun at the precise moment he communicated a threat. However, we previously have rejected the argument that the "use" or "drawing" of a weapon must occur at the precise moment a threat is communicated. See Hall v. State, 837 N.E.2d 159, 160-61 (Ind. Ct. App. 2005), trans. denied. In Hall, the defendant communicated a threat to the victim, Jimison, and immediately afterwards picked up a knife and threatened Jimison with it. We ultimately held, "Because Hall drew a knife immediately after he threatened to kill Jimison, without any break in the chain of events, we conclude that the threat and the wielding of the knife were part of one continuous transaction." Id. Thus, we held the evidence was sufficient to sustain the defendant's Class C felony intimidation conviction. Id.

We reach the same result here. Although it is possible that Cushenberry did not "use" or "draw" his gun at the very moment he verbally threatened the occupants of Dancy's vehicle, he did use his gun very shortly thereafter and as part of one continuous transaction with no break in the chain of events. There is sufficient evidence to support Cushenberry's conviction for Class C felony intimidation.

### *C. Carrying a Handgun Without a License*

Cushenberry's final sufficiency argument concerns his conviction for Class A misdemeanor carrying a handgun without a license. He does not deny that he possessed a handgun, but does claim the State failed to prove that he did not possess a license for it. However, it is well-settled that once the State establishes the defendant possessed a handgun away from his or her residence or place of business, the burden shifts to the defendant to prove that he or she had a valid license or was exempt from the statute. Harris v. State, 716 N.E.2d 406, 411 (Ind. 1999); see also I.C. § 35-47-2-24. Cushenberry, therefore, had the burden of proving he possessed a valid license for the handgun or was exempt from the statute, but he did not do so. There is sufficient evidence to support his conviction for carrying a handgun without a license.

## *II. Double Jeopardy*

Cushenberry next argues that there is a double jeopardy conflict between his convictions for Class C felony attempted battery and one count of Class D felony criminal recklessness, specifically the count that alleged Cushenberry shot at Dancy's occupied vehicle, or count III of the charging information. Indiana's Double Jeopardy Clause, found in Article 1, Section 14 of the Indiana Constitution, "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Two or more 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. Id. 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. Id. at 53. 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 all of the essential elements of a second challenged offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). To determine what facts were used, we consider the evidence, charging information, final jury instructions (if there was a jury), and arguments of counsel. Goldsberry v. State, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

To convict Cushenberry of Class C felony attempted battery with a deadly weapon, the State was required to prove that he (1) engaged in the commission of a substantial step toward (2) knowingly or intentionally (3) touching another person (4) in a rude, insolent or angry manner (5) by means of a deadly weapon. See Matthews v. State, 476 N.E.2d 847, 849 (Ind. 1985) (citing Ind. Code §§ 35-42-2-1 and 35-41-5-1). The requisite culpability for attempted battery with a deadly weapon exists if the defendant's conscious objective is to shoot another person, or where the defendant is at least aware of a high probability that, by his or her conduct of shooting, one of the bullets would strike another person. Id. at 849-50. By comparison, to convict Cushenberry of Class D felony criminal recklessness as charged here, the State was required to prove that he recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily

injury to another person while armed with a deadly weapon. I.C. § 35-42-2-2(b)(1) and (c)(2)(A). Although the elements of these offenses are not identical, there clearly is substantial overlap between them.

This overlap is continued in the wording of the charging information the State filed. The original attempted murder charge against Cushenberry alleged that he knowingly shot a deadly weapon into a vehicle occupied by Dancy, her granddaughter, Michael Wilson, Sr., Briana, and Bianca, with intent to kill them. The criminal recklessness charge at issue alleged that Cushenberry while armed with a deadly weapon recklessly performed an act that created a substantial risk of bodily injury to Dancy, her granddaughter, Michael Wilson, Sr., Briana, and Bianca, and specified that the act was firing into the occupied vehicle. Clearly, Cushenberry's act of firing into Dancy's vehicle was what the State intended to rely on to support both the attempted murder/battery charge and the criminal recklessness charge.

On appeal, the State posits that there was separate evidence supporting the two charges: namely, that the attempted battery occurred when Dancy was backing out of a parking space and Cushenberry shot at the vehicle, and the criminal recklessness occurred when Dancy was driving away and Cushenberry allegedly was still shooting at the vehicle. During opening and closing arguments at trial, however, the State made no such hair-splitting attempt to differentiate evidence supporting the attempted murder/battery charge from evidence supporting the criminal recklessness charge. In addition, the record is unclear as to how many shots Cushenberry fired towards Dancy's vehicle. Given the language of the charging information, the evidence presented at trial,

and the arguments of counsel at trial, we have no hesitation in concluding that there is a reasonable possibility the trial court utilized the same evidence to establish all of the elements of both attempted battery and criminal recklessness and to convict Cushenberry of both crimes, in violation of the Indiana Double Jeopardy Clause.

The trial court here entered judgments of conviction for both attempted battery and criminal recklessness and sentenced Cushenberry on both counts. It did not simply "merge" the guilty findings for both counts without entering a judgment on the criminal recklessness count. Thus, it is necessary to remand with directions to vacate Cushenberry's judgment of conviction for Class D felony criminal recklessness, as alleged in count III of the charging information, in order to remedy this double jeopardy violation. Cf. Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) ("a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned." (emphasis added)).

### *III. Sentence*

Cushenberry's final argument is that the trial court abused its discretion in sentencing him because the sentencing statement was inadequate to support his enhanced sentences of eight years for the Class C felony convictions and three years for the Class D felony convictions. We note that Cushenberry committed these crimes after our legislature replaced "presumptive" sentences with "advisory" sentences in April 2005. Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana's sentencing statutes. See Anglemyer v. State, No. 43S05-0606-CR-230 (Ind. June 26, 2007). First, a trial court

must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id., slip op. at 11. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

The trial court here issued a reasonably detailed sentencing statement, as required by Anglemyer. In that statement, the trial court found Cushenberry's criminal history and the nature of the offense(s) to be aggravating circumstances and made no finding of any mitigating circumstances. Cushenberry contends the trial court should have considered his purported expression of remorse at the sentencing hearing to be a mitigating circumstance. "Remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility." Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006). The trial court did not abuse its discretion in declining to find Cushenberry's alleged expression of remorse to be a mitigating circumstance.

Cushenberry also contends the trial court should have assigned mitigating weight to the fact that he has dependents, and his incarceration would pose a hardship to them. However, the presentence report reveals that Cushenberry never has been employed and had never paid any support for his two children. It is entirely proper not to assign any

mitigating weight to the alleged hardship incarceration will have on the defendant's dependents where the defendant was not supporting those dependents anyway. See Comer v. State, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005), trans. denied. The trial court did not abuse its discretion in not assigning any mitigating weight to this alleged mitigating circumstance.

Having addressed and rejected these alleged defects in the trial court's sentencing statement, we agree with that court that Cushenberry's criminal history and the nature of these offenses supports the imposition of maximum, concurrent sentences. Cushenberry's criminal history, which is reflective of his character for purposes of Appellate Rule 7(B), includes juvenile adjudications for two incidents of Class A misdemeanor battery, three incidents of Class B misdemeanor battery, and one incident of Class B misdemeanor disorderly conduct. As an adult, he has a prior conviction for robbery.[2] He also apparently failed to complete any of the terms of his probation for that offense. Cushenberry amassed this record before committing the present offenses at the age of eighteen. In assigning weight to a defendant's criminal history, we consider the chronological remoteness of any prior convictions as well as the gravity, nature, and number of prior crimes. Gibson, 856 N.E.2d at 147. The age by which a defendant has accumulated his or her criminal history also is a relevant factor. Cloum v. State, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002). Although all of Cushenberry's juvenile adjudications were for misdemeanors, the sheer number of incidents and the fact that they all involved

[2] The presentence report states that this was Class B felony robbery, but Cushenberry only received a two-year sentence for this conviction, which would seem to indicate it was a Class C felony.

violent conduct is significant in the present case. Furthermore, as an adult his conduct has escalated to felonious activity, including robbery and the present offenses. Given the length and nature of Cushenberry's criminal history, accumulated at a young age, it reflects very poorly on his character.

As for the nature of these offenses, Cushenberry fired a gun at a vehicle occupied by five persons, including an infant. In fact, Cushenberry admitted that the infant was his niece. The existence of multiple victims of a crime is an appropriate justification for increasing the sentence for that crime. See French v. State, 839 N.E.2d 196, 197 (Ind. Ct. App. 2005), trans. denied. We find the nature of these offenses to be particularly egregious. In combination with Cushenberry's markedly poor character, we cannot say his aggregate eight-year sentence, representing maximum but concurrent sentences for all these offenses, is inappropriate.

**Conclusion**

There is sufficient evidence to support all of Cushenberry's convictions. However, one of his convictions for criminal recklessness, specifically under count III of the information, must be vacated due to double jeopardy concerns. Finally, his aggregate eight-year sentence is not the result of an abuse of trial court discretion and is not inappropriate. We affirm in part, reverse in part, and remand for the trial court to correct its records in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and VAIDIK, J., concur.