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IN THE COURT OF APPEALS OF INDIANA

Raymond O. Demby, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 16, 2021

Court of Appeals Case No. 20A-CR-1012

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause No. 02D05-1805-F1-6

Tavitas, Judge.

Case Summary

[1] After a fracas during which Raymond Demby struck and shot both his ex-girlfriend and her adult daughter after entering their home, Demby fled. The State charged Demby with the following: Count I, burglary of a dwelling

resulting in bodily injury, a Level 1 felony;[1] Count II, aggravated battery, a Level 3 felony; Count III, domestic battery by means of a deadly weapon, a Level 5 felony; Count IV, battery by means of a deadly weapon, a Level 5 felony; Count V, invasion of privacy, a Level 6 felony; Count VI, auto theft, a Level 6 felony; and Count VII, resisting law enforcement, a Level 6 felony. The State subsequently added Count VIII, attempted murder, a Level 1 felony, and a count alleging a sentencing enhancement, use of a firearm, with respect to Count II. The case went to trial, and a jury convicted Demby of all counts.

[2] At sentencing, the trial court vacated the domestic battery conviction, reduced the burglary conviction from a Level 1 felony to a Level 3 felony "for double jeopardy purposes," and imposed an aggregate eighty-four-year sentence. Tr. Vol. IV pp. 236-37; Appellant's App. Vol. III pp. 159-60. Demby now argues that, under our Supreme Court's nascent *Wadle* precedent, his convictions for attempted murder, aggravated battery, and burglary violated Indiana's prohibition on double jeopardy. Concluding that only Demby's conviction for aggravated battery violated the prohibition against double jeopardy, we affirm in part, reverse in part, and remand with instructions to vacate Demby's conviction for aggravated battery.

[1] The trial court later reduced this count at sentencing to a Level 3 felony burglary pursuant to Indiana Code Section 35-43-2-1(2).

Issue

[3] Demby raises a single issue, which we restate as whether Demby's convictions for attempted murder, aggravated battery, and burglary violate the prohibition against substantive double jeopardy.

Facts

[4] On April 25, 2018, Demby violated a protective order by breaking into the home of his former girlfriend, Courtney Madison. Madison was home with her adult daughter, Kiara Jones. Having been awakened by the sound of the break-in, Jones called emergency services while Madison, carrying a holstered firearm, proceeded to investigate the noise. Madison discovered Demby wielding a hammer that he had apparently used to break into the home. Though Madison and Demby were romantically separated at the time, Demby accused Madison of infidelity, and an argument ensued.

[5] The argument escalated into a physical confrontation, and at some point, during the struggle, the firearm fell to the floor. Demby struck Madison in both the head and sternum with the hammer, causing both significant injury and Madison to lose consciousness. Jones then engaged Demby and attempted to take the hammer from Demby. Madison, meanwhile, regained consciousness and pushed Demby and Jones through the front door and onto the porch outside. Demby then struck Jones with the hammer and returned to the house, where he located and picked up Madison's handgun. Jones ran across the street to seek refuge from a neighbor, as Madison attempted to follow.

[6] Demby returned with the firearm and fired at Madison three times, striking her once in the shoulder and once in the ribs. Demby then approached Jones and shot her in the legs. Demby took a car belonging to Madison's mother and absconded; he was arrested shortly thereafter following a car chase.

[7] On May 1, 2018, the State charged Demby with the following: Count I, burglary resulting in bodily injury, a Level 1 felony; Count II, aggravated battery, a Level 3 felony; Count III, domestic battery by means of a deadly weapon, a Level 5 felony; Count IV, battery by means of a deadly weapon, a Level 5 felony; Count V, invasion of privacy, a Level 6 felony; Count VI, auto theft, a Level 6 felony; and Count VII, resisting law enforcement, a Level 6 felony. On May 18, 2018, the State filed Count VIII, attempted murder, a Level 1 felony.[2] On September 27, 2019, the State filed an additional information for a sentencing enhancement, in accordance with Indiana Code Section 35-50-2-11, alleging that, with respect to Count II, Demby "knowingly or intentionally used a firearm in the commission of a felony under I.C. 35-42, that resulted in death or serious bodily injury. . . ." Appellant's App. Vol. II p. 178.[3]

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[2] This count was later amended on the day Demby's trial began.

[3] Though murder falls within Indiana Code Title 35, Article 42, here Demby was charged with *attempted* murder. Accordingly, as the State explicitly recognized in its sentencing memorandum below, the only conviction to which the enhancement eventually attached was Count II, aggravated battery.

[8] The charging informations for the counts pertinent to this appeal are reproduced in relevant part here:

> COUNT I: ". . . Raymond O. Demby [ ] did break and enter the dwelling of another person, to wit: Courtney Madison or Kiara Jones, with the intent to commit a felony therein, to wit: batter, said act resulting in serious bodily injury to Courtney Madison or Kiara Jones. . . ."
>
> COUNT II: ". . . Raymond O. Demby [ ] did knowingly or intentionally inflict injury on a person, to wit: Courtney Madison [,] that creates a substantial risk of death. . . ."
>
> [Amended] COUNT VIII: ". . . Raymond O. Demby [ ] did attempt to commit the crime of MURDER, with intent to kill another human being, to wit: Courtney Madison, said Defendant engaged in conduct constituting a substantial step toward the commission of the crime of MURDER, by hitting said Courtney Madison with a hammer or shooting her with a firearm. . . ."

Appellant's App. Vol. II pp. 13, 33, 35.

[9] Demby was tried from February 4, 2020, to February 6, 2020, and argued that he was not guilty by reason of insanity. During its opening statement, the State asserted: "So[,] at the end of this case, there will be no doubt at all that the Defendant, Raymond Demby, he definitely intended to kill Courtney Madison, either by using the hammer when he hit her in the head with the hammer or when he shot her." Tr. Vol. III p. 67. During its closing argument, with respect to the attempted murder charge, the State asserted:

> [Y]ou must agree whether Mr. Demby attempted to kill Ms. Madison with the hammer . . . or you can also decide that Mr. Demby attempted to kill Ms. Madison with a gun and that was, again, by shooting her multiple times in the shoulder and in the abdomen; *or both*. And again, it's the State's contention that Mr. Demby, through his actions *with both* the hammer *and with* the gun, intended to kill Courtney Madison.

Tr. Vol. IV p. 191 (emphasis added).

[10] The jury returned a verdict of guilty but mentally ill on all counts. On the specialized verdict form for the attempted murder charge, the jury selected both the firearm and the hammer as the substantial step towards murder, as shown here:

STATE OF INDIANA) IN THE ALLEN SUPERIOR COURT
) SS:
COUNTY OF ALLEN) FELONY DIVISION

STATE OF INDIANA,)
)
Plaintiff,)
)
VS.)
)
RAYMOND O. DEMBY,) CAUSE NO. 02D05-1805-F1-6
)
Defendant,)

VERDICT

(Put an "X" on the appropriate line.)

"We, the Jury, find the defendant, Raymond O. Demby,

___ NOT GUILTY

___ GUILTY

___ NOT RESPONSIBLE BY REASON OF INSANITY at the time of the crime

_X_ GUILTY BUT MENTALLY ILL at the time of the crime

of Count VIII, Attempt Murder, a Level 1 felony."

__X__ using a hammer

__X__ using a firearm

DATE 2-6-2020 FOREPERSON: [signature]

The jury then retired to deliberate on, inter alia, the sentencing enhancement for Count II, and subsequently returned a verdict of guilty with respect to the use of a firearm in the commission of aggravated battery.

[11] At sentencing on March 6, 2020, the State requested:

> [T]hat the burglary be dropped down to a level three [felony], because that would avoid some of the double jeopardy concerns. We're asking the Court to find that the agg — because the attempted murder was charged in the alternative, the hammer or the gun, the jury found both of these weapons could have amount [sic] to attempted murder. We're asking that for the aggravated battery, the gun attach to the aggravated battery, and that the hammer attach to the attempted murder.

Tr. Vol. IV p. 232. The trial court vacated Count III, domestic battery, and reduced the burglary conviction from a Level 1 felony to a Level 3 felony "for double jeopardy purposes." *Id*. at 236. The trial court did not enter a ruling with respect to which weapon should "attach" to which conviction. The trial court sentenced Demby to nine years on Count I; nine years on Count II with a twenty-year enhancement for use of a firearm; three years on Count IV; one year on Count V; one year on Count 6; one year on Count VII; and forty years on Count VIII. The trial court ordered those sentences to be served consecutively for an aggregate eighty-four-year sentence. Demby now appeals.

Analysis

[12] Demby argues that his convictions for attempted murder, aggravated battery, and burglary violate the prohibition against substantive double jeopardy.[4] We apply a de novo standard of review to double jeopardy claims. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020); *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020).

[13] Though Demby was sentenced prior to our Supreme Court's handing down of *Wadle* and *Powell*, his brief was submitted after those opinions were issued. Accordingly, we will apply the analysis set forth in *Wadle* and *Powell* in our review of Demby's double jeopardy claims.[5]

[14] In *Wadle*, our Supreme Court noted that "[s]ubstantive double jeopardy claims come in two principal varieties: (1) when a single criminal act or transaction violates a single statute but harms multiple victims, and (2) when a single criminal act or transaction violates multiple statutes with common elements

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[4] Demby also appears to argue that his conviction for domestic battery violates the prohibition against double jeopardy. The trial court, however, vacated that conviction. Accordingly, that argument is moot, and we will not address it further.

[5] Several panels of this Court have already expressed reservations about whether *Wadle* and *Powell* will apply retroactively. *See, e.g., Diaz v. State,* 158 N.E.3d 363, 368 (Ind. Ct. App. 2020). Without specifically addressing the question, we note that, under the pre-*Wadle* actual evidence test, the 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." *Richardson v. State,* 717 N.E.2d 32, 53 (Ind. 1999). Here, we conclude that, based on the way in which Count II was charged (with the firearm sentencing enhancement), and the fact that the jury marked "firearm" with respect to Count VIII in convicting on both counts, the jury unmistakably relied upon evidence of Demby shooting Madison for both convictions. Accordingly, application of the actual evidence test would result in vacatur of Demby's conviction and sentence pursuant to Count II, aggravated battery.

and harms one or more victims." *Wadle*, 151 N.E.3d at 247. *Powell* addressed the first variety[6], while *Wadle* addressed the second. Here, the second variety is implicated.[7] In *Wadle*, our Supreme Court wrote: "[W]e expressly overrule the *Richardson* constitutional tests in resolving claims of substantive double jeopardy. Going forward, and with a focus on statutory interpretation, we adopt an analytical framework that applies the statutory rules of double jeopardy." 151 N.E.3d at 235. Accordingly, we apply the analytical framework set forth in *Wadle*. We recognize, however, that the framework does not fit every substantive double jeopardy situation.

[15] The *Wadle* framework, a series of consecutively applied tests, provides:

> [W]hen multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutes themselves. If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether the charged offenses are the same. *See* I.C. § 35-31.5-2-168. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if

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[6] The Court held in *Powell*:

> If the statute defines a separate offense for certain discrete acts . . . within that course of conduct, the separate charges (and corresponding convictions) may stand. But if the statute fixes no separate penalty for each of these acts, and unless those acts are sufficiently distinct "in terms of time, place, [and] singleness of purpose," then a court may impose only a single conviction.

Powell, 151 N.E.3d at 261.

[7] Though at least one of the charges alleged that Demby caused harm to a second victim, Jones, the pertinent convictions here are for crimes that victimized Madison alone.

> one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions only. But if the defendant's actions prove otherwise, a court may convict on each charged offense.

Id. at 253.

Wadle: First Step

[16] The first step in the *Wadle* test is to determine whether "either statute clearly permits multiple punishment, whether expressly or by unmistakable implication." *Wadle*, 151 N.E.3d at 253. "If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy."[8] *Id.* at 248 (footnote omitted).

[17] To determine whether any of the salient statutes permit multiple punishment, we look to the express language of the statutes themselves. The Level 3 felony burglary statute provides:

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[8] This would seem to be a highly unusual circumstance. As an example, our Supreme Court noted: "Our tax code, for example, expressly permits the imposition of an excise tax on the delivery, possession, or manufacture of a controlled substance, 'in addition to any criminal penalties' imposed under Title 35." *Wadle*, 151 N.E.3d at 248 (quoting Ind. Code § 6-7-3-20).

> A person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary, a Level 5 felony. However, the offense is:
>
> * * * * *
>
> (2) a Level 3 felony if it results in bodily injury to any person other than a defendant;
>
> * * * * *

Ind. Code § 35-43-2-1.

[18] Count II, aggravated battery, a Level 3 felony, rested upon the following statute:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
>
> (2) protracted loss or impairment of the function of a bodily member or organ; or
>
> (3) the loss of a fetus;
>
> commits aggravated battery, a Level 3 felony.

Ind. Code § 35-42-2-1.5.

[19] Finally, because Demby was charged with *attempted* murder, two statutes, for both murder and "attempt," apply:

> A person attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same level or class as the crime attempted. However, an attempt to commit murder is a Level 1 felony.

Ind. Code § 35-41-5-1. The relevant portion of the statute for murder reads: "A person who: (1) knowingly or intentionally kills another human being . . . commits murder, a felony." Ind. Code § 35-42-1-1.

[20] We find that none of the implicated statutes "clearly permit[ ] multiple punishment, whether expressly or by unmistakable implication." *Wadle*, 151 N.E.3d at 253. Accordingly, we proceed to the second step in the *Wadle* analytical framework.

Wadle: Second Step

[21] *Wadle's* second step requires that we "apply our included-offense statutes to determine whether the charged offenses are the same." *Id.* We determine whether either offense is included in the other—"either inherently or as charged"—under the included-offense statutes. *Id.*

[22] Indiana Code Section 35-38-1-6 provides: "Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the

defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense." Indiana Code Section 35-31.5-2-168 defines "included offense" as an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
>
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

Burglary

[23] We find that, with respect to the burglary conviction, Subsection (1) is not implicated here. Neither aggravated battery nor attempted murder is established by the same material elements as burglary. Burglary requires the breaking and entering of a structure, which neither of the other crimes requires. While burglary under Indiana Code Section 35-43-2-1(2) requires that the breaking and entering *result* in bodily harm, it does not require that the defendant *intend* that result. Both murder and aggravated battery, on the other hand, *do* require proof of mens rea relative to a particular harmful outcome: a knowing or intentional attempted killing and a knowing or intentional infliction of injury causing a substantial risk of death, respectively. Thus, burglary is not

inherently included in either attempted murder or aggravated battery, and vice versa.[9]

[24] Because the distinction between burglary and the other two crimes implicated here, aggravated battery and attempted murder, rests on the fact that each requires proof of a type of material element that the other does not, similar to the federal *Blockburger* test, neither Subsection (2) nor Subsection (3) is applicable. Burglary does not differ from either attempted murder or aggravated battery in the sense that one is merely an attempted version of the other. A burglary is not simply an attempted aggravated battery, nor is an aggravated battery an attempted burglary. Neither do these crimes differ in the sense that the distinction is one of degree of culpability under Indiana Code Section 35-31.5-2-168(3). Rather, the intent elements for these three crimes are directed at separate ends entirely. For a burglary, the intent is to break and enter and commit a subsequent felony (whether that felony is eventually committed or not); for an aggravated battery, the intent is to inflict injury upon

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[9] With respect to whether the burglary conviction could be an included offense as charged, based on the elevation of the offense because of the resulting bodily injury, the *Wadle* court has already addressed the matter:

> [A]n enhanced punishment, whether based on attendant circumstances or on a prior conviction, presents no "double jeopardy issue at all." *See Workman v. State*, 716 N.E.2d 445, 448 (Ind. 1999) (enhanced punishment based on "circumstances surrounding" the crime). *See also Mayo v. State*, 681 N.E.2d 689, 694 (Ind. 1997) (enhancement is neither "a new jeopardy" nor an "additional penalty" for an earlier offense, but rather "a stiffened penalty for the latest crime") (citation omitted). Because the elevation is "not a separate offense or conviction," double-jeopardy analysis is simply inapposite. *Workman*, 716 N.E.2d at 448. *See also Woods v. State*, 234 Ind. 598, 608, 130 N.E.2d 139, 143-44 (1955) (applying this principle to vacate several OWI convictions).

Wadle, 151 N.E.3d at 254.

a person that creates a substantial likelihood of death; and for an attempted murder, the intent is to kill another person. Thus, according to the framework set forth in *Wadle*, the burglary conviction is not a violation of the prohibition against double jeopardy, and the analysis of this claim stops here.

Attempted Murder and Aggravated Battery

[25] We turn, then, to the question of whether attempted murder includes aggravated battery, either inherently or as charged. We find aggravated battery is not inherently included. In order for it to be so, it must be true—in every scenario—that proving the elements of attempted murder would *necessarily* prove aggravated battery. If the greater offense is proved, so too must the lower offense have been. One can be guilty, however, of attempted murder without "knowingly or intentionally inflict[ing] injury on a person," as required by the aggravated battery statute. For example, if a defendant shot at a victim in an attempt to kill, but missed completely, thereby taking a substantial step towards murder, but failing to inflict an injury, he would be guilty of attempted murder but not aggravated battery. Accordingly, aggravated battery is not an inherently included lesser offense of attempted murder.[10]

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[10] We note that the case law on this particular question, as well as related questions pertaining to *attempted* aggravated battery, or choate murder as it pertains to either choate or inchoate aggravated battery, is inconsistent. *See, e.g., Young v. State,* 30 N.E.3d 719, 724 (Ind. 2015) ("Here, attempted aggravated battery is inherently included in murder, as both Court of Appeals panels recognized."); *Wilson v. State,* 697 N.E.2d 466, 476 (Ind. 1998) ("Similarly, attempted battery may be a lesser included offense of attempted murder when the charge reveals an attempted touching, as was the case here."), *trans. denied*; *Ratcliffe v. State*, 553 N.E.2d 1208, 1212 (Ind. 1990) ("Battery is not inherently a lesser included offense of murder."); *Leon v. State*,

[26] We do find, however, that, here, aggravated battery is included in attempted murder as charged, as defined by Indiana Code Section 35-31.5-2-168. Thus, the judgment and sentence for aggravated battery are in violation of Indiana Code Section 35-38-1-6. In so finding, we rely on the fact that the State's firearm enhancement filing required proof of the use of a firearm in the commission of aggravated battery. We further rely on the State's eleventh hour amendment of the attempted murder charging document, including the factual allegation ". . . by hitting said Courtney Madison with a hammer or shooting her with a firearm. . . ." Appellant's App. Vol. III p. 13. To find that, as charged, Demby utilized the firearm in attempting murder, one would necessarily have to find that all of the material elements of aggravated battery, as the State charged it here, were met. Thus, the aggravated battery count was a lesser included offense of the attempted murder count pursuant to Indiana Code Section 35-31.5-2-168.

[27] Pursuant to Indiana Code Section 35-38-1-6 we are required to vacate the judgment and sentence for aggravated battery. Accordingly, our analysis is

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525 N.E.2d 331, 332 (Ind. 1988) ("Battery by means of a deadly weapon requires a touching. Because it is possible to attempt murder without touching the intended victim, battery is not inherently a lesser included offense of attempted murder."); *Whitham v. State*, 49 N.E.3d 162, 169 (Ind. Ct. App. 2015) ("[T]his court has long held that aggravated battery is an inherently lesser included offense to attempted murder."), *trans. denied*; *Stringer v. State*, 690 N.E.2d 788 (Ind. Ct. App. 1998) (holding that an information was sufficient to put the defendant on notice that he could be convicted of battery, as battery was a lesser-included offense of attempted murder under the facts), *trans. denied*; *Meriweather v. State*, 659 N.E.2d 133, 141-42 (Ind. Ct. App. 1995) (holding attempted aggravated battery is an inherently lesser included offense of attempted murder), *trans. denied, abrogated in part on other grounds by Wright v. State*, 658 N.E.2d 563 570 (Ind. 1995).

complete.[11] We pause, however, to address what we view as an inevitable difficulty with the *Wadle* analytical framework. As Judge Vaidik recently observed:

> Because the ground recently shifted in double-jeopardy analysis, our Court and the trial courts will be asked to sort out scenarios we can only now imagine. It is attractive, yet unrealistic, to believe that these two tests can be superimposed on any future contingencies and provide the answer to all our double-jeopardy queries. Neither test may provide the perfect fit. Instead of trying to cram each possibility into the *Wadle* bucket or the *Powell* bucket, we should be guided by the principles expounded in the two cases.

Jones v. State, 159 N.E.3d 55, 67 (Ind. Ct. App. 2020) (Vaidik, J., concurring). This is one of those situations.[12]

[28] We find that the aggravated battery conviction violates the lesser included offense statute. Where a defendant is found guilty of both the greater offense and the lesser-included offense, the proper procedure is to vacate the conviction for the lesser-included offense and enter a judgment of conviction and sentence

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[11] Even if *Wadle's* third step was required, it would not fit the circumstances here. Because we find that Demby was convicted for two crimes based on the same act, *Wadle's* third step would be satisfied by definition.

[12] Demby benefitted from the State's amendment of the attempted murder charge to include a factual allegation with respect to the firearm. Had the State not amended the charging instrument, the aggravated battery would not have been included as charged, and Demby's claim would likely have failed. Though *Wadle* and *Powell* establish newly-wrought analytical frameworks, the core principle of the prohibition against substantive double jeopardy is undisturbed. Here, had the State simply left its charging instrument vague, *Wadle's* formal, stepwise process could very easily have contravened that principle.

only upon the greater offense. *See, e.g., Madden v. State*, No. 20A-CR-196, 2021 WL 97227, at *8 (Ind. Ct. App. Jan. 12, 2021) ("Madden's Level 5 felony kidnapping and criminal confinement convictions do constitute double jeopardy in relation to his Level 2 felony kidnapping conviction. Therefore, his convictions for Level 5 felony kidnapping and criminal confinement must be vacated."). We therefore remand to the trial court to vacate Demby's conviction and sentence for aggravated battery, as well as the sentencing enhancement for use of a firearm attached thereto.

Conclusion

[29] Although Demby argues that his convictions for burglary, attempted murder, and aggravated battery violate the prohibition against double jeopardy, we conclude that only Demby's aggravated battery conviction was a violation of the prohibition against substantive double jeopardy. Accordingly, we affirm in part, reverse in part, and remand with instructions to vacate the conviction and sentence entered on Count II, aggravated battery.

[30] Affirmed in part, reversed in part, and remanded.

Bailey, J., and Robb, J., concur.