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**IN THE
COURT OF APPEALS OF INDIANA**

KYLE BEALS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1004-CR-461

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0812-FB-292518

January 3, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kyle Beals appeals his convictions, after a jury trial, of two counts of robbery and four counts of criminal confinement, all as class B felonies; and one count of resisting law enforcement, as a class D felony.

We affirm in part and reverse in part.

ISSUES

1. Whether the trial court abused its discretion when it admitted evidence as to the pre-trial identification of Beals.
2. Whether Beals' convictions for robbery and criminal confinement violate the double jeopardy protections of the Indiana Constitution.

FACTS

The facts most favorable to the jury's verdicts are as follows. Coming home from work shortly before 1:00 a.m. on December 23, 2008, Pamela Murphy stopped at the 7-11 store for cigarettes. As she chatted with cashier Delores Booth, Beals entered the store wearing a black ski-mask, a tan-colored Carhartt-style jacket, blue jeans and white tennis shoes. Beals pulled out a black gun, pressed it to her back, pushed her against the counter, and demanded that Booth "open the register or he was going to kill" them both. (Tr. 57). Booth pulled out the register drawer and put it on the counter. Beals took the money from the drawer and ordered both women to the floor. They complied, and Beals left the store.

Booth had activated a silent alarm as she dropped to the floor, and after Beals left, she also called 9-1-1. Officer Robert Hicks responded to the 12:56 a.m. dispatch and arrived within three minutes. After receiving reports from the women, Hicks broadcast

the robber's description -- a white male, approximately 6'3" and 250 pounds, wearing a ski mask, Carhartt-style jacket, and blue jeans. Subsequently, Detective Delbert Shelton arrived at the 7-11 to investigate the armed robbery.

At approximately 2:30 a.m. on the same morning, Leandro Goodman and Roger Terry were working at the Airport Marathon station/store. Beals entered wearing a black ski mask, tan Carhartt-style jacket, blue jeans, and white tennis shoes. Beals displayed a black gun and ordered both men to get on the floor; when he was unable to open the cash register, he ordered Goodman to get up and open it. Goodman opened the drawer, and Beals "snatched the money out the drawer [sic] and ran out the doorway." (Tr. 80).

Meanwhile, after finishing their shifts at a business several blocks away, Aaron Butler and Aaron Grose went to their vehicles and found that the locks on Grose's truck had frozen. Butler drove Grose to the Marathon for de-icer. As the two men approached the door, Beals exited -- wearing a Carhartt-style jacket, blue jeans, and black ski mask, with a gun in his right hand and "money coming out of" his left jacket pocket. *Id.* at 114. Once inside the Marathon, they confirmed that it had just been robbed.

Goodman had telephoned the police to report the robbery after Beals left the store. Dispatch reported the robbery. Officer Doug Himmel was at a nearby intersection when he heard the dispatch, and saw a blue Explorer driven by a man in a Carhartt-style jacket -- Beals. The driver of another vehicle pointed at the Explorer, and Himmel followed it.

Other officers were alerted to Beals' location, and they participated in an attempted traffic stop. Beals disregarded the officers' flashing lights and fled. Eventually, Beals turned into a semi-truck parking lot. He crashed over a curb, drove

around the lot in circles, and then plowed through a fence before his vehicle came to a stop. Beals then fled on foot, with several officers in pursuit – “everybody . . . yelling stop police.” *Id.* at 177. Himmel tackled Beals but had difficulty controlling him. Himmel finally brought Beals to the ground and was able to subdue him.

Beals was wearing a tan Carhartt-style jacket, blue jeans, and white tennis shoes. In his jacket pocket was \$350.00, “crammed” in a “pile of money that was completely wadded up.” *Id.* at 213. Further, inside the crashed Explorer were additional bills, as well as a black ski mask, and a black BB gun was found on the pavement of the semi-truck parking lot that Beals had circled.

From the Marathon store, various officers had individually transported Grose, Butler, Goodman, and Terry to the scene where Beals had been stopped. Grose testified that when he arrived at the scene, he saw Beals “standing” there “wearing the same exact stuff,” including the Carhartt-style jacket, and recognized him as the “person that [he] walked past in the gas station.” *Id.* at 140. Butler testified that he identified Beals based on his physical stature and “[t]he clothes he was wearing,” which “was a match to the gentleman that walked out of the gas station.” *Id.* at 121. Goodman testified that he recognized Beal as “[t]he guy that robbed me” based on his wearing “the same tan jacket and jeans,” and having “the same build and height.” *Id.* at 86. Terry testified that based on “the size of the man and the build,” he recognized Beal as “the man that just robbed us.” *Id.* at 101.

Meanwhile, at the 7-11, Officer Shelton had heard the broadcast description of the Marathon armed robber and noted the similarity to the reports of the 7-11 robbery.

Shelton went to where Beals had been apprehended, and observed Beals' Carhartt-style jacket, blue jeans, and white tennis shoes, as well as his stature and race. Subsequently, Shelton compiled a photo array that included Beals.

On December 24, 2008, the State charged Beals. With respect to the 7-11 incident, it charged him with one count of robbery and two counts of criminal confinement (one as to Murphy, one as to Booth), all as class B felonies. With respect to the Marathon incident, it charged him with one count of robbery and two counts of criminal confinement (one as to Goodman, one as to Terry), all as Class B felonies. It also charged Beals with one count of resisting law enforcement, as a class D felony.

On January 2, 2009, Officer Shelton showed Booth the photo array. Booth unequivocally identified Beals as the man who had robbed her at gunpoint on December 23rd, signing and dating it for that purpose.

On February 19, 2009, the State filed notice that it would seek to have Beals adjudicated as an habitual offender. On November 29, 2009, Beals filed a motion to suppress identification evidence. On February 5, 2010, the parties submitted a stipulation of facts and evidence regarding Beals' motion. On February 22, 2010, the trial court denied Beals' motion to suppress. Beals did not appeal that ruling.

A jury trial was held March 1-2, 2010, and testimony to the above was heard. The jury also saw videotaped recordings of both robberies. At no time during the trial did Beals object to any identification testimony. The jury found Beals guilty as charged, and the trial court found him to be an habitual offender.

On April 1, 2010, the trial court held the sentencing hearing. It sentenced Beals to twelve years on each count for the six class B felony convictions, with the three counts for the 7-11 offenses to be served concurrently, and the three counts for the Marathon station offenses to be served concurrently; however, it ordered the two robbery counts to be served consecutive to one another. For the class D felony resisting law enforcement offense, it sentenced Beals to a term of two years -- consecutive to the robbery sentences. In addition, the trial court enhanced the first robbery sentence by twenty years for his being an habitual offender, for a total executed sentence of forty-six years.

DECISION

1. Admission of Evidence

Beals' pre-trial motion to suppress identification evidence asserted that the "show-up" identification procedure" utilized with respect to the Marathon store witnesses was "impermissibly suggestive," and that his picture in the photo array was also "impermissibly suggestive." (App. 66, 67). Therefore, Beals contended that the trial court should order the suppression of all evidence of his "pre-trial identification by witnesses who were involved in the improper pre-trial identification procedures." *Id.* at 67. Beals argues that "the trial court erred in denying his" motion to suppress. Beals' Br. at 9.

Beals brings his appeal of this issue, however, after a completed trial. Thus, the issue here is whether the trial court abused its discretion by admitting the evidence at trial. *See Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003) (when defendant fails to file interlocutory appeal after denial of motion to suppress, then on

appeal following completed trial, “the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial”).

A trial court has broad discretion in ruling upon the admissibility of evidence, and its decision in that regard is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). An abuse of discretion in this context occurs where the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.* at 703. Moreover, the appellate court “will not reverse the trial court’s decision to admit evidence if that decision is sustainable on any ground.” *Crawford v. State*, 770 N.E.2d 775, 780 (Ind. 2002).

As Beals correctly notes, due process of law under the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. *Harris v. State*, 716 N.E.2d 406, 410 (Ind. 1999). Beals “concedes that he did not offer contemporaneous objections during trial as witnesses testified regarding pre-trial show-up identifications,” but argues that here, there was “fundamental error.” Beals’ Br. at 16. Generally, the failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). However, “fundamental error” is an exception to that rule. *Id.* The fundamental error exception

is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.

Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008).

Beals argues that he has demonstrated fundamental error because there was no “independent basis for identifying Beals as the perpetrator of the robberies,” and, thus, “his conviction was based solely on” the impermissible identification testimony. Beals’ Br. at 16. We cannot agree.

As to the photo array, Beals argues that it is impermissibly suggestive because he is the only one of the six men depicted with “a tattoo below his left eye.” *Id.* at 14. We find this tattoo to be nearly impossible to detect. Moreover, Booth testified that before viewing the array, she believed that she could identify the robber “by his eyes” because “he had evil eyes,” which she “still [saw] . . . in nightmares.” (Tr. 63). Booth confirmed that the mask had covered all of the robber’s face “but his eyes and mouth.” *Id.* Booth further testified that when viewing the array, she recognized Beals “because of the eyes.” *Id.* at 65. Based upon the photo array and Booth’s testimony, we do not find that the trial court abused its discretion in admitting evidence of Beals’ identification by Booth.

We next consider the witnesses’ identification of Beal at the scene of his apprehension. A “show-up” identification procedure is not subject to a per-se rule of exclusion, but lest it be “unnecessarily suggestive and so conducive to irreparable mistake as to constitute a violation of due process,” it must be examined in light of the totality of the surrounding circumstances. *Hubbell v. State*, 754 N.E.2d 884, 892 (Ind. 2001). Thus, evidence of an identification after a show-up has been permitted when it occurs shortly after the commission of the crime because of the value of permitting a witness to view a suspect while the image of the perpetrator is fresh in the witness’ mind. *Id.* Here, the four Marathon store witnesses viewed Beals within approximately twenty

to thirty minutes after the robbery. Thus, his appearance would have been very fresh in their minds. Further, as noted above, each witness was separately transported to view Beals and made his identification without information as to any other witness' conclusion. Therefore, based on the totality of the surrounding circumstances, admission of evidence as to the witnesses' identification of Beals at the site of his apprehension may not have constituted an abuse of discretion.

Moreover, “[w]here it is established that evidence of an out-of-court identification has been erroneously admitted because the confrontation was impermissibly suggestive and not otherwise based on the totality of the circumstances, the error may nonetheless be harmless.” *Hubbell*, 754 N.E.2d at 892. A conviction will not be reversed if the State can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.*

We did not find that the photo array shown to Booth was impermissibly suggestive; hence, evidence that she identified Beals as the 7-11 robber was properly admitted. In addition, the jury viewed videotape recordings of both robberies, with the robber clearly wearing the Carhartt-style jacket, blue jeans, white tennis shoes, and a ski mask; his large stature is apparent. From their initial reports to police immediately after the robberies through their testimony at trial, all witnesses described the robber as a tall white male, garbed in a Carhartt-style jacket, blue jeans, and a black ski mask. Seen driving a vehicle “less than 500 feet from” the Marathon store, (tr. 160), and clad in a Carhartt-style jacket, Beals was followed by Officer Himmel. Beals disregarded orders to stop, and was then pursued by Himmel and numerous other officers until he crashed

his vehicle and fled on foot. When finally caught and subdued, Beals was wearing a Carhartt-style jacket, blue jeans -- which jeans, admitted as an exhibit at trial, were the same blue color as the jeans shown in the videotape recordings of the robberies, and white tennis shoes; his jacket pocket was crammed with \$350.00 in loose bills; more bills were found lying in his crashed vehicle; a black ski mask was also in the vehicle; and a black BB gun was found in the lot where he had crashed the vehicle. Hence, we must conclude that this evidence renders any error in admission of the Marathon witnesses' identification harmless. *See Hubbel*, 754 N.E.2d at 892.

2. Double Jeopardy

Beals also argues that the double jeopardy provision of the Indiana Constitution was violated by the trial court's entry of judgment of conviction on robbery and two counts of criminal confinement as to the criminal events at the 7-11 and at the Marathon store because his confinement actions were simply those necessary to commit robbery. We agree.

Pursuant to Indiana's double jeopardy provision, two or more offenses are impermissibly the "same offense" when "with respect to either the statutory elements of the charged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another offense." *Vanzandt v. State*, 731 N.E.2d 450, 455 (Ind. Ct. App. 2000) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 2000)), *trans. denied*. As to the latter "actual evidence test," the necessary inquiry is "whether each offense was established by separate and distinct facts." *Id.* Specifically,

to show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable probability 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 the second challenged offense.

Id. (quoting *Richardson*, 717 N.E.2d at 53. To determine what facts were used by the jury, we consider the evidence, charging information, final jury instructions, and arguments of counsel. *Goldberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

The class B felony offense of robbery is defined, as taking property, while armed with a deadly weapon, “by using or threatening the use of force” or by “putting any person in fear.” Ind. Code § 35-42-5-1. The class B felony offense of criminal confinement is defined as confining a person, while armed with a deadly weapon. I.C. § 35-42-3-3.

With respect to the 7-11 crime, the evidence was that Beals entered the store, brandished a gun, demanded that Booth open the register drawer, grabbed money from the drawer, ordered Booth and Murphy to the floor, and left. With respect to the Marathon crime, the evidence was that Beals entered the store, brandished his gun, ordered both Goodman and Terry to the floor, then ordered Goodman to rise and open the cash register; after Goodman complied, Beals “snatched the money . . . and ran out the door.” (Tr. 80).

The charging information alleges in its first count that Beals “while armed with a deadly weapon,” took money from Booth by “putting [her] in fear or by using or threatening the use of force”; in its second count, that “while armed with a deadly weapon,” he “confine[d]” Booth “by ordering her to lie on the floor at gunpoint”; and in

its third count, that “while armed with a deadly weapon,” he “confine[d]” Murphy, “by ordering her to lie on the floor at gunpoint.” (App. 31, 32). The information alleged in its fourth count that Beals, “while armed with a deadly weapon,” took money from Goodman “by putting [him] in fear or by using or threatening the use of force”; in its fifth, that “while armed with a deadly weapon,” he “confine[d]” Goodman “by ordering him to lie on the floor at gunpoint”; and in its sixth count, that “while armed with a deadly weapon,” he “confine[d]” Terry, “by ordering him to lie on the floor at gunpoint.” *Id.* at 32, 33.

The preliminary instructions included the charging information allegations. The final instructions specified the elements that the State must prove beyond a reasonable doubt by mirroring the charging information allegations, e.g., that Beals “while armed with a deadly weapon, . . . took property from . . . Booth; that “while armed with a deadly weapon,” he “confined . . . Booth without her consent,” etc. *Id.* at 100, 101.

In its opening statement, the State indicated that the evidence would establish that Beals entered the 7-11, showed his gun and demanded money from Booth, grabbed money from the drawer that Booth opened, and ran out of the store; there was no reference to any act of confinement. With respect to the Marathon store, the opening statement indicated that Beals entered, showed his gun, ordered both Goodman and Terry to the floor, then orders Goodman to get up and open the cash drawer, then “t[ook] money from the drawer and he le[ft] the store.” (Tr. 23).

In its closing, the State asserted that at the 7-11, the jury “saw” that the store “was robbed,” and “clearly Dolores Booth,” and “[c]learly Pam Murphy was confined.” (Tr.

301). Further, “[c]learly, that Marathon Station was robbed, clearly Mr. Terry and Mr. Goodman were confined.” *Id.* Such constitutes the whole of the initial closing argument as to the offenses charged, with the balance addressing identification evidence, Beals’ flight, the police pursuit, and his eventual apprehension. In its final closing, it argued that “the evidence [was] uncontroverted,” as the jury had “seen the robberies.” *Id.* at 313. The balance of the State’s final closing argument responded to Beals’ citation of inconsistent witness identification testimony.

Thus, the evidence, charging information, instructions, and argument did not clearly portray the commission of both robbery and confinement as discrete crimes at the 7-11 and also at the Marathon store.

In *Hopkins v. State*, our Supreme Court held that “where the confinement of a victim is greater than that which is inherently necessary to rob [the victim], the confinement, while part of the robbery is also a separate criminal transgression.” 759 N.E.2d 633, 639 (Ind. 2001). Therefore, where the criminal episode was “protracted” over time, and the criminal confinement of the victims had been “completed” by their removal from one floor of the residence to another before being robbed, there was “no substantial likelihood that the jury based its determination of guilt on the confinement counts upon the evidence of the incidental confinement at the moment of the robbery.” *Id.* at 640. Here, the entire criminal episode in both establishments was brief, as indicated by the recording; the confinement in both instances was coextensive with the robbery; and the confinement no greater than necessary to accomplish the robbery.

In *Vanzandt v. State*, 731 N.E.2d 450 (Ind. Ct. App. 2000), *trans. denied*, however, the evidence established that the armed defendant had ordered the victims to lie on the floor while he took money from the cash register and fled. We found “an absence of evidence to establish the essential elements of [the victim] independent of the robbery of [the victim].” *Id.* at 455. Thus, the defendant “demonstrated a reasonable possibility that the jury used the same evidentiary facts to establish criminal confinement of [the victim] as a class B felony as it did to establish the essential elements or robbery of [the victim] as a class B felony.” *Id.*

In the case before us, as in *Vanzandt*, we find that at both locations, Beals’ “compelling” the victims “to lie on the floor” was “not separate and apart from the force used to effect the robbery.” *Id.* Thus, we also find that Beals has demonstrated a reasonable possibility that the jury used the same evidentiary facts to establish Beals’ criminal confinement of the robbery victims and to establish the essential elements of robbery of the victims. Hence, he has established a violation of the double jeopardy clause of the Indiana Constitution. Accordingly, we order that his criminal confinement convictions be vacated. *See Id.* at 456; *see also Polk v. State*, 783 N.E.2d 1253, 1259 (Ind. Ct. App. 2003), *trans. denied*.

Affirmed in part and reversed in part.

NAJAM, J., and BAILEY, J., concur.