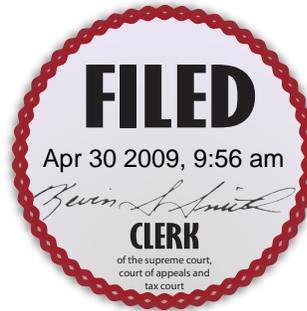


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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY A. ROWE,)
)
Appellant-Defendant,)
)
vs.) No. 46A03-0809-CR-439
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0701-FA-10

April 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jeffrey A. Rowe appeals his convictions of Robbery¹ and Burglary,² both as class A felonies.³ Rowe presents the following restated issues for review:

1. Was the evidence sufficient to support Rowe's convictions for robbery and burglary?
2. Did the elevation of both convictions to class A felonies violate double jeopardy principles?

We affirm in part, reverse in part, and remand with instructions

The facts favorable to the convictions are that in January 2007, seventy-three-year-old Robert Toutloff resided at the Normandy Village apartments. Toutloff became acquainted with Bobbi Jo Lewis approximately four or five months before the events in question when she knocked on his apartment door one day and asked him for money so she could buy milk for her little girl.⁴ Toutloff gave her some money. From that point on, according to Toutloff, the two became friends. Toutloff explained: "I kind of looked after her. I liked her. She was a nice person." *Transcript* at 8. Lewis asked Toutloff for money "every two or three weeks, something like that", ostensibly for essential items such as diapers and milk. *Id.* Eventually, Lewis began to steal money from Toutloff. She once stole \$290 and he had her arrested. Toutloff estimated that Lewis stole money from him "half a dozen times." *Id.* at 10. Nevertheless, Lewis continued to come around and Toutloff continued to give her money.

On the evening of January 21, 2007, Lewis was with Rowe, who was her boyfriend, and Jennifer Benson, who was her sister. The three were driving around in Lewis's father's

¹ Ind. Code Ann. § 35-42-5-1 (West, PREMISE through 2008 2nd Regular Sess.).

² Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2008 2nd Regular Sess.).

³ Rowe was also found to be a habitual offender, but does not appeal that determination.

⁴ Toutloff learned at trial that Lewis actually has no children.

car. After they purchased five dollars worth of gas, the group was out of money. With Rowe driving, they traveled to the Normandy Apartments, where a friend, Charles Everly, gave Lewis \$20. Lewis bought crack cocaine with the money and the three smoked it. After that, Lewis told Rowe that Toutloff kept some money in his right front pocket. Aware that Lewis had gotten money from Toutloff in the past, Rowe put on a hooded sweatshirt, went to Toutloff's apartment, and knocked on his door. Inside, Toutloff was eating dinner when he heard the knock. He went to the door but did not see anyone through the peephole, so he returned to his meal. When he heard a second knock, he went to the door again and this time thought he saw a police officer outside the door, so he unlocked the deadbolt. At that moment, someone violently pushed the door open from the outside, knocking Toutloff to the floor on his back. The intruder jumped on top of Toutloff, straddling his stomach, and began punching Toutloff in the face and head. The man repeatedly demanded, "We know you've got money, where is it?" *Id.* at 19. As the beating continued, Toutloff was eventually able to say, "In here", pointing to a single-drawer filing cabinet right next to them. *Id.* at 20. Still lying on his back, Toutloff pulled the drawer open and took out a small leather shaving kit. The intruder took the shaving kit, opened it, and found approximately \$70 inside. The intruder took out the money, got off of Toutloff, and fled from the apartment.

Toutloff called the police, who responded and took Toutloff's description of what had occurred. Toutloff was taken to the hospital, where it was determined that he had suffered cuts to his face and neck, a broken nose, and severe bruising on his torso. He remained in the hospital for three days.

Returning to Rowe, approximately five minutes after he had left Lewis and Benson in the parking lot, Rowe came running back to the car, jumped into the driver's seat, and "squealed out." *Id.* at 121. Rowe's hands were bleeding from small cuts around his knuckles. He informed them, "I got it." *Id.* at 122. He told the women that Toutloff did not have money in his pocket, but when Rowe punched him hard, "the dude told him it was in the cabinet in a drawer." *Id.* Rowe showed his companions the money he had taken from Toutloff. They traveled to a Family Express convenience store on Franklin Road, where Rowe purchased some cigarettes. After they left the store, Lewis called someone and arranged a drug purchase. A short time later, Rowe gave the drug source "about like \$70, \$80" in exchange for crack cocaine. *Id.* at 125.

Detective Larry Litchford of the Michigan City Police Department investigated the robbery. Detective Litchford knew of Toutloff's history with Lewis, and in fact had in the recent past counseled Toutloff to have no contact with Lewis. After speaking with Toutloff following the robbery, Detective Litchford "knew Bobbie Jo and knew that if anything happened to Mr. Toutloff, that more than likely, she either knew or she was around when this incident occurred." *Id.* at 208-09. By coincidence, Detective Litchford learned that Sergeant Carey Brinkman was conducting an investigation of a death that occurred at the Normandy Apartments on the same night Toutloff was robbed. In speaking with Sergeant Brinkman, Detective Litchford learned that Lewis had a boyfriend named Jeff Rowe, and that Rowe, Lewis, and Benson had been in the apartment complex on the night of the robbery. Sergeant Brinkman contacted Rowe and Lewis and asked them to come to the police station for an

interview regarding the death investigation.

Rowe and Lewis went to the police station on Thursday, January 25, 2007, and spoke with Detective Litchford and Sergeant Brinkman regarding the death at the Normandy Apartments. Thereafter, Detective Litchford asked Lewis if she would be willing to voluntarily speak with him about the Toutloff robbery. She agreed. After waiving her rights, Lewis told him about her and Rowe's and Benson's activities that night, claiming they had nothing to do with the robbery. When Detective Litchford told her that he knew she was not telling him the truth, she admitted that the three had driven to Toutloff's apartment, where Rowe left the car saying he was going to get some money from Toutloff. According to Lewis, Rowe came running back to the car a few minutes later, got in, claimed he had hit Toutloff, and showed them the money he had taken from Toutloff, which Lewis estimated to be \$75. Detective Litchford also spoke with Rowe, who denied even being in the apartment complex at the time of the robbery. During his interview with Rowe, Detective Litchford observed cuts on Rowe's hands and knuckles. Detective Litchford then interviewed a witness connected to the death investigation in the Normandy apartments, and that man, the aforementioned Everly, identified photos of Lewis and Rowe as people who came to his apartment in Normandy Village asking for money, and stated they were there at about the same time Toutloff was robbed.

On January 30, 2007, Rowe was charged with robbery and burglary, both as class A felonies. On March 22, 2007, a count was added alleging that Rowe was a habitual offender. Following a jury trial, Rowe was convicted as charged and found to be a habitual offender.

The court imposed concurrent, forty-year sentences for each of the class A felony convictions and enhanced the executed sentence by thirty years based upon the habitual offender finding.⁵ Thus, Rowe received a seventy-year executed sentence.

1.

Rowe contends the evidence was not sufficient to support his convictions for robbery and burglary. Our standard of review for challenges to the sufficiency of evidence is well settled.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007). It appears the primary thrust of Rowe's sufficiency challenge is that Lewis, whom Rowe characterizes as the “primary witness,” was not credible. *Appellant's Brief* at 6. Of course, our standard of review forbids making credibility assessments except in the most extreme cases, and Rowe does not contend such is warranted here.⁶ Lewis did not witness the incident, but her account of the evening's

⁵ In so doing, the trial court apparently failed to attach the enhancement to a particular offense. This was error. *See Davis v. State*, 843 N.E.2d 65 (Ind. Ct. App. 2006). We say “apparently” because the transcript of the sentencing hearing that was included in Rowe's appendix reflects that the trial court did not attach it to either conviction. Moreover, we can find no sentencing order or related document in the appellate materials that cures this defect. We will address this error in detail at the end of this opinion.

⁶ We are referring to the principle of “incredible dubiousity.” For testimony to be so inherently incredible that it is to be disregarded on this basis, “the witness must present testimony that is inherently contradictory, wholly

events provided compelling circumstantial evidence of Rowe's guilt. Moreover, her account was corroborated by, among other things, (1) Benson's substantially similar account of the trio's, and specifically Rowe's, activities that evening, (2) Everly's testimony that Rowe was in the apartment complex at about the same time Toutloff was robbed, (3) a convenience store security camera, which captured images of Rowe buying cigarettes and further corroborated Lewis's account of the trio's activities that night, and (4) the injuries on Rowe's hands. Viewed as a whole, the evidence was sufficient to sustain the convictions.

2.

Rowe contends his conviction of both robbery and burglary as class A felonies violates double jeopardy principles because both are elevated from lesser offenses to class A felonies based upon the same serious injury. The State agrees that elevating both offenses to class A felonies in this manner violated double jeopardy. The parties disagree, however, on how to remedy the violation. Rowe contends the burglary conviction should remain a class A felony, but the robbery conviction should be reduced to the level appropriate for that offense without a serious injury element, i.e., a class C felony. The State counters that the class A felony robbery conviction should stand and the burglary conviction should be reduced to the level appropriate for that offense without a serious injury element, i.e., a class B felony. We agree with the State.

“When two convictions are found to contravene double jeopardy principles, a

equivocal or the result of coercion, and there must also be a complete lack of circumstantial evidence of the defendant's guilt.” *Clay v. State*, 755 N.E.2d 187, 189 (Ind. 2001).

reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation.” *Smith v. State*, 881 N.E.2d 1040, 1048 (Ind. Ct. App. 2008) (citing *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999)). The jury’s verdict reflects its determination that Toutloff suffered serious bodily injury during Rowe’s attack upon him. If we were to reduce the robbery conviction to a class C felony, which contains no injury element, and let stand the class A burglary conviction, which does not require proof of a *serious* bodily injury, then this aspect of the jury’s findings would be rendered meaningless. Accordingly, we conclude that in order to remedy the double jeopardy violation, the burglary conviction should be reduced to a class B felony.

Our reduction of the burglary conviction to a class B felony on double jeopardy grounds necessitates resentencing on that count. If this were the only change wrought in the sentence imposed by the trial court, we might proceed to adjust the sentence ourselves. *See, e.g., Neff v. State*, 849 N.E.2d 556, 562 (Ind. 2006) (“there may be situations in which the appellate court need not remand because a constitutionally permissible method exists to impose a sentence similar to that imposed by the trial court”). There is, however, another problem with the sentence imposed by the trial court.

In imposing the habitual offender enhancement, the trial court did not specify which conviction it was enhancing. As indicated before, this omission constitutes error.

Our Indiana Supreme Court has repeatedly held that when defendants are convicted of multiple offenses and found to be habitual offenders, trial courts must impose the resulting penalty enhancement on only one of the convictions and must specify the conviction so enhanced. *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999). Failure to specify requires remand to the trial court to correct the sentence as it regards the habitual offender status. *Id.*

Davis v. State, 843 N.E.2d at 67. In *McIntire*, our Supreme Court noted, “The only time we have found remand for re-sentencing to be unnecessary is when we affirmed all convictions and the trial court ordered identical sentences to run concurrently.” *McIntire v. State*, 717 N.E.2d at 103. Those conditions have not been met (i.e., all convictions were not affirmed; one was reduced). Therefore, we must remand to the trial court with instructions to assign the habitual offender enhancement to one of the convictions.

In summary, the evidence was sufficient to support Rowe’s convictions for robbery and burglary, but the burglary conviction must be reduced from a class A felony to a class B felony. This reduction in the offense and the resultant change in the applicable sentencing range, in combination with the failure to attach the habitual offender enhancement to a specific conviction, require that we remand to the trial court for resentencing, consistent with the principles set out in this opinion

Judgment affirmed in part, reversed in part, and remanded with instructions.

NAJAM, J., and VAIDIK, J., concur.