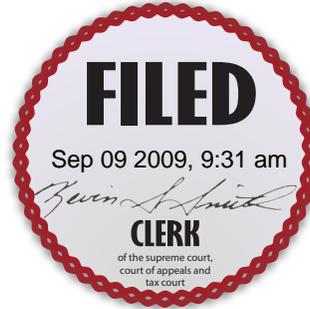


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHNNY C. HORTON,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0901-CR-15
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-0802-FA-44892

September 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Johnny C. Horton appeals his conviction of Class D felony pointing a firearm,¹ asserting that we should vacate the conviction because it violates Indiana's double jeopardy protections. He raises the following restated issue: whether there is a reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of both pointing a firearm and criminal confinement.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

In February 2008, Alicia Everman was residing at an Indianapolis townhouse with her eleven-month-old daughter and Alicia's cousin, Barbara Walls. Alicia's sister, Ashley, had also been staying at the home for the past couple of weeks. At approximately 1:00 a.m. on February 22, 2008, Ashley was cleaning the residence when she heard a knock at the door. At the time, Alicia's boyfriend, Andrew Allen ("Allen"), was sitting at the dining room table. Ashley eventually opened the door and saw three men standing in the hallway wearing hooded sweatshirts pulled up and over their heads to partially cover their faces. Ashley attempted to close the door, but one or more of the men forced their way inside. The three men were later identified as James Bryant, Curtis Brandon, and Horton.

The men forcefully seated Ashley at the table in the dining room with Allen and asked her where her money was located. When she did not immediately provide the information, Bryant struck her in the head with his handgun. Eventually, Ashley told them her purse was in the living room, and Bryant and Brandon led her to the living room. Horton stayed in the

¹ See Ind. Code § 35-47-4-3.

dining room with Allen and kept his gun pointed at Allen, while the other two men went through the house with Ashley.²

After going through upstairs bedrooms, and taking money and possessions from purses and drawers, Bryant and Brandon brought Ashley back downstairs to the dining room. After about five minutes, the three men moved Ashley and Allen from the dining room into the living room, where Bryant and Brandon tied Ashley and Andrew with audiovisual and DVD cords as Horton kept a gun pointed at them. The three men then left the residence. Soon thereafter, police apprehended Brandon, Bryant, and Horton at the apartment complex and arrested them.

On February 25, 2008, the State charged Horton with twelve offenses: burglary as a Class A felony, four counts of criminal confinement as Class B felonies, carrying a handgun without a license as a Class A misdemeanor, pointing a firearm as a Class D felony, battery as a Class C felony, robbery as a Class B felony, intimidation as a Class C felony, and two counts of theft as Class D felonies. Bryant, Brandon, and Horton were tried together before a jury on November 17 and 18, 2008.

The jury found Horton guilty of all charges. However, at the December 2008 sentencing hearing, the trial court vacated two criminal confinement convictions, ordered the battery conviction merged with the burglary and robbery convictions, and reduced the robbery count to a lesser felony. The court sentenced Horton to a total executed term of

² During this time, Alicia was upstairs sleeping in her bedroom; however, she awoke to the sounds of her sister crying and men going through Ashley's belongings. Alicia was able to call 911 without being detected.

thirty-one years: twenty-five years for the burglary conviction and six consecutive years for the Count 8 criminal confinement conviction; all other sentences were ordered to be served concurrently, including the Count 6 pointing a firearm conviction, for which he received a one and one-half year sentence. Horton now appeals, asking us to vacate the pointing a firearm conviction.

DISCUSSION AND DECISION

Horton argues that his convictions for criminal confinement and pointing a firearm violate Indiana's Double Jeopardy Clause, Article 1, section 14 of the Indiana Constitution, which provides that "[n]o person shall be put in jeopardy twice for the same offense." Whether convictions violate double jeopardy is a question of law that we review *de novo*. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005) (citing *Spears v. State*, 735 N.E.2d 1161, 1166 (Ind. 2000)).

"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.'" *Smith v. State*, 881 N.E.2d 1040, 1047 (Ind. Ct. App. 2008) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)). Horton claims that the same evidence was used to convict him of both offenses.

Under the actual evidence test, we examine the evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. *Smith*, 881 N.E.2d at 1047-48. 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 1048. “[T]he ‘proper inquiry’ is not whether there is a reasonable probability that, in convicting the defendant of both charges, the jury used different facts, but whether it is reasonably possible it used the same facts.” *Bradley v. State*, 867 N.E.2d 1282, 1285 (Ind. 2007). The appellant’s showing must amount to more than a remote or speculative possibility the same facts were used. *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). When two convictions are found to contravene double jeopardy principles, a 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*, 881 N.E.2d at 1048.

In this case, the two counts alleged to be in violation of the double jeopardy clause are Count 6, which charged Horton with pointing a firearm as a Class D felony, and Count 8, which charged him with criminal confinement as a Class B felony. Specifically, those charges stated, in pertinent part:

Count VI: Jonny [sic] Horton, on or about February 22, 2008, did knowingly point a firearm, that is: a handgun at another person, namely: Andrew Allen; [and]

Count VIII: James Bryant, Jonny [sic] Horton and Curtis Brandon, on or about February 22, 2008, did knowingly, while armed with a deadly weapon, that is: handguns, confine Andrew Allen, without consent of Andrew Allen, by holding Andrew Everman [sic] at gunpoint[.]

Appellant’s App. at 29-30. Accordingly, to convict Horton of pointing a firearm, Count 6, the State was required to prove that Horton knowingly pointed a handgun at Allen. To

convict Horton of criminal confinement as alleged in Count 8, the State was required to prove that Horton, while armed with a handgun, knowingly confined Allen by holding him at gunpoint. We must determine whether it is reasonably possible that the jury used the same facts to convict Horton of pointing a firearm as it used to convict him of criminal confinement.

The State's position is that the Count 6 charge of pointing the firearm related to the dining room portion of the intrusion (where Horton pointed a gun at Allen while Allen sat at the dining room table), and the Count 8 confinement charge related to the subsequent living room portion of the intrusion (where Horton pointed a gun at Allen and Ashley while they were being tied up with cords). We acknowledge that evidence was presented at trial that Horton held Allen at gunpoint in two different rooms. However, the inquiry does not end there. *See Burnett v. State*, 736 N.E.2d 259, 263 (Ind. 2000) (“Although there was evidence at trial that could have supported both the pointing a firearm charge and the criminal confinement charge, the inquiry does not end there.”) *overruled on other grounds by Ludy v. State*, 784 N.E.2d 459 (Ind. 2003). In making the determination of whether a double jeopardy violation occurred, it is proper for us to consider, in addition to the evidence, the charging information, final jury instructions, and arguments of counsel. *Burnett*, 736 N.E.2d at 263 (finding double jeopardy violation after examining evidence, preliminary instructions, and State's closing argument); *see also Goldsberry*, 821 N.E.2d at 459 (finding no reasonable possibility that the jury relied on the same facts after considering charging information, jury instructions, and State's final argument).

Our review of the record before us indicates that this case was charged and prosecuted in a non-specific way, such that there is a reasonable possibility that the same evidence was used to establish both offenses. Initially, the State read to the jury the charges filed against each defendant, *Tr.* at 33-34, and, later, the trial court read to the jury the preliminary instructions, which included a definition of each charge. *Id.* at 46; *Appellant's App.* at 98, 100. The language of both offenses allege that Horton held a gun to Allen, and although the criminal confinement charge additionally alleges that Horton confined Allen by holding him at gunpoint, it does not in any other way distinguish the circumstances from the pointing a firearm charge. *Cf. Baltimore v. State*, 878 N.E.2d 253, 260 (Ind. Ct. App. 2007) (no double jeopardy violation where charging information for burglary resulting in bodily injury was based on one incident of touching, and sexual battery charge was based on second separate incident of touching), *trans. denied* (2008).

We next observe that the State, in closing argument, did not identify independent evidence supporting each crime or otherwise distinguish which evidence established which offense. To the contrary, the comments about what evidence established which offense were somewhat muddled. That is, the prosecutor first argued that the elements of pointing a firearm were satisfied by Allen's testimony that Horton pointed a handgun at him in the dining room. *Tr.* at 298-99. Thereafter, when arguing that the State had proved the criminal confinement of Allen, the prosecutor stated:

Now, confinement of Andrew Allen, without his consent, again, they were armed with a deadly weapon. They were [sic] held him at gunpoint in the dining room. He wasn't allowed to raise his head. He couldn't look at them. He couldn't move around. He was only allowed to move when they moved

him, and then they tied him up with, like he said, AV cords from the DVD player. I think everybody could agree that Ashley and [Allen's] liberty was substantially interfered with.

Id. at 302. Consequently, the confinement could have been based on events in the dining room, the living room, or both.³

We find that the instant case was not prosecuted in a manner that insured the same evidence was not used to support both verdicts, and Horton has demonstrated that a reasonable possibility exists that the evidentiary facts used to convict him of pointing a firearm were also used to convict him of criminal confinement. We affirm Horton's Class B felony criminal confinement conviction, but remand to the trial court with instructions to vacate the pointing a firearm conviction and its one and one-half year concurrent sentence.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and BARNES, J., concur.

³ Indiana's criminal confinement statute, Indiana Code section 35-42-3-3, identifies two types of criminal confinement. The first subsection prohibits a person from confining another person without that other person's consent; the second subsection, in relevant part, prohibits a person from removing another person from one place to another under force or threat of force. Ind. Code § 35-42-3-3(a)(1), (2). Although the State charged Horton in Counts 4 and 10 with criminal confinement by removing Ashley from one place to another within the home, and thus under subsection (2), it did not make the same allegations with regard to Allen. Rather, Count 8 charged Horton with confinement of Allen by confining Allen without his consent at gunpoint. We note that, therefore, Horton's act of removing Allen from the dining room to the living room could not have served as the basis for his Count 8 criminal confinement conviction.