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ATTORNEYS FOR APPELLEE:

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ANTONIO WILLIAMS, )  
)  
Appellant-Defendant, )  
)  
vs. ) No. 79A04-0903-CR-158  
)  
STATE OF INDIANA, )  
)  
Appellee-Plaintiff. )

**BAKER, Chief Judge**

Appellant-defendant Antonio Williams appeals his convictions for Robbery,<sup>1</sup> a class C felony, Criminal Confinement,<sup>2</sup> a class D felony, Intimidation,<sup>3</sup> a class D felony, and Battery on a Law Enforcement Officer,<sup>4</sup> a class D felony. Williams raises the following arguments: (1) the prosecutor committed misconduct by referring to Williams's invocation of his Fifth Amendment right to silence during opening and closing statements and during the State's case-in-chief; (2) his convictions for robbery and confinement violated principles of double jeopardy; (3) his aggregate six-year sentence for intimidation and battery is contrary pursuant to Indiana Code section 35-50-1-2; and (4) the sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character.

We find that Williams's convictions for robbery and confinement violated principles of double jeopardy and direct the trial court to vacate the confinement conviction. We also find that the aggregate six-year sentence for intimidation and battery as reflected in the trial court's written sentencing statement is contrary to law. Finding no other error, we affirm in part, reverse in part, and remand with instructions to vacate Williams's confinement conviction and amend the sentencing statement consistent with this decision.

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<sup>1</sup> Ind. Code § 35-42-5-1.

<sup>2</sup> I.C. § 35-42-3-3(a).

<sup>3</sup> Ind. Code § 35-45-2-1(b).

<sup>4</sup> I.C. § 35-42-2-1(a)(2)(A).

## FACTS

On July 8, 2007, Purdue Student Andrew Kolberg was walking home from a friend's apartment in West Lafayette. As Kolberg walked, he heard a car approaching quickly down an alley and then stop. Kolberg heard a car door open and close, heard someone calling to him, turned, and saw a person later identified as Williams running toward him. Williams asked Kolberg what was in the bags he was carrying; Kolberg responded that the bags contained markers and alcohol. Williams began to feel Kolberg's pockets with his hand and asked whether Kolberg had any cash on him, telling Kolberg to be honest and then "we won't have to shake you down." Tr. p. 29. Kolberg responded that he had no cash and turned to leave, when Williams said, "I've got five guys in the car and we can get here a lot faster than the cops can." Id. at 30.

Kolberg continued to walk away, at which point Williams motioned to the car. Kolberg heard one of the men call out, "Antonio, grab him," at which point Kolberg felt Williams grab him in a "bear hug" from behind, bringing Kolberg to the ground. Id. at 30-31. Two men emerged from the car and came over to Williams and Kolberg. Williams's arms and legs were wrapped around Kolberg, and as Kolberg attempted to reach his cell phone, one of the other men took it from him and destroyed it. The men took Kolberg's keys and wallet, at which point the three men returned to the car and drove away. Kolberg followed, noting that the vehicle was a light-colored car with an Indiana license plate that included the numbers "1815." Id. at 35.

Kolberg called the police, prepared a written and taped statement, and viewed a photo array. Although he was initially unable to identify Williams as his attacker, he viewed another photo array at another time and successfully identified Williams. Lafayette Police officers suspected that Williams was involved, based on Kolberg's description, and were eventually able to reach Williams on the phone. He was initially uncooperative but eventually provided officers with an address where they could find him. The officers went to the address, where Williams invited them in. Williams asked why they were looking for him, and they explained that he was a suspect in the incident involving Kolberg. Williams told the officers that he was "pleading the fifth" and refused to answer any more questions. Id. at 89. As the officers were leaving, they photographed the car sitting in the driveway—a silver Honda Civic with Indiana DARE license plate "DI 1815." Id. at 89-90.

On July 16, 2007, the State charged Williams with class B felony robbery, class C felony criminal confinement, and class D felony theft. On July 18, 2007, West Lafayette Police Lieutenant Jason Dombkowski and Sergeant Dave Vanvactor went to take Williams into custody. Williams resisted being taken into custody and, once taken into custody, escaped and fled on foot. There was a violent scuffle that resulted in Sergeant Vanvactor sustaining cuts to his right elbow and right shin, scrapes and swelling to his left elbow and knee, and damage to his uniform and police radio. Williams told Lieutenant Dombkowski to "go f\*ck himself, that when I get out of here . . . , I'm going

to come and find you,” and when asked to clarify what he meant, Williams told the lieutenant that he would find out. Guilty Plea Tr. p. 13.

On July 20, 2007, the State amended the charging information, adding counts of class C felony escape, class D felony intimidation, two counts of class A misdemeanor battery, and class A misdemeanor resisting law enforcement. Williams moved to sever the first three counts from the remaining counts, and the trial court granted the motion on November 8, 2007.

Williams’s jury trial on the charges of class B felony robbery, class D felony confinement, and class D felony theft took place on November 13 and 14, 2007. At trial, the prosecutor elicited testimony from a witness regarding Williams’s refusal to speak to police officers when informed he was a suspect in the Kolberg incident. The prosecutor also referred to Williams’s refusal to talk during opening and closing arguments. Williams’s attorney did not object. On November 13, 2007, the jury convicted Williams of robbery as a class C felony, criminal confinement as a class D felony, and theft as a class D felony.<sup>5</sup>

At the close of the January 8, 2008, sentencing hearing, the trial court entered verdicts of guilty but mentally ill and found that the theft conviction merged with the robbery conviction. The trial court sentenced Williams to seven years for robbery and

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<sup>5</sup> Throughout its brief, the State confusingly and mistakenly refers to the class of felonies of which Williams was convicted. At some points, the State incorrectly refers to class B robbery and class C confinement convictions; at others, it correctly refers to class C robbery and class D confinement convictions. We strongly urge the State to get the facts correct in its future endeavors before this court.

three years for confinement, to be served consecutively, for an aggregate sentence of ten years. Seven years are to be served in the Department of Correction and three years are to be served in Community Corrections.

On February 5, 2008, the State again amended the charging information, adding a count of class D felony battery on a law enforcement officer. On February 22, 2008, Williams pleaded guilty to class D felony intimidation and class D felony battery on a law enforcement officer in exchange for the dismissal of the remaining charges. The plea agreement left sentencing to the trial court's discretion and provided that the sentence would be served consecutively to the sentences imposed for Williams's robbery and confinement convictions. At the close of the sentencing hearing held on the same date, the trial court indicated that it was imposing an aggregate four-year sentence on Williams, with three years to be served in the Department of Correction followed by one year on probation, to be served subsequent to Williams's time with Community Corrections. Thus, at the hearing, the trial court indicated that the full aggregate sentence for all offenses would be fourteen years, with three of those years served in Community Corrections and one served on probation.

The trial court's March 25, 2008, written sentencing order, however, states that Williams was sentenced to three years imprisonment for each of the two class D felony convictions, to be served consecutively, with three years served in the Department of Corrections, two years at Community Corrections, and one year on supervised probation. The written sentencing order, therefore, results in an aggregate sentence for all offenses

of sixteen years, with five years served in Community Corrections and one served on probation. Williams now appeals.

## DISCUSSION AND DECISION

### I. Prosecutorial Misconduct

Williams argues that the prosecutor committed misconduct by repeatedly referring to his refusal to speak to police officers when they initially informed him that he was a suspect in the Kolberg robbery. Specifically, the prosecutor referred to Williams's refusal to answer further questions and "pleading the Fifth" in opening and closing arguments. Tr. p. 22, 89, 276-77. Additionally, the State elicited testimony from one of the officers who interviewed Williams that Williams told the officers he was "pleading the fifth," and that Williams "refused to answer any more questions. I wasn't going to ask him any more questions. I was basically just informing him of what we had learned and what was going on." Id. at 89.

Initially, we observe that Williams did not object to the use of this evidence at any point during the trial. To preserve a claim of prosecutorial misconduct, a defendant must raise a contemporaneous objection to the allegedly improper statement and request the trial court to admonish the jury. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). If the defendant is not satisfied with the admonishment, he should move for a mistrial. Id. The failure to request an admonishment or to move for mistrial results in waiver. Id. Where, as here, a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only the grounds for the misconduct but also additional

grounds for fundamental error. An error is fundamental when it “makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm.” Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009).

To establish prosecutorial misconduct, a defendant must show that the prosecutor engaged in misconduct and that the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he would not otherwise have been subjected. Cooper, 854 N.E.2d at 835. Whether a prosecutor’s argument constitutes misconduct is measured by reference to caselaw and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct of the jury’s decision rather than the degree of impropriety of the conduct. Id.

Here, Williams claims that the prosecutor’s references during trial to his pre-arrest statements violated his Fifth Amendment privilege against self-incrimination. As a general rule, a defendant’s pre-arrest silence may not be used as direct evidence of guilt. United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987). There is an exception to that rule, however, when a defendant agrees to speak with authorities but then chooses to stop doing so in the middle of the conversation:

United States v. Davenport, 929 F.2d 1169, 1174 (7th Cir. 1991), . . . holds that if a defendant starts down an exculpatory path by providing statements, and then clams up and refuses to expand on those statements, the latter silence may be introduced at trial. Davenport rests on two propositions. On the one hand, it would be unseemly or dishonest if a prosecutor could purport to respect the silence of an accused at one stage and then use that same silence at a



later stage of the same prosecution to create an inference of guilt. Conversely, it would not serve the criminal justice system to allow defendants to use the Fifth Amendment both as a shield and as a sword, answering questions selectively and preventing the prosecution from mentioning such selectiveness at trial.

United States v. Bonner, 302 F.3d 776, 784 (7th Cir. 2002). In Bonner, the Seventh Circuit held that the defendant's voluntary presentation of documents beyond the scope of a government subpoena and his subsequent refusal to answer questions about those documents was an attempt to tell an exculpatory story; thus, the case was controlled by Davenport and references during trial to his decision to remain silent were permitted.

Here, as in Davenport and Bonner, Williams initially agreed to speak with police officers and invited them into the residence where he was staying. Williams asked the officers why they wanted to speak with him and they told him of the Kolberg robbery and asked where he had been earlier that day. He proceeded to tell them an exculpatory story—he slept until mid-afternoon, smoked a marijuana cigarette, then drove to Danville, Illinois, to purchase alcohol. While in Illinois, he received two traffic citations at 7:09 p.m. Indiana time. Having provided his alibi to the police, the officers explained that the robbery had occurred nearly three hours before Williams had received the speeding ticket and that Williams “looked like a very possible suspect based on all the information we already gathered . . . .” Tr. p. 89. Only at that point did Williams refuse to answer questions, stating that he was “pleading the fifth.” Id. Williams, therefore, is attempting to use the Fifth Amendment as both a shield and as a sword, which was explicitly disallowed in Davenport and Bonner. Therefore, we do not find that the

prosecutor's references during trial to Williams's pre-arrest silence violated his Fifth Amendment rights or constituted prosecutorial misconduct.

And in any event, even if those references had been erroneous, the error would not have been fundamental given the substantial evidence in the record establishing Williams's guilt. Kolberg identified Williams in a photo array and made an in-court identification of Williams as his assailant. Kolberg also remembered and wrote down part of a license plate number that matched Williams's vehicle. Additionally, Kolberg remembered one of his assailants yelling to "Antonio" by name. Tr. p. 30-31. Under these circumstances, there is no reasonable possibility that the State's references to Williams's silence had any effect on the jury's verdict. Thus, we decline to reverse on this basis.

## II. Double Jeopardy

Williams next argues that his convictions for class C felony robbery and class D felony criminal confinement violate the prohibition against double jeopardy. Two 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." Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999).

Williams concedes that there is no impermissible overlap between the statutory elements of the two crimes of which he was convicted;<sup>6</sup> therefore, he focuses on the evidence used to convict him of robbery and criminal confinement. “To show that two challenged offenses constitute the same offense under the actual evidence test, a defendant must show 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.” Merriweather v. State, 778 N.E.2d 449, 454 (Ind. Ct. App. 2002). A defendant’s convictions for robbery and confinement do not run afoul of double jeopardy considerations “when the facts indicate that the confinement was more extensive than that necessary to commit the robbery.” Id.

Here, the record reveals that Williams approached Kolberg as he was walking outside. Williams asked Kolberg if he had any cash, cautioning that if Kolberg was honest, then “we won’t have to shake you down.” Tr. p. 29. Kolberg responded that he had no cash and turned to leave, when Williams said, “I’ve got five guys in the car and we can get here a lot faster than the cops can.” Id. at 30. Kolberg continued to walk away, at which point two men got out of Williams’s car and walked toward Kolberg and Williams, Williams wrapped Kolberg in a bear hug and forced him to the ground, and the

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<sup>6</sup> A person commits class D felony criminal confinement when he knowingly or intentionally confines another person without the other person’s consent. I.C. § 35-42-3-3(a). A person commits class C felony robbery when he knowingly or intentionally takes property from another person by using or threatening the use of force on any person. I.C. § 35-42-5-1.

men took Kolberg's cell phone, car keys, and wallet. As soon as they removed Kolberg's possessions, the assailants returned to the vehicle and drove away.

The State bases its argument that the confinement was more extensive than necessary to commit the robbery on the initial conversation between Kolberg and Williams, drawing a line between that "confinement" and the confinement that occurred during the robbery itself. We cannot agree that the initial interaction between Kolberg and Williams constituted confinement, inasmuch as Kolberg turned around and was walking away before Williams physically restrained him. And because the physical restraint lasted only long enough to remove Kolberg's possessions and the attackers immediately returned to their car and drove away thereafter, we cannot conclude that the confinement was more extensive than necessary to commit the robbery. Therefore, we find that Williams's convictions for robbery and confinement violate the prohibition against double jeopardy. Accordingly, we instruct the trial court to vacate Williams's class D felony criminal confinement conviction.

### III. Sentence

Williams next argues that the sentence imposed by the trial court is erroneous. He first contends that the aggregate sentence imposed by the trial court in its second written sentencing order is illegal. Second, he argues that the sentence is inappropriate in light of the nature of the offenses and his character.

### A. Legality

Before delving into the substance of the sentencing argument, it would behoove us to clarify precisely what sentence Williams received and to adjust that sentence given our conclusion that his confinement conviction must be vacated. The trial court clearly and explicitly imposed a seven-year sentence for the robbery conviction and ordered that sentence to be fully executed with the Department of Correction.<sup>7</sup>

As for the sentence Williams received after his second trial, there is a discrepancy between the statements made by the trial court at the sentencing hearing and the sentence as described in the trial court's written sentencing order. At the sentencing hearing on Williams's convictions for class D felony intimidation and class D felony battery on a law enforcement officer, the trial court stated that it was imposing an aggregate four-year sentence, with three years to be served in the Department of Correction and one year to be served on supervised probation. Thus, under this scenario, Williams would serve ten years in the Department of Correction and one year on probation.<sup>8</sup>

The written sentencing order, however, states that Williams was sentenced to three years imprisonment for each of the two class D felony convictions, to be served consecutively, with three years served in the Department of Correction, two years at Community Corrections, and one year on supervised probation. Under this scenario,

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<sup>7</sup> The trial court also imposed a three-year sentence for Williams's confinement conviction, to be served consecutively to the robbery sentence. Those three years were to be served in Community Corrections. That sentence is obviously vacated along with the conviction.

<sup>8</sup> Williams's guilty plea agreement specified that his sentences for intimidation and battery would be served consecutively to his sentences for robbery and criminal confinement.

therefore, Williams would serve ten years in the Department of Correction, two years in Community Corrections, and one year on supervised probation.

To resolve this discrepancy, Williams directs our attention to Indiana Code section 35-50-1-2(c), which provides that except for crimes of violence—which are not at issue herein<sup>9</sup>—the total of the consecutive terms of imprisonment “to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.”

Williams’s convictions for intimidation and battery on a law enforcement officer occurred when he was resisting arrest. He yelled and cursed at the officers, pushed them, ran away, struggled, kicked, and swung at them. Once handcuffed, Williams threatened Lieutenant Dombkowski. We can only conclude that these convictions arose out of a single criminal episode. See Smith v. State, 770 N.E.2d 290, 294 (Ind. 2002) (noting that where a complete account of a crime can be given without referring to the other offense, the offenses are not a single episode of criminal conduct). Thus, Indiana Code section 35-50-1-2(c) applies and, since Williams’s two convictions arising out of this episode were both class D felonies, limits his consecutive terms of imprisonment to the advisory term for a class C felony—four years.

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<sup>9</sup> The State, again mistakenly representing that Williams was convicted of class B felony robbery, argues that he was, in fact, convicted of a crime of violence. Inasmuch as class C felony robbery is not a crime of violence, however, the State is incorrect. I.C. § 35-50-1-2(a)(12).

The trial court's written sentencing order, therefore, runs afoul of this statute by imposing two consecutive three-year terms. Under these circumstances, we elect to impose the sentence announced orally by the trial court at the sentencing hearing, restating it slightly as follows: two years on each class D felony conviction, with six months to be served on probation for each term, to be served consecutively. Therefore, the aggregate term for Williams's class D felony convictions is four years, with three of those years to be served in the Department of Correction and one year to be served on supervised probation. Consequently, Williams's aggregate sentence for all convictions is eleven years, with one year suspended to probation.

#### B. Appropriateness

Finally, Williams argues that the sentence is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court imposed a seven-year sentence for Williams's robbery conviction, which is one year less than the maximum term for a class C felony conviction. Ind. Code § 35-50-2-6. And for each of his class D felony intimidation and battery convictions, Williams received two years, with six months suspended to probation. I.C. § 35-50-2-7 (providing that the advisory term for a class D felony is one and one-half years imprisonment, with a minimum of six months and a maximum of three years). His guilty

plea agreement required that his class D felony sentences be served consecutively to the robbery sentence.

As for the nature of Williams's offenses, he got together with two of his friends, drove around, and found Kolberg walking alone. He approached and threatened Kolberg, eventually tackling Kolberg and holding him down as Williams's cohorts stole Kolberg's wallet and car keys and destroyed his cell phone. When police officers came to arrest Williams at a later date, he yelled at, cursed at, and threatened the officers. He also used physical force, causing injuries to one of the officers and damage to the officer's uniform and radio.

As for Williams's character, at the age of twenty-two, his criminal history includes convictions for class B felony robbery with a deadly weapon and class A misdemeanor battery. Three additional causes are pending, including allegations of class D felony maintaining a common nuisance, class A misdemeanor possession of marijuana, class D felony receiving stolen property, and class D felony theft. He has had multiple opportunities to rehabilitate himself but has failed to do so and has continued to show an unwillingness to abide by the rule of law.

We recognize, as did the trial court, that Williams pleaded guilty to some of these offenses and has expressed remorse. He has also earned his GED. Furthermore, he has serious mental health problems, as the trial court readily acknowledged by entering a verdict of guilty but mentally ill. Specifically, he has been diagnosed with attention



deficit hyperactivity disorder, bipolar disorder, and obsessive compulsive disorder, and has attempted suicide on two occasions.

Although Williams is not the worst of offenders and did not commit the worst of offenses, his criminal history is significant for a person who is only twenty-two years old. His multiple contacts with the criminal justice system thus far have not encouraged him to change his behavior. And the offenses that he committed herein are undeniably serious. Under these circumstances, we do not find the aggregate sentence of eleven years, with one year suspended to probation, to be inappropriate in light of the nature of the offenses and his character.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate Williams's conviction for criminal confinement and revise the sentencing statement to reflect a seven-year term for robbery, a consecutive two-year term for intimidation, with six months suspended to probation, and a consecutive two-year term for battery on a law enforcement officer, with six months suspended to probation.

BAILEY, J., and ROBB, J., concur.