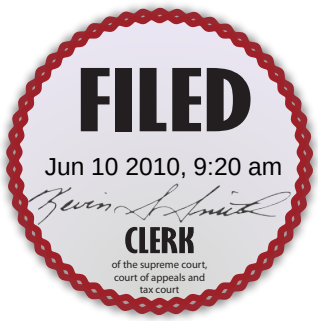


ATTORNEY FOR APPELLANT:

**SUSAN D. RAYL**
Smith Rayl Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**GEORGE P. SHERMAN**
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| KENNETH WILSON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0910-CR-1036 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Commissioner
Cause No. 49G06-0902-FA-26274

**June 10, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Kenneth Wilson appeals his convictions for burglary as a class A felony,[1] robbery as a class B felony,[2] and criminal confinement as a class C felony.[3] Wilson also appeals his sentence for burglary as a class A felony, enhanced by his status as an habitual offender.[4] Wilson raises two issues, which we revise and restate as:

I. Whether his convictions for burglary as a class A felony, robbery as a class B felony, and criminal confinement as a class C felony violate the prohibition against double jeopardy; and

II. Whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm in part, reverse in part, and remand.

The relevant facts follow. On February 17, 2009, "[b]etween 10:00 and 11:00 o'clock" in the evening, John Wylie left his apartment in Indianapolis, Indiana, to return some DVDs he had borrowed from the library. Transcript at 47-48. Wylie walked down an alley toward the library and was confronted by two men who were later identified as Wilson and Frank Byers. Byers asked Wylie "if he could see the DVDs" Wylie was carrying, and when Wylie declined Byers took the DVDs out of his hand. Id. at 49. After that, Wilson hit Wylie in the head, knocked Wylie off of his feet, and knocked Wylie's glasses off. While Wylie "was scuffling to find [his] glasses," Byers went

[1] Ind. Code § 35-43-2-1 (2004).

[2] Ind. Code § 35-42-5-1 (2004).

[3] Ind. Code § 35-42-3-3 (Supp. 2006).

[4] Ind. Code § 35-50-2-8 (Supp. 2005).

through Wylie's pockets and took his wallet, keys, cell phone and a pack of cigarettes. Id. at 50. The men also told Wylie that "if [Wylie] fought with them they would kill [him]." Id.

After the men left, Wylie began walking back to his home because "that was a safe place for [him] to go [he] thought." Id. at 51. As Wylie approached his house, however, he "was hit in the back of the head and knocked down . . . face first." Id. When Wylie looked up, he observed "[t]he same two gentlemen that attacked [him] in the alleyway." Id. Byers told Wylie that they were going to use Wylie's keys to enter his house, and when Wylie told the men that he would not say which key was for his door, Wilson and Byers began "[h]itting, punching, [and] kicking" Wylie for about ten or fifteen minutes while he was still on the ground, causing Wylie pain, mostly to his ribs. Id. at 52. While Wilson and Byers beat Wylie, they told him that "[i]f you fight us, argue with us, we will shoot you." Id. at 53. Wylie briefly stood up to try to defend himself, but one of the men hit Wylie in the face with a beer can and knocked him down again.

After Wilson and Byers determined which key was for Wylie's door, they entered Wylie's apartment, with Wilson dragging Wylie inside. The men told Wylie "to lay face down on the floor or they would kill [him]." Id. at 56. After searching Wylie's apartment for about ten minutes, Wilson and Byers left with Wylie's computer and a DVD player.

After the men left, Wylie went to a Village Pantry store and called the police. Indianapolis Metropolitan Police Officer Jason Ehret responded to Wylie's call and met

Wylie at the Village Pantry. When Officer Ehret found Wylie, Wylie was "[v]ery shaken, almost to the point of crying. He had injuries to his face, [and his] clothes were kind of in disarray." Id. at 84. Wylie gave Officer Ehret descriptions of the two assailants which Officer Ehret relayed to the dispatcher. Soon after, the two men were apprehended and identified as Wilson and Byers.

On February 19, 2009, the State charged Wilson with Count I, burglary as a class A felony; Count II, robbery as a Class B felony; Count III, criminal confinement as a class C felony; and Count IV, criminal confinement as a class C felony. Each count was enhanced based upon bodily injury sustained by Wylie, which the charging information stated as "redness and swelling on the face." Appellant's Appendix at 23-24. On April 27, 2009, the State charged Wilson as an habitual offender listing convictions for robbery as a class B felony on June 23, 1982, auto theft as a class C felony on July 12, 1994, and auto theft as a class C felony on August 9, 2005 as underlying offenses on the habitual offender charge.

A jury trial was held on August 26, 2009, and the jury found Wilson guilty as charged on Counts I-III and not guilty on Count IV. On September 24, 2009, the trial court held a hearing on Wilson's habitual offender charge and for sentencing. The trial court determined Wilson to be a habitual offender based upon previous convictions for robbery on June 23, 1982, auto theft on July 12, 1994, and auto theft on August 9, 2005. The trial court sentenced Wilson to twenty-five years for Count I, burglary as a class A felony, and enhanced that sentence by thirty years by virtue of his status as an habitual

offender. The trial court also sentenced Wilson to eight years for Count II, robbery as a class B felony, and three years for Count III, criminal confinement as a class C felony, and ordered that each of those sentences be served concurrent with Count I. Thus, Wilson was sentenced to an aggregate term of fifty-five years to be executed in the Department of Correction.

I.

The first issue is whether Wilson's convictions for burglary as a class A felony, robbery as a class B felony, and criminal confinement as a class C felony violate the prohibition against double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14. The Indiana Supreme Court has held that "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." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Wilson argues that his convictions violate the "actual evidence" test, not the "statutory elements" test.

"An offense is the same as another under the actual evidence test when there is a reasonable possibility that the evidence used by the fact-finder to establish the essential elements of one offense may have been used to establish the essential elements of a second challenged offense." Id. at 53. However, the Indiana Supreme Court clarified

this test in Spivey v. State, where it held that "[t]he test is not whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense; rather, the test is whether the evidentiary facts establishing the essential elements of one offense also establish all of the elements of a second offense." 761 N.E.2d 831, 833 (Ind. 2002). If the evidentiary facts establishing one offense establish only one or several, but not all, of the essential elements of the second offense, there is no double jeopardy violation. Id.

Convictions for robbery and burglary do not violate the Richardson actual evidence test as "as each crime requires proof of a fact that the other does not; robbery requires proof that the defendant took property from another person and burglary requires proof that the defendant broke and entered a structure." Smith v. State, 872 N.E.2d 169, 176 (Ind. Ct. App. 2007), trans. denied. However, we have also "long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson." Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002). "Among these is the doctrine that where a burglary conviction is elevated to a Class A felony based on the same bodily injury that forms the basis of a Class B robbery conviction, the two cannot stand." Id. The same logic applies to other charges enhanced by bodily injury, including criminal confinement.

Here, Wilson argues that "the State used the same 'bodily injury' to prove both the essential elements of 'bodily injury' in the burglary, robbery, and criminal confinement charges." Appellant's Brief at 9. Wilson argues that "when the same injury is used to

elevate two crimes, the Indiana Double Jeopardy Clause is violated." Id. The State "does not oppose Wilson's request . . . ." State's Brief at 5.

In the charging information, Counts I-III were enhanced to burglary as a class A felony, robbery as a class B felony, and criminal confinement as a class C felony based upon bodily injury described in each Count as "redness and swelling on the face . . . ." Appellant's Appendix at 23-24. Also, in the final jury instructions, the trial court instructed that in order to convict Wilson of the highest felony for each offense, the State must have proven that each crime "resulted in bodily injury to John Wylie, that is: redness and swelling on the face." Id. at 115, 117, 119. Thus, despite the evidence presented at trial of separate injuries, including extensive injury to Wylie's ribcage area during his second encounter with Wilson, "the jury was instructed that it could consider the same bodily injury to find Wilson guilty of the highest felony for each offense." State's Brief at 5.

We conclude that there was a reasonable possibility that the jury relied upon the same evidence of bodily injury when it found Wilson guilty of enhanced versions of burglary, robbery, and criminal confinement. "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." Richardson, 717 N.E.2d at 54. Accordingly, we reduce Wilson's conviction for robbery from a class B felony to a class C felony and his conviction for criminal confinement as a class C felony to a class D felony, and remand to the trial court

for resentencing in accordance with this opinion.[5] See, e.g., Smith, 872 N.E.2d at 177 (holding that although "sufficient evidence might exist to support a finding that [defendant] caused two separate bodily injuries, we conclude that [defendant] has demonstrated a reasonable possibility that the same bodily injury was used to enhance both his burglary and robbery convictions").

II.

The next issue is whether Wilson's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Wilson argues that "[a] thirty year enhancement for being an habitual offender attached to his twenty-five (25) year sentence for Burglary, a Class A felony, is effectively a life sentence for Mr. Wilson, and is inappropriate in light of the nature of the offense and the character of the offender."[6] Appellant's Brief at 10.

[5] We note Wilson's sentence of fifty-five years in the Department of Correction for burglary as a class A felony, and enhanced by virtue of his status as an habitual offender, remains unchanged.

[6] Wilson also appears to argue that the trial court abused its discretion when it attached the habitual offender enhancement to his conviction for burglary as a class A felony, rather than Wilson's conviction for robbery as a class B felony, because "Wilson has never been convicted of a Class A felony prior to the instant case, but has been convicted of Robbery on two prior occasions." Appellant's Brief at

Our review of the nature of the offense reveals that Wilson and Byers confronted Wylie in an alley and that Wilson hit Wylie in the head, which knocked Wylie off of his feet and his glasses to the ground. The two men robbed Wylie of his wallet, keys, cell phone, and a pack of cigarettes, and they threatened to kill Wylie if he tried to fight them. Wilson and Byers attacked Wylie a second time soon thereafter outside of Wylie's home, hitting Wylie in the back of the head and knocking him down. When Wylie would not assist Wilson and Byers in gaining entry to his home, Wilson and Byers began "[h]itting, punching, [and] kicking" Wylie for about ten or fifteen minutes while he was still on the ground, causing Wylie pain mostly to his ribs. Transcript at 52. The men also again threatened to kill him if he resisted. After Byers opened the door, Wilson dragged Wylie inside the home. Wilson and Byers stole Wylie's computer and a DVD player from inside the home.

Our review of the character of the offender reveals that Wilson has an extensive criminal history spanning over thirty years. On July 30, 1977, Wilson was sentenced in

---

12. Wilson does not cite to authority for this proposition. We note, however, that "where a defendant is convicted of multiple felonies at the same time and the defendant is an habitual offender, the trial court may attach the habitual offender finding to any of the relevant felonies even if attachment results in a harsher penalty." Burrus v. State, 763 N.E.2d 469, 472 (Ind. Ct. App. 2002), trans. denied. See also Merritt v. State, 663 N.E.2d 1215, 1217 (Ind. Ct. App. 1996) ("Aside from setting the parameters concerning the length of the enhancement, the relevant statutes contain no guidelines or formulas for courts to apply or follow when determining the length of the habitual offender enhancement. Instead, the decision is left to the trial court's discretion."), trans. denied. We also note that Wilson's thirty-year habitual offender enhancement on a conviction for burglary as a class A felony was the minimum sentence under the habitual offender statute. Ind. Code § 35-50-2-8(h) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense.").

juvenile court to probation on one count of burglary were it committed by an adult. On May 11, 1980, Wilson was sentenced to "SCRIBS" after a true finding in juvenile court for one count of criminal conversion were it committed by an adult. Presentence Investigation Report at 3. On September 10, 1980, Wilson was again sentenced to SCRIBS after a true finding on one count of theft were it committed by an adult.

As an adult, Wilson's inability to follow the law was only more pronounced. In 1981, Wilson was found guilty of public intoxication and "No Operator or Chauffer's License." Id. at 4. Also in 1981, Wilson was found guilty of theft and ordered to serve 324 days at the Indiana State Farm. In June, 1982, Wilson was found guilty of robbery as a class B felony and was sentenced to serve six years in the Department of Correction. Wilson was released to probation on July 26, 1985, but he was again arrested on September 1, 1985. He was found guilty of attempted robbery on July 3, 1986 stemming from that arrest ("CR85-195F"), and the trial court sentenced him to time served plus six years suspended. Wilson was then arrested on August 21, 1986, and on January 9, 1987, he was found guilty of "Resisting Flee with Injury," and was sentenced to one year executed. Id. at 6. Before being sentenced on the resisting charge, he was arrested on October 9, 1987 for vehicle theft and sentenced to three years executed. Wilson's sentence on the vehicle theft charge was ordered to be served "consecutive to any executed time [he] received as a result of a pending probation violation under CR85-195F." Id. at 6.

Wilson was released to parole on June 3, 1992, but he was declared delinquent after absconding in August 1992 and was returned to custody on a parole violation on January 27, 1993. In the interim, however, on December 7, 1992, he was found guilty of operating a vehicle while intoxicated as a class A misdemeanor and sentenced to 365 days, with 185 days suspended. He was again released to parole on March 3, 1993, but he was arrested the same day for resisting law enforcement as a class A misdemeanor. On May 19, 1993, he was sentenced to time served on the resisting charge, but he "also received some executed time as a result of the parole violation, and he was incarcerated until [February 3, 1994], when he was paroled once again." Id. at 6.

On July 12, 1994, Wilson pled guilty to auto theft as a class D felony and auto theft as a class C felony and was sentenced to eight years in the Department of Correction with seven years executed. He was released to probation on November 1, 1998, but he violated his probation when he was arrested on September 25, 1999 for disorderly conduct as a class B misdemeanor.[7] He pled guilty and was sentenced to 180 days with ten days executed. On August 29, 2000, he pled guilty to operating a vehicle while intoxicated as a class A misdemeanor and was sentenced to 365 days with ten days executed. As a condition of his probation, he was ordered to participate in a substance abuse treatment program. His probation was revoked, however, when he was arrested for operating a vehicle while intoxicated as a class D felony, operating a vehicle while

[7] Wilson was also found to have violated his probation based upon "failure to pay fees, and a positive urine test for marijuana on 9/9/1999." Presentence Investigation Report at 8.

intoxicated as a class C misdemeanor, and public intoxication as a class B misdemeanor.[8] He was sentenced to ninety days executed based upon the probation revocation.

On July 25, 2001, Wilson was found guilty of possession of marijuana, hash oil, or hashish as a class A misdemeanor and was sentenced to a six-month suspension of his driver's license. On August 19, 2002, he pled guilty to domestic battery as a class A misdemeanor and was sentenced to 364 days with twenty-eight days executed. His probation was revoked when he did not report to a domestic violence counseling program and was sentenced to 200 days executed. On November 1, 2002, he pled guilty to operating a vehicle while intoxicated as a class D felony and driving while license suspended as a class A misdemeanor and was sentenced to 840 days executed. On April 25, 2003, Wilson was also found guilty of another charge of domestic battery as a class A misdemeanor which occurred on February 25, 2002.

On March 8, 2005, Wilson was charged with resisting law enforcement as a class D felony, driving while license suspended as a class A misdemeanor, and two additional counts of resisting law enforcement as class A misdemeanors. Before he was sentenced on those offenses, however, he was charged on June 8, 2005 with Count I, auto theft as a class D felony; Count II, possession of cocaine or schedule I, II drug as a class D felony; Count III, driving while license suspended as a class A misdemeanor; and Count IV, auto theft as a class C felony. On August 9, 2005, he pled guilty to resisting law enforcement as a class D felony stemming from the March 8, 2005 offenses, as well as to Counts II

[8] This charge was dismissed due to "Essential Police Witness Not Present." Presentence Investigation Report at 9.

and IV from the June 8, 2005 charges, and was sentenced to 730 days executed for resisting law enforcement, two years executed with one year suspended to probation on Count II, and five years with three years executed for Count IV.

Wilson was discharged to probation on July 18, 2007. On January 9, 2008, a hearing was held on a violation of his probation wherein it was alleged among other things that a urine sample he submitted on October 22, 2007 tested positive for cocaine. His probation was revoked, and he was sentenced to 365 executed. Wilson was "discharged from Parole District 3" on December 25, 2008. Id. at 15. On February 18, 2009, he was arrested on the instant offenses.

Wilson has continuously demonstrated his disregard for the law and his failure to be rehabilitated by lenient sentences. After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Howard v. State, 873 N.E.2d 685, 692 (Ind. Ct. App. 2007) (holding that defendant's sentence for burglary and enhancement by being determined to be an habitual offender was not inappropriate in light of defendant's extensive criminal history).

For the foregoing reasons, we affirm in part, reverse in part, and remand for resentencing in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

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