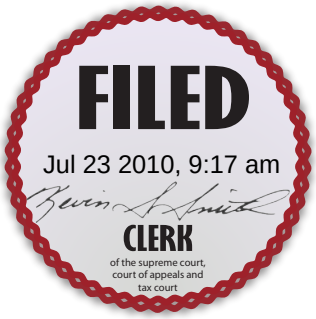

ATTORNEY FOR APPELLANT:

GREGORY T. LAUER
Lauer and Lauer
Martinsville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

NORMAN A. DONOVAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A01-0912-CR-617
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable G. Thomas Gray, Judge
Cause No. 55D01-0903-FC-77

July 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Anthony A. Donovan appeals his convictions for class D felony operating a vehicle while intoxicated ("OWI") endangering a person, class A misdemeanor criminal recklessness with a vehicle, and class B misdemeanor criminal mischief. We remand.

Issues

We restate the issues as follows:

I. Do Donovan's convictions for OWI and criminal recklessness violate constitutional and/or common law prohibitions against multiple punishments for the same offense?

II. Did Donovan's acts amount to a single chargeable crime under the continuing crime doctrine?

Facts and Procedural History

In the fall of 2008, Donovan entered into a dating relationship with Jennifer Miller. Miller had a five-year-old son, whose father was Jason Ault. In February 2009, Miller decided that she wanted to break up with Donovan. On March 13, 2009, Miller came home from a night out with her girlfriends, and an inebriated Donovan arrived shortly thereafter. An altercation ensued, and Donovan made accusations against Miller and threw her against a cabinet. Miller ordered Donovan to leave, and he did. He soon returned, and when Miller heard him banging on the door, she chased him away with a baseball bat. She called Ault, who was having visitation with their child, and Ault told her to come to his house for safety.

When Miller arrived at Ault's house, she received phone calls from Donovan, threatening to trash her house. Shortly thereafter, Donovan drove up in his vehicle and parked in Ault's driveway. Miller screamed to Ault, who ran out of the house carrying a golf

club. Donovan exited his vehicle, and Ault struck the headlight with his golf club. Donovan re-entered his vehicle and chased Ault. During the pursuit, Donovan struck and destroyed a neighborhood entrance sign. After briefly driving away, he returned, exited his vehicle, and engaged in a physical altercation with Ault in the street.

Meanwhile, the police arrived in response to Miller's 911 call. At the scene, Indiana State Police Trooper Steve Jordan noticed that Donovan was glassy-eyed and unsteady, smelled of alcohol, and used slurred speech. A chemical breath test administered at the scene indicated that Donovan's blood alcohol concentration equivalent ("ACE") was .14. At booking, the somewhat incoherent and physically unbalanced Donovan admitted to Morgan County Sheriff's Deputy Mark Wilson that he had consumed alcohol.

On March 13, 2009, the State charged Donovan with two counts of class C felony battery, two counts of class D felony intimidation, class D felony OWI endangering a person, class D felony operating with a .08 ACE, class A misdemeanor criminal recklessness with a vehicle, and class B misdemeanor criminal mischief. On November 4, 2009, a jury found Donovan guilty of class D felony OWI endangering a person, class D felony operating with a .08 ACE, class A misdemeanor criminal recklessness with a vehicle, and class B misdemeanor criminal mischief. The OWI and ACE convictions were class D felonies based on Donovan's in-court admission that he had a prior OWI conviction in 2005. Tr. at 404; Ind. Code § 9-30-5-3. At sentencing on November 30, 2009, the trial court merged the ACE conviction into the OWI conviction and entered judgment on the OWI conviction. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Multiple Punishments for Same Offense

Donovan asserts that he was denied his constitutional protection against double jeopardy as found in Article 1, Section 14 of the Indiana Constitution. Indiana's double jeopardy clause states that "[n]o person shall be put in jeopardy twice for the same offense." We apply a de novo standard of review for double jeopardy claims. *Scott v. State*, 859 N.E.2d 749, 754 (Ind. Ct. App. 2007).

Two or more offenses are the "same offense" for double jeopardy purposes 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). Here, Donovan limits his challenge to the actual evidence test. Under the actual evidence test, we examine the evidence to determine whether each challenged offense was established by separate and distinct facts. *Id*. at 53. "[T]he Indiana Double Jeopardy Clause is violated when there is a reasonable possibility that the evidentiary facts used to establish *the* essential elements of one offense may also have been used to establish *the* essential elements of a second challenged offense." *Bradley v. State*, 867 N.E.2d 1282, 1285 (Ind. 2007) (emphases added). The overlap of some of the evidence to establish *one of* the essential elements of each offense is not enough to amount to a double jeopardy violation. *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). "[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*, 867 N.E.2d at 1285 (citation and quotation marks omitted). "The appellant must show more than a remote or speculative possibility that the same facts were used." *Goldsberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005). In determining what facts were used, we consider the evidence, charging information, final jury instructions, and arguments of counsel. *Id*.

Here, the State charged Donovan with class D felony OWI, class D felony ACE, and class A misdemeanor criminal recklessness with a vehicle,[1] alleging in pertinent part that:

> 5. … Donovan did operate a vehicle while intoxicated in such a manner that a person was endangered.[2]
>
> 6. … Donovan did operate a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per 210 liters of said defendant's breath.[3]
>
> 7. … Donovan did recklessly perform an act with a motor vehicle that created a substantial risk of bodily injury to another person.[4]

Appellant's App. at 7. Counts five and six were charged as class D felonies based on Donovan's 2005 OWI conviction. Ind. Code § 9-30-5-3.[5]

The preliminary jury instructions state in pertinent part:

---

[1] To the extent Donovan includes his criminal mischief conviction in his double jeopardy claim, we note that this conviction was based on a distinct act (destroying the neighborhood entrance sign) against a distinct victim (the neighborhood association). Thus, his conviction on the separate offense of criminal mischief clearly does not violate double jeopardy. *Bald v. State*, 766 N.E.2d 1170, 1172 n.4 (Ind. 2002); *George v. State*, 862 N.E.2d 260, 264 (Ind. Ct. App. 2006). We limit our discussion accordingly.

[2] Ind. Code § 9-30-5-2(b).

[3] Ind. Code § 9-30-5-1(a)(2).

[4] Ind. Code §§ 35-42-2-2(b)(1), -2(c)(1).

The elements of Operating A Vehicle While Intoxicated Endangering a Person are that the accused must:

(1) be a person who
(2) operates a vehicle
(3) while intoxicated
(4) endangering a person[.]

….

The elements of Criminal Recklessness With A Motor Vehicle are that the accused must:

(1) recklessly
(2) perform an act that creates a substantial risk of bodily injury
(3) to another person
(4) while operating a motor vehicle[.]

Appellant's App. at 56, 60.

In his summation of the evidence, the prosecutor argued in part:

So [Donovan] first goes to [Miller's] home and gets physical with her. He leaves and then returns to find himself locked and barricaded out. Does he go home to sleep it off? No. He busts through the door … and gets chased off with a baseball bat [and Miller] runs back to her old boyfriend …. Donovan could have gone to his mother and slept off his drunk, but he didn't, did he? He took several actions that then gave him some pretty certain consequences later on, actions and consequences …. Donovan doesn't care that he's drunk, gets behind the wheel of his car, to chase down [Miller] at [Ault's] house …. [Donovan] tries to run over [Ault] with his car as [Ault] is trying to avoid being hit and taking the danger across the street from his family … and does [Donovan] turn around and go back north on 267? No. He follows and chases. He chases [Ault] down. [Ault] testified that he was trying to get out of his way. He was trying to take evasive action. Every time he did, [Donovan] pointed the car back at him again. So then [Donovan] backs his car out of [Ault's] driveway, doesn't realize or care … that he's running back uphill over the neighborhood sign … At that point then he takes off southbound in his car …. He turns around and comes back within seconds, and this is the second

[5] The base charges were class A misdemeanor OWI endangering a person and class C misdemeanor ACE of 0.08.

> time, at least the second time, that [Donovan] could have avoided these matters getting worse …. He stops his car, gets the weapons out of his trunk, and charges at [Ault], who confronts him …. and [Donovan] starts beating [Ault], who then tries to defend himself …. Let's take a look at criminal recklessness with a motor vehicle. The Judge is going to advise you in his instructions that a person engages in … conduct recklessly if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. Do we, in Morgan County in this day and age, believe that it's an acceptable standard of conduct to chase somebody through a driveway, through the yard, up into the street with a motor vehicle, trying to run them over? I would hope not. That's recklessly. Perform an act that creates a substantial risk of bodily injury …. The substantial risk of injury to the other person, of course, would be [Ault], and it's done while operating a motor vehicle. You've heard plenty of testimony that [Donovan] was the one who was driving this vehicle … chasing [Ault] across the yard, up into the street …. This is the drunk driving charge …. That [Donovan] operated his vehicle …. They pretty much conceded he was drunk from the get-go. And that he endangered a person. Well, he endangered himself, if no one else, by being behind that wheel, drunk as he was, so we would certainly also argue that he endangered anybody who was within 500 feet of him, especially [Ault].

Tr. at 333-37, 341-43.

Donovan essentially argues that the State used the same evidence both to establish the endangerment element of the OWI charge and to establish the substantial risk of bodily injury element of criminal recklessness—namely, Donovan's act of chasing Ault through the neighborhood yards and streets attempting to run him down with his vehicle. Thus, he claims that a reasonable possibility exists that the jury used the same evidence to establish count five, OWI with endangerment, that it used to establish count seven, criminal recklessness with a vehicle. Under *Spivey*, such partial overlap does not violate double jeopardy. 761 N.E.2d at 833.

Although Donovan does not specifically say so, it appears that he might also rely on

the common law rule explained by Justice Sullivan in his concurring opinion in *Richardson*, which prohibits "[c]onviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished." 717 N.E.2d at 56 (Sullivan, J., concurring).

> The legislature has provided that the punishment classification of certain crimes may be enhanced if the behavior which constitutes the crime is accompanied by certain specified additional behavior or causes certain specified additional harm. In situations where a defendant has been convicted of one crime for engaging in the specified additional behavior or causing the specified additional harm, that behavior or harm cannot also be used as an enhancement of a separate crime; either the enhancement or the separate crime is vacated.

Id.

Here, the additional behavior of "endanger[ing] a person" raises class C misdemeanor OWI to class A misdemeanor OWI. Ind. Code § 9-30-5-2. Donovan asserts that this additional behavior is based on the same evidentiary facts that established "substantial risk of bodily injury to another person" for purposes of his criminal recklessness conviction. Ind. Code § 35-42-2-2(b)(1). Because both the OWI charge and the OWI conviction contain the phrase "endangering a person," Donovan appears, at first glance, to raise a valid argument. However, we note that ultimately Donovan's OWI conviction was enhanced to a class D felony based solely on his undisputed prior OWI conviction, and not on his act of chasing Ault with his vehicle. Thus, such enhancement would have applied regardless of whether his conduct endangered Ault. *See* Ind. Code § 9-30-5-3 (stating that a person who violates section 1 or 2 of this chapter commits a class D felony if he has a previous OWI conviction within the preceding five years). Thus, even under a common law approach, the

enhancement of Donovan's OWI was not based on "the very same behavior or harm as [the criminal recklessness offense] for which [he] has been convicted and punished." *Richardson*, 717 N.E.2d at 56 (Sullivan, J., concurring).

Nonetheless, because the State charged and presented Donovan's OWI as OWI "endangering a person," even though such additional fact was unnecessary for his eventual conviction of class D felony OWI, we conclude that the trial court could have best avoided double jeopardy concerns by merging the two class D felony convictions in the opposite direction. At sentencing, the trial court stated that the class D felony ACE conviction "would be *consumed by*" the class D felony OWI conviction. Tr. at 411, 423 (emphasis added). Although the trial court did not so specify, it presumably merged the ACE and OWI convictions due to double jeopardy concerns. *See Morrison v. State*, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005) (stating that double jeopardy occurs when judgments of conviction are entered and cannot be remedied by practical effect of merger or concurrent sentences), *trans. denied*. We conclude that the proper course for double jeopardy purposes would have been to merge the OWI conviction *into* the ACE conviction. The ACE conviction was based on Donovan's chemical test result of .14 ACE. Donovan was clearly intoxicated when he arrived at Ault's house, before he began pursuing Ault with his vehicle. Thus, there is no reasonable possibility that the jury could have used the same evidentiary facts to establish his ACE (the chemical test) as they used to establish criminal recklessness with a vehicle. As such, we remand with instructions for the trial court to merge the OWI conviction into the ACE conviction, vacate the OWI conviction, and enter judgment on the ACE conviction.

II. Continuing Crime Doctrine

Donovan also asserts that his convictions run afoul of the continuing crime doctrine. We disagree. The continuing crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes. *Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005), *trans. denied.* Instead, it defines those instances in which a defendant's conduct is so compressed in time, place, singleness of purpose, and continuity that it amounts only to a single chargeable crime. *Id*. Such is not the case here. An inebriated Donovan threw Miller against a kitchen cabinet, continued to threaten her, eventually followed her to Ault's house, exited his vehicle, re-entered his vehicle, chased Ault through the neighborhood with his vehicle, damaged a sign belonging to the neighborhood association, briefly drove away, turned around, returned to the scene, and engaged in a physical altercation with Ault. Although the events took place on the same night, Donovan's conduct spanned various locations and various victims, and involved no real evidence of singleness of purpose. Thus, his argument is unavailing.

In sum, we remand with instructions to merge Donovan's OWI conviction into his ACE conviction, vacate the OWI conviction, and enter judgment on the ACE conviction. Otherwise, we affirm in all respects.

Remanded.

BAKER, C.J., and DARDEN, J., concur.