



Joshua Henry Field (“Field”) was convicted in Putnam Circuit Court of Class D felony criminal confinement and Class A misdemeanor intimidation. Field appeals and claims that his convictions violate Indiana’s prohibition against double jeopardy. The State concedes the error.

We reverse and remand.

### **Facts and Procedural History**

On August 22, 2009, Field was an inmate in the Behavioral Modification Unit of the Putnamville Correctional Facility. This unit contained approximately sixty-five inmates guarded by four correctional officers. During a disturbance at the unit, two inmates approached Officer John Scott, told him to get down, and threatened to stab and hurt him if he did not comply. The inmates took Officer Scott behind some tables and told him that he would get hurt if he did not stay down. Fearing for his safety, Officer Scott complied with their threats by getting on his knees behind the tables. Defendant Field then ran by Officer Scott, pointed his finger at him, and yelled, “get down and stay down or you are going to get hurt.” Tr. p. 32.

On October 5, 2009, the State charged Field with Class D felony intimidation and Class D felony criminal confinement. A bench trial was held on March 10, 2010, at the conclusion of which the court found Field guilty of Class A misdemeanor intimidation and Class D felony criminal confinement. The trial court sentenced Field to one year on the Class A misdemeanor conviction to be served concurrent with a two-year sentence on the Class D felony conviction. Fields now appeals.

## Discussion and Decision

Field claims that his convictions violate Indiana's prohibition against double jeopardy. To convict Field of Class D felony criminal confinement, the State had to prove that he knowingly or intentionally confined Officer Scott without his consent. See Ind. Code § 35-42-3-3(a)(1) (2004). In this context, "confine" means "to substantially interfere with the liberty of a person." Ind. Code § 35-42-3-1 (2004). Here, the State proved that Field confined Officer Scott without his consent by presenting evidence that Field approached Scott, pointed his finger at him, and told him to "get down and stay down or you are going to get hurt." Tr. p. 32.

To convict Field of Class A misdemeanor intimidation, the State had to prove that he communicated a threat to commit a forcible felony on Officer Scott with the intent that he engage in conduct against his will. See Ind. Code § 35-45-2-1(a)(1) (2004). Here, the State proved this by presenting evidence that Field approached Officer Scott, pointed his finger at him, and told him to get down and stay down or else get hurt.

Convictions for both criminal confinement and intimidation do not constitute double jeopardy if the essential elements of both convictions are supported by different evidence. See, e.g., Stafford v. State, 736 N.E.2d 326, 331 n.5 (Ind. Ct. App. 2000) (no double jeopardy violation where criminal confinement conviction was based on evidence that defendant placed a rope around the victim's neck and intimidation conviction was based on evidence that defendant threatened the victim while armed with a deadly weapon). But where the essential elements of both offenses are established by the same evidence, the convictions constitute double jeopardy under the "actual evidence" test set

forth in Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). See, e.g., McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999) (convictions for criminal confinement and intimidation constituted double jeopardy where both convictions were established by evidence that defendant pushed a baseball bat into the victim's chest and told her that she "wasn't going anywhere.").

This case is substantially identical to McIntire. The same evidence, i.e., Field's actions of pointing his finger at Officer Scott and directing him to get down and stay down or else get hurt, established the essential elements of both convictions. This runs afoul of the actual evidence test. See McIntire, 717 N.E.2d at 101. And the State concedes the error. To remedy this double jeopardy violation, we reverse Field's conviction for Class A misdemeanor intimidation and remand with instructions that the trial court vacate his conviction and sentence thereon. See id.

Reversed and remanded with instructions.

BAKER, C.J., and NAJAM, J., concur.