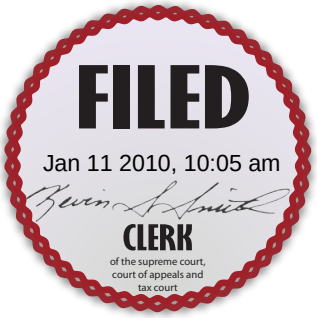

ATTORNEY FOR APPELLANT:

JULIE ANN SLAUGHTER
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

COURTNEY SIMMONS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A04-0905-CR-282
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt Eisgruber, Judge
Cause No. 49G01-0811-FC-263338

January 11, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Courtney Simmons was convicted following a bench trial of robbery, a Class C felony, and battery, a Class A misdemeanor. Simmons was sentenced to concurrent terms of six years for robbery and one year for battery. Simmons appeals, raising two issues for our review: 1) whether sufficient evidence supports his robbery conviction; and 2) whether his convictions and sentences for both robbery and battery violate double jeopardy. Concluding sufficient evidence supports the robbery conviction and Simmons is not subjected to double jeopardy, we affirm.

Facts and Procedural History

Jeff Frank was riding his bicycle in an Indianapolis alley when his shoelace became entangled in the spokes. Frank got off the bike to disentangle himself, and Simmons suddenly appeared in the alley and asked for a cigarette. When Frank gave him a cigarette, Simmons offered to pay for it. Frank declined and tried to leave the alley but Simmons straddled the front tire of his bike and prevented him from leaving, saying, "[W]hat's the matter – why you [sic] afraid – why don't you want to talk to me[?]" Transcript at 10. Two times, Frank tried to turn his bike away from Simmons and leave the alley, but Simmons stepped in front of the bike and prevented him from leaving each time. Finally, because he was scared of Simmons, Frank got off the bike and said, "if you want the bike take the bike." Id. at 11. Simmons replied that he did not want the bike, but he also did not get out of the way, so Frank began to walk away. Simmons got in front of Frank and grabbed his arms. Frank tried to get his cell phone out of his pocket, but the two men wrestled over it until Simmons threw Frank to the ground and

rode out of the alley on Frank's bike. Frank called 911 and police apprehended Simmons nearby. Frank suffered abrasions to his hand and leg.

Simmons was charged with robbery, a Class C felony, and battery, a Class A misdemeanor. Following a bench trial at which Frank and Simmons both testified, the trial court found Simmons guilty as charged and sentenced him to six years for the robbery conviction and one year for the battery conviction, to be served concurrently, with four years served at the Department of Correction and two years served on work release. Simmons now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Simmons argues insufficient evidence supports his conviction of robbery. Our standard of review for sufficiency of the evidence claims is well settled:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnotes, and citations omitted) (emphasis in original).

To convict Simmons of robbery, the State was required to prove beyond a reasonable doubt that Simmons knowingly or intentionally took property from Frank by

using or threatening the use of force or by putting Frank in fear. See Ind. Code § 35-42-5-1; see also Appellant's Appendix at 19 (information charging Simmons with robbery "by putting Jeff Frank in fear or by using or threatening the use of force on Jeff Frank."). Frank testified he was afraid of Simmons when Simmons kept moving in front of him and would not let him leave the alley. Because he was scared, Frank told Simmons to "[t]ake the bike, just leave me alone." Tr. at 13. Simmons grabbed Frank's arms and wrestled with him before throwing him to the ground and taking the bike. Simmons admitted he took the bike and knew it was not his. See id. at 51 (answering defense counsel's question, "And so you took the bike . . . and you knew it wasn't your bike?" by replying, "Yes . . . [t]hat's right."). Simmons contends the State failed to prove the necessary connection between the use of force and the taking of the bike. See Coleman v. State, 653 N.E.2d 481, 483 (Ind. 1995) (holding sufficient evidence of robbery because defendant's "use of force was necessary to accomplish the theft . . . and was thus part of the robbery.").

Simmons was charged with accomplishing the robbery by placing Frank in fear or by using force, however. The evidence most favorable to the judgment is that Simmons repeatedly obstructed Frank's attempts to leave the alley, placing Frank in fear and leading him to tell Simmons to take the bike so he could extricate himself from the situation. Cf. Paulson v. State, 181 Ind. App. 559, 562, 393 N.E.2d 211, 213 (1979) (holding sufficient evidence of robbery for taking victim's purse from her car because defendant's attack on victim caused her to flee her car, preventing her from retaining

control of her purse). Thus, the State proved robbery by placing Frank in fear and did not also have to prove Simmons accomplished the robbery by using force.[1]

Simmons's argument that he had no intent to steal when he entered the alley is essentially a request that we reweigh the evidence in his favor. Simmons testified that after Frank gave him a cigarette, he asked for a light and Frank started yelling for police. At that point, Simmons saw the bike on the ground and "got out of the alley because we were the only two there." Tr. at 51. He characterizes the encounter between the two men as one of "mutual fear of each other" and his motivation for taking the bike as "flight instinct" when Frank yelled for the police rather than an intent to steal. Reply Brief at 3. Intent is a mental state and may be inferred from circumstantial evidence. Proffit v. State, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004). The trial court explicitly rejected Simmons's version of events and accepted Frank's as the more credible. See Tr. at 64 ("I appreciate your story. I don't think it's the accurate story. I believe Mr. Frank's story . . . ."). We do not reweigh evidence or assess witness credibility on appeal. See Drane, 867 N.E.2d at 146. There is sufficient evidence to show Simmons placed Frank in fear to commit a robbery.

II. Double Jeopardy

Simmons also contends his convictions of both robbery and battery violate Indiana's double jeopardy clause, which provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. Art. 1, § 14. "[T]wo or more offenses

[1] The State could have also proved robbery by use of force by establishing that after Frank relinquished control of the bike, Simmons grabbed Frank's hands, threw him to the ground, and rode away on the bike. However, as discussed below, if the robbery conviction rested on the use of force, a double jeopardy issue could arise, as Simmons was charged with battery based upon those same acts.

are the 'same offense' . . . 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) (emphasis in original). Under the actual evidence test, we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. Id. at 53.

As noted above, Simmons was charged with committing robbery by placing Frank in fear or by using or threatening the use of force on Frank. Simmons was charged with battery for "touch[ing] Jeff Frank in a rude, insolent, or angry manner, that is: grabb[ing] Jeff Frank and [throwing] him to the ground," causing bodily injury. Appellant's App. at 19. Simmons contends both his robbery conviction and his battery conviction were based upon the single act of force upon Frank. As also noted above, however, the robbery conviction can be sustained upon a finding Simmons placed Frank in fear, causing him to step away from his bike. In its closing argument, the State acknowledged there was force used in accomplishing the robbery, but also noted Simmons "scared [Frank] enough for him to tell him at one point just take the bike." Tr. at 63. Simmons was tried to the bench, and we presume trial courts know and follow the applicable law. Thurman v. State, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). In the absence of any indication to the contrary, we presume the trial court used the appropriate facts as the basis for separate robbery and battery convictions. The trial court's only statement in pronouncing judgment was that "this isn't what you consider a robbery in the classic sense of the term [but] I think it meets the legal definition of a robbery." Tr. at 64. Cf. Alexander v. State,

768 N.E.2d 971, 978 (Ind. Ct. App. 2002) (finding double jeopardy violation after bench trial where, among other things, trial court's statements indicated it had relied on the same evidence to sustain convictions for unlawful possession of a firearm by a serious violent felon and possession of a handgun without a license), aff'd on reh'g, trans. denied. Simmons was not charged with robbery as a Class B felony which would have required proof of bodily injury; therefore, the trial court did not necessarily have to rely on Simmon's act of grabbing Frank's hands and throwing him to the ground in finding him guilty of robbery. Simmons has failed to demonstrate a reasonable possibility the trial court used the same actual evidence in convicting Simmons of both offenses and, therefore, his double jeopardy claim fails.

Conclusion

Sufficient evidence supports Simmons's conviction of robbery and his convictions of both robbery and battery do not violate double jeopardy. Therefore his convictions are affirmed.

Affirmed.

BAILEY, J., concurs.

BAKER, C.J., concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

COURTNEY SIMMONS,	)	
Appellant-Defendant,	)	
vs.	)	No. 49A04-0905-CR-282
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

Baker, Chief Judge, concurring in part and dissenting in part.

I agree that the evidence was sufficient to support Simmons's conviction for robbery. However, I part ways with the majority's conclusion that the conviction and sentence for battery is appropriate in light of double jeopardy concerns.

As the majority observes, "two or more offenses are the 'same offense' . . . 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) (emphasis in original). Richardson also holds that the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. at 53. The defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish one offense may also have been used to establish a second challenged offense. Id.; see also Alexander v. State, 768 N.E.2d 971, 973 (Ind. Ct. App. 2002).

In this case, the State alleged in the charging information that Simmons committed robbery by "using or threatening the use of force." Appellant's App. p. 19. With respect to the battery charge, the State alleged that Simmons "grabbed" Frank and threw him to the ground resulting in bodily injury. Id.

Granted, the trial court in this case did not necessarily have to rely on Simmons's act of grabbing Frank's hand and throwing him to the ground to find him guilty of robbery. However, I agree with Simmons's contention that the evidence nonetheless shows that there was a reasonable possibility that the trial court used the same evidentiary facts—Simmons's tussle with Frank that resulted in abrasions to his knee and hand—to prove the "use of force" under the robbery statute and to prove Frank's "bodily injury" in accordance with the battery statute. Thus, in accordance with the principles announced in Richardson, I believe that Simmons prevails on his double jeopardy claim. As a result, I would vacate Simmons's conviction and sentence for battery.