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**IN THE  
COURT OF APPEALS OF INDIANA**

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STEVEN D. NILES, )

Appellant-Defendant, )

vs. )

No. 02A03-0606-CR-244

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Kenneth R. Scheibenberger, Judge  
Cause No. 02D04-0511-FD-803

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**December 21, 2006**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Steven Niles (Niles), appeals his convictions of: Count I, criminal recklessness, a Class D felony, Ind. Code § 35-42-2-2; Count II, pointing a firearm, a Class D felony, I.C. § 35-47-4-3; and Count III, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3.

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

## ISSUES

Niles raises two issues on appeal, which we restate as:

- (1) Whether the State presented sufficient evidence to convict Niles of criminal recklessness, pointing a firearm, and resisting law enforcement; and
- (2) Whether Niles' sentence violates the Indiana Constitution's prohibition of double jeopardy.

## FACTS AND PROCEDURAL HISTORY

On November 9, 2005, New Haven Police Officer Rodney Hormann (Officer Hormann) and Fort Wayne Reserve Police Officer Dorsey Lee Simmons (Officer Simmons) (collectively, the Officers) went to Niles' residence to execute a body attachment warrant in connection with a small claims court case. While Officer Simmons positioned himself to watch the backside of the residence, Officer Hormann knocked on the front door. A woman answered the door, and Officer Hormann proceeded to identify himself and requested to speak with Niles. At that time, Officer Simmons began to reposition himself near the front door. Niles came to the door, verified his name and date of birth to Officer Hormann, and told Officer Hormann he "better bring backup."

(Transcript p. 9). Niles then turned and the Officers noticed a weapon in his left hand, which he soon raised and pointed at Officer Hormann's stomach. Officer Hormann quickly tried to knock the weapon out of Niles' hand, but failed; consequently, Officer Hormann pinned Niles against a wall, but still did not succeed in getting Niles to release the weapon. Thereafter, a struggle ensued between the Officers and Niles. Eventually, after delivering several closed hand strikes to the back of Niles' head, the Officers were able to restrain and handcuff him.

On November 17, 2005, the State filed an Information charging Niles with: Count I, criminal recklessness, a Class D felony, I.C. § 35-42-2-2; Count II, pointing a firearm, a Class D felony, I.C. § 35-47-4-3; and Count III, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3. On March 24, 2006, a bench trial was held and Niles was found guilty on all three counts. On April 26, 2006, the trial court held a sentencing hearing. Niles was sentenced to two years in the Department of Correction with one year suspended and one year of probation on each of Counts I and II. On Count III, Niles was sentenced to one year in the Department of Correction. The trial court ordered that all sentences be served concurrently.

Niles now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Sufficiency of the Evidence*

Niles argues that the State failed to present sufficient evidence to convict him of criminal recklessness, pointing a firearm, and resisting law enforcement. Our standard of review for a sufficiency of the evidence claim is well-settled. In reviewing sufficiency of

the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028-29 (Ind. Ct. App. 2002). We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Alspach v. State*, 755 N.E.2d 209, 210 (Ind. Ct. App. 2001), *trans. denied*. A conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier-of-fact. *Cox*, 774 N.E.2d at 1028-29.

#### A. *Criminal Recklessness*

Niles first argues that the State did not prove beyond a reasonable doubt that he committed an act of criminal recklessness during his encounter with the Officers. To convict Niles of criminal recklessness, as a Class D felony, the State was required to show that he recklessly, knowingly, or intentionally performed an act that created a substantial risk of bodily injury to another person, and did so while armed with a deadly weapon. *See* I.C. §§ 35-42-2-2(b)(1) and (c)(2)(A).

Specifically, but without citing to the record, Niles contends that he testified at his trial that he never pointed a gun at Officer Hormann and that the gun he possessed was not operational during the incident. Thus, Niles asserts that the State relied on mere speculation to prove his actions created a substantial risk of bodily injury to Officer Hormann. Initially, we advise Niles to study Ind. Appellate Rule 46(A)(8)(a), which directs appellants to support their contentions with citations to the record. Additionally, our review of the record reveals that both Officer Hormann and Officer Simmons testified at the trial that Niles raised and pointed his gun toward Officer Hormann's mid-

section, and engaged in a struggle over the gun with the Officers. Thus, Niles is asking us to reweigh his testimony against the Officers' testimonies, which we will not do. *See Cox*, 774 N.E.2d at 1028-29. Accordingly, we conclude that the record contains sufficient evidence that Niles pointed a firearm in the direction of a police officer and participated in a physical struggle over a firearm, thereby creating a substantial risk of bodily injury to another person. *See* I.C. § 35-42-2-2.

### B. *Pointing a Firearm*

Next, Niles asserts that the State did not prove beyond a reasonable doubt that he pointed a firearm at Officer Hormann. To convict Niles of pointing a firearm as a Class D felony, the State was required to show he knowingly or intentionally pointed a firearm at another person. I.C. § 35-47-4-3.

Again, Niles bases his sufficiency argument on his testimony that he did not point his gun at Officer Hormann; and again, Niles fails to cite to the record. *See* Ind. Appellate Rule 48(A)(8)(a). Nevertheless, as previously mentioned, the record contains testimony by Officer Hormann and Officer Simmons that Niles did in fact point his firearm toward Officer Hormann's mid-section. Therefore, because we will not reweigh the evidence before us, we conclude that the State put forth sufficient evidence to show that Niles committed the act of pointing a firearm. *See Cox*, 774 N.E.2d at 1028-29.

### C. *Resisting Law Enforcement*

In the last of his sufficiency claims, Niles contends that the State did not prove beyond a reasonable doubt that he committed the crime of resisting law enforcement. To convict Niles of resisting law enforcement, the State was required to show that he

knowingly or intentionally forcibly resisted, obstructed, or interfered with a law enforcement officer or a person assisting the officer while the officer was lawfully engaged in the execution of his or her duties. *See* I.C. § 35-44-3-3.

In particular, Niles relies on *Spangler v. State*, 607 N.E.2d 720, 724-25 (Ind. 1993), to argue that a conviction of resisting law enforcement requires that the defendant used strong, powerful, violent means to evade the officer. Niles contends that his conduct was not strong, powerful, or violent because he never physically confronted the Officers. We find no merit in Niles' argument. In *Spangler*, our supreme court found that the defendant did not act forcibly when he walked away from an officer who was attempting to serve him a protective order. *Spangler*, 607 N.E.2d at 721-22. The facts in the case before us are drastically different. Niles did not simply refuse to accept the body attachment warrant that the Officers attempted to serve him, but rather resorted to pointing a firearm directly at Officer Hormann. Further, the evidence shows that Niles did not cooperate when Officer Hormann tried to knock the weapon out of his hand. Instead, the record supports a conclusion that Niles fought the Officers to the ground to hold onto his gun. In fact, Officer Hormann testified, "at no point was [Niles] . . . giving up when we were fighting over the [] weapon itself." (Tr. p. 11). Therefore, we conclude that the trial court properly determined that Niles intentionally and forcibly resisted law enforcement.

## II. *Double Jeopardy*

Finally, Niles contends that the trial court violated Indiana's prohibition against double jeopardy by convicting and sentencing him on the counts of criminal recklessness and pointing a firearm. The State concedes, and we agree.

Indiana Constitution, Article I, Section 14 provides, "No person shall be put in jeopardy twice for the same offense." Our supreme court has concluded that this provision "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." *Montgomery v. State*, 804 N.E.2d 1217, 1224 (Ind. Ct. App. 2004), *trans. denied* (quoting *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999)). In addition to the traditional notion that double jeopardy bars subsequent prosecution, our supreme court has construed Indiana's double jeopardy rule to also prohibit multiple punishments. *Montgomery*, 804 N.E.2d at 1224.

The analysis of double jeopardy claims under the Indiana Constitution is governed by *Richardson*, in which our supreme court laid out the statutory elements test and the actual evidence test. *Merriweather v. State*, 778 N.E.2d 449, 453 (Ind. Ct. App. 2002). Two offenses are the "same offense" under either test if the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Id.* The statutory elements test and the actual evidence tests are separate considerations. Therefore, even where the statutory elements define the offense as capable of being committed by disparate acts, the convictions may nonetheless constitute a double jeopardy violation "if the actual evidence presented at trial demonstrates that each offense was not established by separate and distinct facts." *Montgomery*, 804 N.E.2d at 1224 (quoting *Castillo v. State*, 734 N.E.2d 299, 303 (Ind. Ct. App. 2000), *reh'g denied*).

In the present case, although Niles argues that a double jeopardy violation occurred under the statutory elements test, the State admits and we agree that the trial court used the same facts to convict Niles of criminal recklessness and pointing a firearm. Thus, we conclude a double jeopardy violation exists under the actual evidence test, the test wherein we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. *Patton v. State*, 837 N.E.2d 576, 582 (Ind. Ct. App. 2005). For an argument of double jeopardy to stand under this test, there must be 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. *Benavides v. State*, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004), *trans. denied*.

Here, the charging Information on Count I, criminal recklessness, stated in pertinent part:

On or about the 9<sup>th</sup> day of November, 2005, . . . [Niles], did while armed with a deadly weapon, to wit: a firearm, recklessly, knowingly, or intentionally perform an act, to wit: by pointing said firearm at [Officer Hormann], which act created a substantial risk of bodily injury to [Officer Hormann] . . . .

(Appellant's App. p. 12). In addition, the State admits that it only introduced evidence to prove Niles pointed a firearm at Officer Hormann in order to convict him of criminal recklessness. Therefore, this fact cannot also be used to convict Niles of pointing a firearm. Consequently, we remand to the trial court with instructions to merge Count II, Niles' conviction of pointing a firearm, into his conviction on Count I, criminal recklessness. *See Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006) (disapproving of this



court's practice of remanding to the trial court with instructions to vacate the lesser included offense after a trial court has merged the convictions and entered a judgment of conviction on only the merged count).

### CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove that Niles committed criminal recklessness, pointing a firearm, and resisting law enforcement. However, because the same evidence was used to prove Count I, criminal recklessness, and Count II, pointing a firearm, we conclude that a double jeopardy violation occurred when the trial court entered a judgment of conviction and sentenced Niles on both of those charges. Accordingly, we direct the trial court to merge the conviction on Count II into the conviction on Count I.

Affirmed in part, reversed in part, and remanded with instructions.

KIRSCH, C.J., and FRIEDLANDER, J., concur.