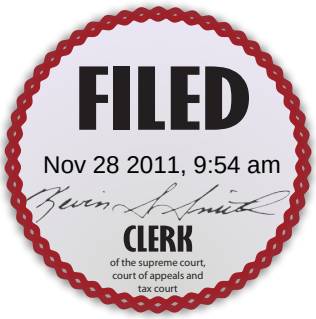

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IN THE
COURT OF APPEALS OF INDIANA

RICHARD EDWARD HUGHES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-1103-CR-165
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki L. Carmichael, Judge
Cause No. 10D01-0909-FC-268

November 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Richard Edward Hughes appeals his convictions for Battery with a Deadly Weapon,[1] a class C felony, and Criminal Recklessness,[2] a class D felony. More particularly, Hughes argues that the State failed to negate his claim of self-defense and that his convictions violate the Double Jeopardy Clause contained in the Indiana Constitution. Concluding that the jury could reasonably reject Hughes's claim of self-defense but that his convictions violate double jeopardy principles, we affirm in part, reverse in part, and remand with instructions that the trial court vacate Hughes's conviction and sentence for criminal recklessness.

FACTS

On September 16, 2009, thirty-nine-year-old Patrick Becka stood by a cash register at a Jeffersonville McDonalds Restaurant (McDonalds) waiting for an employee to take his lunch order. Naomi Stevens, a McDonalds employee, had just walked away from the register where Becka stood. Another employee informed Becka that the register was now closed and that he should wait at another register. Becka cooperated, but as he stood in another line, Stevens returned to the register where Becka originally had been waiting. Stevens received an order from another customer and after Becka complained, she informed him that she would take his order next.

When Becka began placing his order, Hughes, who was nearly eighty years old, said he was supposed to be next and accused Becka of "cut[ting] in line." Tr. p. 127.

[1] Ind. Code § 35-42-2-1(a)(3).

[2] I.C. § 35-42-2-2(c)(2).

Becka explained why he had moved to the front of the line and offered to allow Hughes to order in front of him. However, Hughes declined, saying "f*ck it I eat here every day." Id. at 128. Hughes appeared aggravated, stating "this is bull," and walked away. Id. at 50.

Once Becka's order was complete, he carried his tray from the counter towards the drink fountain. On his way, he encountered Hughes, who said something to Becka that he could not hear. Becka again tried to explain to Hughes what had happened because Becka could see that Hughes was upset. Becka apologized for the inconvenience he had caused. Hughes repeatedly said, "you can kiss my a**," to which Becka responded "you can suck my d*ck" and walked away to fill his drink. Id. at 133. Becka took a seat in the restaurant and watched Hughes walk towards the exit.

A couple of minutes later, Becka saw Hughes walking "fairly quickly" towards him. Id. at 136. Hughes stared at Becka as he walked towards him, and Becka noticed that he had a handgun in his front left pants pocket. As Hughes approached within a few feet of Becka, he stood up, took a few steps towards Hughes, and asked, "what's your problem?" Id. at 138. Becka did not have anything in his hands and did not touch or bump into Hughes. Nevertheless, Hughes, "out of nowhere," hit Becka in the temple with a handgun and then stepped back and pointed the gun at Becka. Id. at 140.

A struggle ensued after Becka grabbed the gun and someone pushed or tackled them into some tables. During the struggle, Raymond Bays, another customer, "was on the business end of [the gun] a couple of times." Tr. p. 14. Ronald Hughes, who was the

McDonalds manager and Hughes's son, ended the struggle when he grabbed the gun and said to his father, "it's Ron and give me the gun." Id. at 34.

A McDonalds employee had called 911, and Ronald gave the gun to the responding officers. The handgun was loaded with five rounds, but no round was chambered, and Hughes had a valid permit to conceal the gun. The police arrested Hughes at the scene.

On September 18, 2009, the State charged Hughes with class C felony battery with a deadly weapon and class D felony criminal recklessness. Hughes's three-day jury trial commenced on November 16, 2010. During the trial, Hughes contended that he had struck Becka with his handgun to defend himself. On November 19, 2010, the jury found Hughes guilty as charged.

On February 28, 2011, the trial court held a sentencing hearing. The trial court observed that there were no aggravating factors but several mitigating factors, including the fact that Hughes had led a law-abiding life and his good nature and character as evidenced by the letters the trial court had received in his support. After concluding that mitigating factors outweighed the aggravating factors, the trial court sentenced Hughes to two years on each count to be served concurrently with two years of probation. Hughes now appeals.

DISCUSSION AND DECISION

I. Self-Defense

Hughes argues that the State failed to meet its burden to negate at least one of the elements of Hughes's claim of self-defense. To prevail on a self-defense claim, a defendant must show that he: (1) was in a place where he had the right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Wilson v. State, 770 N.E.2d 799, 800 (Ind. 2002). The amount of force that an individual may use to protect himself must be proportionate to the urgency of the situation. Pinkston v. State, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004).

Once a claim of self-defense has been raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. Wilson, 770 N.E.2d at 800. The State can meet this burden by directly rebutting the defense or by relying on the evidence in its case-in-chief. Carroll v. State, 744 N.E.2d 432, 434 (Ind. 2001).

On appellate review, whether a defendant acted in self-defense is generally a question of fact that is entitled to considerable deference. Taylor v. State, 710 N.E.2d 921, 924 (Ind. 1999). The standard of review for a challenge to the sufficiency of the evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). If a defendant is convicted despite a claim of self-defense, this Court will reverse only if no reasonable

person could say that self-defense was negated by the State beyond a reasonable doubt. Wilson, 770 N.E.2d at 800-01.

Here, as stated above, after a verbal altercation at the drink fountain, Becka took his tray and sat down in the restaurant and watched Hughes walk towards the exit. Tr. p. 134. A few minutes later, Becka saw Hughes "walking fairly quickly" and staring at Becka. Id. at 136. Becka stood up and asked Hughes, "what's your problem?" Id. at 138. Becka testified that he did not have anything in his hands and did not touch Hughes. Id. at 139-140. Nevertheless, Becka testified that "out of nowhere" Hughes struck him in the head with his gun and pointed it at him. Id. at 140. A struggled ensued and, eventually, Hughes gave his gun to his son, Ronald, who was also the restaurant's manager. From these facts and circumstances, the jury could have reasonably concluded that Hughes provoked, instigated, and participated willingly in the violence and/or that Hughes did not have a reasonable fear of bodily harm. Hughes's arguments to the contrary are mere requests that this Court reweigh the evidence, which we decline to do. Accordingly, this claim must fail.

II. Double Jeopardy

Hughes contends that his convictions for battery with a deadly weapon and criminal recklessness violate Indiana's Double Jeopardy Clause. Article I, Section 14 of the Indiana Constitution states that "[n]o person shall be put in jeopardy twice for the same offense." Our Supreme Court has held that "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) (emphases in original).

Under the actual evidence test, multiple convictions constitute double jeopardy if there is "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." Id. at 53. To determine which facts were used by the jury, a reviewing court will examine the charging information, evidence, arguments, and jury instructions. Davis v. State, 770 N.E.2d 319, 324 (Ind. 2002).

Rutherford v. State, 866 N.E.2d 867 (Ind. Ct. App. 2007), is sufficiently analogous to the instant case to be instructive. In Rutherford, the defendant argued that his convictions for attempted battery and criminal recklessness violated the Double Jeopardy Clause of the Indiana Constitution. Id. at 871. After noting the "substantial overlap" between the elements of the charged offenses, a panel of this Court observed that "[t]his overlap continued in the wording of the charging information." Id. at 872. Specifically, the charging information for the attempted battery[3] alleged that the defendant "knowingly shot a deadly weapon into a[n] [occupied] vehicle." Id. Similarly, the charging information for criminal recklessness alleged that the defendant "while armed with a

[3] The original information charged the defendant with class A felony attempted murder but at the conclusion of the State's evidence, the trial court ruled that the defendant could not be convicted of attempted murder, "but that it would proceed on that charge of the information as a lesser-included offense of Class C felony attempted battery." Rutherford, 866 N.E.2d at 870.

deadly weapon recklessly performed an act that created a substantial risk of bodily injury to [the occupants of the vehicle] and specified that the act was firing into the occupied vehicle." Id.

The panel observed that the State clearly intended to rely on the defendant's act of firing into the occupied vehicle to support both charges and noted that although the State argued that separate evidence supported the two charges, "the State made no such hair-splitting attempt to differentiate evidence supporting the attempted murder/battery charge from evidence supporting the criminal recklessness charge." Id. Accordingly, the panel reversed and remanded with instructions that the trial court vacate the conviction for criminal recklessness because of double jeopardy concerns. Id. at 874.

Here, the charging information read:

> **COUNT I – BATTERY WITH A DEADLY WEAPON (CLASS C FELONY) I.C. 35-42-2-1(a)(3)**
>
> On or about September 16, 2009, . . . RICHARD EDWARD HUGHES did knowingly or intentionally touch Patrick Becka in a rude, insolent, or angry manner, and did so by means of a deadly weapon, to-wit: a handgun.
>
> **COUNT II – CRIMINAL RECKLESSNESS (CLASS D FELONY) I.C. 35-42-2-2(c)(2)**
>
> On or about September 16, 2009, . . . RICHARD EDWARD HUGHES did recklessly, knowingly or intentionally perform an act that created a substantial risk of bodily injury to another person, to-wit: striking Patrick Becka with a handgun, and did so while armed with a deadly weapon, to-wit: a handgun.

Appellant's App. p. 7.

From the charging information, it is apparent that the State intended to rely on Hughes striking Becka with his handgun to support both charges. And while the State points out that Bays was on the "business end," tr. p. 14, of the handgun a couple of times during the struggle, thus creating a substantial risk of bodily injury to Bays, the struggle occurred after Hughes had struck Becka in the head. Moreover, this argument amounts to the same "hairsplitting" attempt to differentiate evidence that the Rutherford Court rejected.[4] Consequently, there is a reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of both offenses, and, therefore, Hughes's conviction for criminal recklessness must be vacated.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate the conviction and sentence for criminal recklessness.

KIRSCH, J., and BROWN, J., concur.

[4] We note that the transcript omitted the State's opening and closing arguments. Accordingly, it is unclear whether the State attempted to differentiate between the two charges by arguing that Hughes had created a substantial risk of bodily injury to Bays to support the criminal recklessness charge. In any event, the charging information alleged that the act that created the risk was striking Becka in the head and, as stated above, that had already occurred.