

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

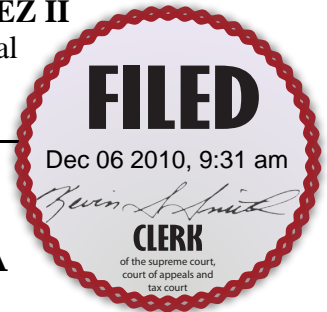
ATTORNEY FOR APPELLANT:

DAVID P. FREUND
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

PATRICK TOLBERT,
Appellant/Defendant,

vs.

STATE OF INDIANA,
Appellee/Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 49A02-1005-CR-545

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0904-FB-40882

December 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Patrick Tolbert appeals from his convictions of Class B felony Robbery and Class B felony Criminal Confinement, contending that they violated constitutional prohibitions against double jeopardy. We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 9:44 a.m. on March 27, 2009, Adrienne Jenkins was working alone at a Family Dollar store in Marion County. Tolbert entered the store and approached her, saying “Go to the register.” Tr. p. 13. When the pair arrived at a cash register, Jenkins placed her mobile telephone down on a counter, and Tolbert took it and put it in his pocket. Tolbert also told Jenkins to open the cash register, which she did, whereupon Tolbert took \$114.00, told her to lie on the ground, and left.

On April 17, 2009, Jenkins was again working at the Family Dollar, but her friend Chawnta Herron and Herron’s daughter were also in the store. At approximately 9:13 a.m., Tolbert and two companions entered the store. Jenkins recognized Tolbert from the earlier robbery and activated the silent alarm. Tolbert approached Jenkins and said, “Don’t you say nothing” and directed one of his associates to “[g]et her.” Tr. pp. 38, 39. The associate, whose face was partially concealed by a bandana, approached, pointed a handgun at Jenkins, and told her to open up the cash register. Jenkins opened the cash register, “stuffed” approximately \$100 into a bag, and handed the bag to Tolbert’s associate. The associate demanded that Jenkins lie on the ground.

Meanwhile, Tolbert had taken Herron to the store safe, whereupon Herron entered the combination that she had just received from Jenkins. The safe would not actually open for five minutes following entry of the combination, a delay that could not be

overridden. While Tolbert and his associates were waiting for the safe to open, police arrived. Tolbert ordered Herron to a cash register to “pretend like [she] was ringing him up.” Tr. p. 121. Jenkins managed to inform one of the police officers that they had, in fact been robbed, at which point police took Tolbert into custody. Tolbert’s associates had apparently fled out a back door when police arrived.

The State ultimately charged Tolbert with Class C felony robbery stemming from the events of March 27, 2009, Class B felony robbery and Class B felony criminal confinement stemming from the events of April 17, 2009, and of being a habitual offender. In regards to the April 17, 2009, charges, the charging information alleged that Tolbert robbed Jenkins and criminally confined Herron. Specifically, the State alleged that Tolbert “took from the presence of Adrienne Jenkins property, that is: U.S. Currency, by putting Adrienne Jenkins in fear of by using or threatening the use of force” and that he, “by force, or threat of force, remove Chawnta Herron from one place to another, that is: moved her from the main store area to behind the counter[.]” Appellant's App. pp. 103-04.

After trial, a jury found Tolbert guilty of both counts of robbery and criminal confinement, and following the second phase of a bifurcated trial, the trial court found him to be a habitual offender. The trial court sentenced Tolbert to six years of incarceration for Class C felony robbery enhanced by ten years by virtue of his habitual offender status, twenty years each for Class B felony robbery and Class B felony criminal confinement, with his Class B felony sentences to be served concurrently with each other

but consecutive to the enhanced Class C felony sentence, for an aggregate sentence of thirty-six years.

DISCUSSION AND DECISION

Whether Tolbert’s Convictions for Class B Felony Robbery and Class B Felony Criminal Confinement Violate Prohibitions Against Double Jeopardy

Tolbert contends that his convictions for Class B felony robbery and Class B felony criminal confinement violate Indiana constitutional prohibitions against double jeopardy. In *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), the Indiana Supreme Court held “that two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to ... the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Id.* at 49-50. The *Richardson* court stated the actual evidence test as follows:

To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate 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. The Indiana Supreme Court has also explained that, when applying the actual evidence test, the question

is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish *one* of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). In determining what evidence the trier of fact used to establish the essential elements of an offense, “we consider the evidence, charging information, final jury instructions ... and arguments of counsel.” *Rutherford v. State*, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

We conclude that there is no reasonable possibility that the jury relied on the same actual evidence to convict Tolbert of Class B felony robbery and Class B felony criminal confinement. As charged, proved, and argued, the two convictions, at the very least, involved two different victims, Jenkins and Herron. Moreover, as charged, proved, and argued, Herron’s confinement took place entirely after the robbery of Jenkins was complete. “Generally, double jeopardy does not prohibit convictions of confinement and robbery when the facts indicate that the confinement was more extensive than that necessary to commit the robbery.” *Merriweather v. State*, 778 N.E.2d 449, 454 (Ind. Ct. App. 2002) (citing *Hopkins v. State*, 759 N.E.2d 633, 639 (Ind. 2001)). Here, although Tolbert confined Jenkins while robbing her, he confined Herron afterwards. Not only was it not necessary to confine Herron in order to rob Jenkins, it happened only after the robbery was complete. *See, e.g., id.* at 457 (finding no double jeopardy violation where confinement continued after robbery was complete when defendant first forced victims to empty register and then forced them to move from register to office). We conclude that here is no reasonable possibility that the jury relied on the same actual evidence in finding Tolbert guilty of Class B felony robbery and Class B felony criminal confinement.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.