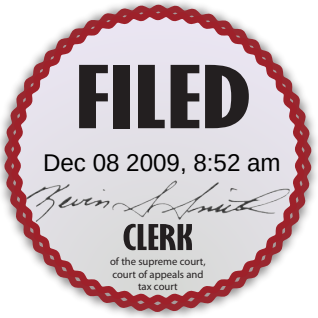


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# IN THE
# COURT OF APPEALS OF INDIANA

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| DEJUAN D. MCINTYRE, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A05-0902-CR-56 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya W. Pratt, Judge
Cause No. 49G01-0712-FA-259671

**December 8, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Dejuan McIntyre appeals his convictions for burglary as a class A felony,[1] two counts of battery as class C felonies,[2] and two counts of domestic battery as class D felonies.[3] McIntyre raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain McIntyre's conviction for burglary as a class A felony and one of his convictions for battery as a class C felony; and

II. Whether McIntyre's convictions violate the prohibition against double jeopardy.

We affirm in part and vacate in part.

The relevant facts follow. McIntyre and Amy Silva dated "[o]ff and on for about three and a half years." Transcript at 73. The relationship ended on November 25, 2007. On November 28, 2007, McIntyre went to Silva's workplace. McIntyre was angry and asked Silva if he could look in her car. Silva opened her trunk and told McIntyre that there was no need for him to be at her workplace. McIntyre told Silva that "everything was just going to be taken care of." Id. at 83. McIntyre then walked back to his vehicle, pulled back around, and yelled at Silva's coworker, "you work with a crazy bitch and everything's going to be taken care of, don't worry about it . . . ." Id. at 85. Silva was afraid and went downtown to file a protective order.

[1] Ind. Code § 35-43-2-1 (2004).

[2] Ind. Code § 35-42-2-1 (Supp. 2007) (subsequently amended by Pub. L. No. 120-2008, § 93 (eff. July 1, 2008); Pub. L. No. 131-2009, § 73 (eff. July 1, 2009)).

[3] Ind. Code § 35-42-2-1.3 (Supp. 2006).

On November 29, 2007, McIntyre called Silva's cell phone multiple times while she was at work. Silva answered one of the calls, and McIntyre "started screaming and yelling" at her. Id. at 93. McIntyre said, "Bitch, you think this is a fucking game. This is not a game. I'm going to kill you." Id. at 94. Silva called the police and reported the incident.

On the evening of November 30, 2007, Silva, Silva's children, and John Gaines, a family friend, were in Silva's apartment. Someone knocked on the door to the apartment, and Silva looked through the peephole but did not see anyone. After another knock, Silva again looked through the peephole and saw McIntyre standing to the side. Silva called the "on-site sheriff." Id. at 105. McIntyre said that he was the police and knocked continuously on the door. McIntyre kicked the door and the door framing cracked. McIntyre kicked the door again and the door flew open.

McIntyre came into the apartment with a butcher knife and said that he wanted to talk to Silva. McIntyre was holding the knife with the blade facing outward. Gaines told McIntyre that he could talk to Silva but he did not need the knife. McIntyre set the knife down for a "split second" and then picked it up. Id. at 182. McIntyre led Gaines and Silva's son toward the back bedroom.

In a "split second," McIntyre "lunged" forward toward Silva. Id. at 189. Gaines then grabbed McIntyre, and Gaines and Silva's son attempted to hold McIntyre back, but McIntyre struck Silva in the head with the blade of the knife. McIntyre and Gaines "tussled a little bit," and McIntyre eventually left. Id. at 191. Silva suffered a "laceration

or a bleeding wound to her head," and Gaines suffered a "very large laceration to the back of the scalp." Id. at 154, 157.

The State charged McIntyre with: (1) Count I, burglary as a class A felony; (2) Count II, battery as a class C felony for touching Silva; (3) Count III, battery as a class C felony for touching Gaines; (4) Count IV, residential entry as a class D felony; (5) Count V, domestic battery as a class D felony; (6) Count VI, domestic battery as a class D felony;[4] (7) Count VII, domestic battery as a class A misdemeanor with a felony enhancement charge; (8) Count VIII, invasion of privacy as a class A misdemeanor; (9) Count IX, invasion of privacy as a class A misdemeanor; (10) Count X, invasion of privacy as a class A misdemeanor; and (11) Count XI, criminal mischief as a class A misdemeanor.[5] The State later dismissed Count XI, criminal mischief as a class A misdemeanor.

During the bench trial, McIntyre moved for judgment on the evidence. The trial court granted the motion as to Counts VIII, IX, and X, each of which charged McIntyre with invasion of privacy as a class A misdemeanor. The trial court found McIntyre guilty of the remaining counts.

The trial court merged the conviction for Count IV, residential entry as a class D felony, into Count I, burglary as a class A felony. The trial court also merged Count VII,

[4] Count V alleged that McIntyre "committed said act in the physical presence of [D.A.], a child less than sixteen (16) years of age . . . ." Appellant's Appendix at 30. Count VI alleged that McIntyre "committed said act in the physical presence of [T.A.], a child less than sixteen (16) years of age . . . ." Id. at 31.

[5] We note that some of the charges were later amended, but the changes were not substantive.

domestic battery as a class A misdemeanor, into Count V and VI, each of which charged McIntyre with domestic battery as a class D felony. The trial court sentenced McIntyre to thirty years for Count I, burglary as a class A felony. The trial court sentenced McIntyre to four years each for Count II, battery as a class C felony, and Count III, battery as a class C felony. The trial court sentenced McIntyre to one and one-half years each for Count V, domestic battery as a class D felony, and Count VI, domestic battery as a class D felony. The trial court ordered that the sentences be served concurrently for an aggregate sentence of thirty years.

I.

The first issue is whether the evidence is sufficient to sustain McIntyre's conviction for burglary as a class A felony and his conviction for battery as a class C felony for touching Gaines.[6] When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable

[6] McIntyre phrases the issue as whether there was sufficient evidence to prove that he went to Silva's residence with the intent to commit felony battery to support his conviction for burglary as a class A felony. While McIntyre focuses on his conviction for burglary, he also appears to argue that the evidence was insufficient to support his conviction for battery against Gaines. Thus, we will address McIntyre's argument. To the extent that McIntyre argues that the evidence is insufficient to support his conviction for battery as a class C felony for touching Silva, we need not address McIntyre's argument because we vacate that conviction. See infra Part II.

doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

A. Burglary

The offense of burglary as a class A felony is governed by Ind. Code § 35-43-2-1, which provides that "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. However, the offense is . . . a Class A felony if it results in . . . bodily injury . . . or serious bodily injury . . . to any person other than a defendant." The State alleged that McIntyre

> did break and enter the building or structure and dwelling of Amy Silva . . . with the intent to commit the felony of Battery therein; that is, with intent to knowingly touch Amy Silva or John Gaines in a rude, insolent or angry manner while armed with a deadly weapon, that is: a knife, which resulted in bodily injury to Amy Silva, that is: a laceration/knife wound to the head and/or which resulted in bodily injury to John Gaines, that is: a laceration/knife wound to the head . . . .

Appellant's Appendix at 29. Thus, the State was required to prove beyond a reasonable doubt that McIntyre broke and entered the dwelling of Silva with intent to commit a battery as a felony and that bodily injury resulted.

McIntyre argues that "[t]he evidence presented at trial did not prove beyond a reasonable doubt that [he] came to Amy Silva's apartment with the intent to commit a battery upon her or John Gaines." Appellant's Brief at 8-9. In support of this argument,

McIntyre states that "John Gaines testified that when [McIntyre] entered the apartment he was not yelling and he did not appear to be angry." Id. at 10.

The facts most favorable to the conviction reveal that McIntyre went to Silva's workplace on November 28, 2007, and told Silva that "everything was just going to be taken care of." Transcript at 83. McIntyre also yelled at Silva's coworker, "you work with a crazy bitch and everything's going to be taken care of, don't worry about it . . . ." Id. at 85. The next day, McIntyre called Silva and said, "Bitch, you think this is a fucking game. This is not a game. I'm going to kill you." Id. at 94.

The following day, McIntyre knocked on the door to Silva's apartment. McIntyre said that he was the police and knocked continuously on the door. McIntyre kicked the door in, came into the apartment with a butcher knife, and said that he wanted to talk to Silva. In a "split second," McIntyre "lunged" forward. Id. at 189. Gaines then grabbed McIntyre, and Gaines and Silva's son attempted to hold McIntyre back, but McIntyre struck Silva in the head with the blade of the knife. McIntyre and Gaines "tussled a little bit," and McIntyre eventually left. Id. at 191. Silva suffered a "laceration or a bleeding wound to her head." Id. at 154.

Based upon our review of the record, we conclude that evidence of probative value exists from which the trial court could have found that McIntyre entered Silva's apartment with the intent to commit a battery upon Silva. See, e.g., Amos v. State, 896 N.E.2d 1163, 1171-1172 (Ind. Ct. App. 2008) (holding that the evidence was sufficient to

sustain the defendant's burglary conviction because it showed that the defendant entered the victim's apartment with the intent to commit robbery), trans. denied.

B. Battery

The offense of battery is governed by Ind. Code § 35-42-2-1, which provides that "[a] person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is . . . a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon . . . ." The State alleged that McIntyre "by means of a deadly weapon, that is: a knife, did knowingly touch John Gaines in a rude, insolent, or angry manger, that is: hit, stabbed or cut at and against the person of John Gaines with said knife." Appellant's Appendix at 29. Thus, the State was required to prove beyond a reasonable doubt that McIntyre knowingly touched Gaines in a rude, insolent, or angry manner which was committed by means of a deadly weapon.

McIntyre appears to argue only that he did not touch Gaines in a rude, insolent, or angry manner because the injury to Gaines was accidental. Specifically, McIntyre points to his own testimony at trial and argues that "[t]he injuries to . . . John Gaines were accidental as a result of John Gaines lifting [McIntyre] in the air, causing [McIntyre] to flail about in an effort to try to break his fall." Appellant's Brief at 14. McIntyre's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Drane, 867 N.E.2d at 146.

The record reveals that Gaines told McIntyre that he could talk to Silva but he did not need the knife. McIntyre led Gaines and Silva's son toward the back bedroom. Gaines testified that McIntyre had the knife above his head and was bringing the knife down before Gaines grabbed him. Gaines grabbed McIntyre and "tussled" with McIntyre. Transcript at 191. Based upon our review of the record, we conclude that evidence of probative value exists from which the trial court could have found that McIntyre knowingly touched Gaines in a rude, insolent, or angry manner. See Teeters v. State, 817 N.E.2d 275, 278 (Ind. Ct. App. 2004) (holding that the evidence was sufficient to show that the defendant touched the victim in a rude, insolent, or angry manner), trans. denied.

II.

The next issue is whether McIntyre's convictions violate the prohibition against double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." IND. CONST. art. 1, § 14. "Indiana's Double Jeopardy Clause . . . prevent[s] the State from being able to proceed against a person twice for the same criminal transgression." Hopkins v. State, 759 N.E.2d 633, 639 (Ind. 2001) (quoting Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999)). The Indiana Supreme Court has 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 *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, 717 N.E.2d at 49.

In addition to the instances covered by Richardson, Indiana courts "have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson." Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002) (quoting Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002) (Sullivan, J., concurring)). "Even where no constitutional violation has occurred, multiple convictions may nevertheless violate the 'rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson.'" Vandergriff v. State, 812 N.E.2d 1084, 1088 (Ind. Ct. App. 2004) (quoting Pierce, 761 N.E.2d at 830), trans. denied. As enumerated in Justice Sullivan's concurrence in Richardson and endorsed by the Indiana Supreme Court in Guyton, five additional categories of double jeopardy exist: (1) conviction and punishment for a crime which is a lesser-included offense of another crime for which the defendant has been convicted and punished;[7] (2) conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished; (3) conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished; (4) conviction and punishment for an enhancement of a crime where the enhancement is imposed for the

[7] In Guyton, the Indiana Supreme Court stated that this category is "presumably covered" by the constitutional double jeopardy analysis under Richardson. Guyton, 771 N.E.2d at 1143.

very same behavior or harm as another crime for which the defendant has been convicted and punished; and (5) conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished. See Guyton, 771 N.E.2d at 1143; Richardson, 717 N.E.2d at 55-56 (Sullivan, J., concurring).

Here, the very same act, i.e., McIntyre's touching of Silva, formed the basis of both of the domestic battery convictions (Counts V and VI), one of the battery convictions (Count II), and the enhancement of the burglary conviction to a class A felony.

"When two convictions are found to contravene double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation." Richardson, 717 N.E.2d at 54. "If it will not, one of the convictions must be vacated." Id. Accordingly, we order that McIntyre's convictions for domestic battery (Counts V and VI) and battery against Silva (Count II) be vacated.[8] See McIntire v. State, 717 N.E.2d 96, 101 (Ind.

[8] We note that the State concedes that McIntyre's two convictions for domestic battery "must be vacated" because "[t]he same evidentiary fact – [McIntyre's] act of cutting Silva – was used to establish the elements of battery against Silva and the two domestic battery convictions." Appellee's Brief at 11.

We also note that the charging information for Count I, burglary as a class A felony mentioned that McIntyre was armed with a deadly weapon and that injuries resulted to Silva. The charging information for Count II, battery as a class C felony for touching Silva, stated that McIntyre used a deadly weapon. We cannot say that the fact that the burglary charge mentioned the bodily injury to Silva and the battery charge only mentioned the fact that McIntyre used a deadly weapon alters our conclusion that McIntyre was improperly sentenced. We find Campbell v. State, 622 N.E.2d 495 (Ind. 1993), abrogated on other grounds by Richardson, 717 N.E.2d at 49 n.36, instructive. In Campbell, the defendant argued that his sentences for battery as a class C felony and burglary as a class A felony violated double

1999) (vacating a conviction for class D felony criminal recklessness when the same evidentiary facts established the essential elements of both class A burglary and class D criminal recklessness); Jones v. State, 523 N.E.2d 750, 754 (Ind. 1998) (vacating a battery conviction because the information showed that the identical touching was the basis of a second battery conviction), abrogated on other grounds by Richardson, 717 N.E.2d at 49 n.36; Vaughn v. State, 782 N.E.2d 417, 422 n.9 (Ind. Ct. App. 2003) (holding that a conviction for battery and a conviction on domestic battery arising out of the same incident creates a double jeopardy violation because battery consists of the very same act as an element of domestic battery) (relying upon Guyton, 771 N.E.2d at 1143), trans. denied; see also Davis v. State, 770 N.E.2d 319, 324 (Ind. 2002) (holding that where a single act forms the basis of both a class A felony burglary conviction and also the act element of an attempted murder conviction, the two cannot stand), reh'g denied.

For the foregoing reasons, we affirm McIntyre's convictions for Count I, burglary as a class A felony, and Count III, battery as a class C felony. We vacate McIntyre's convictions and sentences for Count V, domestic battery as a class D felony, Count VI, domestic battery as a class D felony, and Count II, battery as a class C felony.

Affirmed in part and vacated in part.

CRONE, J., and MAY, J., concur.

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jeopardy. 622 N.E.2d at 500. The Indiana Supreme Court noted that "[a]lthough the battery information alleged use of a deadly weapon and the burglary information alleged serious bodily injury, the basis for the elevation of both crimes was the same slashing of [the victim's] face." Id. The Court concluded that the defendant was improperly sentenced for battery as a class C felony. Id.