ATTORNEY FOR APPELLANT:

KAREN CELESTINO-HORSEMAN
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

RUDOLPH PERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0904-CR-216
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Commissioner
Cause No. 49G06-0709- FC-198386

December 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Rudolph Perry appeals his convictions of two counts of class C felony criminal confinement, two counts of class A misdemeanor interfering with the reporting of a crime, and one count of class D felony auto theft. We affirm.

Issues

Perry raises the following issues for review:

I. Did the acts underlying his two criminal confinement convictions constitute separate events or one continuous event such as to subject him to double jeopardy?

II. Was he subjected to double jeopardy where, having been convicted of criminal confinement, he was also convicted of interfering with the reporting of a crime based on his separate acts of preventing the victim from calling the police and preventing her from seeking medical treatment?

III. Did the evidence necessary to convict him of auto theft overlap with the evidence necessary to convict him of confinement to the extent that he was subjected to double jeopardy?

Facts and Procedural History

In 2007, Perry and Karen McGuiness were involved in a romantic relationship. On September 21, 2007, McGuiness broke up with Perry and told him to move out. At about 7:00 p.m., when she received a phone call from her ex-husband, Perry became angry and began to follow her around the house, trailing only a few feet behind her. When he briefly left her and went into the kitchen, she attempted to run out the front door. He chased her and slammed the door on her arm, causing the door to swing back and hit her in the face. Perry kicked the door, again smashing her arm and face. When she screamed, he slapped his hand

over her mouth and ordered her to be quiet. During the next few moments, she ran to another room and made numerous attempts to call for help. However, Perry grabbed every telephone she attempted to use and hid them.

McGuiness was in tremendous pain and begged Perry to take her to the hospital. After numerous entreaties and refusals, he relented, and the two got into her vehicle, with Perry in the driver's seat and McGuiness in the passenger's seat. Perry buckled McGuiness's seatbelt for her, and the two proceeded toward St. Francis Hospital on Indianapolis's south side. When Perry drove past the hospital and continued north, McGuiness opened her door and attempted to unbuckle her seatbelt. However, he prevented her from extracting herself by placing his hand over the release button. When she begged him to turn around, he said that he was taking her to Methodist Hospital instead. When he passed Methodist and continued driving "far into the country," Tr. at 22, she opened her window to attempt to flag down truck drivers, but he closed it and eventually turned around and took her home.

Throughout the night, Perry never let McGuiness out of his sight. He ordered her to sleep on top of him, and the two fell asleep on the sofa. When she finally awoke, on September 22, 2007, he was watching a football game. Eventually, at about 7:00 p.m., she asked if he would take her to get some food, and he agreed to take her to a fast food restaurant. On the way, he stopped for gas. He locked the car door, took the keys and cell phone, and went inside to pay. Once he was inside, McGuiness quickly exited the vehicle and ran over to Jamie Tuttle, a customer at an adjacent fueling bay. She asked Tuttle to drive her to the hospital, and the two drove away.

On September 24, 2007, Perry was spotted in Muncie driving McGuiness's vehicle. After the September incident at the gas station, McGuiness did not see her vehicle again until January 2008, when her insurance company notified her that her vehicle had been towed from Muncie to Indianapolis and that she could retrieve her personal belongings from it.

On September 27, 2007, the State charged Perry with two counts of class C felony criminal confinement, one count of class D felony criminal confinement, one count of class A misdemeanor domestic battery, one count of class A misdemeanor battery, and two counts of class A misdemeanor interference with reporting a crime. The charging information provides in pertinent part as follows:

> COUNT I
>
> Rudolph Perry, on or about September 22[,] 2007, did knowingly confine Karen McGuiness, by slamming the door on her arm as she was trying to leave which resulted in bodily injury, that is: pain and/or swelling and/or black eyes and /or bruising, to Karen McGuiness;
>
> COUNT II
>
> Rudolph Perry, on or about September 22, 2007, did knowingly confine Karen McGuiness, by driving her in a vehicle with the promise to take her to hospital, but driving around city instead; and said act was committing by using a vehicle, specifically, Ms. McGuiness's white 2002 Chrysler LXI;
>
> ….
>
> COUNT VI
>
> Rudolph Perry, on or about September 21 and/or September 22, 2007, with intent to commit, conceal, or aid in the commission of a crime, did knowingly or intentionally interfere with or prevent Karen McGuiness, another individual, from using a 911 emergency telephone system, obtaining medical assistance, or making a report to a law enforcement officer;

COUNT VII

> Rudolph Perry, on or about September 21 and/or September 22, 2007, with intent to commit, conceal, or aid in the commission of a crime, did knowingly or intentionally interfere with or prevent Karen McGuiness, another individual, from using a 911 emergency telephone system, obtaining medical assistance or making a report to a law enforcement officer.

Appellant's App. at 28-30.

On February 15, 2008, the State amended the information to include one count of class D felony auto theft. A bench trial ensued on January 20, 2009. On January 22, 2009, the trial court found Perry guilty as charged. At a March 26, 2009 sentencing hearing, the trial court declined to enter judgments of conviction on the class D felony criminal confinement count and the two battery counts, based on double jeopardy concerns. The trial court found Perry to be a habitual offender and sentenced him to an aggregate twenty-two-year term, plus an additional 730 days for his probation violation. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Criminal Confinement Convictions

Perry claims that his constitutional protection against double jeopardy has been violated. The Fifth Amendment to the United States Constitution provides, "nor shall any person be for the same offense to be twice put in jeopardy of life or limb." Likewise, Article 1, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." "The double jeopardy prohibition flowing from the fifth amendment of the federal Constitution prohibits imposition of two punishments for a single

offense arising from one set of operative circumstances." *Idle v. State*, 587 N.E.2d 712, 715 (Ind. Ct. App. 1992) (citations and quotation marks omitted), *trans. denied*. We review de novo a defendant's claim that his convictions violated his double jeopardy rights. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005).

At the outset, we note that Perry failed to make timely objections at trial. As such, he has failed to preserve his double jeopardy claims and must demonstrate fundamental error. *Seide v. State*, 784 N.E.2d 974, 977 (Ind. Ct. App. 2003). Fundamental error is extremely narrow and occurs "only when the record reveals a clearly blatant violation of basic principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible." *Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008) (citations and quotation marks omitted). In determining whether a double jeopardy claims rises to the level of fundamental error, we must perform a case-by-case analysis. *See Taylor v. State*, 717 N.E.2d 90, 96 n.7 (Ind. 1999) (rejecting prior summary declarations that violations of double jeopardy rights constitute fundamental error, opting instead for a case-by-case determination).

Perry was convicted of two counts of class C felony criminal confinement. Indiana Code Section 35-42-3-3 provides in pertinent part:

> (a) A person who knowingly or intentionally:
>
> > (1) confines another person without the other person's consent; or
> > (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;
>
> commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Class D felony.

(b) The offense of criminal confinement defined in subsection (a) is:
(1) a Class C felony if:
….
(B) it is committed by using a vehicle; or
(C) it results in bodily injury to a person other than the confining or removing person[.]

Perry contends that his actions against McGuiness constituted one continuous confinement and not two separate confinements. In *Boyd v. State*, 766 N.E.2d 396, 400 (Ind. Ct. App. 2002), we addressed Indiana's double jeopardy prohibition in confinement cases and applied the analytical framework espoused in *Idle*, 587 N.E.2d at 715, to determine whether two punishments had been imposed for a single confinement arising from one set of operative circumstances. The *Boyd* court found the determining factor to be "whether the confinement may be divided into two separate parts." *Boyd*, 766 N.E.2d at 400. "A confinement ends when the victim both feels and is, in fact, free from detention, and separate confinement begins if and when detention of the victim is re-established." *Id.*

Here, the facts presented at trial establish that two distinct confinements occurred. First, when McGuiness attempted to run out the front door, Perry stopped her by slamming the door on her arm. The door swung back and smashed her in the face. Perry then kicked the door, causing further injury to her arm and face, and placed his hand over her mouth. Thus, he knowingly confined her against her will, and the confinement resulted in bodily injury, pursuant to Indiana Code Section 35-42-3-3(b)(1)(C). Thereafter, she repeatedly implored him to take her to the hospital. When he finally relented and they left the house, she voluntarily got into the vehicle with him. The two had been involved in a romantic

relationship, and McGuiness testified that she thought Perry was concerned for her safety when he fastened her seatbelt. Tr. at 20. Thus, the evidence supports a reasonable inference that McGuiness both felt and actually was free from detention when she sat down in the car with Perry.

A second confinement began when Perry prevented McGuiness from exiting the vehicle following his failure to stop at St. Francis Hospital. It continued when he drove past Methodist Hospital, then out into the country, and eventually home. Once home, Perry demanded that she not leave his side and forced her to sleep on top of him during the night. This second confinement continued throughout the following day and lasted until she ran from the vehicle at the gas station. Thus, Perry knowingly utilized a vehicle while confining McGuiness against her will, pursuant to Indiana Code Section 35-42-3-3(b)(1)(B). As such, Perry's double jeopardy claim lacks merit, and he has failed to establish fundamental error. Thus, we affirm his confinement convictions.

II. Convictions for Interference with Reporting a Crime

Next, Perry contends that his two misdemeanor convictions for interfering with reporting a crime violate double jeopardy principles. Again, because he failed to adequately preserve this issue for review, we review his claim for fundamental error. *Seide*, 784 N.E.2d at 977. Specifically, Perry argues that the two convictions for interference with reporting constitute the same offense as criminal confinement and that they must be vacated as a

violation of double jeopardy.[1] In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our supreme court synthesized Indiana's constitutional double jeopardy analysis, holding 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."

Perry predicates his claim on the actual evidence part of the *Richardson* test:

> Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. 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. Under this test, a defendant's double jeopardy rights are 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). Thus, to withstand double jeopardy scrutiny, "each conviction require[s] proof of at least one unique evidentiary fact." *Bald v. State*, 766 N.E.2d 1170, 1172 (Ind. 2002).

Here, the evidentiary facts presented at trial to establish Count I, criminal confinement, were that Perry prevented McGuiness from leaving her house by slamming the front door on her, causing bodily injury to her arm and face. The evidentiary facts used to

[1] Perry does not dispute that he committed more than one act of interference with reporting a crime. His merely contends that the facts presented to establish interference were the same as the facts presented to establish confinement.

establish Count II, criminal confinement, were that Perry prevented McGuiness from exiting the vehicle once he passed St. Francis Hospital and prevented her from leaving his side once the two returned to the house. In contrast, the evidentiary facts used to establish Count VI and VII, interference with the reporting of a crime,[2] were Perry's numerous acts of confiscating and hiding each telephone that McGuiness attempted to use to make 911 emergency calls to seek medical treatment and to report her confinement to law enforcement officers. Thus, the convictions for interference with reporting required proof of at least one unique evidentiary fact not necessary to prove either of the confinement counts. As such, Perry was not subjected to double jeopardy and has failed to establish fundamental error. Accordingly, we affirm his convictions for interference with the reporting of a crime.

III. Auto Theft Conviction

Finally, Perry challenges his conviction for auto theft on double jeopardy grounds. Again, we review for fundamental error. *Seide*, 784 N.E.2d at 977. Indiana Code Section 35-43-4-2.5 provides in part,

> (b) A person who knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the owner of:

---

[2] Indiana Code Section 35-45-2-5 provides:

> A person who, with the intent to commit, conceal, or aid in the commission of a crime, knowingly or intentionally interferes with or prevents an individual from:
>
> (1) using a 911 emergency telephone system;
> (2) obtaining medical assistance; or
> (3) making a report to a law enforcement officer;
>
> commits interference with the reporting of a crime, a Class A misdemeanor.

(1) the vehicle's value or use …

commits auto theft, a Class D felony.

Perry claims that the actual evidence used to convict him of auto theft was the same as the evidence used to convict him of Count II criminal confinement. However, we reiterate that under the *Richardson* test, a defendant's double jeopardy rights are 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*, 761 N.E.2d at 833. As such, if at least one unique evidentiary fact supports each conviction, his double jeopardy claim must fail. *Bald*, 766 N.E.2d at 1172.

As discussed, *supra*, the evidentiary facts used to convict Perry of Count II, criminal confinement, were not limited to his use of McGuiness's vehicle. Rather, they merely *involved* the use of her vehicle, as required under the class C felony version of criminal confinement. Ind. Code § 35-42-3-3. In contrast, the evidentiary facts supporting his auto theft conviction include an eyewitness report that on September 24, 2007, Perry was spotted in Muncie driving McGuiness's vehicle. Thus, he knowingly or intentionally asserted unauthorized control over her vehicle three days after her first confinement in the vehicle and two days after she eventually escaped from the vehicle. As a result, Perry has failed to demonstrate that fundamental error occurred when he was convicted of both criminal confinement and auto theft. Accordingly, we affirm.

Affirmed.

RILEY, J., and VAIDIK, J., concur.