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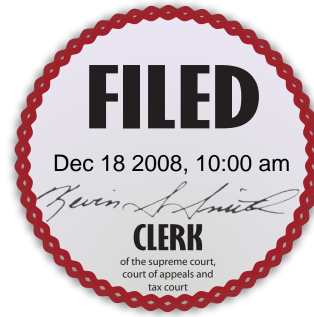


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# IN THE
# COURT OF APPEALS OF INDIANA

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REX JOHNSON, )
 )
Appellant-Defendant, )
 )
vs. ) No. 49A02-0804-CR-315
 )
STATE OF INDIANA, )
 )
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
The Honorable Stanley Kroh, Commissioner
Cause No. 49G03-0709-FB-185284

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**December 18, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Rex Johnson ("Johnson") was convicted in Marion Superior Court of two counts of Class C felony battery, Class D felony criminal confinement, and Class A misdemeanor interference with reporting. Johnson was ordered to serve an aggregate ten-year sentence in the Department of Correction. Johnson appeals raising several issues, which we restate as:

I. Whether the evidence was sufficient to support Johnson's conviction for Class D felony criminal confinement;

II. Whether the evidence was sufficient to support Johnson's conviction for Class A misdemeanor interference with reporting;

III. Whether the judgments of conviction entered on two Class C felony battery counts violate the prohibition against double jeopardy; and

IV. Whether Johnson's sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

**Facts and Procedural History**

Joyce Ross ("Joyce") and Johnson had a romantic relationship, which ended sometime before the date of September 7, 2007. On that date, Joyce invited Johnson to her house. At some point in the early morning hours, Joyce asked Johnson to leave because she was tired and wanted to go to bed. Johnson refused and shortly thereafter began to beat Joyce. Johnson beat Joyce for an extended period of time. Joyce attempted to escape the residence and call the police, but Johnson prevented her from doing so. As a result of the beating, Joyce sustained severe and lasting injuries that required hospitalization.

On September 10, 2007, Johnson was charged with Class D felony criminal recklessness, two counts of Class D felony criminal confinement, and Class A misdemeanor battery. On October 25, 2007, the State moved to amend its charging information, which charged Johnson with the following ten counts: Class B felony aggravated battery, two counts of Class B felony confinement and two counts of Class D felony confinement, two counts of Class C felony battery and one count of Class A misdemeanor battery, Class D felony criminal recklessness, and one count of Class A misdemeanor interference with reporting.

A bench trial was held on February 6, 2008. On February 22, 2008, the trial court found Johnson guilty of Class D felony criminal recklessness, Class D felony criminal confinement, two counts of Class C felony battery, Class A misdemeanor battery, and Class A misdemeanor interference with reporting. The court then sentenced Johnson to two years for the Class D felony criminal confinement conviction, eight years for each Class C felony battery conviction and one year for the interference with reporting conviction. The court ordered the sentences for the battery convictions and the interference with reporting conviction to be served concurrently, but consecutive to the two-year sentence for the confinement conviction, for an aggregate executed term of ten years.[1]

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

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[1] At the sentencing hearing, the court vacated the judgments of conviction for the counts of Class D felony criminal recklessness and Class A misdemeanor battery.

## I. Sufficient Evidence

Johnson argues that the evidence was insufficient to support his conviction for Class D felony confinement and Class A misdemeanor interference with reporting. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

A. *Johnson's Confinement Conviction*

First, Johnson argues that the evidence was insufficient to support his Class D felony criminal confinement conviction. To convict Johnson of confinement, the State was required to prove that Johnson knowingly or intentionally removed Joyce "by fraud, enticement, force, or threat of force, from one (1) place to another." See Ind. Code § 35-42-3-3 (2004 & Supp. 2008). Specifically, the State alleged that Johnson "did knowingly, by fraud, enticement, force, or threat of force, remove Joyce Ross from one place to another, that is: From[] inside the living room of a home, into a bedroom of a home[.]" Appellant's App. p. 76.

Johnson argues that he did not remove Joyce from "one place to another" when he took her from her living room to her bedroom. Br. of Appellant at 8. Specifically, he asserts that the term "place" cannot be defined to include different rooms of the same residence.

In Brown v. State, 868 N.E.2d 464 (Ind. 2007), our supreme court addressed what constitutes removal "from one place to another" under Indiana Code section 35-42-3-3. The word "remove" as used in the statute means "that it is unlawful to cause another person to move from a place or location for specified improper reasons." Id. at 468. Furthermore, the court has rejected the argument that moving the victim only a few feet was insufficient to sustain a conviction for criminal confinement recognizing that the statute does not provide exceptions dependent upon how far the victim is moved. Cornelius v. State, 508 N.E.2d 548, 549 (Ind. 1987). Thus, the term "remove" is not defined by the amount of distance the victim is moved or whether the victim is moved to a "distinct area."

The evidence presented at trial established that Johnson forcibly removed Joyce from the living room of her home to her bedroom. This evidence is sufficient to support Johnson's Class D felony criminal confinement conviction.

B. *Interference with Reporting Conviction*

Johnson also argues that the evidence was insufficient to support his Class A misdemeanor interference with reporting conviction. To prove that Johnson committed the offense of Class A misdemeanor interference with reporting, the State had to establish that Johnson, with the intent to commit, conceal, or aid in the commission of a crime, knowingly or intentionally interfered with or prevented Joyce from using a 911 emergency telephone system. See Ind. Code § 35-45-2-5 (2004); Appellant's App. pp. 77-78.

Joyce testified that she attempted to dial 911, but Johnson grabbed the phone from her and shattered it by slamming it onto the kitchen countertop. Tr. pp. 21-22. Joyce then ran to her bedroom to get another phone, but Johnson was able to destroy that phone before she was able to retrieve it. Tr. p. 23. This evidence is sufficient to establish that Johnson committed Class A misdemeanor interference with reporting. His argument to the contrary is merely a request to reweigh the evidence and the credibility of the witnesses, which our court will not do.

## II. Double Jeopardy

Next, Johnson argues that his convictions for two counts of Class C felony battery violate Indiana's Double Jeopardy Clause. Specifically, Johnson claims that the same evidence was used to convict him of both counts.

Article I, Section 14 of the Indiana Constitution provides that "No person shall be put in jeopardy twice for the same offense." In Richardson v. State, 717 N.E.2d 32 (Ind. 1999), our supreme court developed a two-part test for Indiana double jeopardy claims, and held:

> 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.

Id. at 49.

In this case, Johnson alleges that Joyce's testimony that she lost consciousness after he struck her with a lamp was used to convict him of the following counts of battery:

> COUNT VIII: . . . REX JOHNSON did knowingly or intentionally touch JOYCE ROSS, another person, in a rude, insolent, or angry manner, and furthermore, said touching resulted in serious bodily injury to JOYCE ROSS, specifically, unconsciousness;
>
> COUNT IX: . . . REX JOHNSON, did knowingly or intentionally touch JOYCE ROSS, another person, in a rude, insolent, or angry manner, and furthermore, said touching was committed by means of a deadly weapon, to wit: A LAMP.

Appellant's App. p. 77.

The actual evidence test prohibits multiple convictions if there is "a reasonable probability 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." Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (quoting Richardson, 717 N.E.2d at 53). In Spivey v. State, 761 N.E.2d 831 (Ind. 2002), our supreme court clarified that the actual evidence test "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." Id. at 833 (emphasis added).

At trial, Joyce testified that Johnson hit her on the head with a lamp, causing her to fall onto her bed and "black out." Tr. pp. 36-37. She was then asked if that was the first time she had "blacked out" throughout the ordeal. Joyce stated that she "blacked out" one other time before Johnson hit her with the lamp, which was caused by Johnson punching her in the face and head several times. Tr. p. 37. After Joyce regained consciousness from being struck with the lamp, she managed to throw the lamp out of her

bedroom window and starting yelling "help." Tr. pp. 38-39. Joyce testified that she then "felt [her] head being pulled back . . . [and she] went unconscious again." Tr. p. 39.

Count IX was proven with the evidence that Johnson struck Joyce with the lamp causing her to lose consciousness. That battery was only one of three instances in which Johnson's battering of Joyce caused her to lose consciousness. Joyce's testimony that she "blacked out" after Johnson punched her several times in her face and head supports the conviction on Count VIII. From Joyce's testimony, the trial court reasonably concluded that there were two distinct batteries. Because the actual evidence used to convict Johnson of Count VIII was separate and distinct from the actual evidence used to convict Johnson of Count IX, we conclude that his two Class C felony battery convictions do not run afoul of Indiana's Double Jeopardy Clause.

## III. Johnson's Sentence

Citing Article One, Section Sixteen of the Indiana Constitution and Indiana Appellate Rule 7(B), Johnson argues that his sentence is excessive because he received an aggregate ten-year sentence for incidents arising out of a single episode of criminal conduct.[2] Despite his citation to Rule 7(B), Johnson does not argue that his sentence is inappropriate. His argument is merely a request that we review the trial court's weighing of the aggravating and mitigating circumstances. However, trial courts are no longer obligated to weigh aggravating and mitigating circumstances against each other in

[2] We note that Johnson's aggregate sentence of ten years is equal to the advisory sentence for a Class B felony, which is one class of felony higher than the most serious felony for which Johnson was convicted. Therefore, his sentence does not run afoul of Indiana Code section 35-50-1-2(c).

imposing a sentence. Therefore, Johnson's claim is not available on appellate review. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

Although Johnson cites Appellate Rule 7(B), he does not argue that his aggregate ten-year sentence was inappropriate, and therefore, his claim is waived. See Ind. Appellate Rule 46(A)(8)(a) (2008). Waiver notwithstanding, we note that we have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. See Ind. Appellate Rule 7(B) (2008); Anglemeyer, 868 N.E.2d at 491. Although we are not required under Rule 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Johnson has a prior criminal history consisting of several misdemeanor convictions, which include two Class A misdemeanor battery convictions. He has also been convicted of two Class D felonies. Johnson was on probation for one of the battery convictions when he committed the second battery. He also failed to complete domestic violence counseling. Concerning the nature of the offense, Johnson severely beat Joyce for an extended period of time causing extensive injuries which required hospitalization. For all of these reasons, Johnson's aggregate ten-year sentence is not inappropriate.

**Conclusion**

The evidence is sufficient to support Johnson's convictions for Class D felony confinement and Class A misdemeanor interference with reporting. Johnson's two

convictions for Class C felony battery do not violate Indiana's Double Jeopardy Clause. Finally, Johnson waived his sentencing claim, but notwithstanding that waiver, we conclude that his aggregate ten-year sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAKER, C.J., and BROWN, J., concur.