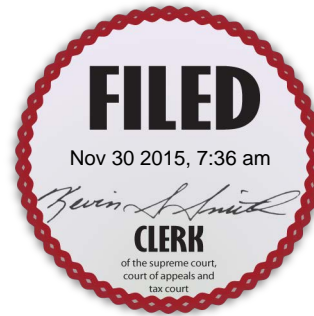


## MEMORANDUM DECISION

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.



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## IN THE COURT OF APPEALS OF INDIANA

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Troy Belk,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

November 30, 2015

Court of Appeals Case No.  
49A05-1503-CR-105

Appeal from the Marion Superior  
Court

The Honorable Kurt M. Eisgruber,  
Judge

Trial Court Cause No.  
49G01-1307-FA-46670

**Pyle, Judge.**

## Statement of the Case

[1] In this appeal, Troy Belk (“Belk”) appeals, following a joint jury trial with two co-defendants,<sup>1</sup> his convictions for Class A felony robbery,<sup>2</sup> Class B felony robbery,<sup>3</sup> Class B felony aggravated battery,<sup>4</sup> and two counts of Class D felony criminal confinement.<sup>5</sup> On appeal, Belk contends that the trial court erred by denying his motion to separate his trial from one of his co-defendants. Specifically, he contends that he was prejudiced by testimony regarding his co-defendant’s out-of-court statement. He also argues that the trial court’s sentencing documents need to be corrected. Because the co-defendant’s out-of-court statement referred only to that co-defendant’s actions and did not reference or implicate Belk, we conclude that the trial court did not abuse its discretion by denying Belk’s motion for a separate trial, and we affirm his convictions. However, we agree that the sentencing documents contained in the record indicate that some of the judgments of conviction were incorrectly

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<sup>1</sup> Today, we also issue opinions in the appeals of Belk’s co-defendants. *See Riley v. State*, 49A02-1503-CR-151; *Carter v. State*, 49A04-1503-CR-106.

<sup>2</sup> IND. CODE § 35-42-5-1. We note that, effective July 1, 2014, a new version of this robbery statute was enacted and that Class A felony robbery is now a Level 2 felony. Because Belk committed this crime in 2013, we will refer to the statute in effect at that time.

<sup>3</sup> I.C. § 35-42-5-1. Pursuant to the 2014 version of the robbery statute, this Class B felony robbery offense is now a Level 3 felony.

<sup>4</sup> I.C. § 35-42-2-1.5. Pursuant to the 2014 version of the aggravated battery statute, this Class B felony offense is now a Level 3 felony.

<sup>5</sup> I.C. § 35-42-3-3. Pursuant to the 2014 version of the criminal confinement statute, these Class D felony offenses are now Level 6 felonies.

entered, and we remand this case to the trial court to correct these sentencing documents.

[2] We affirm and remand with instructions to clarify the sentencing documents.

### **Issues**

1. Whether the trial court abused its discretion by denying Belk's motion for a separate trial from one of his co-defendants.
2. Whether the sentencing documents in this case need to be corrected.

### **Facts<sup>6</sup>**

[3] On July 10, 2013, around 5:00 p.m., Sylvester Kenney ("Kenney")<sup>7</sup> and Michael Spann ("Spann") were at Spann's house on North Chester Avenue in Indianapolis. Spann did not live in this house but used it to sell marijuana. After hearing a knock on the door, Kenney opened it, and Antwoin Carter ("Carter") entered the house. Carter, who was armed with a gun with a laser, pointed it at Kenney and told him to get on the floor. Carter hit Spann on the head with the gun and told him to also get on the floor. Carter then took money from Kenney and Spann. When Spann's phone rang, Carter grabbed the earpiece from Spann and threatened to shoot him in the face if he told someone to come to the house.

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<sup>6</sup> Belk does not challenge the sufficiency of the evidence supporting his convictions; therefore, we will not include a detailed recitation of the facts of his offenses.

<sup>7</sup> Kenney's nickname was "Tussy." (Tr. 71).

[4] Thereafter, Carter went by the window, made a phone call, and said, “I got these b\*\*\*\*es -- y’all better hurry up.” (Tr. 152). Riley and Troy Belk (“Belk”), who were both armed with guns, entered the house. Belk kicked Kenney in the face, demanded money from him, and told Kenney that they had his mother and would kill her if he did not reveal the location of the money. Kenney, who recognized Belk, asked him, “Troy, why you doin[’] this -- Troy --you know I ain’t got no money[.]” (Tr. 165). Belk then grabbed a baseball bat that was in Spann’s house and hit Kenney with it several times. During this time, Carter continued to keep his gun pointed at Kenney. Riley unplugged the surveillance cameras and stood over Spann with his gun pointed at him. When Spann looked up at Riley, he told Spann that he would shoot Spann in the face if Spann looked at him again.

[5] Thereafter, Carter and Belk dragged Kenney into the kitchen, continued to beat him, and asked him where the “stuff” was. (Tr. 264). Riley then grabbed Spann by the shirt, dragged him to the kitchen, and continued to hold his gun on him. Belk “ra[n]sack[ed]” the kitchen and rummaged through closets while Riley kept his gun pointed at Spann. (Tr. 158). Riley said that he had an “itchy trigger finger” and cocked his gun. (Tr. 158). At that same time, the doorbell rang. Belk and Riley ran to the door while Carter, still armed and pointing his gun at Kenney, stayed in the kitchen with Kenney and Spann. Belk said, “open the door and let him in -- we gonna kill him with these two.” (Tr. 159).

[6] At that point, Kenney jumped on Carter and told Spann to run. Kenney punched Carter, who then shot Kenney in the face. Spann ran down the hall,

saw Kenney fall to the ground, and saw a “flame” or a bullet coming toward him. (Tr. 161). Spann then dove out the window and ran down the alley, yelling repeatedly, “They tryin['] to kill us.” (Tr. 163).

[7] Later, when officers from Indianapolis Metropolitan Police Department (“IMPD”) arrived on the scene, Spann gave them the name “Troy” as a suspect. (Tr. 84, 163, 165). Spann and Kenney were both taken to the hospital, and Kenney was placed into a medically-induced coma. In the days following the crimes, IMPD officers investigated the crimes and subsequently showed photographic arrays to Kenney and Spann, who identified Carter, Belk, and Riley as the perpetrators of the crimes.

[8] On July 18, 2013, the State charged Belk and Carter in a joint charging information, in which the following five of seven counts applied to Belk: Count I, Class B felony aggravated battery (of Kenney); Count II, Class C felony battery (of Spann); Count III, Class A felony robbery (of Spann); Count IV, Class B felony criminal confinement (of Kenney); Count V, Class B felony criminal confinement (of Spann).<sup>8</sup> Then, on September 16, 2013, the State amended the charging information by adding a Class A felony robbery (of Kenney) charge and by including Riley’s name in the joint charges. Thus, the amended joint information contained ten counts, the following six of which applied to Belk: Count I, Class B felony aggravated battery (of Kenney); Count

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<sup>8</sup> Count VI, Class D felony criminal confinement (of Lacie Willis), and Count VII, Class D felony intimidation (of Willis), were charged against Carter only.

II, Class C felony battery (of Spann); Count III, Class A felony robbery (of Spann); Count IV, Class B felony criminal confinement (of Kenney); Count V, Class B felony criminal confinement (of Spann); and Count X, Class A felony robbery (of Kenney).<sup>9</sup>

[9] In September 2014, while Carter was incarcerated, he told Ronnie Archer (“Archer”)—who was in the same cell block as Carter and dated Carter’s cousin—about the robbery. According to Archer, Carter told Archer that he had shot somebody and “asked [him] how could somebody get shot in the head and don’t die.” (Tr. 341). Thereafter, Archer talked to the police about his conversation with Carter.

[10] On October 20, 2014, Belk filed a “Motion for Severance from Co-Defendant,” in which he sought a trial separate from Carter.<sup>10</sup> (App. 72). In the motion, Belk asserted that the State was planning to introduce, in the joint trial, a letter that was purportedly written by Carter and that contained incriminating

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<sup>9</sup> Counts I-V and Count X were charged against Belk, Riley, and Carter. Counts VI and VII were charged against Carter only. Count VIII, Class B felony unlawful possession of a firearm by a serious violent felon, and Count IX, Class A misdemeanor carrying a handgun without a license with an enhancement to a Class C felony based on a prior conviction, were charged against Riley only.

<sup>10</sup> The parties refer to this motion and the motion made at trial as a motion to sever or a motion for severance. Because these motions are actually motions for a separate trial from Carter—as opposed to a motion for severance of offenses—we will refer to the motions as motions for a separate trial. *Compare* I.C. § 35-34-1-11(a) (relating to severance of offenses for one defendant) *with* I.C. § 35-34-1-11(b) (relating to separate trials for defendants).

statements he had made.<sup>11</sup> Belk argued that admission of the letter in a joint trial with Carter would be prejudicial and would constitute a violation of his Sixth Amendment rights pursuant to *Bruton v. United States*, 391 U.S. 123 (1968).<sup>12</sup> Riley joined in the motion for a separate trial.

[11] On January 30, 2015, the trial court held a final pre-trial hearing, which included argument on the motion for a separate trial. Riley and Belk argued that the admission of the letter would create a *Bruton* issue due to Carter's reference to "we" contained in the letter and their inability to cross-examine Carter. (Tr. 496-97). The trial court ruled that the letter would not be admissible, and it denied Belk and Riley's joint motion for a separate trial.

[12] This pre-trial hearing was held on the Friday before the Monday trial. At the end of this hearing, the prosecutor, who had originally listed Archer on the State's witness list, told the trial court and the defendants that the State was not planning on calling Archer as a witness. However, during the weekend, the prosecutor contacted the defendants' attorneys to notify them that the State was going to call Archer as a witness.

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<sup>11</sup> As a result of this letter, Carter was later charged with attempted kidnapping. While a copy of this letter was included as an exhibit in Riley's appellate record, it is not included in Belk's appellate record. See *Riley v. State*, 49A02-1503-CR-151.

<sup>12</sup> In *Bruton*, "the United States Supreme Court held that in a joint trial, admission of one defendant's confession that implicates another defendant is a violation of the second defendant's Sixth Amendment right to confront witnesses." *Fayson v. State*, 726 N.E.2d 292, 294 (Ind. 2000) (citing *Bruton*, 391 U.S. at 124-26). Because "[t]he confessing defendant cannot be required to take the stand, . . . the result is a denial of the other defendant's right to cross-examine." *Id.* (citing *Bruton*, 391 U.S. at 137).

[13] The trial court held a two-day jury trial on February 2-3, 2015. Prior to trial, the State filed an amended charging information for jury purposes. In this joint information, the State charged the robbery of Spann as a lesser included B felony; dismissed some of the charges;<sup>13</sup> omitted some of the charges, including Riley’s charge and enhancement that needed to be bifurcated; and renumbered the remaining charges. Thus, for the purposes of trial, the joint charging information contained the following charges against Belk: Count I, Class A felony robbery (of Kenney); Count II, Class B felony robbery (of Spann); Count III, Class B felony aggravated battery (of Kenney); Count IV, Class B felony criminal confinement (of Kenney); and Count V, Class B felony criminal confinement (of Spann).

[14] Before the jury trial commenced, the State discussed its plan to present Archer as a witness. The prosecutor stated that Archer was not going to testify about the excluded letter and that, instead, he would “talk about conversations he had directly with Antwion Carter [while in jail] about Antwion Carter’s case only and none of the other co-defendants.” (Tr. 5). Riley then made an oral motion to separate his trial from Carter’s trial. Riley acknowledged that Archer’s testimony regarding Carter’s out-of-court statement would “go[] only to Mr. Carter,” but he argued that the testimony would be prejudicial. (Tr. 6). In the alternative, Riley sought to exclude Archer’s testimony regarding Carter’s

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<sup>13</sup> The State dismissed the Class C felony battery (of Spann) charge against all three co-defendants and the Class D felony criminal confinement and the Class D felony intimidation charges against Carter.



statement. Belk joined in Riley’s oral motion for a separate trial. Belk also acknowledged that Archer’s proposed testimony would “not speak of Troy Belk in any way” and that there “wo[uld]n’t be an issue in regard to that[.]” (Tr. 6). Belk asked that he have a joint trial with Riley that was separate from Carter’s trial. Riley’s counsel argued that the defendants had just learned during the previous weekend that Archer’s testimony was going to include the statement that Carter had asked how a person could get shot in the head and live. The State argued that Archer was a known witness and that the trial court could give a limiting instruction to the jury to inform them that Carter’s statements could be used only against Carter and not against the other co-defendants. The trial court denied Riley and Belk’s oral motion for a separate trial, finding that Carter’s statement was a statement against his interest and that it was “not . . . prejudicial such that it should be excluded.” (Tr. 11). The trial court stated that it could provide a limiting instruction if Riley and Belk wanted one.

[15] During the trial, Archer testified that he and Carter had been in the same cell block and had talked about “basketball, kids[,]” or “whatever[.]” (Tr. 340). Archer also testified that Carter had talked to him about a robbery<sup>14</sup> case and had told him that he had shot someone. Archer testified that Carter had “asked [him] how could somebody get shot in the head and don’t die.” (Tr. 341).

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<sup>14</sup> At the beginning of Archer’s testimony, the State initially asked Archer if he had talked to Carter about a “burglary” case, (Tr. 340), but when the State asked Archer about Carter’s specific statements, the prosecutor referred to a “robbery” case. (Tr. 341).

None of the defendants objected to Archer's testimony. Neither Belk's attorney nor Riley's attorney cross-examined Archer.

[16] The trial court gave the following preliminary and final jury instruction:

You should give separate consideration to each accused. Each is entitled to have his case decided on the evidence and the law that applies to him. Any evidence which is limited to one accused must not be considered by you as to any other accused.

(App. 91) (capitalization of some letters put into lower case).

[17] The jury found Belk guilty as charged of the five counts against him. The trial court held a joint sentencing hearing for Belk and his two co-defendants. The trial court ordered that Belk's sentences on his convictions be served concurrently and imposed an aggregate executed sentence of forty (40) years, with thirty-five (35) years in the Department of Correction and five (5) years in community corrections.<sup>15</sup> Belk now appeals.<sup>16</sup>

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<sup>15</sup> Because the record before us reveals numerous irregularities relating to sentencing, we will discuss the specifics of the trial court's sentencing when we address Belk's sentencing argument.

<sup>16</sup> During the briefing phase of this appeal, the State filed a Motion for Remand and requested that briefing be suspended so this case could be remanded to the trial court for clarification of its entry of Belk's judgments of conviction. By separate order, issued contemporaneously with this opinion, we deny the State's motion as moot because we will address this sentencing issue in this opinion.

## Decision

[18] Belk argues that: (1) that the trial court erred by denying his motion for a trial separate from Carter; and (2) that the trial court’s sentencing documents need to be corrected. We will address each argument in turn.

### 1. Motion for a Separate Trial

[19] As we review Belk’s challenge to the trial court’s denial of his oral motion for a trial separate from Carter, we bear in mind that a defendant has “no absolute right to a separate trial[.]” *Rouster v. State*, 705 N.E.2d 999, 1004 (Ind. 1999) (citing *Lampkins v. State*, 682 N.E.2d 1268 (Ind.1997), *modified on reh’g* by 685 N.E.2d 698 (Ind. 1997)), *reh’g denied*. INDIANA CODE § 35-34-1-9 permits the joinder of two or more defendants in a single prosecution. *See also Lampkins*, 682 N.E.2d at 1272. INDIANA CODE § 35-34-1-11(b), however, allows a defendant to move for a separate trial. This statutory provision pertaining to a separation of trials for co-defendants provides:

Whenever two (2) or more defendants have been joined for trial in the same indictment or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect:

- (1) a joint trial at which the statement is not admitted into evidence;
- (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or

(3) a separate trial for the moving defendant.

*In all other cases, upon motion of the defendant or the prosecutor, the court shall order a separate trial of defendants whenever the court determines that a separate trial is necessary to protect a defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of a defendant.*

I.C. § 35-34-1-11(b) (emphasis added). Where, as here, the challenged testimony did not “make reference” to Belk, the first part of the statute—which sets forth the three options for the prosecutor—is not implicated. *See id.* Indeed, Belk acknowledges that “[i]f Carter had specifically referenced Belk in his statement or referred to others acting with him, Ind. Code [§] 35-34-1-11(b) would have required the State to choose to try the defendants together without the statement or to try Carter separately.” (Belk’s Br. 5). Accordingly, we will review Belk’s challenge to the trial court’s ruling of his motion for a separate trial under the latter part of the statute.

[20] “The trial court has discretion to grant or deny a motion for separate trials.” *Lee v. State*, 684 N.E.2d 1143, 1147 (Ind. 1997) (citing *Gordon v. State*, 609 N.E.2d 1085, 1088 (Ind. 1993); *Underwood v. State*, 535 N.E.2d 507, 514 (Ind. 1989), *cert. denied, reh’g denied*). “An abuse of discretion occurs when a court denies a defendant’s properly filed motion for separate trials and the parties’ defenses are mutually antagonistic to such a degree that acceptance of one party’s defense precludes the acquittal of the other.” *Rouster*, 705 N.E.2d at 1004 (citing *Lampkins*, 682 N.E.2d 1272). “The soundness of the trial court’s discretion is measured by what actually transpired at trial rather than what was

alleged in the motion[.]” *Averhart v. State*, 470 N.E.2d 666, 680 (Ind. 1984), *cert. denied*. Thus, on review, we consider the events that actually occurred at trial to determine whether a motion for a separate trial should have been granted. See *Rouster*, 705 N.E.2d at 1004-05. See also *Lampkins*, 682 N.E.2d at 1272. “A defendant is not, however, entitled to a separate trial merely because a co-defendant implicates that defendant.” *Rouster*, 705 N.E.2d at 1004. See also *Lee*, 684 N.E.2d at 1147 (holding that there is “no ground for reversal simply because one of the codefendants implicated the defendant”). “[T]he defendant bears the burden of showing that the denial of a separate trial subjected him to such serious prejudice that he was denied a fair trial.” *Averhart*, 470 N.E.2d at 680. See also *Castro v. State*, 580 N.E.2d 232, 234 (Ind. 1991) (“When appellant seeks a reversal claiming an abuse of discretion in the denial of his motion for separate trial, he must show actual prejudice.”).

[21] Here, Belk does not contend that his defense was mutually antagonistic from Carter’s. Indeed, at trial, all three defendants had the same defense – that they were innocent and were misidentified by Spann and Kenney. As he did at trial, Belk acknowledges on appeal that “Carter’s statement did not reference any others involved in the shooting[.]” (Belk’s Br. 6). Nevertheless, Belk contends that the trial court should have separated his trial from Carter’s trial, arguing that he was prejudiced by Archer’s testimony regarding Carter’s admission that he had shot someone. Specifically, in support of his argument that he was prejudiced, Belk contends that Carter’s statement “corroborated Spann’s and Kenney’s testimony that Carter shot Kenney during a robbery” and then

“bolstered the credibility of Spann and Kenney” in regard to their testimony against Belk. (Belk’s Br. 6). Belk, however, did not object to Archer’s testimony at trial, let alone make an objection that it was improper bolstering, and he did not cross-examine the witness. As a result, he has waived review of this issue. *See e.g., Morgan v. State*, 400 N.E.2d 111, 114 (Ind. 1980) (holding that the defendant waived challenge to the trial court’s denial of his motion for a separate trial from a co-defendant by failing to move for a separate trial and that, nonetheless, his argument that he was prejudiced by a witness was also waived because the defendant did not object to her testimony, ask that the testimony be stricken, or cross-examine the witness).

[22] Waiver notwithstanding, Belk’s argument that he was prejudiced ultimately relies on his contention that there was insufficient evidence regarding his identification and involvement in the crime. Belk acknowledges that Spann and Kenney identified him as one of the suspects involved in the crimes against Spann and Kenney, but he argues that the “identification of Belk was a little suspect.” (Belk’s Br. 6). Belk does not raise an argument challenging the sufficiency of the evidence. However, this challenge to the credibility or the weight that the jury should have given Spann’s and Kenney’s testimony is nothing more than an inadequate attempt at a sufficiency argument and an invitation to reweigh the evidence and reassess the jury’s credibility determination, which we will not do. *See Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007).

[23] After reviewing what happened at trial, we conclude that Belk has not shown that the trial court's denial of his oral motion for a separate trial "subjected him to such serious prejudice that he was denied a fair trial." See *Averhart*, 470 N.E.2d at 680. "It is the defendant's burden to show that a fair trial could not otherwise be had, and 'not merely that severance would enhance the prospects for acquittal.'" *Lee*, 684 N.E.2d at 1149 (quoting *Blacknell v. State*, 502 N.E.2d 899, 905 (Ind. 1987) (citing *Broadus and Dunville v. State*, 487 N.E.2d 1298, 1302 (Ind. 1986)), *reh'g denied*). When assessing what occurred at trial, we bear in mind that "there is not a constitutional right to be protected from damaging evidence." *Lee*, 684 N.E.2d at 1147 (quoting *Castro*, 580 N.E.2d at 235 (citing *Smith v. State*, 474 N.E.2d 973 (Ind. 1985))).

[24] On the morning of trial, when moving for a separate trial, Belk acknowledged that Archer's testimony would refer to Carter only and not to him, but he argued generally that the testimony would be prejudicial. The trial court ruled that a separate trial was not necessary because Archer's testimony was not prejudicial, and it instructed the jury, in relevant part, that "[a]ny evidence which is limited to one accused must not be considered by you as to any other accused." (App. 91) (capitalization of some letters put into lower case). During the trial, when Archer testified about Carter's admission, Belk did not object to Archer's testimony and did not cross-examine him. Indeed, as acknowledged by Belk, Archer's testimony about Carter's statement did not mention Belk by name nor did it refer to any action by Belk. Instead, Carter's out-of-court statement referred only to his own actions, i.e., *Carter* shot someone in the head.

Carter's statement did not indicate that he was with anyone or had acted in conjunction with anyone else. Additionally, both victims, Spann and Kenney, testified and identified Belk as one of the perpetrators of the offenses against them. Considering the events that actually occurred at trial, we conclude that the trial court did not abuse its discretion by denying Belk's motion for a separate trial. *See, e.g., Brock v. State*, 540 N.E.2d 1236, 1240 (Ind. 1989) (rejecting a defendant's argument that he was prejudiced by a co-defendant's statement because the statement did not attribute any act to the defendant), *reh'g denied; Wardlaw v. State*, 483 N.E.2d 454, 457 (Ind. 1985) (holding that a defendant was not entitled to a separate trial based on the co-defendant sending an apology letter to the victim because the letter did not refer to the defendant or that the co-defendant had acted in conjunction with another person). *See also Hopper v. State*, 539 N.E.2d 944, 947 (Ind. 1989) (affirming the trial court's denial of the defendant's motion to separate his trial from his co-defendant, who was absent from the trial, where the trial court gave the jury an almost identical instruction as the trial court did in this case).<sup>17</sup>

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<sup>17</sup> Belk also argues that due to the prejudicial impact of Carter's statement, the trial court should have applied the first part of INDIANA CODE § 35-34-1-11(b) and should have given the prosecutor the choice of either: (1) not using Archer's testimony; or (2) trying Belk and Riley in a separate trial. Because we conclude that Belk has not met his burden of showing that he was prejudiced, we will not address this argument.



## 2. Sentencing

- [25] On appeal, Belk asserts that the trial court's sentencing documents do not accurately reflect the judgments of conviction that the trial court intended to enter. He asks that we instruct the trial court to correct these sentencing documents to reflect the appropriate judgments of convictions that correspond to the sentences imposed. The State acknowledges that the sentencing documents need clarification.
- [26] We agree that there is a lack of clarity in the record regarding the entry of judgments of conviction and corresponding sentencing. We also note that there are other issues with the trial court's sentencing documents that need to be addressed.
- [27] While the sentencing documents lack clarity, the record, however, is clear that the jury found Belk guilty as charged in the amended charging information that was filed just prior to trial. Specifically, the jury found Belk guilty of: Count I, Class A felony robbery (of Kenney); Count II, Class B felony robbery (of Spann); Count III, Class B felony aggravated battery (of Kenney); Count IV, Class B felony criminal confinement (of Kenney); and Count V, Class B felony criminal confinement (of Spann).
- [28] At the sentencing hearing, the trial court discussed how it would possibly handle potential double jeopardy concerns with the convictions. Specifically, the trial court stated:

Before we get to argument I just want to get the perspective and I should have given all -- all the parties a head's up on this -- how do you view running these counts -- the -- if I'm runnin[g] under that A those robberies -- that robbery becomes a C. The confinements bump down to D's and then the agg batt really is -- is really part of parcel of that A so I don't know how you view the agg batt -- does it reduce to a C or do you think that stands on its own?

(Tr. 442). The prosecutor pointed out that the robbery conviction for the robbery of Kenney was a Class A felony conviction and that the robbery conviction for the robbery of Spann was a Class B felony conviction. The parties then agreed that the Class B felony aggravated battery conviction would “disappear” because it was an element of the Class A robbery conviction. (Tr. 444). The trial court then stated it would “merge 3 into 1 and we'll sentence on the remaining counts.” (Tr. 445). Thereafter, the trial court orally pronounced the sentence on the Class A felony robbery conviction for Belk and his co-defendants. For Belk, the trial court imposed a forty (40) year executed sentence, with thirty-five (35) years in the Department of Correction and five (5) years in community corrections. The trial court stated that, for each of the defendants, it would be ordering the remaining sentences to be served concurrently to the sentence on this Class A felony robbery conviction. The trial court, however, did not orally pronounce a sentence on the remaining counts during the sentencing hearing. Instead, the trial court stated that it would “break down all the remaining counts in the sentencing [order] but [that it was] running them all as one larger criminal episode[.]” (Tr. 478). The trial

court stated that while there were “two victims and [it] normally like[d] to apportion per victim -- [it would] not in this case.” (Tr. 479).

[29] From reading the transcript of the sentencing hearing, we observe that, ultimately, the trial court merged Belk’s Class B felony aggravated battery conviction into his Class A felony robbery conviction and imposed a forty (40) year sentence on that Class A felony conviction. A review of the sentencing hearing also reveals that the trial court intended to enter sentences on the Class B felony criminal confinement convictions as Class D felonies and to enter a sentence on the Class B felony robbery (of Spann) conviction. Additionally, as discussed above, the trial court stated that it would order all sentences be served concurrently.

[30] However, the sentencing order, abstract of judgment, and chronological case summary do not reflect this intended sentencing. Specifically, these court documents indicate that the trial court entered the following judgments of conviction and imposed the following sentences: (1) robbery of Kenney as a Class A felony with a sentence of forty (40) years; (2) robbery of Spann as a Class A felony with a “Finding of Guilty of a Lesser Included” and with a sentence of fifteen (15) years; (3) Class B felony aggravated battery that was “[m]erged” into the Class A felony robbery of Kenney conviction; (4) Class B felony criminal confinement of Kenney with a sentence of 545 days; and (5) Class B felony criminal confinement of Spann with a sentence of 545 days. (App. 15, 17).

[31] These sentencing documents, therefore, have three issues that need to be corrected. First, in regard to the trial court's act of merging the Class B felony aggravated battery into the Class A felony robbery, which were convictions for which the trial court seems to have entered judgments of conviction, we note that "[a] trial court's act of merging, without also vacating the conviction, is not sufficient to cure a double jeopardy violation" and that such a violation cannot be remedied by the "practical effect" of merging after a conviction has been entered. *Gregory v. State*, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008), *trans. denied*. See also *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006) (explaining that "a merged offense for which a defendant is found guilty, but on which there is neither a judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned"). Because it appears from the record that the trial court entered judgment of conviction on Class B felony aggravated battery prior to merging this conviction, we remand this cause to the trial court with instructions to vacate Belk's judgment of conviction on this offense.

[32] Second, the trial court's sentencing documents need to be corrected to reflect that Belk was convicted of robbery of Spann as a Class B felony. Prior to the commencement of trial, the robbery charge against Spann was amended to a Class B felony charge. The jury found Belk guilty of this robbery as Class B felony, and the trial court sentenced him on the conviction to fifteen years. However, the sentencing documents indicate that the judgment of conviction was entered as a Class A felony. The entry of judgment of conviction as a Class A felony with a sentence of fifteen years is contrary to the statutory sentencing

range set forth for a Class A felony. *See* IND. CODE § 35-50-2-4 (providing that the sentencing range for a Class A felony is between twenty (20) and fifty (50) years). Thus, the abstract of judgment, sentencing order, and chronological case summary should be corrected to reflect that the judgment of conviction of this robbery of Spann was entered as a Class B felony.

[33] Third, the trial court's sentencing documents need to be corrected to reflect that the trial court entered judgments of conviction on the criminal confinement convictions as Class D felonies instead of Class B felonies. While the jury found Belk guilty of these criminal confinement convictions as Class B felonies, the trial court sentenced him on these as Class D felonies due to double jeopardy concerns and imposed a sentence of 545 days on each conviction. However, the sentencing documents indicate that the judgments of conviction on these criminal confinement offenses were entered as a Class B felonies. Again, the entry of judgment of conviction as a Class B felony with a sentence of 545 days is contrary to the statutory sentencing range set forth for a Class B felony. *See* IND. CODE § 35-50-2-5 (providing that the sentencing range for a Class B felony is between six (6) and twenty (20) years). Thus, the abstract of judgment, sentencing order, and chronological case summary should be corrected to reflect that the judgments of conviction of these criminal confinement offenses were entered as Class D felonies.

[34] In summary, the sentencing order, abstract of judgment, and chronological case summary should be corrected to reflect that: (1) the Class B felony aggravated battery conviction was vacated; (2) Belk was convicted of robbery of Spann as a

Class B felony and that the trial court entered judgment of conviction as a Class B felony; and (3) the trial court entered judgments of conviction and sentences on the criminal confinement convictions as Class D felonies instead of Class B felonies.<sup>18</sup>

[35] Finally, we express our concern with the trial court’s failure to impose and pronounce sentencing on all of Belk’s convictions during the sentencing hearing. INDIANA CODE § 35-38-1-5 provides:

When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in the defendant’s own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. *Sentence shall then be pronounced, unless a sufficient cause is alleged or appears to the court for delay in sentencing.*

[36] (Emphasis added). The record does not reveal “a sufficient cause” for the delayed pronouncement of sentencing as the parties did not request a delay in the pronouncement of sentencing nor did the trial court provide a reason why it

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<sup>18</sup> Additionally, we note that the abstract of judgment and sentencing order contain all original charges filed against Belk, even though one of the charges was ultimately dismissed. We acknowledge that the abstract of judgment form, which indicates that it is a “State Form” from the Indiana Department of Correction, appears to add to the confusion in the sentencing documents. (App. 15). The abstract of judgment form, in Part I, requires a trial court list the “charge[s]” against a defendant, instead of the convictions. (App. 15). Then, Part II of the form requires the trial court to list the sentences “[a]s a result of the above convictions[.]” (App. 15). However, the charges listed in Part I are not convictions. Because this abstract of judgment form is used by the Department of Correction for incarceration duration and subsequent release date information, only the actual judgments of conviction and resulting sentences are relevant.

was waiting to “break down all the remaining counts in the sentencing” order. (Tr. 478). At the same time, the parties did not object when the trial court failed to pronounce the remaining sentencing during the hearing. Therefore, we will not remand for a new sentencing hearing. However, we would encourage the trial court, for all future sentencing, to pronounce sentencing on *all* convictions during a sentencing hearing in accordance with INDIANA CODE § 35-38-1-5.

[37] Affirmed and remanded with instructions.

Vaidik, C.J., and Robb, J., concur.