

STATEMENT OF THE CASE

Appellant-Defendant, William T. Bradley (Bradley), appeals his convictions of criminal confinement, as a Class B felony, Ind. Code § 35-42-3-3, and aggravated battery, as a Class B felony, I.C. § 35-42-2-1.5.

We affirm.

ISSUES

Bradley raises three issues on appeal, which we restate as follows:

- (1) Whether the State presented sufficient evidence to sustain Bradley's conviction of criminal confinement;
- (2) Whether the trial court violated the Indiana Constitution's prohibition against double jeopardy when it convicted and sentenced Bradley for both criminal confinement and aggravated battery; and
- (3) Whether the trial court abused its discretion when sentencing Bradley.

FACTS AND PROCEDURAL HISTORY¹

On the morning of September 9, 2004, Bradley and his wife, Vetta Porter (Porter), met with an attorney to discuss filing for a divorce. Bradley and Porter had been married approximately ten years; and three children were born during the marriage P.B, S.B., and K.B ages 12, 8, and 5, respectively. Approximately two weeks earlier, Porter had left the marital residence and moved into an apartment in Louisville, Kentucky. During this

¹ Even though the Indiana Appellate Rules do not prohibit counsel to submit briefs held together with tape, we would like to draw Appellant's attention to Ind. Appellate Rule 43(J) (emphasis added) stating that "[The brief] shall be bound in book or pamphlet form along the left margin. *Any binding process which permits the document to lie flat when open is preferred.*" A brief bound with tape does not lie flat.

time, the three children continued to live at the marital residence with Bradley. Porter returned to the marital residence twice each day to prepare the children for school in the mornings, and to fix dinner in the evenings.

On the afternoon of September 9, 2004, after meeting with the lawyer, Porter left in a separate vehicle to pick up K.B., from her mother's home. When Porter returned to the marital residence with K.B., Bradley was there. Bradley became upset with Porter. About that time, K.B. asked Porter if they could go to the park to play. After visiting the park, Porter and K.B. returned to the marital residence. Upon arriving, Bradley demanded Porter's wedding rings. Porter began walking to the bathroom; she told Bradley that they would be able to talk as soon as she was done using the restroom.

When Porter walked through the threshold of the bathroom, Bradley stabbed her in the upper back with a knife. The blade broke off in Porter's back as she fell forward into the bathroom and onto the toilet. Once Porter fell into the bathroom, Bradley entered the bathroom and struck Porter in the head with a hammer several times. As Porter felt the first hammer blow to her head, she heard the door to the bathroom shut. Bradley hit Porter three or four times in the back of her head with a hammer while she was pinned over the toilet. Porter begged Bradley for her life as she struggled with him for control of the hammer.

During the struggle, Porter bit Bradley, managed to take the hammer, open the bathroom door, and run outside. Porter's yell for help and blood-covered body attracted the attention of a neighbor, Rhonda Ladd (Ladd). Ladd placed Porter in her car with a towel to put over her bleeding wounds. Ladd observed Bradley come outside of the

marital residence; he was also covered in blood. Ladd then noticed K.B. standing in the front door of the house, and she received permission from Bradley to take the child with her. S.B, the couple's other son, arrived home from school shortly thereafter; and Ladd also helped S.B. avoid the altercation.

Officers from the Clark County Sheriff's Office and two ambulances arrived at the scene and treated Porter and Bradley for their wounds. Porter received treatment from two nearby hospitals for the injuries she sustained during the attack. Doctors removed a knife blade from Porter's back and she suffered several lacerations on her back, while her head injuries required sutures and staples.

On September 16, 2004, the State filed an Information charging Bradley with Count I, attempted murder, as a Class A felony; Count II, criminal confinement, as a Class B felony; Count III, aggravated battery, as a Class B felony; and Count IV, domestic battery, as a Class A misdemeanor. On May 31, 2005, the State amended the Information to dismiss Count IV. Then, on July 5 through 7, 2005, a jury trial was conducted. At the end of the trial, the jury found Bradley guilty of Count II, criminal confinement, and Count III, aggravated battery.

On August 25, 2005, the trial court held a sentencing hearing. The trial court found that Bradley's past criminal conviction, evidence that his four-year-old son was within hearing distance of the attack, and the nature and circumstances of the crime to be aggravating circumstances. The trial court found that the aggravating factors outweighed the mitigating factor of Bradley's mental state at the time of the offense. As a result, the trial court aggravated each sentence by five years and ordered the sentences to be served

consecutively. Accordingly, the trial court sentenced Bradley to two consecutive fifteen-year terms of imprisonment for the convictions of criminal confinement and aggravated battery.

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

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Bradley argues that the evidence presented by the State was insufficient to support his conviction for criminal confinement, as a Class B felony. Specifically, Bradley asserts that the State failed to prove beyond a reasonable doubt that he satisfied the “knowingly or intentionally” element of the crime, *i.e.*, that he knowingly or intentionally confined Porter to the bathroom.² We disagree.

Our standard of review for a sufficiency of the evidence claim is well settled. We will not reweigh the evidence or assess the credibility of witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028-29 (Ind. Ct. App. 2002). We consider only the evidence most favorable to the judgment, together with all reasonable inferences that can be drawn therefrom. *Alspach v. State*, 755 N.E.2d 209, 210 (Ind. Ct. App. 2001), *trans. denied*. If substantial evidence of probative value to support the verdict exists, which could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we will affirm the conviction. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

² A person who “knowingly or intentionally confines another person without the other person’s consent” is guilty of criminal confinement. I.C. § 35-42-3-3.

Pursuant to I.C. § 35-42-3-3, a person who knowingly or intentionally confines another person without the other person's consent commits criminal confinement. The offense is a Class B felony if the confinement “is committed with a deadly weapon.” I.C. § 35-42-3-3(b)(2)(A). “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” I.C. § 35-41-2-2(a). “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” I.C. § 35-41-2-2(b). Thus, in order to convict Bradley of this offense, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally confined Porter without her consent.

In the present case, Bradley admits that during the attack there was an interference with his wife’s freedom of movement. Porter testified that after Bradley hit her with the hammer the first time, the blow caused her to fall face-first over the toilet. Then, she heard the bathroom door shut. She testified that she did not touch the door. Further, the evidence confirmed that the door was a model that did not close automatically. During the attack, Porter experienced multiple blows to her back and to the back of her head by a hammer. She struggled with Bradley for control of the hammer and bit him on the hand to get him to release the hammer, which he did. After gaining control of the hammer, she opened the bathroom door, got out and then ran out the front door with Bradley in pursuit.

However, Bradley’s sole defense is that the State did not prove he knowingly or intentionally interfered with Porter’s freedom of movement without her consent. Bradley argues that the evidence does not establish that he contemplated confining Porter in the

bathroom. In support of his argument, Bradley cites to two cases, *Spivey v. State*, 436 N.E.2d 61 (Ind. 1982) and *Hopkins v. State*, 759 N.E.2d 633 (Ind. 2001). In *Spivey*, the defendant was convicted of multiple offenses, including criminal confinement, robbery, kidnapping and attempted murder. *Spivey*, 436 N.E.2d at 62. The defendant entered a gas station, drew a revolver, and ordered two employees into the backroom. *Id.* He ordered the employees to open the station's safe; the employees complied with the request. *Id.* After emptying the safe, the defendant pointed the gun at the employees and ordered them to lie on the floor for five minutes. *Id.* Our supreme court found that the evidence presented would allow a jury to find that a nonconsensual confinement occurred. *Id.* at 63. In *Hopkins*, the defendant was convicted of confinement and robbery. *Hopkins*, 759 N.E.2d at 633. The defendant forced his victims into a basement at gunpoint, robbed them, and forced them to remain in the basement while he went upstairs to search the rest of the house. *Id.* at 638. Our supreme court affirmed the conviction for criminal confinement because it found that the defendant confined the victims in the basement by using force. *Id.* at 639. Bradley asserts the cases stand for the proposition that the State must demonstrate the defendant contemplated confinement during the commission of the offenses.

However, we conclude that the present case can be distinguished from *Spivey* and *Hopkins*. Prior contemplation of the confinement is not the singular means to establish the “knowingly or intentionally” element of criminal confinement.³ By its very nature, a

³ See I.C. 35-42-3-3.

state of mind is not objectively discernible and may only be inferred or deduced from voluntary verbal and physical conduct and surrounding circumstances. *Case v. State*, 458 N.E.2d 223, 226-227 (Ind. 1984). In the present case, Bradley’s physical conduct toward Porter suggests that he was aware of the high probability that he was confining Porter. Bradley’s physical act of shutting the bathroom door, striking Porter in the head with a hammer, pinning her face-first over the toilet, and struggling with Porter to gain control of the hammer would allow a fact finder to reasonably conclude he knowingly and intentionally confined Porter to the bathroom. Therefore, we find a fact finder could reasonably conclude that the evidence was sufficient to support Bradley’s conviction for criminal confinement when his physical conduct interfered with Porter’s freedom of movement.

II. *Double Jeopardy*

Bradley also argues that his convictions for criminal confinement and aggravated battery violate the double jeopardy clause of the Indiana Constitution. Specifically, Bradley asserts that under the actual evidence test, there is a reasonable possibility that the same evidentiary facts were used to convict him of both criminal confinement and aggravated battery. We disagree.

Indiana Constitution Article I, § 14 provides, “No person shall be put in jeopardy twice for the same offense.” Two or more offenses are the “same offense” where the essential elements of one challenged offense also establish the essential elements of a second challenged offense. *Patton v. State*, 837 N.E.2d 576, 581-82 (Ind. Ct. App. 2005). Under the “actual evidence” test, we examine the actual evidence presented at trial to

determine whether each challenged offense was established by separate and distinct facts. *Id.* at 582. To prove a double jeopardy violation under this test, 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. *Benavides v. State*, 808 N.E.2d 708, 712 (Ind. Ct. App. 2004), *trans. denied*. The “reasonable possibility” standard permits convictions of multiple offenses committed as part of a protracted criminal episode, provided the case is prosecuted in a manner that insures the same evidence is not used to support multiple verdicts. *Patton*, 837 N.E.2d at 582. Additionally, double jeopardy will not be found when that possibility is speculative or remote. *Hopkins*, 759 N.E.2d at 640.

Bradley concedes that the offenses of criminal confinement and aggravated battery contain different statutory elements. As previously stated, to prove that Bradley committed criminal confinement, as a Class B felony, the State was required to show beyond a reasonable doubt that Bradley confined Porter without her consent, while armed with a deadly weapon or caused her serious bodily injury. *See* I.C. § 35-42-3-3. On the other hand, to convict Bradley of aggravated battery, as a Class B felony, the State was required to prove that he knowingly or intentionally inflicted injury on a person that created a substantial risk of death or caused: “(1) serious permanent disfigurement; (2) protracted loss or impairment of the function of a bodily member or organ; or (3) the loss of a fetus.” I.C. § 35-42-2-1.5.

In the instant case, Bradley contends that there was a reasonable possibility that the jury used the same evidentiary facts to convict him of both criminal confinement and

aggravated battery. Therefore, we cannot conclude that there was a reasonable possibility the jury used the same evidentiary facts to convict Bradley of both criminal confinement and aggravated battery. There were separate and distinct facts presented to the jury that independently supported each conviction. All of the facts necessary to convict Bradley of aggravated battery relate to his striking Porter from behind with a knife. The record reflects that the very first thrust of the knife caused Porter serious bodily injury. One doctor testified that the knife wound was a serious injury and could have cost Porter her life. However, all of the facts necessary to convict Bradley of confinement with a deadly weapon occurred after Porter was stabbed in the back. The evidence establishes that Porter fell face-first over the toilet, Bradley closed the door to the bathroom, stood over her, and hit her in the head with a hammer. Bradley pinned Porter against the toilet and bathtub as they struggled over the hammer. Porter only escaped when she gained control of the hammer. Thus, we conclude that there is a reasonable possibility that the jury used different evidentiary facts to convict Bradley of aggravated battery and criminal confinement.

Moreover, during the sentencing hearing, the State instructed the jury to consider each count in isolation, and then move to the next count before rendering a verdict. The State specifically argued to the jury that they might see some overlap but they should leave such a determination for the court to decide. The trial court recognized some overlap in evidence to support Count II, criminal confinement and Count III, aggravated battery, considering the hammer blows resulted in serious bodily injury to Porter. Nevertheless, the trial court emphasized that the knife wound to the back was sufficient

to allow the jury to conclude that the knife injuries created a substantial risk of death. Therefore, we disagree with Bradley's contention that the jury's confinement verdict was based on the same facts it used to support its aggravated battery verdict, and conclude that no double jeopardy violation occurred here.

Bradley also concedes that double jeopardy would not proscribe convictions of both criminal confinement and aggravated battery when the facts reflect that the confinement was more extensive than necessary to commit aggravated battery. *See Bruce v. State*, 749 N.E.2d 587 (Ind. Ct. App. 2001), *trans. denied* (the facts relating to the attempted battery occurred before the facts relating to the confinement which allowed convictions for both attempted aggravated battery and criminal confinement). Bradley contends, nonetheless, that the present case offers no evidence that the confinement began before the aggravated battery, or extended beyond the end of the physical attack. However, as the State argues, the facts reflecting Bradley's confinement of Porter were more extensive than those showing his aggravated battery of Porter.

As discussed above, Bradley's commission of aggravated battery was established when the State presented evidence that he stabbed Porter in the back with a knife. Bradley's criminal confinement conviction was established when the State presented evidence of confinement which occurred after Bradley stabbed Porter in the back with a knife. As the State argues, it is reasonable that the jury found Porter was confined in the bathroom against her will only after the initial blow by Bradley stabbing the knife in her back. Thus, contrary to Bradley's argument here, the facts in the record indicate that his confinement was not co-extensive with his battery of Porter. Where the confinement of a

victim is greater than that which is inherently necessary to commit the additional offense, confinement is part of the additional offense, and is also a separate criminal transgression. *Hopkins*, 759 N.E.2d at 639-40. Accordingly, Bradley was appropriately convicted for both confinement and aggravated battery.

III. Sentencing

Lastly, Bradley contests his sentence. Specifically, Bradley argues that the trial court abused its sentencing discretion by improperly considering and weighing the aggravators and mitigators. As previously stated, Bradley was sentenced to consecutive fifteen-year sentences for Count II, criminal confinement, and Count III, aggravated battery. Ind. Code § 35-50-2-5 provides a sentence of a fixed term between six and twenty years, with the presumptive sentence being ten years for a Class B felony.⁴

Sentencing decisions, including increasing or decreasing the presumptive sentence, lie within the trial court's sound discretion and may be revised by an appellate court only for an abuse of discretion. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). If a trial court uses aggravating or mitigating circumstances to modify the presumptive sentence, the trial court must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. *White v. State*, 847 N.E.2d 1043, 1045 (Ind. Ct. App. 2006). When

⁴ Public Law 71-2005, abolishing "presumptive sentences" in favor of "advisory sentences" is not applicable in the instant case since its effective date was April 25, 2005, whereas the commission of the offense for this case was prior to April 25, 2005. See *Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997).

identifying aggravating circumstances to support the imposition of aggravated and consecutive sentences, the trial court must comply with *Blakely v. Washington*, 542 U.S. 296 (2004). Even a single aggravating circumstance may support the imposition of an enhanced sentence or consecutive sentences. *White*, 847 N.E.2d at 1045.

A. Aggravating Factors

First, Bradley argues that the trial court abused its sentencing discretion in finding aggravating factors. The trial court recognized three aggravating factors: (1) Bradley's prior criminal history; (2) the offense was committed in the presence of Bradley's minor son; and (3) the nature and circumstances of the offense. Bradley concedes that the use of a prior conviction as an aggravator does not offend *Blakely*; however, Bradley argues that the commission of the offense in the presence of a minor and the nature and the circumstances of the crime offend *Blakely*. See *Blakely*, 542 U.S. 296. Even if the trial court improperly applied aggravating circumstances, Bradley's sentence may be upheld in light of other valid aggravating circumstances. *Rembert v. State*, 832 N.E.2d 1130, 1133 (Ind. Ct. App. 2005).

Blakely holds that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase a sentence above the presumptive sentence assigned by the legislature. *Blakely*, 542 U.S. at 303. "[T]he fact of a prior conviction" is an exception to that rule. *Id.* at 301. In accordance with *Blakely*, our supreme court recognizes four proper ways for a trial court to increase a sentence with aggravating circumstances: (1) prior conviction(s), (2) a fact found by a jury beyond a reasonable doubt, (3) facts when admitted by a defendant, and (4) in the

course of a guilty plea where the defendant has waived *Apprendi* rights and stipulated to certain facts or consented to judicial fact finding. *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005).

1. *Commission of an Offense Within Hearing Distance of a Minor*

Bradley contends that the trial court erred when it found Bradley's commission of the offense within the hearing or presence of a person who is less than eighteen years of age and not the victim of the offense as an aggravator. Specifically, Bradley argues that because there was no jury finding as to the effect the events had on Bradley's son, consideration of this aggravator would offend *Blakely*. Although Bradley concedes that his testimony established that K.B. was home during the attack, he argues that his testimony did not establish that K.B. actually witnessed or heard the attack. However, pursuant to I.C. § 35-38-1-7.1, the minor child is not actually required to see or hear the offense taking place. The statute merely requires that the offense is committed in the presence or within hearing of a person who is less than eighteen and not the victim of the offense. *Firestone v. State*, 838 N.E.2d 468,474 (Ind. Ct. App. 2005).

In the instant case, Bradley admitted at trial that K.B. was in the home at the time of the offense. Bradley testified that he removed K.B. from the home in order for him to accompany Ladd. Thus, the record supports a conclusion that the trial court determined Bradley's testimony provided a factual basis in support of this aggravating factor. Therefore, we conclude that the trial court properly considered K.B.'s presence at the crime scene as aggravating factor.

2. *Nature and Circumstances of the Offense*

Bradley also asserts that the trial court's consideration of the nature and circumstances of the crime offended *Blakely*. Specifically, Bradley argues that trial court went beyond his testimony to support this finding of aggravation. We disagree. Pursuant to I.C. § 35-38-1-7.1, the nature and circumstances of the crime is a proper aggravating factor. Moreover, a trial court may consider the particular circumstances of factual elements as aggravating. *Stewart v. State*, 531 N.E.2d 1146, 1150 (Ind. 1988). In the instant case, the record shows that the trial court discussed why factors such as the child's presence, the child's witnessing the aftermath of the attack, the severity of the attack, and Bradley's struggle with Porter over the hammer after he stabbed her in the back were aggravating. Further, the nature and circumstances are sufficiently supported by Bradley's admissions at the trial and sentencing hearing. Bradley admitted that he attacked his wife with a hammer and a knife, struggled with Porter over the hammer, that K.B. was present during the attack, and that he was covered with blood during the aftermath of the attack when his children observed him. Thus, the trial court properly considered the nature and circumstances of the crime as an aggravating factor.

3. *Prior Conviction*

Bradley contends that the trial court abused its discretion when it found that his prior conviction was an aggravating factor. Specifically, Bradley asserts that the trial court should have considered the chronological remoteness of his prior conviction when it found that the conviction was an aggravating factor. The remoteness of a prior conviction may be considered in deciding whether a prior offense is a valid aggravator, but remoteness does not exclude its consideration as an aggravator. *Frey v. State*, 841

N.E.2d 231, 235 (Ind. Ct. App. 2006). A prior conviction may be used to aggravate a sentence without having been found by a jury beyond a reasonable doubt. *See Ryle v. State*, 821 N.E.2d 320, 321 (Ind. 2005).

Notwithstanding the trial court's recognition that the conviction was remote, it found the prior conviction aggravating because of the nature and circumstances of the offense, and the similarity to the instant offense. Both Bradley's battery convictions were crimes of violence and involved the same victim, Porter. In *Carlson v. State*, 716 N.E.2d 469, 473-74 (Ind. Ct. App. 1999), the defendant plead guilty to dealing cocaine. Ten years prior to the instant offense, the defendant plead guilty to the possession of cocaine. *Id.* at 474. We found that the defendant's ten-year old misdemeanor conviction that was "cocaine-related" was properly found to be a significant aggravating factor by the trial court where the instant offense was also cocaine-related. *Id.* Similarly, Bradley's convictions are related because both involve battery and the same victim. Thus, the remoteness of Bradley's initial battery conviction does not preclude the trial court from using the conviction as an aggravating factor because the prior offense is related to the instant offense.

Furthermore, during the sentencing hearing, the trial court cited *Johnson v. State*, 830 N.E.2d 895 (Ind. 2005), to support its contention that Bradley's past conviction is a significant aggravating factor. In *Johnson*, our supreme court found that the defendant's prior misdemeanor convictions could be used as aggravators because the offenses were crimes of violence or physical force, thus making them significant to the defendant's present crimes. *Id.* at 898. Bradley's prior criminal record, like the defendant is in

Johnson, although not extensive, also involved a misdemeanor, and was a crime of violence and physical force. Therefore, we conclude that the trial court properly considered the prior conviction as an aggravator.

B. *Mitigating Factors*

Next, Bradley contends that the trial court applied inappropriate weight to the mitigators it recognized. Specifically, Bradley asserts that the trial court did not attach a specific amount of weight to the mitigation; the trial court found the weight minimal when compared to the aggravating circumstances. However, it is well-established that when a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. Further, the trial court is not required to accept the defendant's arguments as to what constitutes a mitigating factor. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied*. "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." *Id.* (quoting *Gross v. State*, 769 N.E.2d 1136, 1140).

In the present case, the trial court recognized Bradley's mental state at the time of the offense and the remoteness in time of his prior misdemeanor conviction as mitigating factors. Minimal weight was afforded to Bradley's mental state because the jury found he was not insane or mentally ill at the time of the crime. However, even though it was determined that Bradley was not insane at the time of the offense, it was shown that he suffered from a depressive disorder. Evidence in the record reflects that Bradley was in a

depressive disorder state at the time of the crime, as indicated by lack of sleep, lack of food and nutrition. Thus, the trial court did recognize that Bradley suffered because of his mental state. However, Bradley wanted the trial court to give his depressed disorder more substantial weight. As mentioned previously, the trial court was not required to give the same weight to the proffered mitigating factor as Bradley did. *See Comer*, 839 N.E.2d at 728.

Bradley also argued that the trial court should have taken into account the fact that the State previously convicted him of misdemeanor battery without the assistance of counsel as a mitigating factor. However, we cannot agree that the trial court overlooked that factor. The record reflects that Bradley requested a public defender and the trial court denied his request. It was proper for the trial court to consider the conviction even in light of Bradley's lack of representation. *See Scott v. Illinois*, 440 U.S. 367, 374 (1979) (holding that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense); *see also Nichols v. U.S.*, 511 U.S. 738, 748-49 (1994) (holding that a misdemeanor conviction obtained without the assistance of counsel valid under *Scott*, is also valid when used to aggravate punishment at a subsequent conviction). The trial court found that the State amended the Class A misdemeanor charge down to a Class B misdemeanor charge. Thus, the trial court did not consider Bradley's lack of counsel a mitigating circumstance. Furthermore, the trial court was not required to accept

Bradley's argument as to what constitutes a mitigating factor. *See Comer*, 839 N.E.2d at 728.

C. *Weighing of Aggravating and Mitigating Factors*

Finally, Bradley argues that trial court improperly balanced the aggravating and mitigating factors. We again disagree. In determining an appropriate sentence, the trial court must evaluate and balance aggravating and mitigating circumstances before imposing a sentence. *Jones v. State*, 698 N.E.2d 289, 291 (Ind. 1998). A single aggravating factor is sufficient to support the imposition of aggravated or consecutive sentences. *Hayden v. State*, 830 N.E.2d 923, 929 (Ind. Ct. App. 2005). Even if a trial court improperly applied aggravating circumstances, a sentence enhancement may be upheld where there are other valid aggravating circumstances. *See Rembert v. State*, 832 N.E.2d at 1133.

Here, the trial court found several aggravators; nevertheless, it did not impose the maximum sentence. The trial court noted that it might have been inclined to follow the State's recommendation of a maximum term of forty years, if not for the trial court's finding a mitigating circumstance, in particular Bradley's depressive disorder. Nonetheless, the trial court concluded that the aggravating circumstances supported by the trial record far exceeded any consideration of weight attached to the mitigating circumstances. Accordingly, based on the trial court's identification of valid aggravators and its balancing of recognized mitigating factors, we conclude that the trial court did not abuse its discretion in sentencing Bradley to an aggravated and consecutive sentence.

CONCLUSION

Based on the foregoing, we conclude (1) there was sufficient evidence to support Bradley's conviction for criminal confinement, (2) Bradley was not subject to double jeopardy when he was convicted of both criminal confinement and battery; and (3) the trial court properly sentenced Bradley based on the aggravating factors outweighing the mitigating factors.

Affirmed.

DARDEN, J., concurs.

VAIDIK, J., concurs in part, dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM T. BRADLEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 10A01-0510-CR-475
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	
)	

VAIDIK, Judge, concurring in part, dissenting in part

While I agree with the majority’s determination regarding sufficiency of the evidence, I must respectfully dissent from its determination that the confinement and battery convictions here do not violate the considerations of double jeopardy, and, consequently, from the sentence imposed by the trial court.

The majority appears to regard the aggravated battery as an act occurring separately from the confinement in this case. Looking to the record as a whole, I am unable to find any evidence that supports this determination, i.e., evidence that indicates some point of delineation between the confinement and the battery.

Porter testified that as she was walking into the couple’s bathroom, she felt what she referred to as a “punch,” which caused her to fall over the toilet. Tr. p. 14. As she was falling, she heard the bathroom door shut, and when she looked up, she saw Bradley standing over her with a hammer, and he hit her with it “at least three or four times.” *Id.*

at 14-15. She eventually fought him off, opened the door to the bathroom, and ran from the house. *Id.* at 16. These facts suggest that Bradley's confinement of Porter occurred simultaneously with his battery of her.

Moreover, the amended charging information alleges that Bradley committed criminal confinement in a manner that caused open head wounds with a hammer. Appellant's App. p. 55. The information further alleges that Bradley committed aggravated battery in a manner causing an "open head wound and a knife wound to the back." *Id.* Because the information for each of these counts references an open head wound, and because nothing in the evidence indicates that the open head wound referenced in the battery count occurred as part of an act separate from the open head wound referenced in the confinement count, it appears that the confinement and the battery were each part of one continuing occurrence.

Applying this analysis to the question of double jeopardy then, it first occurs to me that the majority misconstrues the standard we are to follow when assessing an alleged violation of double jeopardy. The majority found that "there is a reasonable possibility that the jury used *different* evidentiary facts to convict Bradley of aggravated battery and criminal confinement." Slip op. at 10 (emphasis added). This is not the proper inquiry in a double jeopardy analysis. We ask not whether there is a reasonable probability that the jury used *different* evidentiary facts to convict a defendant of both charges, but rather whether there is a reasonable possibility that it used the *same* facts to do so. *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002); *Benavides*, 808 N.E.2d at 712. Responding to this inquiry, I conclude that there is.

The facts of the case indicate that Bradley “punched” Porter so that she fell into the bathroom and that as she was falling, she heard the door close. Continuing his assault, Bradley proceeded to beat Porter with the hammer. The charging information alleges that Bradley battered Porter in a manner that caused an open head wound *and* a knife wound to the back, while the information supporting confinement alleges that Porter was confined in a manner resulting in an open head wound from the hammer. I cannot say, on the record in this case, that any of the open head wounds occurred apart from the confinement; therefore, I cannot say that the battery, which includes an open head wound, occurred apart from the confinement. The fact that the jury convicted Bradley of both of these crimes, coupled with the fact that the crimes were predicated, in part, on the same facts, indicates that there is a reasonable possibility that the jury used the same facts to convict Bradley of both criminal confinement and aggravated battery. As Bradley was convicted of both B felony charges and received consecutive fifteen-year sentences, I would remand this case with instructions to vacate either of these charges and sentence Bradley to fifteen years executed on the remaining charge.