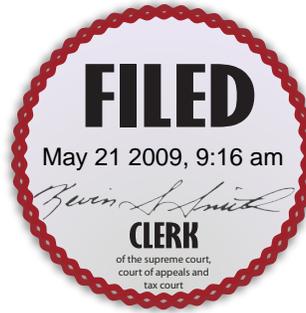


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MICKEL JOSE MCNEIL,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 45A03-0811-CR-541

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Natalie Bokota, Judge Pro Tempore
Cause No. 45G02-0803-FB-21

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mickel McNeil appeals his convictions for carjacking, a class B felony,¹ and robbery as a class B felony.²

We affirm.

ISSUES

1. Whether the trial court abused its discretion in instructing the jury.
2. Whether McNeil's convictions constitute double jeopardy.
3. Whether McNeil's convictions violate the continuing crime doctrine.

FACTS

On November 8, 2007, Joseph Aiello was a self-employed salesman, selling home-theater systems out of his car. At some point in the afternoon, Aiello stopped in Lake Station and flagged down a vehicle, driven by McNeil, to ask for directions. After receiving directions, Aiello talked to McNeil and his passenger about home-theater systems. McNeil acted interested in buying a system and told Aiello to follow him to his house "to get money to pay [him] for the speakers." (Tr. 83).

Aiello followed the men to a house and parked his vehicle in the driveway, behind McNeil's vehicle. McNeil exited his vehicle, told Aiello to "hold on a second," and went "around the house[.]" (Tr. 84). McNeil returned shortly thereafter and told Aiello to come and get his money. Aiello exited his vehicle and walked to McNeil's vehicle, whereupon McNeil pulled up his shirt, revealing a handgun. Referring to the gun, he

¹ Ind. Code § 35-42-5-2.

² I.C. § 35-42-5-1.

asked Aiello in a threatening manner if he knew what it was. He then instructed Aiello to keep his hands at his sides and to not move.

Keeping one hand on his gun, McNeil removed identification cards and \$82.00 in cash from Aiello's pockets. He then told Aiello to start walking. At some point, the passenger exited the Bonneville and told Aiello "don't get shot, over and over repeated, don't get shot, it's not worth it, . . . just keep walking, this wasn't my idea[.]" (Tr. 86-87). McNeil then drove away in Aiello's vehicle, followed by the other man in McNeil's vehicle. Among the items in Aiello's vehicle were "three complete home theater systems," a cell phone, and a blood pressure machine. (Tr. 95).

Aiello telephoned police from a neighboring house. He subsequently identified McNeil from a photo array.

On March 5, 2008, the State charged McNeil with Count I, class B felony carjacking and Count II, class B felony robbery. On July 31, 2008, the State filed an amended information, alleging McNeil to be an habitual offender.

The trial court commenced a jury trial on September 2, 2008, after which the jury found McNeil guilty as charged. The State made a motion to dismiss the habitual offender allegation, which the trial court granted. Following a sentencing hearing on October 7, 2008, the trial court sentenced McNeil to concurrent sentences of eighteen years on each count.

Additional facts will be provided as necessary.

DECISION

1. Jury Instructions

McNeil asserts the trial court erred in instructing the jury on robbery as both a class B and class C felony. The elements of robbery are set forth in Indiana Code section 35-42-5-1, which provides that a person who, “[b]y using or threatening the use of force on any person” and while armed with a deadly weapon, “knowingly or intentionally takes property from another person or from the presence of the another person,” commits class B felony robbery.

McNeil argues that the trial court’s failure to include the element of force “as one of the enumerated elements of the crime of robbery in its final instructions to the jury” constituted fundamental error, particularly when read in conjunction with the instruction on carjacking, which set forth the element of using or threatening force. McNeil’s Br. at 4. He contends that a juror reading the robbery instructions and carjacking instruction “would reasonably conclude that unlike the crime of carjacking, the State need not prove the use or threat of force in order to convict [him] of the crime of robbery.” *Id.* at 6.

“Jury instructions are within the discretion of the trial court and will not be reversed unless the instructions, when taken as a whole, misstate the law or mislead the jury.” *Burgett v. State*, 758 N.E.2d 571, 577 (Ind. Ct. App. 2001), *trans. denied*. McNeil did not object to the trial court’s instruction. Failure to object to a jury instruction results in waiver on appeal, unless giving the instruction was fundamental error. *Id.*

The fundamental error exception to the waiver rule is extremely narrow. *Glotzbach v. State*, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). “To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* at 1226. Fundamental error occurs when there is a

blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error denies the defendant fundamental due process. *Id.*

“In determining whether fundamental error occurred in the giving of instructions, we consider all the relevant information provided to the jury including that in closing arguments and other instructions.” *Davis v. State*, 835 N.E.2d 1102, 1108 (Ind. Ct. App. 2005), *trans. denied*. “There is no due process violation where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law.” *Id.*

The pertinent instructions read as follows:

INSTRUCTION NO. 6

The crime of robbery is defined by law as follows:

A person who knowingly or intentionally takes property from another person or from the presence of another person by using or threatening the use of force on any person commits robbery, a Class C felony. The offense is a Class B felony if it is committed while armed with a deadly weapon.

Before you may convict the Defendant in Count II, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. took property from the person or presence of Joseph Aiello
4. and the offense was committed while armed with a deadly weapon.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of robbery, a Class B felony, in Count II.

If the State did prove each of these elements beyond a reasonable doubt, you must find the Defendant guilty of the crime of robbery, a Class B felony, in Count II.

(Tr. 390).

INSTRUCTION NO. 7

Included in the charge of robbery, a Class B felony, is the lesser included crime of robbery, a Class C felony, which is defined by law as follows:

A person who knowingly or intentionally takes property from another person or from the presence of another person by using or threatening the use of force on any person commits robbery, a Class C felony.

Before you may convict the Defendant of robbery, a Class C felony, in Count II, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. took property from the person or presence of Joseph Aiello.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of robbery, a Class C felony, in Count II.

If the State did prove each of these elements beyond a reasonable doubt, you must find the Defendant guilty of the crime of robbery, a Class C felony, in Count II.

(Tr. 391).

The trial court also read the charging information to the jury during both preliminary and final instructions:

This is a criminal case brought by the State of Indiana The case was commenced when an information was filed, charging the defendant with Carjacking, a Class B felony, and Robbery, a Class B felony. That information omitting its formal parts, reads as follows:

....

COUNT II

. . . McNeil did knowingly or intentionally, and while armed with [a] handgun, a deadly weapon, take money and IDs from the person or

presence of Joseph Aiello by using or threatening the use of force on Joseph Aiello, contrary to I.C. 35-42-5-1

(Tr. 49, 384). Additionally, the trial court preliminarily instructed the jury that “[t]he crime of robbery is defined by law as follows: A person who knowingly or intentionally takes property from another person or from the presence of another person by using or threatening the use of force on any person” (Tr. 51).

Furthermore, the State presented the elements of robbery to the jury during its closing argument: “Count II says, the State has to prove that . . . McNeil did knowingly or intentionally and while armed with a handgun, a deadly weapon take money and I.D.s from the person or presence of Joseph Aiello by using or threatening the use of force on Joseph Aiello.” (Tr. 373).

Based on all of the relevant information given to the jury and considered as a whole, we cannot say that the trial court’s failure to enumerate the use or threat of the use of force on any person as an element of robbery in Instructions No. 6 and 7 misled the jury as to the correct understanding of the law. We therefore find no fundamental error.

2. Double Jeopardy

McNeil next asserts that his convictions for robbery and carjacking violate Indiana’s prohibition against double jeopardy. He contends that “[a] comparison of the elements of the two offenses makes one thing clear—since a motor vehicle is ‘property,’ a person cannot commit the crime of carjacking without also committing the crime of robbery.” McNeil’s Br. at 7. Thus, he argues that “the essential elements of carjacking also establish the essential elements of robbery.” *Id.* 7-8. We disagree.

Pursuant to Article 1, Section 14 of the Indiana Constitution, “[n]o person shall be put in jeopardy twice for the same offense.”

[T]wo offenses are the “same offense” in violation of the Indiana Double Jeopardy Clause 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.

Lee v. State, 892 N.E.2d 1231, 1233 (Ind. 2008) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999)).

Here, McNeil argues that his convictions violate the “statutory elements” test. He, however, does not address the “actual evidence” test. Under the “actual evidence” test,

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 1234. ““The Indiana Double Jeopardy Clause is not violated when 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.”” *Lee*, 892 N.E.2d at 1234 (quoting *Spivey v. State*, 717 N.E.2d 831, 833 (Ind. 2002)).

Application of this test requires the court to “identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective” In determining the facts used by the fact-finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel.

Id. (internal citations omitted).

Again, the State charged McNeil with, and the jury convicted him of, carjacking and robbery, as a class B felony. For the carjacking conviction, the State was required to establish that he (1) knowingly or intentionally, (2) took a motor vehicle from another person or from the presence of another person, (3) either by using or threatening the use of force on any person or by putting any person in fear. *See* I.C. § 35-42-5-2.

For the robbery conviction, the State was required to establish that he, (1) while armed with a deadly weapon, (2) knowingly or intentionally, (3) took property from another person or from the presence of another person, (4) either by using or threatening the use of force on any person, or by putting any person in fear. *See* I.C. § 35-42-5-1. Specifically, the State charged that McNeil “did knowingly or intentionally, and while armed with [a] handgun, a deadly weapon, take money and IDs from the person or presence of Joseph Aiello by using or threatening the use of force on Joseph Aiello” (App. 8).

The evidence presented at trial shows that on November 8, 2007, McNeil lured Aiello to a residence with the suggestion that he was interested in purchasing a stereo system from him. Once there, McNeil pretended to retrieve cash from the residence. He then beckoned Aiello to leave his vehicle. Once Aiello got to McNeil’s vehicle, McNeil showed him a gun, told him not to move, and made threatening remarks about the gun. He then proceeded to take money and picture identification from Aiello’s pockets. After telling Aiello to “start walking,” McNeil walked down the driveway, got into Aiello’s vehicle, and drove away. (Tr. 85).

These facts can properly support both convictions. The robbery conviction is supported by McNeil taking Aiello's cash and identification from his pockets. The carjacking conviction is supported by McNeil taking Aiello's vehicle after the robbery was completed. We therefore find no violation of Indiana's prohibition against double jeopardy.

3. Continuing Crime

McNeil asserts that his convictions violate the continuing crime doctrine. He argues that he should have been convicted of only one of the charges because "[t]he taking of Aiello's personal property and the taking of his vehicle were accomplished moments apart, by the same display of a weapon, by the same threat of force, and pursuant to a single scheme or purpose." McNeil's Br. at 9.

Under the continuing crime doctrine, "actions that are sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Firestone v. State*, 838 N.E.2d 468, 471 (Ind. Ct. App. 2005). It "does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes[.]" *Id.* Rather, it prevents the State from charging a defendant twice for the same continuous offense where the defendant's conduct amounts only to a single chargeable crime. *Id.* 471-72.

In support of his argument, McNeil cites to *Buchanan v. State*, No. 78A01-0806-CR-284, 2009 WL 153200 (Ind. Ct. App. Jan. 23, 2009), *trans. pending*.³ In that case, Buchanan telephoned in false bomb threats to local schools as a diversionary tactic to facilitate the robbery of a bank. During the robbery, he intimidated bank employees with a shotgun. Following a bench trial, the trial court convicted him of, *inter alia*, robbery, false reporting, and intimidation. He appealed, arguing that the continuing crime doctrine required that his convictions for false reporting and intimidation be vacated. This Court agreed, finding that the false reporting, robbery, and intimidation crimes were “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction” *Buchanan*, at *6. We find *Buchanan* distinguishable from the case here.

In *Buchanan*, the defendant committed false reporting and intimidation to facilitate the robbery. Thus, his actions constituted a “singleness of purpose, and continuity of action as to constitute a single transaction.” *Firestone*, 838 N.E.2d at 471.

The evidence in this case, however, shows that McNeil committed two separate offenses. Namely, he committed robbery when he threatened Aiello with a gun, told him not move, and then took Aiello’s cash and identification. At this point, the commission of robbery was complete. However, he then told Aiello to start walking, went down the driveway, and took Aiello’s vehicle. This crime occurred separate and apart from the robbery; moreover, neither the carjacking nor the robbery was necessary to facilitate the

³ Westlaw indicates that this case is both an unpublished memorandum decision and a published opinion. A review of this Court’s docket shows that this case is published.

commission of the other. Thus, we cannot conclude that McNeil's actions fall within the continuing crime doctrine.

Affirmed.

BAILEY, J., and ROBB, J., concur.