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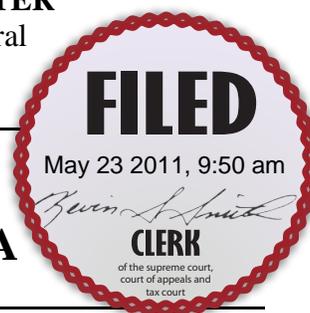
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**IN THE
COURT OF APPEALS OF INDIANA**

JOHNNY BAPTISTE,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-1010-CR-616

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0912-FA-102372

May 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Johnny Baptiste appeals his convictions for Class A felony robbery, Class A misdemeanor battery, and Class D felony auto theft. Baptiste argues that (I) his convictions for robbery and auto theft violate the double jeopardy single-larceny rule and (II) his convictions for robbery and battery violate the double jeopardy actual-evidence test. We agree and therefore reverse his convictions for both auto theft and battery.

Facts and Procedural History

Fred Blankenship pulled into the parking garage at the Hyatt Hotel in downtown Indianapolis. He parked in an assigned spot, grabbed his two briefcases and lunchbox, and began walking toward a pedestrian skywalk which connected the parking garage to the hotel. The skywalk entrance was approximately eighty feet from Blankenship's car.

Baptiste and associate Dewand Hardin were standing at the skywalk entrance. As Blankenship passed, Hardin struck him in the head. Blankenship fell down. Either Baptiste or Hardin continued hitting Blankenship while he was on the ground. Blankenship sustained an orbital fracture, broken nose, and dislocated jaw.

One of the perpetrators instructed Blankenship to "give me your keys." Tr. p. 52. Blankenship removed his keys from his pocket and handed them over. Hardin and Baptiste took off in Blankenship's car. They were apprehended by police two days later.

The State charged Baptiste with several offenses including Class A felony robbery, Class B felony aggravated battery, and Class B felony carjacking. The charging information alleged:

COUNT I [Class A felony robbery, Ind. Code § 35-42-5-1]

Johnny Baptiste, on or about December 21, 2009, did knowingly take from the person or presence of Fred Blankenship property, that is: a set of keys, by putting Fred Blankenship in fear or by using or threatening the use of force on Fred Blankenship which resulted in serious bodily injury, that is: an orbital fracture and/or damage to the nose requiring surgical repair and/or a gash to the head requiring stitches and/or jaw dislocation, to Fred Blankenship;

COUNT II [Class B felony aggravated battery, Ind. Code § 35-42-2-1.5]

Johnny Baptiste, on or about December 21, 2009, did knowingly inflict injury, that is: an orbital fracture and damage to the nose requiring surgical repair and/or a gash to the head requiring stitches and/or jaw dislocation, to another person, namely: Fred Blankenship, that caused a protracted loss or impairment of the function of a bodily member or organ, that is: impairment of vision and/or an orbital fracture requiring an implant, to Fred Blankenship, by striking Fred Blankenship;

COUNT III [Class B felony carjacking, Ind. Code § 35-42-5-2]

Johnny Baptiste, on or about December 21, 2009, did knowingly take from the person or presence of Fred Blankenship a motor vehicle, that is: a Honda CRV automobile, by putting Fred Blankenship in fear or by using or threatening the use of force on Fred Blankenship;

Appellant's App. p. 90-91.

A jury found Baptiste guilty as charged, though out of double jeopardy concerns, the trial court reduced Baptiste's convictions on Counts II and III to Class A misdemeanor battery, Ind. Code § 35-42-2-1(a)(1), and Class D felony auto theft, *id.* § 35-43-4-2.5, respectively. Baptiste appeals.

Discussion and Decision

Baptiste raises two issues: (I) whether his robbery and auto theft convictions violate the double jeopardy single-larceny rule and (II) whether his robbery and battery convictions violate the double jeopardy actual-evidence test.

I. Robbery and Auto Theft

Baptiste first claims that his robbery and auto theft convictions violate the double jeopardy single-larceny rule.

The Fifth Amendment to the United States Constitution guarantees that “[no] . . . person [shall] be subject for the same offense to be twice put into jeopardy.” The Fifth Amendment double jeopardy clause is made applicable to the states via the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Article 1, Section 14 of the Indiana Constitution similarly provides that “[n]o person shall be put in jeopardy twice for the same offense.”

Both the federal and state double jeopardy prohibitions forbid multiple punishments for the commission of a single offense. *See Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Walker v. State*, 932 N.E.2d 733, 736-37 (Ind. Ct. App. 2010), *reh’g denied*.

Multiple actions sufficient to constitute separate instances of one chargeable offense may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute only a single punishable crime. *See Nunn v. State*, 695 N.E.2d 124, 125 (Ind. Ct. App. 1998). Under such circumstances, imposition of multiple convictions for that offense will violate double jeopardy. *See Boyd v. State*, 766 N.E.2d 396, 401 (Ind. Ct. App. 2002). “[T]he State cannot split up a single offense and make distinct parts of that single offense . . . the basis for separate or multiple prosecutions.” *Holt v. State*, 178 Ind. App. 631, 383 N.E.2d 467, 472 (1978).

In the specific context of theft, when several articles of property are taken at the same time, from the same place, belonging to the same person or to several persons, there may be but a single larceny. *Raines v. State*, 514 N.E.2d 298, 300 (Ind. 1987); *see also*

Jenkins v. State, 695 N.E.2d 158, 162 (Ind. Ct. App. 1998). Determination of whether only a single larceny is committed turns in part on whether the defendant harbored a “single intent and design” when taking the property at issue. *See Taylor v. State*, 879 N.E.2d 1198, 1204 (Ind. Ct. App. 2008). This is ordinarily a question of fact to be determined by the factfinder, but it may be resolved as a matter of law where intent is clearly manifested and uncontroverted. *Holt*, 383 N.E.2d at 472 n.13.

Here we conclude that the facts sustain a finding of only one indivisible robbery and that Baptiste’s simultaneous convictions for robbery and auto theft thus violate double jeopardy. Baptiste and Hardin were waiting inside the Hyatt parking garage as Blankenship drove in and parked. After accosting and assaulting Blankenship, Baptiste and Hardin demanded his car keys and took no other items from his person. They proceeded straight to his vehicle and took off. The site of the assault was just eighty feet from the car. Together these circumstances—namely the continuity of action, proximity of the assault to the car, and apparent singleness of purpose to steal an automobile—demonstrate a single intent and design to take Blankenship’s vehicle. The taking of Blankenship’s keys was simply a necessary incident to the theft of his car. We thus conclude that Baptiste’s forcible taking of Blankenship’s keys and car constituted but a single punishable larceny. *See Holt*, 383 N.E.2d at 471 (finding one continuous theft, where defendant took keys and money from victim’s office and stole car from adjoining parking lot); *see also Stout v. State* 479 N.E.2d 563, 568 (Ind. 1985) (finding only one theft, where personal property was stolen from home and car was taken from garage); *cf. Bivins v. State*, 642 N.E.2d 928, 945 (Ind. 1994) (evidence supported separate theft

convictions, where defendant took money, credit card, and keys from victim's motel room and then stole car from motel parking lot), *reh'g denied*; *Potter v. State*, 451 N.E.2d 1080, 1082 (Ind. 1983) (evidence supported separate robbery and theft convictions, where defendant took money, jewelry, keys, and other items from victim's apartment and stole automobile thereafter). Accordingly, Baptiste's convictions for both robbery and auto theft violate double jeopardy, and to cure the violation we reverse Baptiste's lesser conviction for auto theft. *See Richardson v. State*, 717 N.E.2d 32, 55 (Ind. 1999) (where two convictions cannot stand, we vacate the conviction with the less severe penal consequences).

II. Robbery and Battery

Baptiste next argues that his robbery and battery convictions violate Indiana's double jeopardy actual-evidence test.

Article 1, Section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Two or more offenses are the “same offense” in violation of Article 1, Section 14 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. *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999).

Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Lee v. State*, 892 N.E.2d 1231, 1234 (Ind. 2008). 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 factfinder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.* 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 factfinder's perspective. *Id.*

Here the State concedes that Baptiste's convictions for robbery and battery violate Article 1, Section 14's actual-evidence test. That is, the striking blows to Blankenship which established the force element of Baptiste's robbery conviction were the same striking blows which formed the predicate of Baptiste's battery conviction. A reasonable possibility thus exists that the evidentiary facts used to establish the essential elements of robbery were also used to establish the essential elements of battery. *See, e.g., Richardson, 717 N.E.2d at 54.* Accordingly, the two convictions violate double jeopardy, and to cure the violation we reverse Baptiste's lesser conviction for battery.

The trial court's judgment is affirmed in all other respects.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and MATHIAS, J., concur.